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## "Docile Bodies" or Rebellious Spirits?: Issues of Time and Power in the Waiver and Withdrawal of Death Penalty Appeals

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## Articles

### **"DOCILE BODIES" OR REBELLIOUS SPIRITS?: ISSUES OF TIME AND POWER IN THE WAIVER AND WITHDRAWAL OF DEATH PENALTY APPEALS**

Avi Brisman\*

#### I. INTRODUCTION

This past term, the United States Supreme Court heard arguments in the case of *Baze v. Rees* regarding the use of the tri-chemical "cocktail" used to execute inmates on death row—sodium thiopental (also known as sodium pentothal, an ultra-short acting barbiturate to render the individual unconscious), pancuronium bromide (also known as Pavulon, which causes muscle paralysis), and potassium chloride (to stop the heart).<sup>1</sup> In *Baze*, the petitioners neither challenged the constitutionality of the use of lethal injection, in particular, nor the penalty of capital punishment, as a whole. In fact, even if the Supreme Court had ruled in favor of Ralph Baze and Thomas C. Bowling, the two Kentucky inmates

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<sup>1</sup> *Baze v. Rees*, 128 S. Ct. 1520, 1527, 1532–153 (2008). See also Linda Greenhouse, *Justices to Enter the Debate over Lethal Injection*, N.Y. TIMES, Sept. 26, 2007, at A24; Linda Greenhouse, *Justices Uphold Lethal Injection in Kentucky Case*, N.Y. TIMES, Apr. 17, 2008, at A1; Gilbert King, *Cruel and Unusual History*, N.Y. TIMES, Apr. 23, 2008, at A21; Adam Liptak, *Moratorium May Be Over, but Hardly the Challenges*, N.Y. TIMES, Apr. 17, 2008, at A26; Mark Sherman, *Supreme Court Upholds Use of Lethal Injections*, ASSOCIATED PRESS, Apr. 16, 2008, <http://a.abcnews.com/TheLaw/SCOTUS/wireStory?id=4664276>; Editorial, *The Death Penalty Returns*, N.Y. TIMES, May 7, 2008, at A26; Editorial, *The Supreme Court Fine-Tunes Pain*, N.Y. TIMES, Apr. 17, 2008, at A28. See generally Linda Greenhouse, *After a 32-Year Journey, Justice Stevens Renounces Capital Punishment*, N.Y. TIMES, Apr. 18, 2008, at A22; Linda Greenhouse, *Justices, Already Split, Commence Work on a Polarizing New Docket*, N.Y. TIMES, Oct. 1, 2007, at A17; Elizabeth Weil, *It's Not Whether To Kill, but How*, N.Y. TIMES, Nov. 4, 2007, at WK3.

who brought the challenge to the state's lethal injection protocol, the result would not have overturned their death sentences (or the sentence of any other death row inmates for that matter).

The issue in the case was limited to the standard that courts use to evaluate whether a method of execution violates the Eighth Amendment of the United States Constitution.<sup>2</sup> What lay in the balance then was, at most, a requirement that states employ a different method for carrying out executions.<sup>3</sup>

Ultimately, the Supreme Court upheld Kentucky's method of execution, holding that "[a] stay of execution may not be granted . . . unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain[.]" and that the petitioners had not established that the risks were "so

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<sup>2</sup> Specifically, the Supreme Court considered whether the Eighth Amendment prohibits means for carrying out a method of execution that create an "unnecessary risk" of pain" or only a "substantial risk of wanton and unnecessary infliction of pain, torture[,] or lingering death." *Baze*, 128 S. Ct. at 1529; *See also* Greenhouse, *Justices to Enter the Debate over Lethal Injection*, *supra* note 1, at A20; Greenhouse, *Justices Uphold Lethal Injection in Kentucky Case*, *supra* note 1, at A1, A18; King, *supra* note 1, at A25; Liptak, *Moratorium May Be Over, but Hardly the Challenges*, *supra* note 1, at A18; Sherman, *supra* note 1; Editorial, *The Supreme Court Fine-Tunes Pain*, *supra* note 1, at A26. *See generally* Mark Essig, *This Is Going To Hurt*, N.Y. TIMES, Nov. 4, 2007, at 415; Greenhouse, *After a 32-Year Journey, Justice Stevens Renounces Capital Punishment*, *supra* note 1, at 24; Adam Liptak, *At 60% of Total, Texas Is Bucking Execution Trend*, N.Y. TIMES, Dec. 26, 2007, at A1; Kirk Semple, *Judge Stays Execution, Citing Case Under Review*, N.Y. TIMES, Nov. 15, 2007, at A24; Weil, *supra* note 1, at WK3. In addition, the Supreme Court considered: 1) whether carrying out an execution causes "unnecessary risk of pain and suffering" in violation of the Eighth Amendment upon a showing that readily available alternatives that pose less risk of pain and suffering could be used, and 2) whether continued use of the current three-drug "cocktail" violates the Eighth Amendment prohibition on cruel and unusual punishment because lethal injections can be carried out using other chemicals that pose less risk of pain and suffering. *Baze*, 128 S. Ct. at 1520. *See generally* Greenhouse, *After a 32-Year Journey, Justice Stevens Renounces Capital Punishment*, *supra* note 1, at A20; Linda Greenhouse, *Justices Stay Execution, A Signal to Lower Courts*, N.Y. TIMES, Oct. 31, 2007, at A1; Greenhouse, *Justices Uphold Lethal Injection in Kentucky Case*, *supra* note 1, at A1, A18; Linda Greenhouse, *Trying to Decipher the Justices on the Current State of the Death Penalty*, N.Y. TIMES, Oct. 19, 2007, at A21; King, *supra* note 1, at A25; Editorial, *The Supreme Court Fine-Tunes Pain*, *supra* note 1, at A26. *See also* Liptak, *Moratorium May Be Over, But Hardly the Challenges*, *supra* note 1, at A18; Sherman, *supra* note 1.

Note that the Supreme Court's consideration of issues regarding execution methods, rather than abolition, is consistent with the shift in public discourse about capital punishment. *See* Penny J. White, *Errors and Ethics: Dilemmas in Death*, 29 HOFSTRA L. REV. 1265, 1266 (2001).

<sup>3</sup> Ralph Blumenthal & Linda Greenhouse, *Texas Planning New Execution Despite Ruling*, N.Y. TIMES, Sept. 29, 2007, at A1 (stating that "[e]ven if the Supreme Court rules in favor of the two Kentucky inmates who brought the challenge to lethal injection, the result will not be to overturn any death sentences, but rather, at the most, to require a different method to carry them out."). *See also* Essig, *supra* note 2, at 415; Weil, *supra* note 1, at WK3.

substantial or imminent as to amount to an Eighth Amendment violation."<sup>4</sup> Chief Justice Roberts wrote in his controlling opinion, "Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual."<sup>5</sup> Despite this ruling, the potential impact of the case is still quite broad and may well affect a category of death row inmates<sup>6</sup> (in what Michael Tonry refers to as a "window of opportunity"<sup>7</sup>) who often fly beneath the public radar in death penalty cases.<sup>8</sup>

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<sup>4</sup> *Baze*, 128 S. Ct. at 1534, 1537. See also Greenhouse, *Justices Uphold Lethal Injection in Kentucky Case*, *supra* note 1, at A1, A18; Sherman, *supra* note 1.

<sup>5</sup> *Baze*, 128 S. Ct. at 1531.

<sup>6</sup> Some have suggested that the term, "death row" inmate, is pejorative, preferring instead "capital punishment" ("CP") inmate or "capital offenders." George Lombardi, Richard D. Sluder, & D. Wallace, *Mainstreaming Death-Sentenced Inmates: The Missouri Experience and Its Legal Significance*, 61(2) FED. PROBATION 3, 5 (1997). See also Cunningham & Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Review of Literature*, 20 BEHAV. SCI. LAW 191, 205 (2002). Such concerns notwithstanding—and because "death row inmate" is still commonly used—this Article will use the terms "capital offenders," "capital punishment inmate," "death row inmate," "death-sentenced inmate," and "condemned prisoner" interchangeably.

<sup>7</sup> MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE 94 (2004). Using Tonry's formulation, Kudlac, for example, argued that "declining support for capital punishment and DNA exonerations opened a 'window of opportunity' that was followed by prohibitions on executing juveniles and the mentally retarded and statewide moratoriums on executions." CHRISTOPHER S. KUDLAC, PUBLIC EXECUTIONS: THE DEATH PENALTY AND THE MEDIA 5 (2007). The suggestion here is that the Supreme Court's decision in *Baze* may affect the waiver and withdrawal of death penalty appeals in the same way that DNA exonerations impacted capital punishment for juveniles and the mentally retarded.

<sup>8</sup> See, e.g., BRIAN FORST, ERRORS OF JUSTICE: NATURE, SOURCES, AND REMEDIES 199-200 (2004). Forst continues,

[f]or decades the death penalty fight had been waged principally on . . . ethical questions such as whether it is cruel and unusual (from the left) or whether lesser punishments are unjust to the victims of murder and their survivors (from the right), and empirical questions as to whether it deters or brutalizes and whether it is applied in a discriminatory manner, especially with regard to the races of the defendant and the victim.

*Id.* See, e.g., Richard W. Garnett, *Christian Witness, Moral Anthropology, and the Death Penalty*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 541, 544 (2003). Garnett states,

the imposition of the death penalty raises a wide variety of challenging, provocative, important, and perhaps more practical questions. For example, does the death penalty deter crime? If so, do the "costs" of capital punishment justify its deterrence "benefits"? How much confidence should we have in the accuracy of the results of capital trials, and how might we increase that confidence? How much appellate and post-conviction review is necessary, appropriate, and feasible in capital cases? To what extent, if at all, should American constitutional and

Since *Gregg v. Georgia*<sup>9</sup>—the Supreme Court holding that paved the way for the resumption of capital punishment in the United States<sup>10</sup>—1,138 executions have been carried out, 131 of which have involved “volunteers”<sup>11</sup>—individuals who waive or withdraw appeals at a point

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criminal law relating to the death penalty reflect developments in international law, and in the domestic laws of other countries? Are death-eligible defendants provided with adequate legal representation? Do prosecutors and jurors discriminate on the basis of race or sex in the imposition of the death penalty? Does the United States Constitution require that juries, not judges, make the decision for death, or that some convicted murderers—say, those with severe developmental disabilities or teenagers—be exempted categorically from execution? And so on.

*Id.* (footnote omitted); White, *supra* note 2, at 1267–68, 1270 (stating that “[f]or the most part, recent discussions have focused on the reliability of the capital punishment system, rather than whether the death penalty is right or wrong[.]” and observing that “[t]he imperfections of America’s capital punishment system became real when Americans learned that innocent people were being sentenced to death and executed for crimes they did not commit.”).

For an illustration of which death penalty cases seem to attract (the most) public attention, see, e.g., KUDLAC, *supra* note 7, at 5–8, 12–13, 65, 83, 145.

<sup>9</sup> 428 U.S. 153 (1976).

<sup>10</sup> In 1972, following a five-year moratorium on executions, the United States Supreme Court held in *Furman v. Georgia*, 408 U.S. 238 (1972), that Georgia’s death penalty statute violated the Eighth Amendment’s prohibition against cruel and unusual punishment. In *Gregg*, the Court upheld Georgia’s newly-passed death penalty statute and ruled that the death penalty did not always constitute cruel and unusual punishment. Gary Mark Gilmore, executed by firing squad on January 17, 1977, and mentioned *infra* Parts III & IV, was the first person put to death after *Gregg*. See *Gilmore v. Utah*, 429 U.S. 1012 (1976). For a brief overview of U.S. Supreme Court death penalty jurisprudence from 1972–76 and the relationship of *Furman* to *Gregg*, see White, *supra* note 2, at 1267 n.10.

<sup>11</sup> Death Penalty Information Center, Execution Database, <http://www.deathpenaltyinfo.org/getexecdata.php> (last visited Jan. 19, 2009) (providing death penalty statistics, current as of Jan. 15, 2009). Note that “a significant proportion of defendants charged with capital murder express a preference for a death sentence at some point during the course of interactions with their attorneys.” Richard J. Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363, 1380 (1988). See also *Smith v. Armontrout*, 812 F.2d 1050, 1052 (8th Cir. 1987) (noting that the inmate had “changed his mind about the desirability of post-conviction relief at least eight times”); *State v. Dodd*, 838 P.2d 86, 103 (Wash. 1992) (Utter, J., dissenting) (stating that “[i]t is common for those on death row to express a will to stop their appeals and proceed with execution. Most change their minds and agree to continue the appeals process.”); C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25(3) LAW & SOCIAL INQUIRY 849, 859 n.16, 862 n.17 (2000) [hereinafter Harrington, *A Community Divided*]; C. Lee Harrington, *Mental Competence and End-of-Life Decision Making: Death Row Volunteering and Euthanasia*, 29 J. HEALTH POL. POL’Y & L. 1109, 1109 (2004) [hereinafter Harrington, *Mental Competence and End-of-Life Decision Making*]; Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 853–61 (1987).

For example, at various junctures in their respective criminal proceedings, both Aileen Wuornos and Timothy McVeigh expressed preferences for the death sentence. See KUDLAC, *supra* note 7, at 54–55, 63, and 103 (noting that Wuornos expressed a desire to be executed on a number of occasions—April 1992, October 1994, and July 2001—but was not

when viable claims still exist in their cases.<sup>12</sup> "Volunteering" may seem like an odd term to employ in the death penalty context,<sup>13</sup> given that it connotes second graders frantically waiving their hands in response to a query from a teacher, do-gooders spending time at a Boys & Girls club, or people picking up trash as part of an organized "Park Day" or "Neighborhood Improvement Day." Indeed, as Harrington writes: "[I]n popular parlance[,] a volunteer is someone who dutifully and nobly offers his or her time, energy, services, or body (in this case, quite literally) for the common good – volunteering is socially praiseworthy."<sup>14</sup> But in the context of capital punishment, the term is used to refer to individuals who have chosen to forego their appeals of death penalty sentences and includes individuals who may hold vastly different perspectives on death and the crime(s) for which they are to be executed.<sup>15</sup>

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executed until October 2002, and that McVeigh asked for his execution and indicated that he would seek no appeals in December 2000 – six months before the execution was carried out). More recently, John A. Muhammad, who was convicted of sniper attacks in the Washington area in 2002, wrote a letter to prosecutors requesting their help in putting an end to his legal appeals from death row. *Virginia: Sniper Asks To Stop Appeals*, N.Y. TIMES, May 7, 2008, at A24.

Despite the fact that many defendants charged with capital murder express a preference for a death sentence at some point during the course of their proceedings, most capital defendants ultimately change their minds and choose not to volunteer. See Bonnie, *supra* note 11, at 1388 ("Many capital defendants are ambivalent about their preferences and vacillate as the trial process unfolds. In most cases, however, stable preferences against execution eventually emerge."); Harrington, *A Community Divided*, *supra* note 11, at 850. See generally Ralph Blumenthal, *After Hiatus, Setting a Wave of Executions*, N.Y. TIMES, May 3, 2008, at A1 (noting the ambivalence of Jack Henry Smith, 70, the oldest Texas inmate on death row, who stated, "I'd hate to go before my time," but admitted that the prospect of an end to his confinement might come as a relief).

<sup>12</sup> See Richard J. Bonnie, *Mentally Ill Prisoners on Death Row: Unsolved Puzzles for Courts and Legislatures*, 54 CATH. U. L. REV. 1169, 1169 (2005); Harrington, *A Community Divided*, *supra* note 11, at 859 n.16; Harrington, *Mental Competence and End-of-Life Decision Making*, *supra* note 11, at 1124; G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness, and Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860, 861 (1983). Note that instances of "volunteering" occurred before the reinstatement of the death penalty in 1976. *Id.* at 861 n.8. Note also that "volunteer[ing]" can refer to individuals who argue for and attempt to procure the death penalty as a punishment from the beginning of the criminal justice process. See Bonnie, *supra* note 11, at 1379–80. See also Urofsky, M. I., *A Right to Die: Termination of Court Appeals for Condemned Prisoners*, 75 J. CRIM. L. & CRIMINOLOGY 553, 553–82 (1984) (554–62, especially).

<sup>13</sup> Sometimes "consensual executions" is used in lieu of "volunteering." See Harrington, *A Community Divided*, *supra* note 11, at 850.

<sup>14</sup> Harrington, *Mental Competence and End-of-Life Decision Making*, *supra* note 11, at 1122.

<sup>15</sup> See David A. Davis, *Capital Cases: When the Defendant Wants To Die*, THE CHAMPION 45, 45–47 (June 1992); Harrington, *A Community Divided*, *supra* note 11, at 860; Harrington, *Mental Competence and End-of-Life Decision Making*, *supra* note 11, at 1110–11.

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A number of medical anthropologists and sociologists have explored how death has multiple meanings. For example, Margaret Lock, in her ethnographic inquiry into North American and Japanese ontologies of death and the politics of organ transplants, asked whether death is an event or a process, and stated that the concept of, and criteria for, death are culturally determined:

professional consensus has been lacking as to whether death is a moment or a process and how best to determine when it occurs. No consensus exists even as to whether a definition of death should be applicable to all living forms or whether there can be a death unique to humans. . . .

. . . .  
. . . Clearly, death is not a self-evident phenomenon. The margins between life and death are socially and culturally constructed, mobile, multiple, and open to dispute and reformulation.

MARGARET LOCK, TWICE DEAD: ORGAN TRANSPLANTS AND THE REINVENTION OF DEATH 7, 11 (2002). Similarly, Emiko Ohnuki-Tierney, another medical anthropologist comparing brain death and organ transplantation in North America and Japan, maintains that “death is always culturally defined even though it may be expressed in biological terms.” Emiko Ohnuki-Tierney, *Brain Death and Organ Transplantation: Cultural Bases of Medical Technology*, 35 CURRENT ANTHROPOLOGY 233, 235 (1994). And for Turner, a medical sociologist,

[t]here is a sense in which we can regard dying as the final process of aging. Sociologists occasionally suggest that we can distinguish three forms of dying, namely psychological, sociological[,] and biological dying. As we grow old we are gradually marginalized within the community and begin to lose a number of personal contacts, which takes the form of a personal or psychological contraction (dying) from social relations. Through the process of dying our social contacts are gradually diminished and we find ourselves socially isolated. Finally, this process is terminated by a biological death which brings to a conclusion the long history of our personal disengagement. We can therefore regard dying like aging as a gradual attrition of social relations combined with increasing dependency often on institutions which are somewhat anonymous and bureaucratic.

BRYAN S. TURNER, MEDICAL POWER AND SOCIAL KNOWLEDGE 125 (2d ed. 1995).

For additional support for the proposition that death exists as both a biological fact and cultural construct, see Stanley L. Brodsky, *Professional Ethics and Professional Morality in the Assessment of Competence for Execution: A Response to Bonnie*, 14(1) LAW & HUM. BEHAV. 91, 94-95 (1990) [hereinafter Brodsky, *Professional Ethics and Professional Morality*] (explaining that “some individuals view death as a brief sleep, after which they promptly return, memories intact. Some view death as a time during which they leave their bodies after which their astral selves will watch their friends with physical bodies. . . . These perspectives emphasize the importance of evaluating how a condemned man’s view of death influences his choice to be executed.”); STANLEY L. BRODSKY, THE PSYCHOLOGY OF ADJUSTMENT AND WELL-BEING 252-53 (1988) [hereinafter BRODSKY, PSYCHOLOGY OF ADJUSTMENT AND WELL-BEING]. Brodsky stated,

One more answer can be given to the question of why death should be awaited with peaceful acceptance by some and with fierce despair by others. It is because death has so many different meanings. To some, death is a trigger, a stimulus that produces predictable responses. Death may be understood as an event, a process that may be a dramatic display or the quiet eye closing of beautiful actresses in

In fact, it is partly because the intent of volunteers is so difficult to discern that the issue has been so contentious.<sup>16</sup> Some individuals support an inmate's right to personal autonomy and would permit waiver or withdrawal of appeals provided that the courts are certain that the inmate is neither depressed nor suicidal, nor in fact innocent or legally ineligible for the death penalty. Thus, these proponents would allow waiver or withdrawal of appeals by competent prisoners based on procedural claims, such as ineffective assistance of counsel, improperly excluded jurors, and prosecutorial misconduct.<sup>17</sup> Others contend that the debate should surround not the nature of the appeals, but the motive of the competent inmate, whereby authentic acceptance of responsibility is treated differently than a mere desire to escape the grueling conditions of death row.<sup>18</sup> Still, others argue that regardless of the nature of the appeal or the motive of the inmate, a condemned inmate's decision to waive or withdraw his appeal should not be honored because the State's interests in preserving life, safeguarding the integrity of the proceedings and the legal profession, and protecting the interests of the inmate's

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movies. How the state of death is approached affects the actual process of dying.

*Id.*; ARTHUR KLEINMAN, *THE ILLNESS NARRATIVES: SUFFERING, HEALING AND THE HUMAN CONDITION* 154 (1988) (discussing how each individual "must work out an appropriate and desired way toward death" in contrast to the "mechanical models of the stages of dying").

For a recent (counterintuitive) study finding that people become happier, rather than distressed, when contemplating their own death, see G. Nathan DeWall & Roy F. Baumeister, *From Terror to Joy: Automatic Turning to Positive Affective Information Following Mortality Salience*, 18(11) *PSYCHOL. SCI.* 984, 984-90 (2007).

For a recent overview of how different cultures and societies regard suicide, see *Suicide: Elusive, but Not Always Unstoppable*, *ECONOMIST*, June 23, 2007, at 63-64. See also Benedict Carey, *Making Sense of the Great Suicide Debate*, *N.Y. TIMES*, Feb. 10, 2008, at WK1, WK8. Carey states,

An expression of true love or raw hatred, of purest faith or mortal sin, of courageous loyalty or selfish cowardice: The act of suicide has meant many things to many people through history, from the fifth-century Christian martyrs to the Samurais' hara-kiri to more recent literary divas, Hemingway, Plath, Sexton.

... Suicide is an intimate, often impulsive decision that has defied scientific understanding, just as it has confounded easy explanation throughout history, or in literature.

*Id.* at WK1.

<sup>16</sup> See, e.g., Adam Liptak, *Another Kind of Appeal From Death Row: Kill Me*, *N.Y. TIMES*, Mar. 14, 2007, at A14.

<sup>17</sup> See *infra* Part III & IV. See also Bonnie, *supra* note 11, at 1390-91; Liptak, *supra* note 16, at A14.

<sup>18</sup> See *infra* Part III & IV. See also Stephen Blank, *Killing Time: The Process of Waiving Appeal the Michael Ross Death Penalty Cases*, 14 *J.L. & POL'Y* 735, 735-77 (2006); Liptak, *supra* note 16, at A14.



family far outweigh the inmate's right to personal autonomy.<sup>19</sup> And finally, some claim that "competent" waiver or withdrawal is impossible and that the expressed desire to forego appeals is an indication of the inmate's depression or suicidal ideation.<sup>20</sup>

Scholars and commentators have considered such issues as the legal standard for waiver and withdrawal<sup>21</sup> and the dilemmas it poses for defense lawyers<sup>22</sup> and mental health professionals (forensic clinicians);<sup>23</sup> the nature of the claim the condemned wishes to waive or withdraw (i.e., substantive vs. procedural);<sup>24</sup> the stage of the criminal justice process in which the individual expresses a preference for a death sentence (i.e., at trial vs. on appeal);<sup>25</sup> and who may further appeal on behalf of an incompetent prisoner (known as "next friend standing").<sup>26</sup> This Article takes a different tack, building on *Fair Fare?: Food as Contested Terrain in U.S. Prisons and Jails*, where this author used practices in prison as a lens

<sup>19</sup> See *infra* Part III & IV. See also Strafer, *supra* note 12, at 895-908; White, *supra* note 11, at 859.

<sup>20</sup> See *infra* Part III & IV. See also Blank, *supra* note 18, at 764; Richard C. Dieter, *Ethical Choices for Attorneys Whose Clients Elect Execution*, 3 GEO. J. LEGAL ETHICS 799, 799-820 (1990); Harrington, *A Community Divided*, *supra* note 11, at 849-881.

<sup>21</sup> See, e.g., Blank, *supra* note 18, at 735-77; Bonnie, *supra* note 12, at 1185-88; Harrington, *Mental Competence and End-of-Life Decision Making*, *supra* note 11, at 1109-51; Strafer, *supra* note 12, at 860, 876, 887.

<sup>22</sup> Richard J. Bonnie, *Dilemmas in Administering the Death Penalty: Conscientious Abstention, Professional Ethics, and the Needs of the Legal System*, 14 LAW & HUM. BEHAV. 67, 68-75 (Feb. 1990); Davis, *supra* note 15, at 45-47; Dieter, *supra* note 20, at 799-820; Harrington, *A Community Divided*, *supra* note 11, at 849-881; Harrington, *Mental Competence and End-of-Life Decision Making*, *supra* note 11, at 1111; White, *supra* note 11, at 859-60.

According to Harrington, "[d]eath row volunteering . . . heightens the disjuncture between the competing obligations of defense counsel to respect client autonomy and protect client interests[;]" while "[v]olunteering raises similar ethical questions at all phases of litigation but resolving them becomes more difficult with each progressive phase [and as other issues are considered]." Harrington, *A Community Divided*, *supra* note 11, at 855, 856, 868.

<sup>23</sup> Compare Bonnie, *supra* note 22, at 75-90 (criticizing the arguments for abstention from the capital sentencing process by mental health professionals), and Richard J. Bonnie, *Grounds for Professional Abstention in Capital Cases: A Reply to Brodsky*, 14 LAW & HUM. BEHAV. 99, 99-102 (1990), with Brodsky, *Professional Ethics and Professional Morality*, *supra* note 15, at 91-97.

<sup>24</sup> Bonnie, *supra* note 11, at 1377-79.

<sup>25</sup> *Id.* at 1389 ("If the trial court determines, after a suitable hearing, that the recalcitrant defendant has expressed a rational and stable preference for a death sentence, the attorney should be directed to comply with the defendant's wishes regarding the presentation of mitigating evidence.").

<sup>26</sup> See, e.g., Blank, *supra* note 18, at 767-70; Paul F. Brown, *Third Party Standing – "Next Friends" as Enemies: Third Party Petitions for Capital Defendants Wishing to Waive Appeal*, 81 J. CRIM. L. & CRIMINOLOGY 981, 981-1001 (1991); Jane L. McClellan, *Stopping the Rush to the Death House: Third-Party Standing in Death-Row Volunteer Cases*, 26 ARIZ. ST. L.J. 201, 201-41 (1994).

with which to examine prison power nexuses and to challenge conceptions of power relations in prison as simple, static, and unidirectional.<sup>27</sup> In this Article, waiver and withdrawal of death penalty appeals serve as the domain through which meanings, identities, and relations are defined and contested, and this Article attempts to set forth a conceptual framework with which to understand these power dynamics. Again relying on Wolf's observation that "power balances always shift and change, its work is never done; [and] it operates against entropy[.]"<sup>28</sup> the author of this Article argues, as he did in *Fair Fare*, that power relations between the State and the condemned are not unambiguous, straightforward, and imbalanced affairs. This Article attempts to further an understanding of prison power relations in a qualitatively and quantitatively different context<sup>29</sup>—for, after all, "the penalty of death is different in kind from any other punishment imposed under our system of criminal justice."<sup>30</sup>

Part II of this Article briefly sketches some general characteristics of death row inmates and provides an overview of the conditions of death row confinement, including the impact of this environment on the emotional, mental, physical, and psychological health of the condemned prisoner.

With this foundation, Part III turns to a consideration of reasons proffered for volunteering, ranging from guilt and remorse to perceptions of justice and fairness to avoidance of death row conditions to depression and suicidal urges to macho and hypermasculine notions of pain and death. In so doing, Part III fleshes out the legal standard for the waiver or withdrawal of death penalty appeals and contemplates the argument that competent waiver is impossible in light of the experience of death row conditions of confinement (a theory known as "Death Row Syndrome" or "Death Row Phenomenon"), as well as the contentions that waiver or withdrawal upholds the dignity and autonomy of the prisoner.

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<sup>27</sup> Avi Brisman, *Fair Fare?: Food as Contested Terrain in U.S. Prisons and Jails*, 15(1) GEO. J. POVERTY L. & POL'Y 49, 49-93 (2008).

<sup>28</sup> Eric R. Wolf, *Distinguished Lecture: Facing Power*, 92 AM. ANTHROPOLOGIST 586, 590 (1990).

<sup>29</sup> Recognizing, of course, that "power is a notoriously difficult, and highly contested, variable (effect? intention?) to isolate for purposes of either social or ethnographic analysis[.]" Mark Goodale, *The Power of Right(s): Tracking Empires of Law and New Modes of Social Resistance in Bolivia (and Elsewhere)*, in THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL 130, 146 (Mark Goodale & Sally Engle Merry, Eds., 2007).

<sup>30</sup> *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (plurality opinion). See also McClellan, *supra* note 26, at 241; White, *supra* note 11, at 863, 865.

Part IV offers an analysis of waiver and withdrawal in light of Foucauldian notions of discipline and bio-power, as well as Hardt and Negri's conception of the suicide bomber as an "opposite" of bio-power.<sup>31</sup> This Part considers the intent of the volunteer and the interests of the State, and classifies the volunteer as either a "docile body" or a "rebellious spirit" depending on his motivation(s) for waiver or withdrawal and his "use" (or lack thereof) to the State. While Part IV presents the options quite starkly—as if the only choices available are "docile bodies" or "rebellious spirits"—the author of this Article does not dismiss the possibility of a continuum. Rather, the goal is simply to help address the larger question of who ultimately controls the body of the condemned and to offer an instrument for exploring and contemplating the continued rationale for the death penalty and the purpose it may serve as a social phenomenon.

Part V of this Article by presents directions for future research in light of *Baze*, the role of punishment in social life, and Foucauldian notions of punishment and spectacle.

## II. CHARACTERISTICS OF DEATH ROW INMATES AND CONDITIONS ON DEATH ROW

Death row inmates in the United States are predominantly male (approximately 98.5%) and disproportionately Southern.<sup>32</sup> More than half are non-White—a percentage that far exceeds the racial composition of the United States as a whole.<sup>33</sup> Many suffer from neurological abnormalities and neuropsychological deficiencies,<sup>34</sup> as well as psychological disorders.<sup>35</sup> According to Cunningham and Vigen, "[d]eath row inmates appear to have a disproportionate rate of serious psychological disorders relative to a general prison population . . . ranging from maladaptive defenses to pervasive depression, mood

<sup>31</sup> MICHAEL HARDT & ANTONIO NEGRI, *MULTITUDE: WAR AND DEMOCRACY IN THE AGE OF EMPIRE* 44–45 (2004).

<sup>32</sup> Cunningham & Vigen, *supra* note 6, at 194, 206. See also Victor L. Streib, *Death Penalty for Female Offenders, January 1, 1973, Through June 30, 2007* (2007), <http://www.deathpenaltyinfo.org/FemDeathJune2007.pdf> (last visited Nov. 6, 2007).

<sup>33</sup> See Cunningham & Vigen, *supra* note 6, at 195–96, 206 (comparing the percentage of African-Americans in the U.S. population as a whole—12.3%—to the percentage of African-Americans on death row 42.72%); Death Penalty Information Center, *Time on Death Row*, <http://www.deathpenaltyinfo.org/article.php?&did=1397#drs> (last visited Dec. 8, 2007). For a discussion of whether this comparison is meaningful, see Reuben M. Greenberg, *Race, the Criminal Justice System, and Community-Oriented Policing*, 20 HARV. J.L. & PUB. POL'Y 397, 397–404 (1997).

<sup>34</sup> Cunningham & Vigen, *supra* note 6, at 201, 206.

<sup>35</sup> *Id.* at 200.

lability, and diminished mental acuity to episodic and chronic psychosis."<sup>36</sup> In addition, those convicted of capital offenses frequently have dysfunctional family histories (e.g., parental abuse, neglect, abandonment, foster care, and parental substance abuse),<sup>37</sup> and a sizeable percentage report personal histories of substance abuse/dependence,<sup>38</sup> including alcohol and/or drug use at the time of their crimes.<sup>39</sup> As Burr expounds:

The defendant is typically limited in his or her ability to live a productive, independent, law-abiding life. These limits are imposed by a combination of problems: mental illness, organic brain damage, mental retardation, fetal alcohol syndrome, years of unrelenting battering and abuse at the hand of parents or adult caretakers, drug and alcohol dependence or, most commonly, some combination of these disabilities. When a violent crime is committed by a person who has one or more of these disabilities, the disabilities have necessarily contributed to that crime: through impairment of the ability to recognize or make appropriate judgments about stressful situations and about socially unacceptable behavior; through an increased vulnerability to acting on the very strong impulses that all of us have, but that most of us have a way to modulate; through a diminished ability to recognize the harmful effects of one's behavior on other people—to empathize; through a tendency to misperceive situations as threatening or hostile when they are really not; and finally, through a kind of reflexive and almost unconscious resort to violence as a way of coping with stress.<sup>40</sup>

With respect to intellectual ability and educational achievement, although there are some instances of highly intelligent condemned prisoners,<sup>41</sup> most death row inmates have not graduated from high

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<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 202, 206.

<sup>38</sup> *Id.* at 201, 206.

<sup>39</sup> *Id.*

<sup>40</sup> Richard H. Burr, *Representing the Client on Death Row: The Politics of Advocacy*, 59 UMKC L. REV. 1, 2-3 (1990) (footnote omitted).

<sup>41</sup> For example, the first modern capital punishment case (1924) to receive a large amount of media attention involved Nathaniel Leopold, 19, and Richard Loeb, 18, who

school and possess IQs in the low-average-to-average range.<sup>42</sup> Functional literacy levels of those on death row are frequently well below what would be expected from the amount of schooling these prisoners report receiving.<sup>43</sup> Many border on mental retardation.<sup>44</sup> As such, Cunningham and Vigen assert that “the intellectual, literacy, and psychological deficits of most death row inmates render them incapable of responding to the demands of direct appeals or postconviction proceedings without the assistance and representation of qualified legal counsel.”<sup>45</sup> This leads them to conclude the following:

[I]t is disturbing that so many inmates on death row are so obviously damaged—developmentally, intellectually, educationally, neurologically, and psychologically. To the extent that the death penalty is intended to punish those murderers who are most morally culpable, there would seem to be some miscarriage of that intent when it is visited upon individuals who are manifestly damaged, deficient, or disturbed in their psychological development and functioning.<sup>46</sup>

Such developmental, intellectual, educational, neurological, and psychological limitations may be exacerbated by the particular adverse conditions of death row incarceration.<sup>47</sup> While variation in death row

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were convicted of the murder of Jacob Franks. KUDLAC, *supra* note 7, at 26. Leopold, a law student at the University of Chicago at the time of the crime, had an IQ over 200. *Id.* Loeb was the youngest graduate ever of the University of Michigan and had an IQ over 160. *Id.* Similarly, the serial killer, Ted Bundy, graduated with honors from the University of Washington and briefly attended law school before devoting himself full-time to his criminal career. *Id.* at 36–37.

<sup>42</sup> Cunningham & Vigen, *supra* note 6, at 199, 206. See generally R.J. Herrnstein, *Criminogenic Traits*, in CRIME 39, 49–53 (James Q. Wilson & Joan Petersilia eds., 1995) (discussing the psychology of criminal behavior and the intelligence of offenders as a whole and noting that “[a]fter sex and age, the single most firmly established psychological fact about the population of offenders is that the distribution of their IQ scores differs from that of the population at large. Instead of averaging 100, as the general population does, offenders average about eight points lower.”).

<sup>43</sup> Cunningham & Vigen, *supra* note 6, at 199–200, 202, 206.

<sup>44</sup> *Id.* at 206. Note, however, that in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court held that the execution of persons with mental retardation is cruel and unusual punishment and unconstitutional under the Eighth Amendment.

<sup>45</sup> Cunningham & Vigen, *supra* note 6, at 206. See also *id.* at 202.

<sup>46</sup> *Id.* at 207.

<sup>47</sup> *Id.* at 206. Note that unless an inmate is subjected to examination and evaluation prior to confinement, it may be difficult to discern which symptoms and illnesses an individual already has and which ones have been caused or exacerbated by death row conditions. See generally TURNER, *supra* note 15, at 80 (stating that “[d]elusions and hallucinations[] . . . may

confinement conditions and policies exists from state to state,<sup>48</sup> and while the experience of death row is unique to each individual,<sup>49</sup> the death row setting is typically described as austere, barbaric, and draconian.<sup>50</sup> Inmates sentenced to death are frequently confined in separate areas of prisons (hence the term, "death row")<sup>51</sup> and experience few opportunities for exercise, rehabilitation, or even interaction with other inmates.<sup>52</sup> As Brodsky explains: "Living on death row is substantially different from living in the prison population in general. . . . Death row inmates typically have restricted opportunities for work, education, recreation, visitation, worship, and friendships with other prisoners."<sup>53</sup> Similarly, Lombardi and his colleagues have found the following:

Capital punishment inmates were housed at a belowground unit at JCCC [the Jefferson City Correctional Center in Jefferson City, Missouri] completely segregated from the general inmate population. With restrictions on movement and limited access to programs, conditions of confinement for death row inmates were similar to those found in other states. Death row inmates did not leave their housing unit. All services, including medical, recreation, food, and legal materials, were brought to condemned prisoners.

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occur in a wide range of cultural and subcultural contexts and especially under stress and sensory deprivation . . .").

<sup>48</sup> Cunningham & Vigen, *supra* note 6, at 194, 204. See also Johnnie L. Gallemore, Jr. & James H. Panton, *Inmate Response to Lengthy Death Row Confinement*, in *CAPITAL PUNISHMENT IN THE UNITED STATES* 527, 531 (1975).

<sup>49</sup> Gallemore & Panton, *supra* note 48, at 531 (stating that "the adjustment [to death row] seems to be unique for each individual and not entirely predictable on the basis of psychiatric diagnosis and previous behavior").

<sup>50</sup> Cunningham & Vigen, *supra* note 6, at 194 (noting the impact of "particularly draconian conditions of incarceration" on inmates); Lombardi et al., *supra* note 6, at 3 (stating that "[f]rom early times, death row conditions were characterized by a pervasive emphasis on rigid security, isolation, limited movement, and austere conditions[]"); Strafer, *supra* note 12, at 869 (noting the "barbaric conditions pervading death rows and the debilitating and life-negating effects of these conditions").

<sup>51</sup> Lombardi et al., *supra* note 6, at 3. See also Blumenthal, *supra* note 11, at A11. Although according to one commentator, Texas's death row is "hardly a row any more, but an entire compound[.]" given that 360 men and 9 women await execution. *Id.*

<sup>52</sup> Death Penalty Information Center, *Time on Death Row*, <http://www.deathpenaltyinfo.org/article.php?&did=1397#drs> (last visited Dec. 8, 2007) (explaining that during their years on death row, inmates "are generally isolated from other prisoners, excluded from prison educational and employment programs, and sharply restricted in terms of visitation and exercise, spending as much as 23 hours a day alone in their cells").

<sup>53</sup> Brodsky, *Professional Ethics and Professional*, *supra* note 15, at 94.

Inmates were permitted 1 hour of outside exercise each day in a small, fenced area by the unit.<sup>54</sup>

While violence and the threat of violence in prison is a persistent and pervasive problem contributing to inmate anxiety, depression, and stress,<sup>55</sup> most death row inmates—even those in facilities where death-sentenced prisoners are integrated into the general prison population—do not behave violently.<sup>56</sup> According to Cunningham and Vigen,

most death row inmates are engaged in direct appeals or postconviction reviews of their death sentences, seeking sentence commutation or new trials. As the outcome of subsequent petitions and litigation might be influenced by death row misconduct, inmates do have something to

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<sup>54</sup> Lombardi et al., *supra* note 6, at 4. See also Blank, *supra* note 18, at 753 (explaining how “[death row] inmates are generally isolated from other prisoners, excluded from prison educational and employment programs, and sharply restricted in terms of visitation and exercise, spending as many as twenty-three hours a day alone in their cells”); JAMES W. MARQUART, SHELDON EKLAND-OLSON, AND JONATHAN R. SORESENSEN, *THE ROPE, THE CHAIR, AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923–1990* 138 (1994) (describing a “dominance of security” on Texas’ death row, with twenty plus hours of cell confinement, meals in cells, strict custody procedures, and restraints on out-of-cell movement). See also McClellan, *supra* note 26, at 213–14 (describing the “lonely lives” of inmates on death row, who usually do not mingle with the general population, spend most of their hours “locked down[,]” frequently eat their meals alone in their cells, and receive little exercise or rehabilitation); Strafer, *supra* note 12, at 869–70 (describing how “death row inmates are generally not integrated into the general prison population; have no access to ‘rehabilitative’ programs; have little opportunity to exercise; and are confined to their cells for extraordinarily long periods of time”).

<sup>55</sup> See, e.g., Avi Brisman, *Toward a More Elaborate Typology of Environmental Values: Liberalizing Criminal Disenfranchisement Laws and Policies*, 33 *NEW ENG. J. ON CRIM. & CIV. CONFINEMENT* 283, 303–05 (2007). For a comparison between levels of violence in American and Japanese prisons, see Norimitsu Onishi, *As Japan Ages, Prisons Adapt to Going Gray*, *N.Y. TIMES*, Nov. 3, 2007, at A1.

<sup>56</sup> Cunningham & Vigen, *supra* note 6, at 203 (“An expectation then that death row inmates will invariably commit assaults in prison because they have ‘nothing to lose’ appears to be unfounded. . . . [T]he majority of death row inmates do not exhibit serious violence within the structured context of institutional confinement.”). See also *id.* at 207; Tad Friend, *Dean of Death Row: The Man Who Became the Face of San Quentin*, *THE NEW YORKER*, July 30, 2007, at 62, 68; Lombardi et al., *supra* note 6, at 7 (finding that “[t]he majority of capital offenders are more easily managed with integration. Before the integration program, [condemned] inmates had little to lose—outside of limited program activities—for noncompliance with facility regulations.”); MARQUART ET AL., *supra* note 54, at 181 (noting that most prisoners awaiting execution serve their time without major incident).

lose should they exhibit a pattern of recurrent institutional violence.<sup>57</sup>

Nevertheless, many inmates experience death row as a "living death"<sup>58</sup> in large part because of the lengthy amount of time they spend awaiting execution.<sup>59</sup>

To illustrate, consider Robert-François Damiens, the failed regicide, whose gruesome execution is described in lurid detail by Michel Foucault at the beginning of *Discipline and Punish: The Birth of the Prison*. Damiens's unsuccessful assassination attempt of Louis XV of France occurred on January 5, 1757; his execution took place just under two months later on March 2, 1757.<sup>60</sup> Similarly, the Death Penalty Information Center explains that "[w]hen the [C]onstitution was written, the time between sentencing and execution could be measured in days or weeks."<sup>61</sup> In contrast, most death-sentenced inmates in the United States today "languish for periods best measured in years as they await final disposition of their cases in the appellate process."<sup>62</sup> Condemned prisoners frequently spend over a decade awaiting execution.<sup>63</sup> For example, Cunningham and Vigen found that the eighty-five prisoners

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<sup>57</sup> Cunningham & Vigen, *supra* note 32, at 203. Cunningham and Vigen also explain that "[f]or some, the violent offense of conviction occurred in a particular context or at a developmental stage that is not replicated in prison." *Id.*

<sup>58</sup> R. JOHNSON, CONDEMNED TO DIE: LIFE UNDER SENTENCE OF DEATH 17 (1981) (emphasis omitted).

<sup>59</sup> See generally Lombardi et al., *supra* note 6, at 9.

Even where the conditions of death row are not so degrading as to violate general cruel and unusual punishment norms, or result in mental incompetency for execution, the very length of death row confinement has been raised as an issue. Jurists have noted that lengthy death row confinement might result in cruel and unusual punishment.

*Id.* Cf. Adam Liptak, *At 60% of Total, Texas Is Bucking Execution Trend*, *supra* note 2, at A18 (describing how "Texas courts . . . speed the process along").

<sup>60</sup> MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 3 (Alan Sheridan, trans., 1977).

<sup>61</sup> Death Penalty Information Center, *Time on Death Row*, <http://www.deathpenaltyinfo.org/article.php?&did=1397#drs> (last visited Dec. 8, 2007). See generally *Ford v. Wainwright*, 477 U.S. 399, 420 (1986) (Powell, J., concurring) (noting that "in cases tried at common law[,] execution often followed fairly quickly after trial").

<sup>62</sup> Lombardi et al., *supra* note 6, at 3.

<sup>63</sup> Blank, *supra* note 18, at 752-53. See also Death Penalty Information Center, *Time on Death Row*, <http://www.deathpenaltyinfo.org/article.php?&did=1397#drs> (last visited Dec. 8, 2007).



executed in 2000 averaged 11.42 years between sentence and execution.<sup>64</sup> For some prisoners, their time on death row exceeds twenty years.<sup>65</sup>

Part of the reason for the lag between sentence and execution (aside from the requirements of the exhaustion doctrine, whereby a state prisoner must exhaust all state judicial remedies to litigate federal claims before a federal court will hear a petition for writ of habeas corpus<sup>66</sup>) is that reforms intended to ensure the accuracy and thoroughness of convictions and sentences have taken increasingly more time.<sup>67</sup> For the

<sup>64</sup> Cunningham & Vigen, *supra* note 6, at 195.

<sup>65</sup> Blank, *supra* note 18, at 753. See also Death Penalty Information Center, *Time on Death Row*, <http://www.deathpenaltyinfo.org/article.php?&did=1397#drs> (last visited Dec. 8, 2007). Tad Friend explains in his article that

[t]he public broadly endorses the [death] penalty—by about sixty-five per cent in most polls—but many capital cases are beset by doubt, mitigating circumstances, or evidence of the condemned’s remorse or redemption. California has a particularly thorough appellate process, and the result, on death row at San Quentin, is agonizing stasis: six hundred and twenty-nine men, the nation’s largest assembly of the condemned, now sit for an average of more than twenty-two years before their sentence is carried out.

Friend, *supra* note 56, at 62, 68.

It is thus interesting to note that over the years, the amount of time that elapses between commission of the crime and execution has increased, while the amount of time it takes to execute an inmate has decreased. It used to be that individuals, such as Damiens, see FOUCAULT, *supra* note 60, were tried quickly and the execution was prolonged. Now, the final disposition takes years, but once the date of execution arrives, the goal is to kill the inmate as quickly as possible. See Theo Emery, *Tennessee, After Review, Sets Execution*, N.Y. TIMES, May 9, 2007, at A19.

<sup>66</sup> See 28 U.S.C. § 2254(b)(1) (2000). Under the “total exhaustion” requirement of *Rose v. Lundy*, federal district courts must dismiss “mixed petitions”—petitions containing both unexhausted and exhausted claims—in their entirety. 455 U.S. 509, 520–22 (1982). In the blunt words of Justice Sandra Day O’Connor, who authored the opinion for the Court, “our interpretation of §§ 2254(b), (c) provides a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court.” *Id.* at 520.

See also Larry W. Yackle, *The Misadventures of State Postconviction Remedies*, 16 N.Y.U. REV. L. & SOC. CHANGE 359 (1988). Before presenting federal claims to a federal court in a petition for habeas corpus, prisoners usually have to engage any state post conviction procedures available after their convictions are affirmed on direct state appellate review. *Id.*

<sup>67</sup> See Blank, *supra* note 18, at 752. Blank explains,

In the wake of the Supreme Court-mandated suspension of the death penalty from 1972 to 1976, numerous reforms have been introduced to create a less arbitrary system, arbitrary referring to ensuring that the process used to convict an inmate to death is accurate and thorough. This has resulted in lengthier appeals, as mandatory sentencing reviews have become the norm, and continual changes in laws and technology have necessitated reexamination of individual sentences.

*Id.* (footnote omitted); Death Penalty Information Center, *Time on Death Row*, <http://www.deathpenaltyinfo.org/article.php?&did=1397#drs> (last visited Dec. 8, 2007).

most part, such measures have been welcomed.<sup>68</sup> But, these efforts geared towards rendering the criminal justice system less arbitrary have prolonged the experience of living on death row.

Lombardi and his colleagues offer the following reminder: "outside of occasional news stories about appeals, stays, or actual executions, little attention is paid to death row prisoners themselves. Yet the capital punishment process also involves *confinement*—commonly for years—as inmates' cases wind their way through the appellate system."<sup>69</sup> West paints a more poignant picture: "Everyone must die, but only the condemned prisoner is subjected to the terrible agony of prolonged waiting—sometimes for years, tormented by hope—to be deliberately slaughtered by a self-righteous society, while others, no different, are allowed to live. This torture is harsher than the thumbscrew and rack."<sup>70</sup> But perhaps Blank offers the best assessment, suggesting that death-sentenced inmates who spend so much time awaiting execution actually receive "two distinct punishments: the death sentence itself, and the years of living in conditions tantamount to solitary confinement."<sup>71</sup>

Indeed, the prolonged anticipation of death in a (relatively) known manner at an uncertain time under the austere conditions described above may be considered one of the most stressful of all human experiences.<sup>72</sup> As such, many death row inmates, especially those who

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<sup>68</sup> See Death Penalty Information Center, *Time on Death Row*, <http://www.deathpenaltyinfo.org/article.php?&did=1397#drs> (last visited Dec. 8, 2007) (contending that "[d]eath-penalty proponents and opponents alike say such careful review is imperative when the stakes are life and death").

<sup>69</sup> Lombardi et al., *supra* note 6, at 3 (emphasis added).

<sup>70</sup> Louis Jolyon West, *Psychiatric Reflections on the Death Penalty*, in CAPITAL PUNISHMENT IN THE UNITED STATES 419, 421-22 (Hugo Adam Bedau and Chester M. Pierce, eds., 1975). See generally Blumenthal, *supra* note 11, at A1, A11 ("Death is death[] . . . . If they stick a needle in your arm or shoot you in the head, it's cruel and inhuman punishment, taking a human life. . . . [A] life sentence is a whole lot worse—it's torture." (quoting Jack Harry Smith, 70, the oldest death row inmate in Texas) (internal quotation marks omitted)).

<sup>71</sup> Blank, *supra* note 18, at 753. See also Death Penalty Information Center, *Time on Death Row*, <http://www.deathpenaltyinfo.org/article.php?&did=1397#drs> (last visited Dec. 8, 2007) (asking "whether death row prisoners are receiving two distinct punishments: the death sentence itself, and the years of living in conditions tantamount to solitary confinement—a severe form of punishment that may be used only for very limited periods for general-population prisoners").

<sup>72</sup> See *In re Medley*, 134 U.S. 160, 172 (1890) (declaring that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it"); *Coleman v. Balkom*, 451 U.S. 949, 952 (1981) (stating that "the deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of the ultimate step itself") (Stevens, J., opinion respecting denial of cert.); Blank, *supra* note 18, at 752; Gallemore & Pantan, *supra* note 48, at 527, 531; Robert Johnson, *Under Sentence of Death: The Psychology of Death Row Confinement*, 5 LAW &

enter prison with pre-existing (although not necessarily diagnosed) emotional and psychological illnesses, suffer feelings of defeat, fear, helplessness, lack of empathy and sympathy, loneliness, and vulnerability, as well as mood swings, recurrent depression, and a deterioration of mental and physical abilities, characterized by confusion, drowsiness, forgetfulness, lethargy, listlessness, and mental slowness.<sup>73</sup> In this sense, the body of the criminal (as well as his mind

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PSYCHOL. REV. 141, 141-92 (1979). See also Death Penalty Information Center, *Time on Death Row*, <http://www.deathpenaltyinfo.org/article.php?&did=1397#drs> (last visited Dec. 8, 2007) (stating that “unlike general-population prisoners, even in solitary confinement, death-row inmates live in a state of constant uncertainty over when they will be executed. For some death row inmates, this isolation and anxiety results in a sharp deterioration in their mental status.”); Note, *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814, 830 (1972) (“The tremendous mental strain of inexorably approaching a foreordained death is unique to the condemned man. The imposition of this strain violates society’s standard that a man should be treated with human dignity, and robs the condemned prisoner of his own human dignity and psychological integrity.”) (footnotes omitted); Strafer, *supra* note 12, at 867 (declaring that “[i]t is difficult to imagine a source of psychological stress more exacting than being forced to live the spasmodic certainty and uncertainty of being sentenced to die”); West, *supra* note 70, at 424 (stating that “[d]eath sentences create a grisly reservoir of condemned persons living under unbelievable stress in a situation . . . [on] Death Row, organized and controlled in grim caricature of a laboratory, the condemned prisoner’s personality is subjected to incredible stress for prolonged periods of time”). See generally *Lackey v. Texas*, 115 S. Ct. 1421, 1421 (1995) (“It is arguable that neither ground [retribution nor deterrence] retains any force for prisoners who have spent some 17 years under a sentence of death.”) (Stevens, J. opinion respecting denial of cert.); *Elledge v. Florida*, 119 S. Ct. 366, 367 (1998) (maintaining that “after such a delay [twenty-three years], an execution may well cease to serve the legitimate penological purposes that otherwise provide a necessary constitutional justification for the death penalty”) (Breyer, J., dissenting from denial of cert.); *Knight v. Florida*, 120 S. Ct. 459, 461-62 (1999) (stating that “[w]here a delay, measured in decades, reflects the State’s own failure to comply with the Constitution’s demands, the claim that time has rendered the execution inhuman is a particularly strong one[.]” and contending that “[i]t is difficult to deny the suffering inherent in a prolonged wait for execution[.] . . .”) (Breyer, J., dissenting from denial of cert.); *Smith v. Arizona*, 128 S. Ct. 466, 466 (2007) (“Smith can reasonably claim that his execution at this late date [thirty years after sentencing] would be ‘unusual.’ I am unaware of other executions that have taken place after so long a delay[.]”) (Breyer, J., dissenting from denial of cert.).

<sup>73</sup> See *Blank, supra* note 18, at 746 (stating that “living under sentence of death can cause an overwhelming sense of helplessness and fear”) (citing *State v. Ross*, 272 Conn. 577, 593 (2005)); *Cunningham & Vigen, supra* note 6, at 204 (“Not surprisingly, there is evidence that these bleak confinement conditions impact the psychological adjustment of death row inmates – most of whom spend many years in this status.”); *Lombardi et al., supra* note 6, at 8 (“Overly oppressive physical conditions of death row may be detrimental to the inmate’s mental health . . . .”); West, *supra* note 70, at 425 (“The strain of existence on Death Row is very likely to produce behavioral aberrations ranging from malingering to acute psychotic breaks.”). See also *Blank, supra* note 18, at 746 & n.61 (describing how “‘prisoners held in segregated confinement frequently develop mental disturbances’ . . . includ[ing] impaired alertness, attention and concentration, hyperresponsiveness to stimuli, withdrawal,

and soul) is "slowly destroyed as part of the legal system of revenge."<sup>74</sup> Contrary to Foucault's contentions, the death sentence (albeit not the *execution*, per se) has very much retained "those long processes in which death [i]s both retarded by calculated interruptions and multiplied by a series of successive attacks."<sup>75</sup>

With this bleak backdrop, this Article now turns to a consideration of the reasons proffered by inmates and commentators for the waiver or withdrawal of death penalty appeals. While an exhaustive review is outside the scope of this Article, Part III endeavors to provide a sufficient survey of motivations for volunteering, as well as arguments for and against allowing the waiver or withdrawal of appeals, in order to set the framework for the discussion in Part IV of what these positions reveal about the power dynamics between the State and the condemned prisoner.

### III. PURPORTED REASONS FOR VOLUNTEERING AND WHETHER COURTS SHOULD PERMIT THE WAIVER OR WITHDRAWAL OF DEATH PENALTY APPEALS

The general supposition in capital cases is that defendants wish to avoid the death penalty.<sup>76</sup> Indeed, as Davis contends, "Our system of justice rests on two fundamental but rarely articulated assumptions. Those who are alive want to remain so. When their interest in living is threatened[,] they will fight to remain alive."<sup>77</sup> But as noted above, many capital defendants, at various points in their criminal proceedings, express a preference for death to the alternative of life in prison<sup>78</sup>—a preference that, depending on the circumstances, may challenge State control of the inmate's body<sup>79</sup> and State attempts to manipulate the

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obsessive preoccupation with trivial matters, sleep disturbances and psychotic delirium") (citing *Ross*, 272 Conn. at 593); Johnson, *supra* note 72, at 141-92.

<sup>74</sup> TURNER, *supra* note 15, at 34.

<sup>75</sup> FOUCAULT, *supra* note 60, at 12.

<sup>76</sup> White, *supra* note 11, at 853. See generally DeWall, *supra* note 15, at 984 (stating that "[m]ost living things strive to continue living"); cf. McClellan, *supra* note 26, at 213 (stating that "[d]eath-row inmates may have understandable motivations to actively seek the imposition of presumably valid sentences").

<sup>77</sup> Davis, *supra* note 15, at 45.

<sup>78</sup> See generally *supra* note 9 and accompanying text. See Harrington, *A Community Divided*, *supra* note 11, at 861-62. According to Harrington, the decision to volunteer is usually marked by some "precipitating factor . . . extraneous to the case[.]" such as "a friend or family member has stopped visiting, the food or noise in the prison has gotten particularly bad, relations between inmates have turned violent, and so forth." *Id.*

<sup>79</sup> See TURNER, *supra* note 15, at 17, 210. See generally J. Anthony Paredes and Elizabeth D. Purdum, "Bye-bye Ted . . .": *Community Response in Florida to the Execution of Theodore Bundy*, 6 ANTHROPOLOGY TODAY 9-11 (1990) (describing how "the governor [of Florida] and [Ted]

meaning of death and suicide (or at least the conditions under which death occurs).<sup>80</sup>

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Bundy seemed locked together as mythic combatants" over whether and when Bundy would die).

Because most defense attorneys will not accede to their clients' requests to waive or withdraw death penalty appeals, one could make the argument that the struggle for control of the inmate's body involves *three* players, rather than two—the State, the inmate, and the defense attorney. See generally White, *supra* note 11, at 859–60 (describing efforts taken by defense lawyers to circumvent inmates' requests to "volunteer").

<sup>80</sup> See generally *infra* Part IV. See generally MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION, VOL. I 135–36, 139–40 (Robert Hurley, trans., Vintage Books 1990) (1978) (illustrating how "[f]or a long time, one of the characteristic privileges of sovereign power was the right to decide life and death. . . . The sovereign exercised his right of life only by exercising his right to kill, or by refraining from killing[.]" but that starting in the Seventeenth century, "[t]he old power of death that symbolized sovereign power was now carefully supplanted by the administration of bodies and the calculated management of life."); HARDT & NEGRI, *supra*, note 31, at 20 ("Sovereign political power can never really arrive at the pure production of death because it cannot afford to eliminate the life of its subjects."); LOCK, *supra* note 15, at 195 (suggesting that the "[s]udden and uncontrolled death, and particularly accidental and violent death, death in childbirth, and suicide, raise concerns about the condition of the social order"); TURNER, *supra* note 15, at 210 (describing how

[w]ith technological change in the production and termination of life processes, the state has become increasingly involved in the legal dispute over the character of life—its origins, shape and destiny. To some extent these conflicts raise at an acute political level the features of modern patriarchy, since the state is now involved in the technical, political and ideological battle over women's bodies.

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For French sociologist Emile Durkheim, who wrote the first case study of suicide, suicide rates were a reflection of the state of a community or society. Rapidly increasing rates of suicide were, according to Durkheim, symptomatic of the breakdown of the collective conscience and social control. EMILE DURKHEIM, SUICIDE: A STUDY IN SOCIOLOGY 14–17 (John A. Spauling & George Simpson, trans., 1955) (1897); cf. JACK D. DOUGLAS, THE SOCIAL MEANINGS OF SUICIDE 103–08 (1967). Following Durkheim, states thus have a vested interest in the attitudes, meanings, perceptions, and rates of suicide. See generally TURNER, *supra* note 15, at 179 (noting that "the state must attempt to preserve and promote the general conditions of social harmony").

For perspectives on the relationship of the State in Japan to the meaning of suicide, see Chikako Ozawa-de Silva, *Too Lonely to Die Alone: Internet Suicide Pacts and Existential Suffering in Japan* (under review with CULTURAL ANTHROPOLOGY) (referring to Japan as a "'suicide nation' . . . due to the various forms of suicide that have gained prominence in public attention," describing the "popular Japanese discourse that suicide is one way that individuals can assert their autonomy in a collectivist Japanese society," claiming that "[t]here has been a strong tendency in Japanese thought on suicide to blame society itself and to look outside the actual individuals for the cause of suicide," and explaining that "[i]n Japan . . . certain suicides are given a positive cultural valence . . . suicide is culturally acceptable only under certain circumstances—when there is a clear reason for the person to commit suicide according to cultural norms") (manuscript on file with author); MAURICE PINGUET, VOLUNTARY DEATH IN JAPAN 2–3 (1993) (explaining that "the essential point is

A death row inmate may volunteer for execution for any number of reasons. Some possess persistent guilt and sorrow about the crime or crimes they committed.<sup>81</sup> As Davis explains, "there are those who have a profound, overpowering sense of guilt for what they have done, and for them, their execution is the only way to not only expiate their sins but to relieve them from the excruciating pain they are enduring."<sup>82</sup> Others with even more guilt and an even more extreme need for expiation "view death as the entrance into an eternity of torture, justly deserved for their true sins."<sup>83</sup> In less radical ways, many express feelings of "remorse" and stress the importance of "justice."

For example, in *Comer v. Stewart*,<sup>84</sup> the inmate explained that his decision to withdraw his appeal grew out of a lengthy process of introspection whereby he came to regret his actions, to recognize the hurt he had caused many people in his life, and to accept and participate in the punishment justice demanded for his crime.<sup>85</sup> Acknowledging a debt to the friends and family of his victim, as well as a desire to spare his own family and friends ongoing pain, Comer declared: "I started thinking about my victims, thinking about everything. It's just time to end it now. . . . I've been saying for a year—for, you know, the last couple of years, at least, I killed this guy. . . . I stuck a gun in the guy's ear, pulled the trigger."<sup>86</sup> Comer did not express a true desire to die, nor did he indicate support for the death penalty in general as a form of punishment. But in his arguments to the district court, he indicated that he wished to waive his appeals and expedite his death sentence because he accepted the finality of his punishment<sup>87</sup>—reasons that the district court found persuasive.<sup>88</sup>

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that in Japan, there was never any objection in principle to the free choice of death—a question on which Western ideology has always found it difficult to pronounce").

<sup>81</sup> Harrington, *A Community Divided*, *supra* note 11, at 850.

<sup>82</sup> Davis, *supra* note 15, at 46. *See also* Harrington, *A Community Divided*, *supra* note 11, at 850.

<sup>83</sup> Brodsky, *Professional Ethics and Professional Morality*, *supra* note 15, at 94.

<sup>84</sup> *Comer v. Stewart*, 230 F. Supp. 2d 1016 (D. Ariz. 2002).

<sup>85</sup> *Id.* at 1063.

<sup>86</sup> *Id.* at 1063, 1062 (internal quotation marks omitted). *See generally* Harrington, *A Community Divided*, *supra* note 11, at 850.

<sup>87</sup> *Comer*, 230 F. Supp. 2d at 1061–72; Blank, *supra* 18, at 750–51.

<sup>88</sup> *Comer*, 230 F. Supp. 2d at 1063. On appeal, a divided three-judge panel for the United States Court of Appeals for the Ninth Circuit affirmed the district court's determination that Comer had made a "free and deliberate choice" to die, but found that Comer's Fourteenth Amendment rights had been violated and held that Comer was entitled to a new sentencing hearing. *Comer v. Schirro*, 463 F.3d 934, 948, 964–65 (9th Cir. 2006). *See also* Liptak, *supra* note 16, at A14. The Ninth Circuit then agreed to hear the case en banc, *Comer v. Stewart*, 471 F.3d 1359 (9th Cir. 2006), and on rehearing en banc, the Ninth Circuit

In contrast, the death row inmate in *Hamblen v. State* expressed no reservations about capital punishment as a matter of course.<sup>89</sup> But like Comer, Hamblen agreed with its imposition in his own case.<sup>90</sup> Going one step further than Comer, Hamblen, like other condemned prisoners pressing for waiver or withdrawal, revealed that he did not want to grow old in prison and no longer wished to live.<sup>91</sup> In response to Hamblen's probation officer's recommendation of life imprisonment without hope of parole in order to provide the opportunity for reflection upon the senselessness of his crime, Hamblen stated:

Mr. Chance [the probation officer] might have a valid point if I were a young man with a whole lifetime ahead of me and with a whole pocketful of hopes and

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held that Comer's pro se motion to waive further proceedings on habeas petition was voluntary and valid. *Comer*, 480 F.3d at 960.

In reflecting on Comer's case, it is worth considering the work of two anthropologists working in Japan. In her observations about the effect of the Japanese psychotherapeutic method of Naikan on its practitioners, Chikako Ozawa-de Silva writes that Naikan permits one to engage in

a life-review enabl[ing] one to reflect on what kind of person one was in life, and what one should have or could have done in the past; it is a serious self-examination, which most people will have at one point in their life. . . . Naikan is thus a preliminary facing of death, and, if done deeply enough, actually eventuates an experience of fundamental renewal, described by clients and practitioners as "rebirth."

CHIKAKO OZAWA-DE SILVA, *PSYCHOTHERAPY AND RELIGION IN JAPAN: THE JAPANESE INTROSPECTION PRACTICE OF NAIKAN* 27 (2006). Comer's process of introspection, like that of the Naikan practitioner, may have permitted him to comprehend his mistakes and crimes. But with no opportunity to live differently (for had he not been executed, he still would have spent his life in prison) and no occasion to make positive contributions as a result of his new self-understanding and self-awareness, he was unable to feel renewal and rebirth, leaving death as the only option.

Similarly, Dorinne K. Kondo, in her examination of the Rinri (Ethics) movement in Japan and the creation of "ethics centers" (also referred to as "ethics retreats" or "ethics schools"), explains that the purpose of such centers is to create "disciplined selves" – selves possessing "sensitivity to social context and to the demands of social roles – not dogged adherence to an 'authentic,' inner self to which one must be true, regardless of the situation or the consequences for others." DORINNE K. KONDO, *CRAFTING SELVES: POWER, GENDER, AND DISCOURSES OF IDENTITY IN A JAPANESE WORKPLACE* 107–08 (1990). Comer's extensive self-reflection, combined with the austerity of prison, may have permitted him to transform his "self," much like the attendees of the ethics schools. But with no opportunity to build on this transformation – with no opportunity to live differently, the way that ethics school participants use their ethics experiences to "carry[] out [their] prescribed roles as dutiful sons and daughters and as loyal, diligent workers." *Id.* at 113. Comer may have felt that death was the only real choice.

<sup>89</sup> 527 So. 2d 800, 802 (Fla. 1988).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* See also Davis, *supra* note, 15, at 46; Harrington, *A Community Divided*, *supra* note 11, at 850; White, *supra* note 11, at 861.

dreams. . . . But, as a matter of fact, I'm 55, almost 56 years old and I don't harbor any dreams that are going to be realized in this world, and I am not particularly given to reflection. Therefore, it seems to me that Mr. Chance's recommendation in this instance is inappropriate and [the prosecutor] Mr. Bledsoe's, on the other hand, is appropriate.<sup>92</sup>

The trial judge considered Hamblen's preference, reviewed the record, including the psychological reports, and sentenced Hamblen to death.<sup>93</sup> The Florida Supreme Court affirmed the judgment and sentence of death.<sup>94</sup>

Situations such as Comer's and Hamblen's present challenges to courts, attorneys, and mental health professionals who must assess the competency and voluntariness of waiver/withdrawal. The standard used to determine whether an individual is competent to waive or withdraw his death penalty appeals and forego any further legal proceedings was first set forth in *Rees v. Peyton*.<sup>95</sup> In *Rees*, the Supreme Court indicated that courts must evaluate "whether [the prisoner] has [the] capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises."<sup>96</sup> Since *Rees*, some courts considering the issue of competence with respect to a would-be volunteer have broken down the *Rees* standard into a series of questions. For example, in *Rumbaugh v. Procnier*,<sup>97</sup> the Fifth Circuit interpreted the *Rees* test to require a death-eligible defendant to answer the following:

- (1) Is the person suffering from a mental disease or defect?

<sup>92</sup> *Hamblen*, 527 So. 2d at 802 (internal quotation marks omitted). See also *Davis*, *supra* note 15, at 46.

<sup>93</sup> *Hamblen*, 527 So. 2d at 802. A trial judge made this determination because Hamblen had waived his right to have a jury consider whether he should be executed. *Id.* at 801. Hamblen did not appeal his sentence, but the public defender's office was appointed as appellate counsel for Hamblen. *Id.* at 802. Hamblen moved to withdraw the appeal, but his motion was denied. *Id.*

<sup>94</sup> *Id.* at 805. See Death Penalty Information Center, *Execution Database*, <http://www.deathpenaltyinfo.org/searchable-database-executions> (last visited Nov. 28, 2007). Hamblen was electrocuted on September 21, 1990. *Id.*

<sup>95</sup> 384 U.S. 312 (1966).

<sup>96</sup> *Id.* at 314. See also *Blank*, *supra* note 18, at 738, 764–67; *Harrington*, *Mental Competence and End-of-Life Decision Making*, *supra* note 11, at 1113; *McClellan*, *supra* note 26, at 232.

<sup>97</sup> 753 F.2d 395 (5th Cir. 1985).



- (2) If the person is suffering from a mental disease or defect, does that disease or defect prevent him from understanding his legal position and the options available to him?
- (3) If the person is suffering from a mental disease or defect which does not prevent him from understanding his legal position and the options available to him, does that disease or defect, nevertheless, prevent him from making a rational choice among his options?<sup>98</sup>

The Fifth Circuit continued:

If the answer to the first question is no, the court need go no further, the person is competent. If both the first and second questions are answered in the affirmative, the person is incompetent and the third question need not be addressed. If the first question is answered yes and the second is answered no, the third question is determinative; if yes, the person is incompetent, if no, the person is competent.<sup>99</sup>

While some courts rely on “the actual *Rees* formulation,” rather than breaking down the *Rees* standard into three questions,<sup>100</sup> the point is that a condemned prisoner may not waive or withdraw his appeals or otherwise terminate his legal proceedings without a sufficient hearing to ascertain his ability to make such a choice rationally. Despite this safeguard,<sup>101</sup> determining whether a death row inmate possesses the

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<sup>98</sup> *Id.* at 398. The Eleventh Circuit has adopted a similar approach. See *Lonchar v. Zant*, 978 F.2d 637, 641-42 (11th Cir. 1992); *Hauser ex rel. Crawford v. Moore*, 223 F.3d 1316, 1322 (11th Cir. 2000).

For a brief overview of *Rees* and *Rumbaugh*, see Harrington, *Mental Competence and End-of-Life Decision Making*, *supra* note 11, at 1113 n.5 and accompanying text; McClellan, *supra* note 26, at 232-33; see also Strafer, *supra* note 12, at 876.

<sup>99</sup> *Rumbaugh*, 753 F.2d at 398-99.

<sup>100</sup> *Dennis ex rel. Butko v. Budge*, 378 F.3d 880, 888 n.4 (9th Cir. 2004).

<sup>101</sup> According to some commentators, the *Rees* standard and permutations thereof are inadequate. See, e.g., Blank, *supra* note 18, at 766, 770; Strafer, *supra* note 12, at 860-912. One commentator claims:

The *Rees* test for competency[] . . . is unclear and subject to differing interpretations. . . . The *Rees* test requires that the court find *either* that the defendant lacks appreciation of defendant’s position and is unable to make rational choices *or* that the defendant suffers from a mental disease, disorder, or defect affecting capacity. Therefore, under *Rees*, if a defendant suffers from a mental illness but makes seemingly rational choices, the court still should find the defendant incompetent. In contrast, under the Fifth Circuit’s interpretation[,] . . . the court could find the same defendant competent.

requisite competency is extremely difficult when the prisoner expresses a desire to volunteer for execution because he can no longer tolerate the dehumanizing conditions of most death row facilities, as described above<sup>102</sup> and as seen in the example of *Hamblen*, or experiences severe depression or possesses pre-existing suicidal urges<sup>103</sup> that nonetheless do not prevent his "understanding his legal position and the options available to him[.]"<sup>104</sup> Establishing whether a prisoner has made a knowing and intelligent waiver or withdrawal of his death penalty appeals may prove particularly vexing when the prisoner expresses a wish "to escape the roller-coaster experience of the habeas appeals process or to seize control over it[.]"<sup>105</sup> or indicates a desire for a "macho confrontation with death."<sup>106</sup> While this latter proffered reason for volunteering—the wish for a macho confrontation with death also known as "the 'blaze of glory' syndrome"<sup>107</sup>—may seem odd and unusual, Brodsky notes that "[t]hese beliefs are not rare; a small but visible minority of condemned men hold them."<sup>108</sup> In fact, Gary Mark Gilmore, noted above and discussed again in Part IV—the first individual executed in the United States following the reinstatement of

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McClellan, *supra* note 26, at 233 (footnotes omitted).

<sup>102</sup> See *supra* Part II. See also Harrington, *A Community Divided*, *supra* note 11, at 850; Strafer, *supra* note 12, at 873. Strafer argues that:

In a sense, the condemned have at their disposal an "easier" way to find release from unbearable conditions [than dying patients]: they can simply "pull the plug" by firing their attorneys and withdrawing their appeals. Robert Lee Massie, for example, attempted to dismiss his automatic appeal from a first degree murder conviction in California in 1979 primarily because he preferred execution to the extended torture of life on San Quentin's death row.

Strafer, *supra* note 102, at 873 (citing *Massie v. Sumner*, 624 F.2d 72 (9th Cir. 1980), *cert. denied*, 449 U.S. 1103 (1981)).

<sup>103</sup> Harrington, *A Community Divided*, *supra* note 11, at 850.

<sup>104</sup> See *supra* note 96 and accompanying text.

<sup>105</sup> Harrington, *A Community Divided*, *supra* note 11, at 850. See also Blank, *supra* note 18, at 746 (explaining that "living under sentence of death can cause an overwhelming sense of helplessness and fear resulting in a desperate need to regain control by waiving further challenges to the death sentence").

<sup>106</sup> Harrington, *A Community Divided*, *supra* note 11, at 850 (internal quotation marks omitted). See Brodsky, *Professional Ethics and Professional Morality*, *supra* note 15, at 93 (discussing the hypothetical prisoner whose "primary underlying motive [for withdrawal of appeals] is a deep commitment to toughness, to hypermasculine, adolescent beliefs that the worth of a man lies in his tolerance of pain."); Harrington, *Mental Competence and End-of-Life Decision Making*, *supra* note 11, at 1133 (noting that some inmate's "don't want to be perceived as wishy-washy or weak or cowardly" and that they want newspapers to report "[i]nmate goes bravely to his death[']").

<sup>107</sup> Strafer, *supra* note 12, at 875 n.56. See also McClellan, *supra* note 26, at 214-15.

<sup>108</sup> Brodsky, *Professional Ethics and Professional Morality*, *supra* note 15, at 93. See also McClellan, *supra* note 26, at 209; White, *supra* note 11, at 872.

the death penalty after *Gregg v. Georgia* lifted the four-year moratorium imposed by *Furman v. Georgia* in 1972<sup>109</sup>—was “intoxicated by the prospect of [his] own punishment” and relished the publicity associated with his volunteering and becoming the first person to be executed after reinstatement.<sup>110</sup>

These reasons are neither exhaustive nor mutually exclusive: a death row inmate may possess multiple motivations for wishing to waive or withdraw his appeals and may emphasize one over another depending on circumstances and the progress (or lack thereof) of his proceedings. That a condemned prisoner’s grounds for volunteering may be protean, making it difficult to discern his intent and his competency,<sup>111</sup> has led many people to argue that death row inmates should not be permitted to waive or withdraw their appeals.

For example, although the United States Supreme Court has rejected the argument that defendants who wish to waive or withdraw their appeals are incompetent per se<sup>112</sup>—meaning that death row inmates who volunteer are evaluated on an ad hoc basis under the standard set forth in *Rees*—some contend that competent waiver is impossible given the context of death row. According to White, who interviewed capital defense attorneys regarding volunteering:

[Defense attorneys] often said that few, if any, capital defendants are able to make a rational judgment about whether they want to be executed. They pointed out that many capital defendants have severe mental problems and that they seem incapable of making firm decisions about anything. Moreover, according to defense attorneys, conditions on death row may often be sufficiently debilitating as to impede the decision-making capacity of defendants who initially were rational.<sup>113</sup>

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<sup>109</sup> See *supra* note 10 and accompanying text.

<sup>110</sup> Jon Nordheimer, *Death Wish Is Discerned In Poetry and Killings of Doomed Convict*, N.Y. TIMES, Nov. 15, 1976, at 15. See also KUDLAC, *supra* note 7, at 20–21.

<sup>111</sup> See McClellan, *supra* note 26, at 235 (stating that “[t]he uncertainty of mental health sciences and the impossibility of knowing with certainty what is going on inside someone’s mind both contribute to the difficulty of determining competence”).

<sup>112</sup> *Lenhard v. Wolff*, 443 U.S. 1306, 1312–13 (1979). See also *Smith v. Armontrout*, 812 F.2d 1050, 1057 (8th Cir. 1987) (stating that “*Rees* clearly contemplates that competent waivers are possible”); Blank, *supra* note 18, at 764; Harrington, *A Community Divided*, *supra* note 11, at 852; McClellan, *supra* note 26, at 231.

<sup>113</sup> White, *supra* note 11, at 858–59. See also Harrington, *Mental Competence and End-of-Life Decision Making*, *supra* note 11, at 1136 (stating that “[i]n the death row context[,]” it is

Similarly, Strafer contends that

decisions to "waive" further legal challenges can almost invariably be traced to the unconscionable conditions to which [the] condemned are subjected. Inmates are put to the Hobson's choice of prolonged torture by incarceration or swift torture by execution. An inmate's "choice" of the latter alternative over the former is no more voluntary than a confession beaten out of a police suspect during a custodial interrogation; only the method utilized to exact that "choice" is unique.

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... [T]he "realities" of life on death row convey to the prisoner such a resounding message that no "spoken words" of coercion need be expressed. Through the daily indignities both big and small, the near total isolation which extends for years, the absence of virtually all activities, and other brutal conditions, the death row prisoner is "told" he is worthless and should be and will be dead. The "choice" presented by the State is to die now or continue to be punished for challenging the State's decision by the harsh regimes reigning on death row.<sup>114</sup>

For Strafer, as with the capital defense lawyers interviewed by White, the *Rees* standard is inadequate because it ignores the reality of death row conditions and the impact that they likely have on the individuals' level of psychological stress.<sup>115</sup> As Strafer concludes:

Stripped of the "psychological integrity" necessary to make a fully rational decision, death row inmates cannot, with any intellectual honesty, be considered to be acting voluntarily when they demand their swift executions.

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possible that "poor prison conditions and the stress of life under a death sentence might obviate the possibility of a rational choice to be executed").

<sup>114</sup> Strafer, *supra* note 12, at 863-88.

<sup>115</sup> *See id.* at 863, 890. *See also* Harrington, *Mental Competence and End-of-Life Decision Making*, *supra* note 11, at 1110 (explaining the position that "the dreadful living conditions of most death row facilities, combined with the mental stress of living under a death sentence, significantly alter inmates' abilities to make rational life-and-death decisions").

Although prison conditions may not always render a condemned inmate's decision legally "involuntary," the ability of the inmate to make a truly autonomous decision is nevertheless severely restricted by the prison environment.<sup>116</sup>

Others take a less extreme approach, arguing not that competent withdrawal is impossible (as a philosophical or psychological matter), but that "the conditions and long stay on death row cause inmates to lose mental competency and embrace death as an escape from death row"<sup>117</sup>—often referred to as "Death Row Syndrome" or "Death Row Phenomenon."<sup>118</sup> Although "Death Row Syndrome" or "Death Row Phenomenon" are legal terms, rather than clinical ones, and have not been recognized by the American Psychiatric Association (and do not appear in its handbook, the Diagnostic and Statistical Manual of Mental Disorders ("DSM")),<sup>119</sup> some international courts have recognized the

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<sup>116</sup> Strafer, *supra* note 12, at 892, 907.

<sup>117</sup> Blank, *supra* note 18, at 737 n.12. See also Death Penalty Information Center, *Time on Death Row*, <http://www.deathpenaltyinfo.org/article.php?&did=1397#drs> (last visited Dec. 8, 2007); *supra* Part II.

<sup>118</sup> Blank, *supra* note 18, at 737 n.12 and accompanying text, 738, 749–56; Death Penalty Information Center, *Time on Death Row*, <http://www.deathpenaltyinfo.org/article.php?&did=1397#drs> (last visited Dec. 8, 2007).

Schiffrin articulates "death row phenomenon" slightly differently, referring to it as "the argument that prolonged detention on death row of itself constitutes cruel and unusual punishment." Natalia Schiffrin, *Jamaica Withdraws the Right of Individual Petition Under the International Covenant on Civil and Political Rights*, 92 AM. J. INT'L L. 563, 564–65 (1998).

Some mental health professionals refer to the "collection of psychological symptoms experienced by inmates confined in cells with little social interaction or other sensory stimulus, particularly for lengthy periods of time" as "'SHU Syndrome'" (Segregated or Supermax Housing Unit Syndrome). *Comer v. Stewart*, 230 F. Supp. 2d 1016, 1025 n.18 (D. Ariz. 2002). See also David McCord, *Imagining a Retributivist Alternative to Capital Punishment*, 50 FLA. L. REV. 1, 98–103 (January 1998). These symptoms have also been characterized by mental health professionals as "Ad Seg Syndrome or Reduced Environmental Stimulus Syndrome ('RES Syndrome')." *Comer*, 230 F.Supp.2d at 1025 n.18; Nan D. Miller, *International Protection of the Rights of Prisoners: Is Solitary Confinement in the United States a Violation of International Standards?* 26 CAL. W. INT'L L.J. 139, 162–69 (1995); Sally Mann Romano, *If the SHU Fits: Cruel and Unusual Punishment at California's Pelican Bay State Prison*, 45 EMORY L.J. 1089, 1110 n.124 and accompanying text, 1119 n.173 and accompanying text, 1132 nn.261–62 and accompanying text, 1133 n.269 and accompanying text (1996).

<sup>119</sup> Blank, *supra* note 18, at 752 nn.100–01 and accompanying text (citing David Wallace-Wells, *What Is Death Row Syndrome? And Who Came up with It?*, Slate (Feb. 1, 2005), available at <http://www.slate.com/id/2112901/>).

syndrome or phenomenon as grounds for refusing extradition,<sup>120</sup> as well as for commuting a death sentence to life imprisonment.<sup>121</sup>

Not everyone believes that competent withdrawal is impossible or that those on death row who wish to waive or withdraw their appeals suffer from "Death Row Syndrome." In fact, some contend that volunteering permits condemned prisoners to uphold their dignity, autonomy, and self-esteem by recognizing them as adults able to make their own independent decisions.<sup>122</sup> For example, Bonnie argues as follows:

A convicted prisoner does not become a pawn of the state. Even a prisoner sentenced to death retains a constitutionally protected sphere of autonomy—of belief, expression, and, to a limited extent, action. The state is bound to respect a convicted prisoner's inalienable freedom of conscience. He is free to admit his guilt and to repent, just as he is free to proclaim his innocence in defiance of the verdict under which he stands convicted. He is free to resign himself to the social decree, acknowledging the justice of the punishment, just as he is free to decry it.

A condemned prisoner may believe that the sentence of death is justly deserved and should be carried out, notwithstanding the existence of doubts about its validity. A condemned prisoner may prefer the unknowable fate of execution to the known pains of imprisonment, the only option likely to be available. As long as the prisoner is competent to make an informed

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<sup>120</sup> Soering v. United Kingdom, 11 EUR. HUM. RTS. REV. 439 (1989); Soering v. United Kingdom, 161 Eur. Ct. H.R. (Ser. A) (1989). See also Blank, *supra* note 18, at 753–55; Death Penalty Information Center, *Time on Death Row*, <http://www.deathpenaltyinfo.org/article.php?&did=1397#drs> (last visited Dec. 8, 2007).

*But see* Kindler v. Canada, No. 470/1991, reported at 14 HUM. RTS. L.J. 307 (1993). In *Kindler v. Canada*, the Canadian Supreme Court did not refuse extradition based on the possibility that the defendant could be subject to Death Row Syndrome. *Id.* See also Blank, *supra* note 18, at 755.

<sup>121</sup> See Pratt and Morgan v. Jam., Commc'n Nos. 210/1986, 225/1987 (views adopted Apr. 7, 1987), UN Doc. CCPR/C.35/D.210/1986 and 225/1986; Earl Pratt and Another Appellant v. Attorney General for Jamaica and Another Respondents, [1994] 2 A.C. 1, 1993 WL 963003, at \*35–36 (P.C.) (appeal taken from the Court of Appeal of Jamaica); Pratt v. Att'y Gen. for Jam., [1994] 2 App. Cas. 1, 22. See also Blank, *supra* note 18, at 754–55; Schiffrin, *supra* note 118, at 563–68.

<sup>122</sup> For a discussion of the difference between "choice" and "autonomy," see SUSAN ORPETT LONG, *FINAL DAYS: JAPANESE CULTURE AND CHOICE AT THE END OF LIFE* 6 (2005).

and rational choice, the argument for respecting this choice would appear to be a powerful one.<sup>123</sup>

While Bonnie endorses measures taken by courts to ensure that death row inmates are competent to make decisions about volunteering, he rejects the categorical view that condemned prisoners are incapable of exercising voluntary choice.<sup>124</sup> For him, “[t]he view that the decisions of death penalty defendants or death-row inmates are never competent or voluntary undermines respect for the prisoner’s autonomy while pretending to honor it.”<sup>125</sup> Elsewhere he writes: “To ignore the prisoner’s preference in all cases, on grounds of ‘soft paternalism,’ undermines the principle of autonomy by pretending to respect it. . . . I would not demean the dignity of the condemned as a price for society’s failure to abolish the death penalty.”<sup>126</sup>

Bonnie’s contention that volunteering permits the condemned prisoner to uphold his dignity, autonomy, and self-esteem resonates with the findings of medical anthropologists, medical sociologists, and psychiatrists dealing more broadly with issues of choice and death. For example, Susan Long in her exegesis on bioethics and end-of-life decision making in Japan, notes that “how to die has been added to the realm of what we can choose”<sup>127</sup> and that the conscious construction of self occurs through the choices we make.<sup>128</sup> Similarly, Ohnuki-Tierney, in her cross-cultural comparison of brain death and organ transplantation, writes:

[T]he body is essential to the life and death of a person and to personhood.

. . . .

For the self-identity of individuals in all cultures, the body holds intense emotional power. The existential seat of personhood is the body. “I” is experienced through “my body” in relationship to others and their bodies.<sup>129</sup>

While Ohnuki-Tierney’s observations would likely be met favorably by many individuals not on death row, one could well argue that they

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<sup>123</sup> Bonnie, *supra* note 11, at 1376. See also Bonnie, *supra* note 22, at 72-73.

<sup>124</sup> Bonnie, *supra* note 11, at 1375 n.31.

<sup>125</sup> *Id.*

<sup>126</sup> Bonnie, *supra* note 23, at 102.

<sup>127</sup> LONG, *supra* note 122, at 5.

<sup>128</sup> *Id.* at 6.

<sup>129</sup> Ohnuki-Tierney, *supra* note 15, at 236, 240.

have special relevance to the condemned prisoner whose body, as noted in Part II, is highly regulated and subjected to control by the State, and whose "[c]hoices are constrained by what is possible in [his] given environment[.]"<sup>130</sup> His experience of "I" or sense of self is wrapped up in a body in relationship to others—just like that of a non-incarcerated person. But he may regard State management and restriction of his body in all facets of his life as an infringement on his personhood, and thus consider volunteering as an (perhaps the only) opportunity to (again) experience himself as an "existential self," rather than an "animated machine"<sup>131</sup> or "depersonalized thing[.]"<sup>132</sup>

In a similar vein, Ozawa-de Silva, writing about internet suicide pacts in Japan, argues: "to prevent suicide is to cruelly deprive individuals of one of the few, free, important acts an individual can make in an extremely conformist society."<sup>133</sup> Extending her ideas to the arena of volunteering, one could maintain that to prevent waiver or withdrawal of death penalty appeals is to cruelly deprive individuals of one of the few, free, important acts an individual can make in the hyper-conformist prison society.

This Article will return to the intersection of agency and autonomy, volunteering, and suicide later in Part IV. But first, this Article sets forth a classificatory model for how one might consider the death row volunteer in light of State perspectives on, and the inmate's expressed motivations for, waiver or withdrawal.

#### IV. DOCILE BODIES OR REBELLIOUS SPIRITS?: THE INTENT OF THE VOLUNTEER (AND WHETHER IT MATTERS), THE INTERESTS OF THE STATE, AND WHAT THIS MAY REVEAL ABOUT THE DEATH PENALTY IN THE UNITED STATES

##### A. *Docile Bodies*

At the beginning of *Discipline and Punish*, and as noted above in Part II, Foucault describes the execution of Damiens and the transition from

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<sup>130</sup> LONG, *supra* note 122, at 10.

<sup>131</sup> CECIL G. HELMAN, CULTURE, HEALTH AND ILLNESS: AN INTRODUCTION FOR HEALTH PROFESSIONALS 81 (1994).

<sup>132</sup> TURNER, *supra* note 15, at 76.

<sup>133</sup> Ozawa-de Silva, *supra* note 80. For an in-depth argument of the "right to suicide," see THOMAS SZASZ, FATAL FREEDOM: THE ETHICS AND POLITICS OF SUICIDE (1999); THOMAS SZASZ, MY MADNESS SAVED ME: THE MADNESS AND MARRIAGE OF VIRGINIA WOOLF (2006). See also TURNER, *supra* note 15, at 77-78 (discussing Szasz's "anti-psychiatry" and positions with respect to the freedom to choose, the right of the patient to resist forced treatment, and his strident opposition to the insanity plea in criminal cases).



punishment aimed at the body to punishment aimed towards the soul.<sup>134</sup> Such a shift occurred, in part, to transform criminals in order to make them “docile” or useful<sup>135</sup>—“useful” in the sense of functioning and promoting the new economics (e.g., factories) and politics (e.g., military organization and warfare) of the modern industrial age.<sup>136</sup> But what would a “docile” or “useful” body be in the context of the death penalty? Foucault is less than explicit in this sense—in part because the death penalty was on the wane at the time of his writing (the last execution in France occurred in 1977 and it was officially outlawed in 1981).<sup>137</sup>

One could argue that a “docile body” in the death penalty context refers to the volunteer—the “pliant mind”<sup>138</sup>—the individual who “rolls over” and allows the State to carry out its sentence (in contrast to the death row inmate who continues to fight his sentence). This would appear to constitute a reconceptualization of Foucault’s notion of “docile bodies” and would appear to treat “docility” in normative terms<sup>139</sup> because a dead body is not particularly “useful” in the Foucauldian sense (i.e., in terms of promoting efficiency in factories, military regiments, and school classrooms). Or so it would appear.

According to Foucault, in the nineteenth century, crime became

not a potentiality that interests or passions have inscribed in the hearts of all men, but that it [became] almost exclusively committed by a certain social class; that criminals, who were once to be met with in every

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<sup>134</sup> FOUCAULT, *supra* note 60, at 3, 31. See also NANCY SCHEPER-HUGHES, DEATH WITHOUT WEeping: THE VIOLENCE OF EVERYDAY LIFE IN BRAZIL 220–21 (1992). See generally Anton Blok, *The Symbolic Vocabulary of Public Executions*, in HISTORY AND POWER IN THE STUDY OF LAW: NEW DIRECTIONS IN LEGAL ANTHROPOLOGY 31, 46–47, 51 (June Starr & Jane F. Collier, eds., 1989).

<sup>135</sup> FOUCAULT, *supra* note 60, at 135, 70, 69. See also FOUCAULT, *supra* note 80, at 139–41; DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 136 (1990); John O’Neill, *The Disciplinary Society: From Weber to Foucault*, 37 BRITISH JOURNAL OF SOCIOLOGY 42, 42–43, 54 (1986); OZAWA-DE SILVA, *supra* note 88, at 33; Nancy Scheper-Hughes & Margaret M. Lock, *The Mindful Body: A Prolegomenon to Future Work in Medical Anthropology*, 1 MED. ANTHROPOLOGY Q. 6, 8 (1987); TURNER, *supra* note 15, at 34.

<sup>136</sup> FOUCAULT, *supra* note 60, at 135–69. See also GARLAND, *supra* note 135, at 131–55.

<sup>137</sup> See, e.g., FOUCAULT, *supra* note 60, at 137–38; MICHEL FOUCAULT, POWER: ESSENTIAL WORKS OF FOUCAULT 459–61 (James D. Faubion, ed., Robert Hurley, et al. trans., 1994).

<sup>138</sup> Scheper-Hughes & Lock, *supra* note 135, at 8.

<sup>139</sup> As an example of “docility” in normative terms, consider Strafer’s comment that “[i]n the extermination camps of Nazi Germany, prisoners were repressed into ‘docility’ to the point where they ‘walked to the gas chambers or . . . dug their own graves and then lined up before them so that, shot down, they would fall into the graves.’” Strafer, *supra* note 12, at 872 n.46 (quoting B. BETTLEHEIM, THE INFORMED HEART 250 (1960)).

social class, now emerged almost all from the bottom rank of the social order.<sup>140</sup>

Foucault continues that not only has prison failed to eliminate crime, but that

prison has succeeded extremely well in producing delinquency, a specific type, a politically or economically less dangerous—and, on occasion, usable—form of illegality; in producing delinquents, in an apparently marginal, but in fact centrally supervised milieu; in producing the delinquent as a pathologized subject.

....  
 .... Because the prison facilitates the supervision of individuals when they are released, because it makes possible the recruiting of informers and multiplies mutual denunciations, because it brings offenders into contact with one another, it precipitates the organization of a delinquent milieu, closed in upon itself, but easily supervised: and all the results of non-rehabilitation (unemployment, prohibitions on residence, enforced residences, probation) make it all too easy for former prisoners to carry out the tasks assigned to them. Prison and police form a twin mechanism; together they assure in the whole field of illegalities the differentiation, isolation[,] and use of delinquency. In the illegalities, the police-prison system segments a manipulable delinquency. This delinquency, with its specificity, is a result of the system; but it also becomes a part and an instrument of it. So that one should speak of an ensemble whose three terms (police—prison—delinquency) support one another and form a circuit that is never interrupted. Police surveillance provides the prison with offenders, which the prison transforms into delinquents, the targets and auxiliaries of police supervisions, which regularly send back a certain number of them to prison.<sup>141</sup>

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<sup>140</sup> FOUCAULT, *supra* note 60, at 275.

<sup>141</sup> *Id.* at 277, 281–82.

As Garland explains, Foucault makes the “argument that the creation of delinquency is useful in a strategy of political domination because it works to separate crime from politics, to divide the working classes against themselves, to enhance the fear of prison, and to guarantee the authority and powers of the police.”<sup>142</sup>

Extending this avenue of inquiry, one could argue that the death penalty thus functions as a supreme example or reminder of the undesirability of prison and “the authority and powers of the police” – what Paredes and Purdum refer to as the “validation-of-law hypothesis[.]”<sup>143</sup> For them,

capital punishment in contemporary America functions as the ultimate validator of law, serving “to reassure many that society is not out of control after all, that the majesty of the Law reigns, and that God is indeed in his heaven”, [sic] in much the same way the Aztec rituals reassured the population that the state was healthy and the Sun would remain in the heavens.<sup>144</sup>

As they explain, “many do take special comfort in the affirmation of authority and order which capital punishment seems to provide—especially when the executed is such a vile smart-aleck as the likes of Ted Bundy.”<sup>145</sup> Following this line of thinking, one could maintain that the “docile body” is the body that is used by the State to flex its muscle when need be.

But if this is the case—if the death row inmate really is a “docile body” – what is the significance of “volunteering”? If the State has retained the death penalty in order to promote its strength and power when needed, then does it matter whether the prisoner fights the State (by fighting his sentence) or not? Again, one might be tempted to argue that a situation where the “volunteer” rolls over—gives up because he does not wish to grow old in prison because he can no longer stand the

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<sup>142</sup> GARLAND, *supra* note 135, at 149–50. See FOUCAULT, *supra* note 60, at 264–92.

<sup>143</sup> Paredes & Purdum, *supra* note 79, at 9.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 11. See also J. Anthony Paredes, *Capital Punishment in the USA*, 9 ANTHROPOLOGY TODAY 16, 16 (1993). Paredes states,

capital punishment in America promotes confidence in the existing social order and is an institutionalized magical response to perceived disorder. . . . [M]any Americans cling to the hope that by ritually executing an occasional murderer (from among thousands)[.] order will be restored as surely as collectively sanctioned killing of a threatening deviant restored social harmony in the (imagined) tribal or frontier or agrarian or small town or old neighbourhood past.

conditions of death row — is desired by the State. This is a “super-docile” or “super-useful” body—it shows the power of the State not only over the body (in the sense of corporeal death), but also over the soul and will of the prisoner to live. While some claim that the State wants death row inmates to volunteer,<sup>146</sup> most courts and commentators suggest the opposite—that the State, consistent with its desire to dictate the meaning of death and suicide and the circumstances under which death occurs,<sup>147</sup> does not favor waiver or withdrawal.

First and foremost, and as noted above, the State has an interest in the preservation of life and the prevention of suicide<sup>148</sup>—an interest that does not end once an individual is sentenced to prison or death.<sup>149</sup> In fact, courts have been particularly sensitive to the “self-destructive motivations”<sup>150</sup> of volunteers and have taken measures and explicitly expressed the desire to avoid complicity in state-assisted suicide.<sup>151</sup> Even

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*Id.*

<sup>146</sup> See Harrington, *A Community Divided*, *supra* note 11, at 864 (stating that “[m]ost attorneys believe the courts are more than willing to set a speedy execution date for inmates claiming to want one even if the desire is not sustained”). See generally Harrington, *Mental Competence and End-of-Life Decision Making*, *supra* note 11, at 1130, 1133 (noting that the attorneys he studied “believe the national pro-death penalty climate shapes how courts frame the meaning of elected executions (i.e., as freely made expressions of inmate autonomy) and thus how they respond to inmates wishing to waive postconviction appeals[.]” and that attorneys “fear the courts strategically construct decisions to waive appeals as a competent exercise of inmate autonomy[.]” and thus, they conclude that “[a]llowing inmates to volunteer, . . . both confirms and perpetuates the pro-death penalty climate in the United States.”).

<sup>147</sup> See *supra* Part III.

<sup>148</sup> Harrington, *A Community Divided*, *supra* note 11, at 864; McClellan, *supra* note 26, at 215; Strafer, *supra* note 12, at 896, 903.

<sup>149</sup> For example, the state is permitted to force-feed a hunger-striking prisoner. See Brisman, *supra* note 27, at 86; McClellan, *supra* note 26, at 215.

<sup>150</sup> George F. Solomon, *Capital Punishment as Suicide and as Murder*, in CAPITAL PUNISHMENT IN THE UNITED STATES 432, 433 (Hugo Adam Bedau & Chester M. Pierce, eds., 1975).

<sup>151</sup> *Whitemore v. Arkansas*, 495 U.S. 149, 172 (1990) (Marshall, J., dissenting) (“[A] wrongful execution is an affront to society as a whole”); *Hammett v. Texas*, 448 U.S. 725, 726 (1980) (Marshall, J., dissenting) (disagreeing with the Supreme Court’s granting of a motion by a pro se death-row inmate to withdraw his petition for review with the Supreme Court on the grounds that the Court’s actions constituted an approval of “state-administered suicide”); *Massie v. Sumner*, 624 F.2d 72, 74 (9th Cir. 1980), cert. denied, 449 U.S. 1103 (1981) (prohibiting the defendant from waiving review of his death sentence on the grounds that “[t]he state of California has a strong interest in the accuracy and fairness of all its criminal proceedings”); *Commonwealth v. McKenna*, 383 A.2d 174, 181 (Pa. 1978) (explaining that “the waiver concept was never intended as a means of allowing a criminal defendant to choose his own sentence. Especially is this so where, as here, to do so would result in state aided suicide.”); *Grasso v. State*, 857 P.2d 802, 811 (Okla. 1993) (Chapel, J., specially concurring). The court stated that

in situations where courts have permitted waiver or withdrawal—such as in *Hamblen*—courts have recognized “the friction between an individual’s right to control his destiny and society’s duty to see that executions do not become a vehicle by which a person could commit suicide.”<sup>152</sup>

Part of this heightened concern stems from the “murder/suicide phenomena” that is often present in death penalty cases in general and waiver and withdrawal cases in particular.<sup>153</sup> According to Strafer, “[t]he ‘murder/suicide’ phenomenon refers to the clinically recognized syndrome in which an individual intentionally commits murder in a state with a death penalty hoping that, once caught, the State will execute him and thereby accomplish what he himself cannot bring about by his own hand.”<sup>154</sup>

At first blush, this might seem like an odd reason to commit murder and thus a rare occurrence in United States death penalty jurisprudence. But according to Strafer, “the impulse to murder is often preceded by a history of failed attempts at suicide.”<sup>155</sup> This was the case in *People v.*

the State of Oklahoma has a keen interest in assuring that its system of justice is not being manipulated or abused by a defendant. The State must not become an unwitting partner in a defendant’s suicide by placing the personal desires of the defendant above the societal interests in assuring that the death penalty is imposed in a rational, non-arbitrary fashion.

*Id.* See generally *Lenhard ex rel. Bishop v. Wolff*, 444 U.S. 807, 811–12 (1979) (Marshall, J., dissenting from decision denying stay of execution) (reasoning that “[b]y refusing to pursue his Eighth Amendment claim, Bishop has, in effect, sought the State’s assistance in committing suicide”).

Compare C. Lee Harrington, *A Community Divided*, *supra* note 11, at 875 (noting that “[t]he legal literature refers to volunteering as state-assisted suicide, a phrase defense attorneys suggest has two meanings—that the state actually performs the killing through executions and that the state provides an impetus or ‘shove’ toward suicide[,]” and suggesting that the more appropriate term might be “client-assisted homicide.”), with *Bonnie*, *supra* note 11, at 1363, 1375 (

The prisoner’s interest in controlling his own fate is often denigrated by proponents of aggressive judicial review as amounting to nothing more than ‘state-administered suicide.’ This is hyperbole, of course; only if execution of a lawfully imposed death sentence amounts to homicide is the state an agent of suicide when it executes a competent prisoner who has declined to contest his death sentence.

) (footnote omitted), and *Bonnie*, *supra* note 22, at 72 (same).

<sup>152</sup> *Hamblen v. State*, 527 So.2d 800, 802 (Fla. 1988).

<sup>153</sup> Strafer, *supra* note 12, at 863.

<sup>154</sup> *Id.* at 863 n.12.

<sup>155</sup> *Id.* at 865. According to Strafer, “decisions to plead guilty or waive post-conviction remedies in capital cases . . . reflect either the intentional death wish of the condemned, as in the ‘murder/suicide’ phenomenon, or the synergistic effect of the panic attendant to the

*Cash*, where the defendant, having twice attempted suicide, unsuccessfully, and unable to determine the method for his third try, "decided that if he killed [someone] the State would take his life."<sup>156</sup> Similarly, White offers the following commentary:

Psychiatrists have long recognized that some killers' motivation for killing is to bring about their own execution. . . . [T]his motivation may be unconscious and impossible to establish with scientific certainty. In others, however, the killer's desire to be executed may be conscious. Psychiatrists have documented cases in which killers have openly stated that their reason for killing was to have the state execute them.<sup>157</sup>

Likewise, McClellan notes:

Frequently, persons who seek the death penalty are suicidal individuals who killed expressly for the purpose of getting the death penalty—the so-called "murder-suicide" syndrome. . . . [Some condemned prisoners] may have killed because they wanted the state to end their lives. Execution then becomes state-assisted suicide. For people with suicidal tendencies,

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anticipation of death by execution accompanied by continued existence in the insufferable environs of death row." *Id.* at 875.

<sup>156</sup> *People v. Cash*, 345 P.2d 462, 463 (Cal. 1959). *See also* Strafer, *supra* note 12, at 865.

Like *Cash*, James D. French, the last person executed in Oklahoma prior to *Furman v. Georgia* and the only person executed in the United States in 1966, had seriously attempted suicide several times prior to killing his cellmate (after having received a life sentence for murdering a motorist). *See* Katherine van Wormer, *Execution-Inspired Murder a Form of Suicide?*, 22 J. OFFENDER REHAB. 1, 1-10 (1995); West, *supra* note 70, at 419, 426-27. As West explains:

[d]uring a psychiatric examination in 1965, French admitted to me that he had seriously attempted suicide several times in the past but always "chickened out" at the last minute. His basic (and obviously abnormal) motive in murdering his inoffensive cellmate was to force the State to deliver to him the electrocution to which he felt entitled and which he deeply desired. French was the only man who was executed in the United States during 1966. He had successfully forced the State of Oklahoma to fulfill its contract to reward murder with murder. If Oklahoma had *not* had the death penalty, it is likely that both of the men murdered by James French would still be alive.

West, *supra* note 70, at 427. *See also* White, *supra* note 11, at 874-75.

<sup>157</sup> White, *supra* note 11, at 874 (footnote omitted).

therefore, the death penalty may actually encourage murder.<sup>158</sup>

The idea that the death penalty may actually encourage murder resonates with West, who writing in the mid-1970s, states:

I am convinced that there is an even more specific way in which the death penalty breeds murder. It becomes more than a symbol. It becomes a promise, a contract, a covenant between society and certain (by no means rare) warped mentalities who are moved to kill as part of a self-destructive urge. These murders are discovered by the psychiatric examiner to be, consciously or unconsciously, perpetrated in an attempt to commit suicide by committing homicide. It only works if the perpetrator believes he will be executed for his crime. I believe this to be a significant reason for the tendency to find proportionally more homicides in death penalty states than in those without it. I even know of cases where the murderer left an abolitionist state deliberately to commit a meaningless murder in an executionist state, in the hope thereby of forcing society to destroy him.<sup>159</sup>

Although West's contentions predate Gilmore's volunteering and execution, the statements could easily apply to him: after serving sentences in Oregon and Illinois for robbery and assault, Gilmore was paroled and decided to relocate to Utah—a state that, at the time, employed the firing squad as its method of execution—rather than

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<sup>158</sup> Jane L. McClellan, *Stopping the Rush to the Death House: Third-Party Standing in Death-Row Volunteer Cases*, 26 ARIZ. ST. L.J. 201, 214 (1994) (footnotes omitted). As McClellan further explains,

[w]hen death-row inmates volunteer for execution, the state becomes a vehicle for fulfilling their suicidal desires. . . . The courts allow waiver of counsel under the guise of preserving defendants' autonomy. At some point, inmates' interests in ending protracted appellate review of their cases may override third-party interests. However, defendants may be choosing their sentences by manipulating the judicial system: confessing to the crime; not cooperating with or firing attorneys; not presenting mitigating evidence at sentencing; and waiving appeals.

*Id.* at 240 (footnote omitted).

For an early discussion of the "murder-suicide" phenomenon (although the term itself is not used), see Robert Fletcher, *The New School of Criminal Anthropology*, 4 AM. ANTHROPOLOGIST 201, 216 (1891).

<sup>159</sup> West, *supra* note 70, at 419, 426 (citation omitted).

return to his home state of Oregon, which had no death penalty.<sup>160</sup> According to Dr. John C. Woods, chief of forensic psychiatry at Utah State Hospital and one of the psychiatrists who examined Gilmore before his trial,

'Knowing he did not want to return to prison, [Gilmore] took the steps necessary to turn the job of his own destruction over to someone else. . . . He went out of his way to get the death penalty; that's why he pulled two execution-style murders he was bound to be caught for. I think it's a legitimate question, based on this evidence and our knowledge of the individual, to ask if Gilmore would have killed if there was not a death penalty in Utah.'<sup>161</sup>

While Gilmore may be the most famous example of the murder/suicide phenomena and of an individual relocating to a state with the death penalty in order to improve his chances for "suicide-by-State,"<sup>162</sup> others have been inspired by Gilmore and have attempted to procure the same results<sup>163</sup>—demonstrating that "some defendants kill so that society will execute them."<sup>164</sup> Thus, the State, besides its "normal" interest in the preservation of life and the prevention of suicide,<sup>165</sup> has a potentially heightened interest in preventing its system of justice from being transformed into an "instrument of self-destruction."<sup>166</sup>

In addition to the preservation of life and avoidance of state-assisted suicide, the State also possesses an interest in safeguarding the integrity of the proceedings. As McClellan insists, "The state also has a strong interest in ensuring that trial and sentencing are fair and that only death-deserving defendants receive the death penalty."<sup>167</sup> Similarly, White

<sup>160</sup> Jon Nordheimer, *Death Wish Is Discerned in Poetry and Killings of Doomed Convict*, N.Y. TIMES, Nov. 15, 1976, at 15.

<sup>161</sup> *Id.* (quoting Dr. John C. Woods, chief of forensic psychiatry at Utah State Hospital).

<sup>162</sup> "Suicide-by-State" is akin to "'suicide by cop'" or SBC—"an instance in which a person attempts to commit suicide by provoking the police to use deadly force." See, e.g., *Hainze v. Richards*, 207 F.3d 795, 797 n.1 (5th Cir. 2000).

<sup>163</sup> See *Judy v. State*, 416 N.E.2d 95, 98, 100 (Ind. 1981). See also White, *supra* note 11, at 854.

<sup>164</sup> *Id.* at 877.

<sup>165</sup> See *supra* Part III.

<sup>166</sup> *Fareta v. California*, 422 U.S. 806, 840 (1975) (Burger, J., dissenting). See also White, *supra* note 11, at 865 n.45 and accompanying text.

<sup>167</sup> McClellan, *supra* note 26 at 216. McClellan also contends that the death penalty is a unique, final punishment. Society does not suffer in the same way from a defendant's waiver of appeal in a minor



contends that “society has a special interest in making sure that death sentences are imposed only in accordance with the rule of law. Moreover, in view of the concerns expressed in *Furman v. Georgia*, the public has an interest in ensuring that the death penalty not be imposed arbitrarily.”<sup>168</sup> Expanding on this line of reasoning, Harrington articulates the position that the State has

an interest in upholding the Eighth Amendment to the U.S. Constitution (which provides, among other things, protection from cruel and unusual punishment); an interest in ensuring that innocent persons not be executed; an interest in ensuring the validity of the conviction and sentence through the appellate process; and an interest in not allowing inmates to choose their own sentencing.<sup>169</sup>

Strafer agrees, but presents his argument slightly differently, couching it much in the same way the *Hamblen* court did<sup>170</sup> — as a tension between the State’s interests in preserving life and the integrity of the proceedings, on the one hand, and the inmate’s right to personal autonomy on the other. For Strafer, what tips the scales in favor of the State’s interest,<sup>171</sup> is that he adds factors such as the interest in protecting

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felony case because the result is only a few years in prison for the defendant. When the state executes an inmate, it does so on behalf of all citizens of that state.

*Id.* at 228.

<sup>168</sup> White, *supra* note 11, at 865 (citing *Furman v. Georgia*, 408 U.S. 238 (1972)). According to White, “[t]hese [State] interests may be adequately protected without requiring every capital defendant to oppose the death penalty.” *Id.*

<sup>169</sup> Harrington, *A Community Divided*, *supra* note, at 851. See generally Jeffrey Toobin, *Death in Georgia*, THE NEW YORKER, Feb. 4, 2008, at 32, 35 (discussing the case of Brian Nichols, who shot and killed four people after escaping from custody at the Fulton County Courthouse in Atlanta, GA in March 2005, his offer to plead guilty to every count in his indictment and accept a life sentence in exchange for the district attorney’s agreement to abandon pursuit of the death penalty, and the district attorney’s rejection of the plea offer on the grounds that “[m]y belief is that punishment is a question that should be decided by the community. It is not appropriate to kill four people and outline for the citizens what his punishment should be. I don’t think the defendant should choose his own punishment.”) (quoting Fulton County district attorney Paul Howard).

<sup>170</sup> See *supra* note 150. See also *supra* note 120–31 and accompanying text.

<sup>171</sup> Strafer, *supra* note 12, at 896. Strafer concludes that “the governmental interest in ensuring that the death penalty is administered in a constitutional manner should always take precedence over the inmate’s ‘right to die.’” *Id.* Cf. Bonnie, *supra* note 11, at 1390–91. Bonnie states,

I believe that the prisoner’s interest in controlling his own fate should be subordinated to a societal interest in the integrity of the legal process *only* in situations in which it is necessary to assure that the prisoner has

the integrity of the legal profession,<sup>172</sup> the interests of the inmate's family members (who frequently do not endorse the decision to volunteer),<sup>173</sup> the "federal interest in ensuring that a particular *crime* is deserving of the death penalty"<sup>174</sup> (as distinct from an interest in ensuring that a particular *offender* is deserving of the death penalty),<sup>175</sup> and, finally, "an interest in refusing to enforce punishments that serve no purpose."<sup>176</sup>

This last point is particularly important to Strafer and especially relevant to the discussion below in Part IV.B. According to Strafer, punishment in general and the death penalty in particular serve the twin aims of deterrence and retribution. For him, "Deterrence is not served by executing the individual who murdered only because he wished to die but does not have the courage to do it himself[]"<sup>177</sup> – as in the case of the murder/suicide phenomenon. With the volunteer, the State also does not achieve its goal of retribution: "Even the State's interest in retribution is diluted in the volunteer context. To the extent that execution is sought only because the inmate considers it less painful than life imprisonment, the State's interests in retribution are probably better served by requiring life imprisonment."<sup>178</sup> In other words, by refusing to

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committed an offense for which the death penalty has been prescribed. Indeed, I believe that the law's duty to respect individual dignity is heightened, not diminished, when choices are made in the shadow of death.

*Id.*

<sup>172</sup> Strafer, *supra* note 12, at 904–05. According to Strafer,

[t]he State also has an interest in protecting the integrity of the legal profession, just as it has an interest in "the maintenance of the ethical integrity of the medical profession." A lawyer has an ethical obligation to intervene on his client's behalf when "[a]ny mental or physical condition of a client . . . renders him incapable of making a considered judgment on his own behalf." Allowing a condemned inmate to waive further appeals may conflict with this ethical obligation, particularly where the inmate initially sought to avoid the death penalty and professes a desire to waive appeals only after a long incarceration on death row.

*Id.* (footnotes omitted).

<sup>173</sup> See *id.* at 895–908.

<sup>174</sup> *Id.* at 902.

<sup>175</sup> White, *supra* note 11, at 866 (stating that "[t]he issue of arbitrariness poses greater problems. If capital defendants are permitted to seek their own executions, the system will inevitably be less effective in selecting only the most heinous offenders for execution").

<sup>176</sup> Strafer, *supra* note 12, at 904 (citation omitted). See generally *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (stating that "a punishment is 'excessive' and unconstitutional if it . . . makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering").

<sup>177</sup> Strafer, *supra* note 12, at 904.

<sup>178</sup> *Id.* See also West, *supra* note 70, at 425 (contending that the "the basic motive for executions [is] revenge").

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fight his conviction and sentence, thereby clearing the path to his execution, the inmate removes the State's ability to treat his death as repayment for the crime, proportional to the harm that was caused. In so doing, the inmate wrestles control of the meaning of his own death away from the State<sup>179</sup>—or in Foucauldian terms, “usurp[s] the power of death which the sovereign alone[] . . . had the right to exercise”<sup>180</sup>—an idea explored in greater detail below.

B. *Rebellious Spirits*

Toward the end of the first volume of *The History of Sexuality*, Foucault introduces the term “bio-power,” which he uses to refer to the practice of modern states to regulate the conduct of their subjects as entire populations and as individual bodies in all aspects of life,<sup>181</sup> and which he claims has been indispensable to the development of the modern nation-state and capitalism.<sup>182</sup> But for many scholars, Foucauldian notions of power are problematic because they do not contemplate and fail to account for opposition or resistance.<sup>183</sup> For example, Turner argues that “given the power of discipline and

<sup>179</sup> See generally Davis, *supra* note 15, at 46 (arguing that “the adversarial nature of the criminal sentencing trial has collapsed when the defendant concedes his death”).

<sup>180</sup> FOUCAULT, *supra* note 80, at 138.

<sup>181</sup> *Id.* at 140 (“Hence there was an explosion of numerous and diverse techniques for achieving the subjugation of bodies and the control of populations, marking the beginning of an era of ‘bio-power.’”). See generally GARLAND, *supra* note 135, at 136 (describing Foucault’s notion of how power operates in modern society— “[t]he idea now is to regulate thoroughly and at all times rather than to repress in fits and starts”).

The term “bio-power” is closely related to the Foucauldian concept of “biopolitics” or “biopolitical.” Foucault employs the former term more frequently, but subsequent scholars have taken up and developed the latter. See, e.g., AIHWA ONG, FLEXIBLE CITIZENSHIP: THE CULTURAL LOGICS OF TRANSNATIONALITY 120 (1999) (explaining that “[c]itizenship requirements are the consequence of Foucauldian ‘biopolitics,’ in which the state regulates the conduct of subjects as population (by age, ethnicity, occupation, and so on) and as individuals (sexual and reproductive behavior) so as to ensure security and prosperity for the nation as a whole”). Margaret Lock and Nancy Scheper-Hughes, medical anthropologists whom the author of this Article cites at various junctures throughout this Article, use the term “body politic” to refer to “regulation, surveillance, and control of bodies (individual and collective) in reproduction and sexuality, work, leisure, and sickness.” Margaret Lock & Nancy Scheper-Hughes, *A Critical-Interpretive Approach in Medical Anthropology: Rituals and Routines of Discipline and Dissent*, in READINGS FOR A HISTORY OF ANTHROPOLOGICAL THEORY 486, 489 (Paul A. Erickson & Liam D. Murphy, eds., 1990).

<sup>182</sup> FOUCAULT, *supra* note 80, at 94–95.

<sup>183</sup> This is not to suggest that criticisms of Foucault are limited to issues of power and resistance. For example, Ozawa-de Silva criticized Foucault on the grounds that his “extensive discussion of the body still leaves the ‘body’ as a rather abstract entity rather than focusing more closely on specific aspects of embodied experience.” OZAWA-DE SILVA, *supra* note 88, at 34.

surveillance, it is difficult to know how one would explain or locate opposition, resistance[,] and criticism to medical (or any other form of) dominance."<sup>184</sup> Similarly, Garland contends that:

Foucault's tendency to discuss the spread of discipline as if it were politically unopposed is a serious deficiency in his account. . . . [I]t ignores all the forces which operate to restrain the disciplinary impulse and to protect liberties. What is in fact a description of the control *potential* possessed by modern power-knowledge technologies is presented as if it were the reality of their present-day *operation*. It is a worst-case scenario which ignores the strength of countervailing forces.<sup>185</sup>

Hardt and Negri take a different tack. Rather than critiquing Foucault per se, they build on his concept of "bio-power," claiming that some acts, such as suicide bombings, function as essentially the "opposite of biopower" or challenge the pervasiveness and omnipotence of bio-power by using life and body as weapons:

*A sovereign power is always two-sided: a dominating power always relies on the consent or submission of the dominated. The power of sovereignty is thus always limited, and this limit can always potentially be transformed into resistance, a point of vulnerability, a threat. The suicide bomber appears here . . . as a symbol of the inevitable limitation and vulnerability of sovereign power; refusing to accept a life of submission, the suicide bomber turns life into a horrible weapon. This is the ontological limit of biopower in its most magic and revolting form.*<sup>186</sup>

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<sup>184</sup> TURNER, *supra* note 15, at 14.

<sup>185</sup> GARLAND, *supra* note 135, at 167-68. To his credit, Foucault does mention "resistance." But it is a dim view of resistance: "Where there is power, there is resistance, and yet, or rather consequently, this resistance is never in a position of exteriority in relation to power." FOUCAULT, *supra* note 80, at 95. As Knauff explains, "Foucault suggests that resisting this power is particularly difficult; what seems to be opposition against power or authority is often just a superficial reshuffling of terms or allegiances at the level of content." BRUCE M. KNAUFF, GENEALOGIES FOR THE PRESENT: CULTURAL ANTHROPOLOGY 142 (1996). See also MICHEL DE CERTEAU, THE PRACTICE OF EVERYDAY LIFE 45-61 (1984) (critiquing Foucault for failing to consider the role of tactical resistance in practices of everyday life).

<sup>186</sup> HARDT & NEGRI, *supra* note 31, at 54.

Later on, they expound:

Once we recognize sovereignty as a dynamic two-sided relationship [between rulers and ruled] we can begin to recognize the contradictions that continually appear within sovereignty. Consider, first of all, the modern military figure of sovereignty, that is, the power to decide over the life and death of subjects. The constant development of technologies of mass destruction throughout the modern era arriving finally at nuclear weapons has . . . made this prerogative of sovereignty approach something absolute. The sovereign in possession of nuclear weapons rules almost completely over death. Even this seemingly absolute power, however, is radically thrown into question by practices that refuse the control over life, such as, for example, suicidal actions, from the protest of the Buddhist monk who sets himself on fire to the terrorist suicide bomber. When life itself is negated in the struggle to challenge sovereignty, the power over life and death that the sovereign exercises becomes useless. The absolute weapons against bodies are neutralized by the voluntary and absolute negation of the body. Furthermore, the death of subjects in general undermines the power of the sovereign: without the subjects[,] the sovereign rules not over society but an empty wasteland. The exercise of this absolute sovereignty becomes contradictory with sovereignty itself.<sup>187</sup>

In light of these observations, one could suggest that the volunteer can and may function as an *opposite of* or in *opposition to* bio-power—as a “rebellious spirit.” Clearly, not every volunteer does or would, and the determination would depend in part on the intent of the condemned prisoner wishing to waive or withdraw his appeals. For example, the death row inmate who can no longer tolerate the dehumanizing conditions of most death row facilities or who experiences severe depression or who possesses pre-existing suicidal urges that nonetheless do not prevent his understanding his legal position and the options available to him probably would not be regarded as stretching the “ontological limits of biopower.”<sup>188</sup> On the other hand, the prisoner who

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<sup>187</sup> *Id.* at 332–33.

<sup>188</sup> See *supra* text accompanying note 186.

wishes to "escape the roller-coaster experience of the habeas appeals process or to seize control over it," or who indicates a desire for a "'macho' confrontation with death,"<sup>189</sup> or who positions his volunteering as a rebuff to the State might well be considered a symbol of the inevitable limitation and vulnerability of sovereign or State power.

Certainly, the volunteer in the death penalty context—the individual who waives or withdraws his appeals—does not transform his body into the same type of weapon as the suicide bomber, whose circumstances and political (and potentially religious) motivations are different,<sup>190</sup> whose actions may carry distinct cultural currency,<sup>191</sup> and who may cause dozens of deaths along with his own.<sup>192</sup> But his actions may well merit inclusion in a (broad) discussion that includes both suicide bombers and individuals engaging in hunger strikes or self-immolation.

To explicate, it might be useful to consider Wee's conception of an "extreme communicative act" ("ECA")—a term he employs to refer to nonlinguistic communicative acts that are "typically associated with

<sup>189</sup> See *supra* text accompanying note 106.

<sup>190</sup> The author of this Article is indebted to Moyukh Chatterjee for pointing this out.

<sup>191</sup> That suicide and suicide bombing each hold divergent and culturally-specific meanings should not be overlooked. See JACK D. DOUGLAS, *THE SOCIAL MEANINGS OF SUICIDE* (1967). See generally Mark Halsey, *Against 'Green' Criminology*, 44 *BRIT. J. CRIMINOLOGY* 833, 841 n.9 (2004) (explaining that "[m]achines of axiomisation (e.g. the law machine) will tend toward the former [permanent and natural,] whereas machines of absolute decoding (e.g. the terrorist machine) tend toward the latter [contestable and reworkable]"). See generally LOCK, *supra* note 15, at 195. Halsey describes how

Japan is a society acutely sensitive to the way in which the social order may be contested through death practices. Ritual suicides by samurai, generals, unrequited lovers, and famous authors are feted as part of Japan's tradition, both inside the country and outside it. Taking one's life to make a statement about the condition of society, or the worth of a cause, or alternatively about a perceived failure of self or another to meet society's expectations, are long-standing practices in Japan.

Halsey, *supra* note 191, at 841 n.9. See also Michael Moss & Souad Mekhennet, *The Guidebook for Taking a Life*, *N.Y. TIMES*, June 10, 2007, at § 4:1, 3 (discussing the "jihad etiquette"—the unwritten set of "rules" that guide and justify the killing that militants commit); Ozawa-de Silva, *supra* note 80 (pointing out that "[i]n Japan . . . one of the dominant features in the rhetoric of suicide has been cultural anesthetization, whereby certain suicides are given a positive cultural valence" (citations omitted)); *Suicide: Elusive, But Not Always Unstoppable*, *ECONOMIST* 63, 63 (June 23, 2007) (explaining that "Japan is a conformist society, and life, it is said, is bleak for those who do not fit in. It has a tradition of self-killing, which in some forms, such as the ritualised *seppuku* ('belly-cutting') of the samurai, may still be deemed honourable, even noble."); cf. Kim Gamel, *Teens Forced To Be Human Bombs*, *THE HONOLULU ADVERTISER*, May 27, 2008, at A3 (describing weeping teenagers claiming to have been forced into training for suicide bombings by Saudi militants in Iraq).

<sup>192</sup> Death penalty volunteers (with the exception of situations such as Gilmore's) are also less likely to attract the same level of media attention as suicide bombers. See generally Stephen Holden, *Learning To Empathize with a Suicide Bomber*, *N.Y. TIMES*, May 9, 2007, at B5.

protests, particularly in the context of a lengthy political struggle[,] . . . occur 'late' in the interactional sequence, that is, after a number of less dramatic expressions of protest have already been employed[,] and . . . involve some form of self-inflicted harm, which can sometimes be fatal."<sup>193</sup> Wee's primary example involves politically-oriented or politically-inspired hunger strikes and acts of self-immolation.<sup>194</sup> Given that the volunteer does not possess a commitment to a specific, prior political position (although one may regard his crime(s) in political terms, i.e., as a comment on class structure or socio-economic status) and lacks allegiance to a broader political cause (although the volunteer may come to regard himself as part of a larger confederacy of death row inmates opposing the State), the analogy is not perfect.<sup>195</sup> And there may also be some issue with the fact that Wee considers it crucial that the acts be "self-inflicted since they are intended to express the strength of the actors' own commitment to a specific position."<sup>196</sup> But the "close relation[ship] between ECAs and the notion of martyrdom"<sup>197</sup> and the "assymetrical power relationship where the actor who engages in an ECA is in the position of lesser power"<sup>198</sup>—both relevant in the context of waiver and withdrawal of death penalty appeals—help illustrate how the volunteer may not be a "docile body" in either normative or Foucauldian terms, but a "rebellious spirit" undermining the power of the State.

How does the volunteer work to subvert the power of the State? The initial and most obvious way has already been noted: by challenging State interests in the preservation of life and the prevention of suicide, as well as the State's desire to forestall the murder/suicide phenomena and

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<sup>193</sup> Lionel Wee, 'Extreme Communicative Acts' and the Boosting of Illocutionary Force, 36 J. PRAGMATICS 2161, 2162–163 (2004).

<sup>194</sup> See *id.* See also Lionel Wee, *The Hunger Strike as a Communicative Act: Intention Without Responsibility*, 17 J. LINGUISTIC ANTHROPOLOGY 61, 63 (2007).

<sup>195</sup> See Wee, *supra* note 193, at 2171. Wee explains:

While all the ECAs are aimed at expressing the strength of the actors' commitment to specific positions, in both the IRA and Kurdish examples, the ECAs seem to be further prompted by the desire to actually achieve a particular goal by getting somebody to do something (e.g., to grant political status to the IRA prisoners or to grant political asylum to a Kurdish rebel leader).

*Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 2172.

<sup>198</sup> *Id.* at 2173. See generally Michiel Leezenberg, *Power in Communication: Implications for the Semantics-Pragmatics Interface*, 34 J. PRAGMATICS 893, 898 (2002) (contending "that the efficacy of, say, performative language[,] cannot be wholly characterized in terms of the powers conventionally associated with words, but also depends on the power or status function conferred on the person uttering them").

safeguard the integrity of criminal proceedings and the legal profession. But in addition to thwarting State efforts to dictate the conditions and meaning of death, the volunteer may be considered a rebellious spirit in a less dramatic, albeit no less significant, way.

According to Nugent, the State's "unending iterative productions—its everyday bureaucratic routines, its formulaic documentary practices, and its magnificent public rituals—establish for it a seemingly neutral, objective vantage point that stands 'above' or 'outside' the social order, watching, preserving, safeguarding."<sup>199</sup> Through its "endless production and circulation of documents," Nugent continues, the State "never stop[s] talking."<sup>200</sup> Applying Nugent's contentions regarding the State to situations involving capital defendants, one could argue that the State benefits not so much from the *execution*, but from the lengthy death penalty litigation process. In this light, the "docile body"—the "useful" death row inmate—is not the one whom the State can execute when it is convenient and necessary as a symbol of State power, but *all* death row inmates who help establish the State's ongoing claim to authority through its endless production and circulation of briefs, motions, and opinions. In this way, "volunteering" could serve as an act of resistance or opposition to bio-power not by undermining the power of the sovereign when the State does not wish to flex its muscle—by beating the State to the punch, so to speak—but by effectively shutting the State up—by (prematurely) ending the conversation and doing so on the inmate's own terms.

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<sup>199</sup> David Nugent, *Dark Fantasies of State: Notes from the Peruvian Underground* (Draft) (presented at "Off-Centered States: Political Formation and Deformation in the Andes," Institute for Comparative and International Studies, Emory University) (Sept. 28–29, 2007) (manuscript on file with author).

<sup>200</sup> *Id.* at 21. See also Shannon Speed, *Exercising Rights and Reconfiguring Resistance in the Zapatista Juntas de Buen Gobierno*, in *THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL* 163, 178 (Mark Goodale & Sally Engle Merry eds., 2007) (suggesting that pursuing social struggle by petitioning the state through the legal system for the establishment of 'rights' may serve to buttress the neoliberal state's role as the purveyor and protector of rights, and as upholder of 'law and order.'). See generally Jean E. Jackson, *Rights to Indigenous Culture in Colombia*, in *THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL* 204, 229 (Mark Goodale & Sally Engle Merry eds., 2007) (contending that "the state is not a unitary center of power, but in fact is composed of institutions like legislatures and judiciaries whose individual actors engage in discourses and practices of power, the multiple effects of which give the appearance of a state") (citing JAMES C. SCOTT, *DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS* (2003); *Maddening States*, 32 *ANN. R. ANTHROPOLOGY* 393–410 (2001); Trouillot, Michel-Rolph, *The Anthropology of the State in the Age of Globalization: Close Encounters of the Deceptive Kind*, 42 *CURRENT ANTHROPOLOGY* 125, 125–38 (2001)).



## V. CONCLUSION AND DIRECTIONS FOR FUTURE RESEARCH

This Article has attempted to set forth a conceptual framework with which to understand the power dynamics that exist between the State and the condemned prisoner wishing to waive or withdraw his death penalty appeals. Using Foucauldian notions of discipline and bio-power, as well as Hardt and Negri's formulation of an "opposite" of bio-power, this Article has considered the motivations of the volunteer and the interests of the State and then classified the volunteer as either a "docile body" or a "rebellious spirit." Admittedly, the presentation of the options is quite stark. But the intent has not been to exclude the potential for a continuum (or even a non-Foucauldian contemplation of volunteering). Rather, the goal has been to offer a starting point for understanding who ultimately controls the body of the condemned, and to offer an instrument for exploring and contemplating the continued rationale for the death penalty and the purpose it may serve as a social phenomenon.

As mentioned at the outset of this Article, death penalty jurisprudence in the United States is at a critical juncture. Although *Baze* did not directly address the issue of volunteering for execution, the outcome of the case may well affect the waiver and withdrawal of death penalty appeals. Had the Supreme Court ruled that the Eighth Amendment prohibits methods of execution that create an "unnecessary risk of pain and suffering" — effectively requiring a new method of lethal injection — more death row inmates might now be volunteering because of the perception that the new method(s) will cause less pain.<sup>201</sup> But such a ruling could also have resulted in fewer volunteers if the language of the opinion had suggested that abolition might be forthcoming. As it turned out, the Supreme Court's holding sanctions the existing cocktail.<sup>202</sup> Some individuals on death row have continued to press their appeals.<sup>203</sup> Others, such as David Mark Hill (executed on June 6, 2008) and Marco Allen Chapman (executed on November 21, 2008) have

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<sup>201</sup> See Essig, *supra* note 2, at WK15. According to one commentator, a new cocktail would serve as no guarantee of pain-free executions. *Id.* "[D]ecades of executions have taught us this: Technical systems are prone to failure, and human bodies are irreducibly complex and idiosyncratic. Whatever the technique, executions will go horrifyingly wrong." *Id.*

<sup>202</sup> Such a holding, by no means, requires states to use the existing cocktail. In the aftermath of *Baze*, states are free to continue to do so or to come up with a newer, less painful method.

<sup>203</sup> See, e.g., Andrew Welsh-Huggins, *Ohio Inmate Says He's Too Fat For Execution* (Aug. 5, 2008), [http://news.yahoo.com/s/ap/20080804/ap\\_on\\_re\\_us/death\\_penalty\\_cooley](http://news.yahoo.com/s/ap/20080804/ap_on_re_us/death_penalty_cooley) (last visited Aug. 11, 2008).

waived their appeals.<sup>204</sup> (Michael Rodriguez labored for more than a year to convince courts that he was competent to drop his appeals;<sup>205</sup> he was finally executed on August 14, 2008.<sup>206</sup>) Still others, seeking a "macho confrontation with death"<sup>207</sup> might volunteer, knowing that doing so would generate some element of publicity and prestige—especially in light of the Court's decision. Additional research will be needed to understand the impact of *Baze* on the waiver and withdrawal of death penalty appeals.

Perhaps more significant than couching the issue of death penalty volunteering in the context of *Baze*, this Article, using the issue of waiver and withdrawal of death penalty appeals as a domain through which meanings, practice, identities, and relations are defined and contested, has attempted to set forth a conceptual framework with which to understand the power dynamics that exist between the death row inmate and the State. While the focus of this Article has clearly been on the ways in which death penalty volunteering affects those power relations between the condemned prisoner and the State, it speaks to and is part of broader social processes and issues of power, including the place of capital punishment in a wider socio-political network.<sup>208</sup> As Ohnuki-Tierney acknowledges, "[t]here have always been culturally sanctioned ways of terminating human life, including wars and other purposeful killings."<sup>209</sup> Additional avenues of inquiry are needed to help shed light on the death penalty's role in contemporary society<sup>210</sup>—essentially, the "what" or "why" of power in contrast to Foucault's epistemic "how."<sup>211</sup>

<sup>204</sup> Associated Press, *National Briefing—South: South Carolina: Killer Is Executed*, N.Y. TIMES, June 7, 2008, at A12; Death Penalty Information Center, Execution Database, <http://www.deathpenaltyinfo.org/getexecdata.php> (last visited Jan. 19, 2009).

<sup>205</sup> Michael Graczyk, *Texas 7 Member Volunteers for Execution this Week*, YAHOO! NEWS (Aug. 10, 2008), [http://news.yahoo.com/s/ap/20080810/ap\\_on\\_re\\_us/texas7\\_execution&printer=1;\\_ylt=AlbN\\_d0flgNXIP2UCChT38IH2ocA](http://news.yahoo.com/s/ap/20080810/ap_on_re_us/texas7_execution&printer=1;_ylt=AlbN_d0flgNXIP2UCChT38IH2ocA).

<sup>206</sup> See Death Penalty Information Center, Execution Database, <http://www.deathpenaltyinfo.org/getexecdata.php> (last visited Dec. 08, 2007).

<sup>207</sup> Harrington, *A Community Divided*, *supra* note 12, at 850.

<sup>208</sup> This type of approach is well-articulated by David Garland. See GARLAND, *supra* note 135, at 3–22. For a recent evolutionary perspective on why people punish and how punishment becomes established within populations, see Robert Boyd & Sarah Matthew, *A Narrow Road to Cooperation*, 316 SCI. 1858, 1858–59 (2007).

<sup>209</sup> Ohnuki-Tierney, *supra* note 15, at 239. See also Kalervo Oberg, *Crime and Punishment in Tlingit Society*, 36 AM. ANTHROPOLOGIST 145, 145–56 (1934); Keith F. Otterbein, *On Reconsidering Violence in Simple Human Societies*, 29 CURRENT ANTHROPOLOGY 633, 635 (1988); Paredes, *supra* note 145, at 16 (referring to capital punishment as a "cross-cultural universal").

<sup>210</sup> For example, one might consider Solomon's contention that "capital punishment legitimizes killing as a way to deal with problems." Solomon, *supra* note 150, at 443.

<sup>211</sup> KNAUFT, *supra* note 185, at 157.

For example, as this Article has noted, in the United States the trend has been to move away from painful executions. As Essig recently remarked:

It was only in the 1850s or so that Americans became squeamish about the pain suffered by executed prisoners. Before that, pain wasn't a problem; it was the point. Through drawing and quartering, beheading, shooting[,] or hanging, the state inscribed its power on the body of the convict and provided a lesson in the perils of disobedience.<sup>212</sup>

Similarly, Weil has mused:

The history of capital punishment in the United States has been filled with a peripatetic search for a method of killing that doesn't offend a blood-thirsty, yet tough-on-crime, yet squeamish public. Nooses, if the drop is too short, leave bodies twitching; if the drop is too long, heads pop off. Electric chairs result in horrible odors and burns. Firing squads are too violent. Gas chambers take too long and are too grotesque. (One 1992 lethal gas execution in Arizona caused an attorney general to throw up and a warden to threaten to quit if he had to execute by that method again.)<sup>213</sup>

Gradually, overt fetishistic fascinations with painful, bloody punishment and executions have given way to a preference for quiet,

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<sup>212</sup> Essig, *supra* note 2, at WK15. See generally Edward Lewine, *Bitter Pill*, NEW YORK TIMES BOOK REVIEW, Dec. 2, 2007, at 68 (reviewing HAROLD SCHECHTER, *THE DEVIL'S GENTLEMAN: PRIVILEGE, POISON, AND THE TRIAL THAT USHERED IN THE TWENTIETH CENTURY* (2008)) (asking "Who knew . . . that the 19th century had a very different crime obsession than we do now?").

<sup>213</sup> Weil, *supra* note 1, at WK3. See also Essig, *supra* note 2, at WK15 ("Starting in the 1850s, such sensitivities [to prisoner pain and prolonged suffering] gave rise first to improved hanging methods and later to the electric chair, the gas chamber[,] and lethal injection. Each method was promoted as less painful for the prisoner and less emotionally fraught for those who watch."). See generally Theo Emery, *Tennessee, After Review, Sets Execution*, N.Y. TIMES, May 9, 2007, at A19 (reporting that "Florida suspended executions late last year after it took 34 minutes for an inmate to die, and Ohio re-examined its procedures after it took 90 minutes to put an inmate to death last May"); Friend, *supra* note 56, at 70 (explaining that some regarded the execution of Stanley "Tookie" Williams, founder of the Crips and later nominated for the Nobel Peace Prize for his helping to broker gang truces, as a "prolonged 'torture-murder'").

antiseptic, and comparatively private capital punishment.<sup>214</sup> Or so it seems. Despite questions as to whether the death penalty does indeed deter violent crimes,<sup>215</sup> American society has been unwilling to part with capital punishment—for the “alleged social benefits [of] retributive justice and deterrence[.]”<sup>216</sup> If American society genuinely rejects gruesome displays of prolonged pain and agony experienced by bodies suffering unspeakable pain *and* if there exists serious doubts about the alleged social benefits,<sup>217</sup> one must ask why the death penalty has continued to persevere.<sup>218</sup> Some commentators speculate that “the new focus on terrorism in the United States . . . [has] helped to keep the federal death penalty alive and public opinion about capital punishment in an ambivalent state.”<sup>219</sup> While this is certainly a possibility—for

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<sup>214</sup> See generally Adam Liptak, *Florida Panel Urges Steps for Painless Executions*, N.Y. TIMES, Mar. 2, 2007, at A12 (“Opponents of the paralytic chemical [used in lethal injection] say it serves no legitimate purpose and may mask agonizing pain. But corrections officials say using other methods would take too long and could subject witnesses to discomfort.”).

<sup>215</sup> Compare James R. Acker, *Impose an Immediate Moratorium on Executions*, 6 CRIMINOLOGY & PUB. POL’Y 641, 645 (2007) (calling into question “the utility of capital punishment, including its efficacy in deterring murder,” and pointing to findings that “strongly suggest that capital punishment is not a superior deterrent to murder than is life imprisonment”), and Burr, *supra* note 40, at 14 (stating that

we can show that over the years in which the death penalty has been with us, it has never been demonstrated to deter violent crimes. At best, it has no effect—at worst, by sanctioning the deliberate killing of one another, it encourages homicide. . . . The death penalty is not a deterrent to violent crime.

), and Paredes and Purdum, *supra* note 79, at 9 (ruminating that “capital punishment does no more to deter crime than the rituals of Tenochtitlan did to keep the sun in the sky[.]”), with Reuben M. Greenberg, *Race, the Criminal Justice System, and Community-Oriented Policing*, 20 HARV. J. L. & PUB. POL’Y 397, 400 (1997) (“In reality, no one knows for certain whether the death penalty is a deterrent. However, common sense suggests that it might be, and the need to protect the public from the most vicious offenders [sic] justifies taking this punitive action.”), and Adam Liptak, *Does Death Penalty Save Lives? A New Debate*, N.Y. TIMES, Nov. 18, 2007, at 1, 24 (reporting on recent studies that have found that the death penalty prevents murders), and Jeremy W. Peters, *Move To Repeal Death Penalty in New Jersey, Where It’s Mainly Academic*, N.Y. TIMES, Nov. 19, 2007, at A24 (same).

<sup>216</sup> Essig, *supra* note 2, at WK15. See also Harrington, *Mental Competence and End-of-Life Decision Making*, *supra* note 11, at 1112 n.3 (noting the importance of the societal goals of retribution and deterrence).

<sup>217</sup> But see Greenberg, *supra* note 214, at 400; Liptak, *supra* note 214, at 24; Peters, *supra* note 214, at A24.

<sup>218</sup> See Otterbein, *supra* note 209, at 635. According to at least one anthropologist, “capital punishment is found in all or nearly all societies[.]” *Id.*

<sup>219</sup> KUDLAC, *supra* note 7, at xvi. According to Kudlac, [b]y 1994, growing opposition to the death penalty was becoming visible across the country. The Oklahoma City bombing and subsequent arrest of Timothy McVeigh in 1995 arguably affected this trend by reinvigorating many people’s support for capital punishment.

“[p]unishment . . . is not reducible to a single meaning or a single purpose”<sup>220</sup>—the author of this Article is cautious of “instrumental, punishment-as-crime-control conception[s.]”<sup>221</sup> Instead, this author questions whether secret and (albeit somewhat attenuated) sadistic pleasures may still permeate the collective subconscious—pleasures that may be better understood through an examination of public interest in the “bifurcated spectacle” of trial (and sentencing) on the one hand and execution on the other,<sup>222</sup> as well as through the continued study of the growth and popularity of violent forms of entertainment (television shows, including news programs, movies, and video games).<sup>223</sup> Future

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In addition, the new threat of terrorism was used to justify the continued practice of the death penalty.

*Id.* at xv.

<sup>220</sup> GARLAND, *supra* note 135, at 17.

<sup>221</sup> *Id.* at 19.

<sup>222</sup> See Kai T. Erikson, *Notes on the Sociology of Deviance*, 9 SOC. PROBS. 307, 310 (1962) (

In an earlier day, correction of deviant offenders took place in the public market and gave the crowd a chance to display its interest in a direct, active way. In our own day, the guilty are no longer paraded in public places, but instead we are confronted by a heavy flow of newspaper and radio reports which offer much the same kind of entertainment.

). See generally Jeff Ferrell, *Criminalizing Popular Culture*, in POPULAR CULTURE, CRIME, AND JUSTICE 71, 71–83 (Frankie Y. Bailey & Donna C. Hale eds., 1998) (describing the role of the mass media in presenting, re-presenting, and constructing criminality); KUDLAC, *supra* note 7, at 102 (describing how in the cases of Bundy, Gacy, Wuornos, and Tucker, “[o]nce the verdict was rendered, the case dropped out of the headlines until an announcement of a scheduled execution date. The media typically ignores the correctional system.”). Cf. FOUCAULT, *supra* note 60, at 9 (asserting that “the publicity has shifted to the trial, and to the sentence; the execution itself is like an additional shame that justice is ashamed to impose on the condemned man[.]”).

<sup>223</sup> See Geoffrey Gorer, *The Pornography of Death*, reprinted in GEOFFREY GORER, DEATH, GRIEF, AND MOURNING 192, 197 (1965). This inquiry itself is by no means new. See *id.* More than fifty years ago, George Gorer argued that “violent death has played an ever-growing part in the fantasies offered to mass audiences—detective stories, thrillers, Westerns, war stories, spy stories, science fiction, and eventually horror comics.” *Id.*

For examples of scholarly inquiries into, and analysis of, media constructions and depictions of crime, including local and national newspaper coverage of crime and crime control, as well as the portrayal and production of crime, criminals, justice, juvenile delinquency, and violence in film, television, cyberspace, popular music, comic books and other popular culture texts, see CHARLES R. ACLAND, YOUTH, MURDER, SPECTACLE: THE CULTURAL POLITICS OF “YOUTH IN CRISIS” (1995); Frankie Y. Bailey & Donna C. Hale, *Popular Culture, Crime, and Justice*, in POPULAR CULTURE, CRIME, & JUSTICE 1, 1–20 (Frankie Y. Bailey & Donna C. Hale eds., 1998); MEDIA, PROCESS, AND THE SOCIAL CONSTRUCTION OF CRIME: STUDIES IN NEWSMAKING CRIMINOLOGY (Gregg Barak ed., 1994); Gregg Barak, *Media, Crime, and Justice: A Case for Constitutive Criminology*, in CULTURAL CRIMINOLOGY 142, 142–66 (Jeff Ferrell & Clinton R. Sanders eds., 1995); REPRESENTING O.J.: MURDER, CRIMINAL JUSTICE, AND MASS CULTURE (Gregg Barak ed., 1996); Henry H. Brownstein, *The Media and the Construction of Random Drug Violence*, in CULTURAL CRIMINOLOGY 45, 45–65

(Jeff Ferrell & Clinton R. Sanders eds., 1995); Derral Cheatwood, *Prison Movies: Films About Adult, Male, Civilian Prisons: 1929–1995*, in *POPULAR CULTURE, CRIME, & JUSTICE* 209, 209–31 (Frankie Y. Bailey & Donna C. Hale eds., 1998); STEVEN M. CHERMAK, VICTIMS IN THE NEWS: CRIME AND THE AMERICAN NEWS MEDIA (1995); Steven M. Chermak, *The Presentation of Drugs in the News Media: The News Sources Involved in the Construction of Social Problems*, 14 *JUST. Q.* 687, 687–718 (1997); Steven M. Chermak, *Police, Courts, and Corrections in the Media*, in *POPULAR CULTURE, CRIME, & JUSTICE* 87, 87–99 (Frankie Y. Bailey & Donna C. Hale eds., 1998); STEVE CHIBNALL, LAW AND ORDER NEWS: AN ANALYSIS OF CRIME REPORTING IN THE BRITISH PRESS (1977); THE MANUFACTURE OF NEWS: DEVIANCE, SOCIAL PROBLEMS, AND THE MASS MEDIA (Stanley Cohen & Jock Young eds., 1973); ENTERTAINING CRIME: TELEVISION REALITY PROGRAMS (Gray Cavendar & Mark Fishman eds., 1998); C. Greek, O.J. and *The Internet: The First Cybertrial*, in REPRESENTING O.J.: MURDER, CRIMINAL JUSTICE, AND MASS CULTURE 64, 64–77 (Gregg Barak ed., 1996); STUART HALL, ET AL., POLICING THE CRISIS: MUGGING, THE STATE, AND LAW AND ORDER (1978); A. Howe, *The War Against Women: Media Representations of Men's Violence Against Women in Australia*, 3 *VIOLENCE AGAINST WOMEN* 59, 59–75 (1997); PHILLIP JENKINS, USING MURDER: THE SOCIAL CONSTRUCTION OF SERIAL HOMICIDE (1994); David Kidd-Hewitt, *Crime and the media: A Criminological Perspective*, in CRIME AND THE MEDIA: THE POST-MODERN SPECTACLE 1, 1–24 (David Kidd-Hewitt & Richard Osborne eds., 1995); PAUL KOOISTRA, CRIMINALS AS HEROES: STRUCTURE, POWER, AND IDENTITY (1989); Gary T. Marx, *Electric Eye in the Sky: Some Reflections on the New Surveillance and Popular Culture*, in *CULTURAL CRIMINOLOGY* 106, 106–41 (Jeff Ferrell & Clinton R. Sanders eds., 1995); Graeme Newman, *Popular Culture and Violence: Decoding the Violence of Popular Movies*, in *POPULAR CULTURE, CRIME, & JUSTICE* 40, 40–56 (Frankie Y. Bailey & Donna C. Hale eds., 1998); Jeffrey Niesel, *The Horror of Everyday Life: Taxidermy, Aesthetics, and Consumption in Horror Films*, in INTERROGATING POPULAR CULTURE: DEVIANCE, JUSTICE, AND SOCIAL ORDER 16, 16–31 (Sean E. Anderson & Gregory J. Howard eds., 1998); Amy Kiste Nyberg, *Comic Books and Juvenile Delinquency: A Historical Perspective*, in *POPULAR CULTURE, CRIME, & JUSTICE* 61, 61–70 (Frankie Y. Bailey & Donna C. Hale eds., 1998); P.A. Perrone & Meda Chesney-Lind, *Representations of Gangs and Delinquency: Wild in the Streets*, 24 *SOC. JUST.* 96, 96–116 (1997); David P. Phillips, *The Impact of Mass Media Violence on U.S. Homicide*, 48 *AM. SOC. REV.* 560, 560–68 (1983); NEIL POSTMAN, AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOWBUSINESS (1986); CONSTRUCTING CRIME: PERSPECTIVES ON MAKING NEWS AND SOCIAL PROBLEMS (Gary W. Potter & Victor E. Kappeler, eds., 2006); C. Reinerman & C. Duskin, *Dominant Ideology and Drugs in the Media*, 3 *INTERN. J. DRUG POL.* 6, 6–15 (1992); Clinton R. Sanders & Eleanor Lyon, *Repetitive Retribution: Media Images and the Cultural Construction of Criminal Justice*, in *CULTURAL CRIMINOLOGY* 25, 25–44 (Jeff Ferrell & Clinton R. Sanders eds., 1995); RICHARD SPARKS, TELEVISION AND THE DRAMA OF CRIME: MORAL TALES AND THE PLACE OF CRIME IN PUBLIC LIFE (1992); Richard Sparks, *Entertaining the Crisis: Television and Moral Enterprise*, in CRIME AND THE MEDIA: THE POST-MODERN SPECTACLE 49, 49–66 (David Kidd-Hewitt & Richard Osborne eds., 1995); RAY SURETTE, MEDIA, CRIME, AND CRIMINAL JUSTICE: IMAGES AND REALITIES (1998); Sara Thornton, *Moral Panic, The Media, and British Rave Culture*, in ALAN ROSS & TRICIA ROSE, MICROPHONE FIENDS: YOUTH MUSIC AND YOUTH CULTURE 176, 176–92 (1994); Kenneth D. Tunnell, *Reflections on Crime, Criminals, and Control in Newsmagazine Television Programs*, in *POPULAR CULTURE, CRIME, & JUSTICE* 100, 100–10 (Frankie Y. Bailey & Donna C. Hale eds., 1998); Neil Websdale & Alexander Alvarez, *Forensic Journalism as Patriarchal Ideology: The Newspaper Construction of Homicide-Suicide*, in *POPULAR CULTURE, CRIME, & JUSTICE* 123, 123–41 (Frankie Y. Bailey & Donna C. Hale eds., 1998); and Jeff Williams, *Comics: A Tool of Subversion*, in INTERROGATING POPULAR CULTURE: DEVIANCE, JUSTICE, AND SOCIAL ORDER 97, 97–115 (Sean E. Anderson & Gregory J. Howard eds., 1998). Even Foucault himself suggested that “[i]t is the criminal . . . that is needed by the press and public opinion.” FOUCAULT, *supra* note 137, at 432. See Jeff

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inquiries might well consider whether “the gloomy festival of punishment”<sup>224</sup> has indeed died out—whether “[p]unishment [has, in fact,] gradually ceased to be a spectacle[.]”<sup>225</sup>—or whether its “visible intensity” has just been transformed.

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Ferrell, *Cultural Criminology*, 25 ANNU. REV. SOCIOLOG. 395, 397, 408 (1999). More recently, Jeff Ferrell has explored the “spectacle and carnival of crime[.]” and the ways in which “the mass media constructs crime as entertainment[.]” *Id.* at 408; *see id.* at 407, 408–09, 411. *See also* Simon Hallsworth, *It’s Good To Watch: Cruelty, Transgression and Popular Culture*, (Paper presented at *On the Edge: Transgression and The Dangerous Other: An Interdisciplinary Conference*, John Jay College of Criminal Justice and The Graduate Center, City University of New York) (Aug. 9, 2007) (on file with author). Simon Hallsworth has made continued progress in revealing and explaining the ways in which various groups produce and consume images of crime—especially with respect to how television crime dramas affect the production and perception of crime and policing imagery. *Id.*

The author of this Article would encourage further investigations into how crime is depicted and portrayed by various media and the ways in which crime, crime news, and crime entertainment have become entangled and blurred. But the author of this Article would urge specific focus on depictions of torture in recent horror movies (such as the *Saw* series, *Untraceable* (Cohen/Pearl Productions 2008), *The Texas Chainsaw Massacre: The Beginning* (New Line 2006)) and inquiries into whether these films—these “hundreds of tiny theatres of punishment”—have replaced the (pleasure derived from the) spectacles of execution from yesteryear. *See* FOUCAULT, *supra* note 60, at 113. *See also* Stanley Cohen, *The Punitive City: Notes on the Dispersal of Social Control*, 3 CONTEMP. CRISIS 339, 359 (1979).

<sup>224</sup> FOUCAULT, *supra* note 60, at 8.

<sup>225</sup> *Id.* at 9. *See also* Anton Blok, *The Symbolic Vocabulary of Public Executions*, in HISTORY AND POWER IN THE STUDY OF LAW: NEW DIRECTIONS IN LEGAL ANTHROPOLOGY 31, 46–52 (June Starr and Jane F. Collier eds., 1989) (discussing the decline of the “[t]heater of [p]unishments”).