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"I'll Make Them Shoot Me": Accounts of Death Row Prisoners Advocating for Execution

Meredith Martin Rountree

About 11% of death-sentenced prisoners executed in the United States hastened executions by abandoning their appeals. How do these prisoners persuade courts to allow them to abandon their appeals? Further, how do legal structures and processes organize these explanations, and what do they conceal? An analysis of Texas cases suggests that prisoners marshal explanations for their desires to hasten execution that echo prevailing cultural beliefs about punishment and the death penalty. The coherence of these accounts is amplified by a non-adversarial, unreliable legal process. This article contributes to our understanding of legal narratives, and expands their analysis to include not only hegemonic stories and legal rules, but also the legal process that generates them.

Charles Rumbaugh, who had a history of psychiatric hospitalization and suicide attempts, was convicted of capital murder and sentenced to death. In an Amarillo, Texas federal district court hearing on whether he was sufficiently mentally competent to drop his legal appeals in order to expedite his execution, Rumbaugh testified:

> All I really wanted to say is that it doesn't matter to me; that I've already picked my own executioner and I'll just make them kill me. If they don't want to do it . . . if they don't want to take me down there and execute me, I'll make them shoot me.

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> I think I'll make them shoot me right now. (*Rumbaugh* v. *Procunier* 1985: 397)

At this point, Rumbaugh charged a deputy U.S. Marshal, who duly shot him. Rumbaugh survived, leaving the court to decide whether to permit Rumbaugh to hasten execution. The court did, and Rumbaugh was subsequently executed.

About 11% of death-sentenced prisoners executed in the United States hastened their own executions by abandoning their appeals (Death Penalty Information Center 2012). This article examines how legal proceedings in these cases can serve as a forum in which social deviance (seeking execution) is neutralized by stock penal narratives. Prisoners marshal explanations that resonate with broader cultural beliefs about the death penalty, prison, and the legal system. They thereby deflect other interpretations, such as "suicide by cop," that are socially deviant, if apparently legally acceptable under *Rumbaugh*.

Sociolegal studies of courtroom narrative have generally analyzed verbal exchanges (Donovan and Barnes-Brus 2011), the role of larger cultural scripts (Donovan and Barnes-Brus 2011; Fleury-Steiner 2002; Umphrey 1999), the impact of laws and legal rules (Ewick and Silbey 1995; Fraiden 2010), and the disposition of individual judges (Lens 2009). Less common are studies that include in their analysis dynamics of the legal process. Susan Bandes' (1999) examination of court narratives of police brutality, for example, explains how institutional resistance to claims of police brutality, legal standards for civil rights lawsuits, the larger common law litigation paradigm, and unequal resources available to litigants transform evidence of systemic government misconduct into anecdotes.

This study similarly integrates a discussion of the broader legal process with the content of narratives of death-seeking. It contends that the proceedings draw on a repertoire of cultural beliefs affirming the death penalty system. At the same time, this evidence is shaped by legal rules and practices that constrain the presentation of deviant counter-narratives. While legal rules "regulate what is able to be narrated" (Umphrey 1999: 403), so does the evidence. Some courtroom stories are more compelling than others not simply because they, for example, incorporate hegemonic beliefs, but because they are not contradicted by evidence telling an alternative story. Exploring the context from which courtroom narratives emerge is essential to interpreting the law's stories. Using Texas as a case study, this article considers execution-seeking narratives within a particular set of legal ethical rules, problematic mental health practices, and a larger legal culture that devalues and underfunds adversarial litigation.

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In presenting these data, I do not seek to arbitrate whether a particular prisoner was correctly deemed competent. Each subject has been executed and without the ability to gather a more comprehensive account of a prisoner's mental capacity, there is no way to discern the "right" answer in these cases. Further, I do not argue that efforts to hasten one's own execution are *per se* evidence of incompetence. Instead, I contend that American culture generally views efforts to hasten death and the death penalty as deviant, and that lawyers (at least) see legal appeals as important in death penalty cases. I argue that prisoners' accounts help neutralize the deviance of their efforts to die. They do so by drawing on broader cultural narratives about penality and criminality, and marginalizing possible evidence of distress and suicidality. Further, the legal structures—here competency determinations—can privilege some stigma-defusing narratives over others, while the absence of an adversarial process hides counter-narratives.

This article first sets out the legal standards for hastening execution. Next, it describes the ways in which prisoners who seek the death penalty are deviant. Then, it offers some background from the sociological literature about how narratives can neutralize deviance. This prefatory discussion is followed by research findings regarding the kinds of stories death-seeking prisoners tell courts to hasten execution, as well as the legal structures from which these stories emerge and in which they are accepted. It concludes with a discussion and suggestions for future research.

Law of Waiver

Courts evaluate a "volunteer's"[1] decision to abandon appeals according to four criteria: the prisoner must make a knowing, voluntary, and intelligent waiver of his rights to appeal and must be mentally competent (*Godinez v. Moran* 1993; *Rees v. Peyton* 1966). These criteria are commonly applied in other parts of the criminal justice system. In accepting a guilty plea, for example, the court engages in a (usually rote) colloquy with the defendant designed to elicit the defendant's agreement that he understands that by pleading guilty, he abandons certain constitutional trial rights (the "knowing" criterion), that he has not been coerced into giving up these rights (the "voluntary" requirement), and this decision reflects that the defendant, having been advised by counsel, under-

[1] Death-sentenced prisoners who drop their appeals in order to hasten their executions are commonly called "volunteers" (Blume 2005; Brisman 2009; Harrington 2000). Because the connotations of free will (and civic-mindedness) associated with the word "volunteer" are unsettled, I enclose the word in quotation marks.

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stands the charges against him and the consequences of his plea (the "intelligent" waiver) (*Brady v. United States* 1970).

With respect to competence, in the context of death-sentenced prisoners waiving appeals, courts generally cite the Supreme Court's decision in *Rees v. Peyton* (1966), which asked whether the prisoner had 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" (1966: 314). In *Rumbaugh v. Procunier* (1985), the case opening this article, the Fifth Circuit confronted a tension inherent in this standard as mental health professionals testified that Rumbaugh grasped the logical consequences of his decision, but his decision was substantially affected by a mental disease, namely severe depression. The Fifth Circuit then refined its interpretation of *Rees* by restricting the judicial determination of competence to whether the prisoner's decision was "the product of a reasonable assessment of the legal and medical facts and a reasoned thought process" (1985: 402).[2] That this "rational decision-making process" took place within a severe depression that "contribute[d] to his invitation of death" was legally irrelevant so long as he was aware of his situation and his options (*id*.). Rumbaugh's courtroom attempt to be killed therefore became evidence supporting his effort to waive appeals. A psychiatrist testified the attempt "reinforced his conclusions that Rumbaugh was acting knowingly and intentionally with full knowledge and appreciation of the situation in which he found himself" as he sought to waive his appeals (*Rumbaugh v. Procunier* 1985: 397).

The Supreme Court subsequently revisited the question of competency in *Godinez v. Moran* (1993). Like Rumbaugh, Moran had a prior suicide attempt, "deep depression," and took psychiatric medication (*Godinez v. Moran* 1993: 409–411). Harmonious with *Rumbaugh's* holding, the Supreme Court ruled that mental competency requires simply that the prisoner has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual

[2] The three part test articulated by the Fifth Circuit in *Rumbaugh* has been accepted in other jurisdictions (*Comer v. Schriro* 2007; *Lonchar v. Zant* 1992). Courts ask:
(1) Is the person suffering from a mental disease or defect?
(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? (*Rumbaugh v. Procunier* 1985: 398–399)

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understanding of the proceedings against him" (*Godinez v. Moran* 1993, relying on *Dusky v. United States* 1960). Therefore, it found the trial court correctly permitted Moran to plead guilty to capital murder and discharge his attorneys in order to prevent the presentation of evidence against the death penalty.

The *Moran* dissenters protested: "the majority upholds the death sentence for a person whose decision to discharge counsel, plead guilty, and present no defense well may have been the product of medication or mental illness" (1993: 409). The majority opinion dismissed this concern: "[r]equiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel" (1993: 402).

In affirming Moran's competence, the Supreme Court essentially announced a unitary standard for mental competence in legal proceedings (Blume 2005; Poythress et al. 2002). The standard for mental competency to waive appeals and expedite execution is the same as the standard for mental competency to stand trial, and as *Moran* and *Rumbaugh* make clear, mental competence is not a high bar to cross. The Supreme Court in *Indiana v. Edwards* (2008: 178) recognized that this standard permits even severely mentally ill defendants to be found competent. Many lawyers casually refer to competence as requiring only that their clients be "oriented times three," i.e., are aware of time, place, and person, screening out only the most psychotic defendants.

Court proceedings to determine competence combine a low legal standard with highly subjective evaluations that generally eschew empirically-based, standardized measures of competency assessment (Bardwell and Arrigo 2002; Poythress et al. 2002; Zapf et al. 2004). Maroney complains that "adjudicative competence, despite its enormous importance, is on the whole a surprisingly ramshackle affair [as] [i]t is poorly understood, under-theorized, and inconsistently implemented" (Maroney 2006: 1380). While this "ramshackle affair" may be unsatisfactory from the perspective of reliability and validity, its relatively unstructured quality makes it a rich source of sociolegal data.

Studies examining the context of legal decisions about mental status are scarce. In his study of legal proceedings on involuntary commitment for psychiatric hospitalization, James Holstein (1993) examined the "constitutive practices" of civil commitment courts. Holstein considered how clinical recommendations and legal decisions to commit individuals for involuntary psychiatric treatment were framed by ways in which, for example, the legal system was organized, how participants interacted with each other, and the cultural scripts, such as those surrounding gender, age, and "home," informed the process.

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Volunteers do not present themselves to a court with the same regularity as candidates for involuntary psychiatric treatment. Therefore, they do not have the uniquely constituted environment Holstein observed. Instead, volunteers thrust themselves into the workaday criminal court world of routine arraignments and guilty pleas, with most of the participants—judges and attorneys alike—taken aback at the prisoner's request and uncertain of the law. Because we cannot understand volunteers as Holstein did, through a dedicated, specialized court, this study relies not on courtroom observations, but court documents, including hearings and expert competence evaluations.

Hastening as Deviant

For some imagining life on death row, nothing may seem more understandable and rational than an attempt to end the pains of imprisonment and seize control of the process by ending appeals. Nonetheless hastening execution by abandoning appeals is a socially deviant act. Most death row prisoners are committed to pursuing their appeals. Volunteers represent about 11% of those executed, not of those sentenced to death. Volunteers seek to expedite execution within a local death row culture where volunteering is generally not the norm, and also within a larger culture that has historically criminalized and stigmatized desires to die. The Supreme Court in *Washington v. Glucksberg* (1997) considered a statute prohibiting doctors from acceding to the request by terminally ill patients for assistance in hastening death. It canvassed a wide range of social concerns associated with hastening death of others, and noted that bans on assisting suicide are widespread and "longstanding expressions of the States' commitment to the protection and preservation of all human life" (710). Whether to help someone hasten death is a question fundamental to the moral fabric of the country: "Indeed, opposition to and condemnation of suicide—and, therefore, of assisting suicide—are consistent and enduring themes of our philosophical, legal, and cultural heritages" (710). It cited "a consistent and almost universal tradition that has long rejected the asserted right, and continues explicitly to reject it today, even for terminally ill, mentally competent adults" (723).

The *Glucksberg* Court was troubled at the prospect of facilitating suicide: "all admit that suicide is a serious public-health problem, especially among persons in otherwise vulnerable groups. . . . The State has an interest in preventing suicide, and in studying, identifying, and treating its causes" (730). The Court was particularly concerned by the problem of accurately diagnosing and treating

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depression, and cited empirical data linking depression, mental disorders and desires to hasten death (730–731).

The response to *Glucksberg*'s invitation to the states to experiment with different physician-assisted suicide legal regimes also reflects the strength of the concerns expressed in that case. While the "right" to die under certain circumstances has gained some popular and political support within the past 20 years, physician assistance in dying is clearly legal in only two out of 50 American states, is highly regulated, and is a right relatively rarely exercised[3] (Hillyard and Dombrink 2001; Oregon Death With Dignity Act 1997; Washington Death With Dignity Act 2008). Reflecting recurrent concerns regarding requests to hasten death, the two states that do permit physician-assisted suicide prohibit assistance to any terminally ill individual who suffers from "a psychiatric or psychological disorder or depression causing impaired judgment" (Oregon Death With Dignity Act 1997, O.R.S. 127.825 § 3.03; Washington Death With Dignity Act 2008, RCW 70.245.060).

Schmeiser has observed that in volunteer cases, "[t]he specter of suicide, and the potential for judicial complicity in a private act that takes on emphatically public dimensions here, in fact haunts courts as they reason through their decisions" (2011: 89). One legal case (from Nevada, not Texas) illustrates tensions courts may feel in accepting the full implications of *Rumbaugh*. In that case, the court took pains to discredit an expert's finding of the prisoner's suicidal ideation, even as it noted that suicidality did not indicate incompetence (Dennis ex rel. *Butko v. Budge* 2004: 892–893).

Further, death penalty appeals are generally understood (at least by lawyers) to play an important role in the American death penalty, which relies heavily on a system of legal procedures for its legitimacy (Garland 2010). "Death is different," and in capital cases, courts are instructed to insist on "super due process" (*Gardner v. Florida* 1977; *Ford v. Wainwright* 1986). Supreme Court opinions have cited the existence of legal appeals—namely appeals of trial error ("direct appeals"), as opposed to post-conviction collateral attacks such as petitions for writs of *habeas corpus*—in finding the death penalty constitutional in 1976 (*Jurek v. Texas* 1976: 276; *Whitmore v. Arkansas*, Marshall, J., dissenting). Even in Texas, the value of appeals should not be wholly discounted. Since the return of the death penalty in 1977, only 44% of those sentenced to death in Texas have been executed, with almost 22% winning reversals or commutations (Snell 2011).

[3] In Oregon in 2010, 59 patients died as a result of ingesting lethal physician-prescribed medications; six patients died after ingesting medications prescribed prior to 2010 (Oregon Public Health Division 2011). In Washington in 2010, 51 patients were reported to have died as a result of ingesting lethal physician-prescribed medications (Washington Department of Health 2011).

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A few judges in this study expressed their concern with bypassing appeals. One judge said:

> This is a very unusual situation, it is for me, for the system that we operate under. To me it is just—to me it is just not normal that you want to do what you want to do. It is almost like assisting you in a suicide, because you want to represent yourself on a case of this type." (*Gonzales* RR 2: 40)[4]

Another judge refused to permit a prisoner to waive his appeals even though he had found him competent to do so:

> [I]t would be my statement on the record that before any man is executed out of this court, that my conduct, as well as counsel's conduct and the jury's conduct be thoroughly examined from every angle whatsoever, regardless of any request by a defendant to be put to death. (*Hayes*, July 6, 2000 hearing at 20–21)

Permitting a prisoner to sidestep this process runs contrary to this foundational belief in the importance of appeals.

Finally, embracing punishment is deviant. As Susan Schmeiser has argued, these prisoners challenge a core belief about the purpose of punishment: "Revenge . . . seems less sweet and justice less pure when punishment finds a willing recipient" (2011: 73). By inviting the death penalty, these prisoners threaten to "convert what passes for just punishment—and the rational adjudication that undergirds it—into a damning theater of self-immolation" (2011: 76).

As noted, under *Rumbaugh*, even apparent suicidality is no legal bar to expediting execution. The low legal standard for establishing competence therefore invites inquiry into purposes of the more elaborate explanations presented in many of these cases. I argue below that the volunteer narratives, in conjunction with the legal system, distance the prisoner's request from these concerns.

Volunteer Accounts

Sociologists have long observed that people explain deviant behavior by "align[ing] their behavior with culturally acceptable

[4] Gonzales had made clear that he sought to represent himself in order to get the death penalty and waive appeals. Citations to the transcript or "Reporter's Record" are noted "RR," followed by the volume number. The Clerk's Record is referred to as "CR." "Supp. CR" and "11.071 CR" refer to Clerk's Records for post-trial proceedings. The state court appellate and postconviction records in each case are filed together in the Texas State Library and Archives Commission. Most of the files are part of the Court of Criminal Execution Case Files at the Texas State Archives, 1974–2010 or the Court of Criminal Appeals "Case files" series, part III, file numbers 49720–70736, 1975–1988, Archives and Information Services Division, Texas State Library and Archives Commission. A few case files were at the Texas Court of Criminal Appeals when I reviewed them, but they have reportedly been transferred to the State Archives.

language to restore order and interaction" (Orbuch 1997: 463). Whether described as "vocabularies of motive" (Mills 1940), "narratives," or "accounts" (Orbuch 1997),[5] they are designed to "display[] the reasonableness, rationality, and legality of the business at hand" (Holstein 1993: 35). Accounts reflect normative structures of the social setting and the audience (Mills 1940; Scott and Lyman 1968; Sykes and Matza 1957), and are most persuasive when they incorporate prevailing normative frameworks (Orbuch 1997).

Certainly the death penalty specifically, and penality generally, are embedded within larger normative systems. Christian beliefs, for example, have been intertwined with the death penalty since the American colonial era. Executions are seen as a catalyst for the prisoner's religious renewal and redemption (Banner 2002; Mason 2006). The recent ascendance of retributive punishment policies meant a return to older ideas of law-breakers as evil, rational, and exercising free will unconstrained by a broader social context (LaChance 2007: 703–704; Garland 2001: 184). American penality is also suffused with popular desires for suffering by lawbreakers. Because they are fundamentally bad people, they deserve harsh punishment, and the popular legitimacy of the death penalty relies heavily on this strain of retributive animus (LaChance 2007: 703–704; Sarat 2001). Particularly in Texas, the death penalty is seen as a legitimate and desirable punishment for murderers (Vollum et al. 2004).

While constitutionally important, appeals by death-sentenced prisoners are often portrayed as frivolous and manipulative (Amsterdam 1999 (analyzing language Supreme Court uses to denigrate and dismiss death row appeals); Wallace 2006: 728 n.222 (Congressional criticism of capital appeals); Alper 2011: 881 n.83 (media criticism of capital appeals)). At the same time, the American death penalty is also informed by larger cultural and legal narratives of due process, rights, autonomy, and the sanctity of the individual (Garland 2010).

Based on the sociological research, one would expect prisoners' death-seeking narratives to use a "vocabulary of motives" to reduce their perceived deviance. Narratives expressing an acceptance of the death penalty grounded in one (or more) stock penal scripts, and/or invoking a right to choose that punishment could accomplish that task.

Narratives not only reflect cultural norms and hegemonic beliefs, but they are also constructed by social processes that can

[5] Orbuch explains that while theoretically narratives and accounts differ in some ways, "the distinct meanings of these two concepts are often difficult to disentangle" (1997: 467–468). I use the two words interchangeably.

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"conceal the social organization of their production and plausibility" (Ewick and Silbey 2005: 214). In other words, the legal process constructs narratives by creating and following rules that privilege certain narratives and obscure others. Ewick and Silbey cite the Supreme Court's 1987 decision in *McCleskey v. Kemp* as an example. In that case, the Court refused to connect the individual case with broader social patterns when it rejected a statistical study of racial disparities in the administration of Georgia death penalty. It instead focused on a narrative of whether the prosecutor or jury had engaged in racial discrimination. The Court then demanded evidence of the jurors' thought processes that, by legal rule, are specifically shielded from judicial review. Therefore, legal claims about racist prosecution of the death penalty could thereafter only prevail if they mustered evidence about an individual prosecutor's racist conduct in the case at bar. The fact that statistical evidence demonstrated the importance of race in determining who was sentenced to death in a particular jurisdiction did not matter because the legal rules deemed that information irrelevant. This transforms the legal story of racism and the death penalty. The organization of the legal process thereby produces a certain kind of story that becomes taken for granted (1995: 215, 217).

Based on Ewick and Silbey's insight, this article analyzes the prisoners' narratives, as well as the ways in which the legal system relies on rules and practices that promote the plausibility of the prisoners' narratives by concealing other information. Whereas Ewick and Silbey accomplished this through a kind of "top down" approach—that is, they showed how a high court decision can organize the social reality of a death penalty case by deciding what evidence counts—this article instead adopts a "bottom up" inquiry, exploring how the combination of cultural beliefs, legal rules, and forensic practices also contribute to court narratives.

Method

To obtain these accounts, this study used court documents related to the waiver process, including letters to the court, hearings and expert competency evaluations. In these documents, volunteers are generally required to explain their decisions; they speak directly to the court, unfiltered by their attorneys; and their accounts are purposeful, namely to convince the court to grant their request.

To identify the population of Texas volunteers, I searched the Death Penalty Information Center (DPIC) Execution Database (http://deathpenaltyinfo.org/executions) for prisoners executed by the State of Texas whom DPIC coded as volunteers. DPIC codes

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as volunteers those prisoners who waive available legal appeals. It excludes, therefore, prisoners who pursue legal remedies, but do not seek clemency. It also excludes those prisoners who abandoned their appeals at one point, but then changed their minds, regardless of whether the courts permitted them to resume their appeals (Vandiver et al. 2008). I then reviewed court files and consulted with longtime Texas death penalty attorneys to confirm these individuals met my criteria for execution volunteers, namely that they had taken steps to abandon an opportunity to pursue legal appeals conventionally taken by death row prisoners.[6] I included one individual excluded by DPIC because he tried (unsuccessfully) to reinstate his appeals. Because this prisoner, Danielle Simpson, persuaded a judge to allow him to drop his appeals, I considered his account relevant and appropriate to include.[7] Through professional networks and media searches, I also identified four other prisoners (Robert Anderson, Richard Foster, Michael Rodriguez, and Robert Streetman) who abandoned their appeals, but were not listed as volunteers in the DPIC execution database.

At the time I conducted the research for this study, I concluded 31 prisoners had been executed by the State of Texas after abandoning their appeals. I reviewed all court files on these prisoners that I could obtain through the Texas State Archives and the Texas Court of Criminal Appeals (TCCA). Where I had reason to believe these files did not reflect all the litigation surrounding the waiver, I examined files maintained by the trial court and accessible to me, but I did not review all trial court records in each case. My access to federal court files was considerably more limited because of the relative inaccessibility in the federal archives.[8] For federal court proceedings, I either obtained from counsel transcripts of the federal court hearing or reviewed the court orders disposing of the prisoners' request.

[6] Using these criteria, I eliminated one prisoner listed by DPIC. This man declined only the opportunity to pursue a second round of post-conviction appeals not routinely advanced by Texas death-sentenced prisoners. Indeed, most Texas prisoners do not have counsel at this stage as counsel will generally not be appointed by any court. Therefore, the considerations for forfeiting that opportunity likely vary considerably and, most importantly for this project, would not be reflected in any court record. Since prisoners are generally not entitled to proceed in successor litigation, they need to explain why they should be able to proceed at all, not why they should be allowed to halt these appeals.

[7] Not included in this study are death-sentenced prisoners who waived appeals and then managed to resume them in part (usually with dramatically limited legal claims). Systematically identifying this population through legal research databases is challenging, if not impossible, as the forfeited stage of review may not be explicitly noted in any opinion or order submitted to electronic legal research databases.

[8] Fortunately for this project, the overwhelming majority of these prisoners (25 out of 31) sought to hasten their executions while in state court.

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Including court correspondence, statements in the trial record, court orders, and/or hearings on waivers,[9] I obtained 20 accounts from the 31 volunteer files.[10] I took extensive, generally verbatim, notes of the letters, transcripts and/or orders in the court files. In this review, several distinct themes (often co-occurring) emerged in the prisoners' explanations for their desire to drop their appeals. Based on these observations and interpretations, I created a set of categories. After reviewing all the accounts multiple times, I used Atlas.ti to code them, and then recoded them as I refined the categories (Creswell 2003; Esterberg 2002). I returned repeatedly to these accounts over an extended period of time in revising this article and in connection with a larger project of which this is part. While I did not have the benefit of another coder, reviewing these accounts with fresh eyes and with the benefit of new extra-judicial information repeatedly tested the appropriateness of the categories and the assignment of certain accounts in particular categories.

Findings

Contents of Accounts

Of those 20 volunteers for whom I found court accounts for their decisions, I identified four commonly recurring themes. Twelve said their execution was fair and appropriate for their crime. Another twelve (and one by inference) sought execution because death was preferable to continued life on death row. Ten framed their decision as an assertion of their rights. Eight cited religious beliefs.

Death Penalty as a Fairly Imposed and/or Appropriate Punishment

Twelve volunteers endorsed capital punishment as a correct punishment, whether for legal or moral reasons (and often both). Texas's first volunteer—Stephen Morin—stated simply: "I've been convicted. I accepted the Court's ruling on that, and I ask the Court

[9] Hearings in state court specifically on the waiver did not occur with regularity with prisoners sentenced prior to 1995, when a new state post-conviction statute mandated hearings on waiver of counsel for post-conviction proceedings (Texas Code of Criminal Procedure Ann. 11.071 §2(a)).

[10] These prisoners were Robert Atworth; Richard Beavers; Richard Foster; Aaron Foust; Joe Gonzales, Jr.; Larry Hayes; Ynobe Matthews; Alexander Martinez; David Martinez; Steven Morin; James Porter; Steven Renfro; Michael Rodriguez; Charles Rumbaugh; Danielle Simpson; James Smith; Richard Smith; Benjamin Stone; Christopher Swift; and Charles Tuttle. Although the state courts refused to permit Larry Hayes to waive his appeals (*see supra*), I included him in this study because the trial court found him mentally competent in making a knowing, intelligent, and voluntary waiver of his appeals.

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to proceed."[11] Benjamin Stone wrote: "I am satisfied with my sentence and find no error in my trial. Therefore, I am requesting that the Death Warrant be issued in order for the sentence to be carried out."[12] Richard Beavers stated simply: "I have a debt to pay and I'm ready to pay it."[13] Alexander Martinez emphasized the link between dropping his legal appeals and taking moral responsibility for his offense in asking the trial court to "help me in moving my appeals faster so that justice may be served fully to its extent. I am not retarded and eccept [sic] my punishment as given."[14] None told the court, as Charles Rumbaugh wrote just prior to execution: "Just as the State of Texas has indicted me for the offense of Capital Murder, so do I indict each and every adult citizen of the State of Texas for the premeditated murders of nine men thus far, and further, for conspiring to murder over 200 others who are now incarcerated under sentence of death" (Crawford 2006: appendix I).

In addition to those who explicitly connected their executions with their crimes, some prisoners asserted they would pose a future danger—a criteria for sentencing an individual to death in Texas (Texas Code of Criminal Procedure Ann. 37.071)—if not executed. Two told the jury they would be violent in prison,[15] and another communicated his dangerousnessness during his competency evaluation.[16] While not directly stating that the death penalty is an appropriate punishment, these assertions implicitly endorse one of its fundamental premises.

None asserted innocence in court,[17] and 11 stated they were guilty.

[11] *State v. Morin*, AP-69,028 (Tex. Crim. App.), RR 25:3.

[12] *State v. Stone*, AP-72,405 (Tex. Crim. App.), Oct. 10, 1996 letter to TCCA.

[13] *Ex parte* Beavers, No. 465138 (Harris County), March 2, 1994 hearing at 13.

[14] *Ex parte* Alexander Martinez, WR-61844-01 (Tex. Crim. App.), Aug. 10, 2004 hearing, Exh. 2 at 3.

[15] *State v. Gonzales*, AP-72,253 (Tex. Crim. App.), RR 7:230-31; *State v. Renfro*, AP-72,794 (Tex. Crim. App.), RR 28:3671.

[16] *Ex parte* Alexander Martinez, WR-61844-01 (Tex. Crim. App.), Aug 10, 2004 hearing, Exh. 2 at 5.

[17] Because I have only the court's order and not the hearing transcript, I did not count Richard Foster in this category. In his waiver hearing, however, Richard Foster apparently stated that he had not committed the murder intentionally, making his offense a non-capital murder (Texas Penal Code Ann. §§19.02, 19.03). The court notably emphasized the fact of his admission, however, rather than his legal innocence: "Before this court and in this hearing, Foster, apparently for the first time, admitted that he had committed the crime, claiming only that the taking of the decedent's life during the commission of the robbery was not intentional" (*Foster v. Johnson*, 4:92–CV–00615–Y (N.D. Tex.), March 14, 2000 Order at 3). James Smith asserted variously that he was guilty and not guilty during his trial, but during his successful effort to expedite his execution, Smith did not speak of his guilt or innocence. By contrast, in his final statement, Smith stated he was innocent (Crawford 2006: appendix I).

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Volunteers also generally, but not always, refrained from criticizing the legitimacy of the death penalty appeals process.[18] Those few prisoners who referred to their lawyers generally expressed their appreciation or emphasized that their decision to waive appeals was unrelated to dissatisfaction with their lawyer.[19] Where the record reflects a few prisoners making statements about the pointlessness of appeals, they generally discussed this only with the mental health evaluator (Tuttle, J. Smith, and A. Martinez), and one lawyer put it in a pleading (D. Martinez). Another prisoner (Simpson) emphasized in his live testimony that futility was not the primary reason for his desire to waive appeals; he simply did not want to continue living on death row while on appeal. By contrast, in addition to the 11 who asserted they were guilty, four described their trials as fair. Another four asserted further appeals would waste taxpayer money. Hayes and Tuttle emphasized the victims' survivors need for closure, and Swift reminded the court that the victims' survivors had expressed at trial their desire that he receive the death penalty.[20]

Death Was Better than Continued Life on Death Row

One prisoner, Richard Smith, sought to abandon his appeal after receiving a diagnosis of terminal kidney cancer. Another 12 prisoners said they simply could not "do time" or found death row particularly difficult. Life on death row is hard without a doubt (Arriens 2005; Jackson and Christian 1980). James Smith described conditions as "subhuman."[21] Another complained about the tedium

[18] James Smith explained he "did not want to be involved in what I perceive to be a farce and a sham of the appellate procedure," which "only works to accumulate lots of money for the state from the people . . . it's obscene . . . it's done by the courts and the legislatures at the expense of the inmate who is subjected to sub-human conditions . . . it's physical and psychological abuse" (*State v. Smith*, No. 375813-A (Harris Cty, Tex.), May 18, 1990 competency evaluation). Swift speculated that the trial judge wanted him to appeals because "death penalty appeals may provide greater pay than normal cases" (State v. Swift, AP-75,186 (Tex. Crim. App.), Swift letter to CCA, July 30, 2005 at 3). Danielle Simpson complained that "the way the appeals process is . . . there is really no such thing as the law because the way I see it, they're going to do what they want to do regardless" (*Simpson v. Quarterman*, No. 1:04CV485 (E.D. Tex.), June 9, 2009 hearing at 31–32). Perhaps predictably, none of these three is included in the "death penalty as a fairly imposed and/or appropriate punishment" category.

[19] *State v. Gonzales*, AP-72,253 (Tex. Crim. App.), *pro se* appellate brief at 4; *Ex parte* Tuttle, WR-36,793-01 (Tex. Crim. App.), Dec. 1997 letter to trial court; *Ex parte* Atworth, WR-42,070-01 (Tex. Crim. App.), CR 46–47.

[20] *State v. Hayes*, AP-73,830 (Tex. Crim. App.), July 6, 2000 hearing at 7; *Ex parte* Tuttle, WR-36,793-01 (Tex. Crim. App.), Dec. 22, 1997, S-CR 6; *State v. Swift*, AP-75,186 (Tex. Crim. App.), Feb. 2, 2006 hearing at 19.

[21] Supra at n.17.

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of death row, but also stressed "how frightful and 'hazardous' his condition is while he has been in TDC. . . . [H]e is fearful of bodily harm on a daily basis."[22]

Danielle Simpson wrote the Fifth Circuit:

> "Kill Me".!!
>
> . . .
>
> [B]eing locked up in a [sic] isolated solitary cell of confinement 23 and 24 hours per day isn't justice nor is it considered living—its [sic] cruel and unjust, therefore I'm really looking forward to my execution because its just "me against the world."[23]

More commonly, prisoners ($N = 12$) echoed Foust's complaint that life in prison is not a life: "I am just ready to hurry things along, you know. Prison is not really the place to live. It's not like living out in the world, you know. It's not really a life, and that's my sentence, so I am ready to speed it up."[24]

Assertions of Rights and Autonomy

These emerged in ten narratives. Stephen Morin "demand[ed]" an execution date.[25] Steven Renfro told the court and jury that he believed he should have the choice between life in prison or death.[26] More commonly, however, these prisoners invoked their real or imagined legal rights. For example, Aaron Foust wrote, "sir, I do believe it my right to die as soon as possible."[27] Benjamin Stone asserted: "I see no reason for not being allowed to represent myself on this or any other matter on my own behalf under my Sixth Amendment right."[28]

One mental health evaluator drew on conventional notions of criminality in explicitly ascribing this reasoning to one volunteer:

> In some bizarre way, consistent with his life-long, maladaptive, sociopathic behavior, he has chosen to die prematurely because, in this examiner's opinion, in all medical probability, it is the only

[22] *Ex parte* Tuttle, WR-36,793-01 (Tex. Crim. App.), at S-CR 9.

[23] *Simpson v. Quarterman*, 291 Fed. Appx. 622, 2008 WL 4155104 (5th Cir. 2009) (unpub'd) at 2, 4.

[24] *State v. Foust*, AP-73,130 (Tex. Crim. App.), July 16, 1998 hearing at 4.

[25] *State v. Morin*, AP-69,028 (Tex. Crim. App.), Nov. 10, 1983 letter to trial court.

[26] *State v. Stone*, AP-72,405 (Tex. Crim. App.), RR 28:3664.

[27] *State v. Stone*, AP-72,405 (Tex. Crim. App.), Letter to trial court, filed June 10, 1998.

[28] *State v. Stone*, AP-72,405 (Tex. Crim. App.), Oct. 10, 1996 and Jan. 11, 1997 letters to TCCA.

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> thing that he can control now that will render the efforts of his counsel and the legal system ineffective and futile.[29]

These claims for authority and autonomy were much more common in correspondence with the court, rather than in face-to-face hearings. Consciously or not, the prisoners may have recognized that in seeking the sovereign's permission, they were better off acceding to its power rather than insisting that the court recognize that they have rights and claims requiring respect and accommodation. James Scott Porter, for example, who sent unusually abusive, coarse, and threatening letters to the TCCA demanding to halt his appeals, ultimately failed in waiving his appeal in that court. The TCCA instead simply affirmed his conviction and death sentence after considering the appellate briefs filed by his lawyers, making no comment or ruling on Porter's right to waive those appeals.[30]

Christian Beliefs

Eight of the volunteer accounts cited religious beliefs, with six incorporating Christian beliefs regarding spiritual rebirth, the divine forgiveness flowing from that experience, and heaven.[31] Charles Tuttle "state[d] that he is a Christian and he has found peace with his belief in the hereafter and sees that as his only reasonable and logical way out and wants to accelerate that time frame."[32] Porter explained to the federal district court: "my salvation, God, is more important than this physical body."[33]

Beliefs about heaven made prison life even more unappealing.[34] Christopher Swift saw his death as a way to reunite with his victims (his wife and mother-in-law). Further, the afterlife had to be better than his current existence, which he "emphasized [as]

[29] *Ex parte* Alexander Martinez, WR-61844-01 (Tex. Crim. App.), Aug 10, 2004 hearing, Exh. 2 at 5.

[30] This outcome resonates with Schmeiser's observation that "volunteers" "may not evince the sort of narcissism that threatens to usurp legal prerogative, but must demonstrate an autonomy that recognizes and properly internalizes law's authority. A volunteer who flouts legal authority ceases to be a proper executable subject, so adjudicative processes must reaffirm law's dominion over death" (2011: 103). Porter met with greater success in federal district court where he was permitted to waive his appeals after a hearing at which he explained his desire for execution was a product of this religious beliefs (*Porter v. Dretke*, No. 1:03-CR-448 (E.D. Tex.), Jan. 30, 2004 hearing).

[31] Ynobe Matthews's religious affiliation was not clear from the court documents. James Smith was reportedly a Hare Krishna.

[32] *Ex parte* Tuttle, WR-36,793-01 (Tex. Crim. App.), at Supp. CR 6.

[33] *Porter v. Dretke*, No. 1:03-CV-448 (E.D. Tex.), Jan. 30, 2004 hearing at 28–29.

[34] *Simpson v. Quarterman*, No. 1:04-CV-485 (E.D. Tex.), June 9, 2009 hearing at 18–19.

plagued by dissatisfaction and turmoil."[35] Swift also anticipated that heaven would deliver him from the pains of his schizophrenia.[36] Perhaps less confident in his destination after death, Ynobe Matthews framed his desire to drop his appeals as part of his spiritual evolution and resulting desire to turn his fate over to divine authority: "I believe I done come to grips with my religion and with God, and I think that I'll just let me and him deal with this now."[37]

The Process Generating These Accounts

While volunteers plainly hew to certain conventional narratives, Ewick and Silbey remind us to look more broadly at how the legal system structures the production of these accounts. As described below, these prisoners' accounts emerge from a legal process that minimized conflict, and even inquiry, into deviance-increasing narratives.

Assessments of Mental Functioning Were Subjective, Truncated, and Minimized Mental Dysfunction or Distress

By the time the volunteer appeared before the court to waive his appeals, he had been tried, convicted and sentenced. Embedded within each step were explicit or implicit jury findings of sanity at the time of the crime, and at least for cases tried after 1991,[38] of no evidence of mental dysfunction sufficient to persuade the jury to impose a sentence less than death. Further, due process prohibits trying criminal defendants while they are mentally incompetent, and the court has an independent responsibility to inquire if it has bona fide doubt as to the defendant's competence, even if the criminal trial is underway (*Medina v. California* 1992; *Drope v. Missouri* 1975; *Pate v. Robinson* 1966).

The judge considering the prisoner's request is usually the same judge who presided over the trial, and while the cumulative momentum of those determinations may not be expressed, the trial

[35] *State v. Swift*, AP-75,186 (Tex. Crim. App.), Supp. CR 39.

[36] *State v. Swift*, AP-75,186 (Tex. Crim. App.), July 30, 2005 letter to TCCA at 3.

[37] *Ex parte* Matthews, WR-56,143-01 (Tex. Crim. App.), 11.071 CR 162.

[38] Prior to 1991, Texas juries were generally instructed to answer only two questions on capital sentencing, one asking whether the defendant's homicidal conduct had been committed "deliberately," the second asking whether the defendant would likely be a danger in the future. The special issues were modified in 1991; the deliberateness question was removed, and a new question was added to enable juries to consider broadly evidence that mitigated the defendant's moral culpability (*Abdul-Kabir v. Quarterman* 2007; Texas Code of Criminal Procedure Ann. 37.071).

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judges in these cases freely drew on their observations of the prisoner during the trial in concluding the waivers met the legal standards.[39]

In some cases, no mental health expert was consulted. Two prisoners were simply asked by the judge whether they had a history of mental illness.[40] Where mental health evaluations were conducted, only three used a standardized competency assessment tool.[41] Instead, they relied heavily on interviews with the prisoner, including for the prisoner's mental health history. In addition to the significant stigma of mental illness, volunteers know that perceived mental competence is essential for them to waive their appeals. In his December 1997 letter to TCCA, Tuttle wrote, "Moreover, I am competent to make this decision, as I am sure the trial authorities will recognize." Hayes wrote, "I understand psycological [sic] testing will be required before this can be done and I am ready and willing for this to be done any time."[42] The prisoners, therefore, have ample reason to understate any history of mental dysfunction.

Christopher Swift, whom a court-appointed psychiatrist had previously found insane at the time of the crime,[43] was the sole source of information for his mental health assessment at the time he sought to waive his appeals. Swift acknowledged his schizophrenia, but emphasized that he was much better than he was at trial when he was beset by auditory hallucinations. The hallucinations "don't lead me to hurt myself or others" and the "voices are significantly less intense, frequent and meaningful."[44] After his evaluation, he wrote a frantic letter to the TCCA, explaining that he "had been manipulated into giving an interview which could potentially destroy my chances of foregoing an appeal(s)."[45] At the subsequent hearing on his competency, he clarified: "At the time of my examination with Dr. Martinez I believe six or more months ago, I confessed that to a small degree I still heard strange voices although these voices did not dictate my actions. Since that time and thanks be to God and my Christian friends

[39] *State v. Ricky Wayne Smith*, AP-41,742 (Tex. Crim. App.), May 14, 1999 hearing at 3; *Ex parte* Tuttle, WR-36,793-01 (Tex. Crim. App.), Dec. 12, 1997 hearing at 7, 60.

[40] *State v. Foust*, AP-73,130 (Tex. Crim. App.), July 16, 1998 hearing at 6; *Ex parte* Matthews, WR-56,143-01 (Tex. Crim. App.), Sept. 17, 2002 hearing at 165–166.

[41] *Ex parte* Atworth, WR-42,070-01 (Tex. Crim. App.), 11.071 CR 44; *Porter v. Dretke*, No. 1:03-CV-448 (E.D. Tex.), Nov. 3, 2003 Scarano Report; *State v. Swift*, AP-75,186 (Tex. Crim. App.), S-CR 37.

[42] *State v. Hayes*, AP-73,830 (Tex. Crim. App.), July 5, 2000 letter to TCCA.

[43] *State v. Swift*, AP-75,186 (Tex. Crim. App.), CR 165.

[44] *State v. Swift*, AP-75,186 (Tex. Crim. App.), Supp. CR 40.

[45] *State v. Swift*, AP-75,186 (Tex. Crim. App.), Supp. CR 63.

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who have encouraged me so, I have been freed completely from these voices."[46]

Joe Gonzales, Jr. described his previous experience with psychiatric treatment as undertaken solely to appease his fiancée, with headaches as the only lingering sequelae to a month-long coma he experienced after a car accident.[47] These assertions were never explored beyond Gonzales's representations.[48] In Danielle Simpson's case, the examining psychiatrist never corroborated Simpson's claim that he was given Thorazine, a powerful antipsychotic sometimes used to control schizophrenia and mania, only as a sleep aide (National Library of Medicine 2011; June 3, 2009 Price report). Alexander Martinez forbad an examiner from contacting any of his intimates, and the examiner complied.[49] Not only were the mental health evaluations based primarily (and sometimes solely) on the information the prisoner sought to present during the interview, but some examiners also failed to consider readily available information from other times in the prisoner's life, such as mental health evidence presented at trial. One evaluator, for example, reflected no awareness of psychological evidence presented at trial regarding a prisoner's brain impairment, history of head trauma and very serious drug abuse, as well as his history of depression, anxiety, guilt internalization, fear, and distress.[50]

These examples contrast sharply with a federal court hearing in Arizona in which a psychiatrist spent over 50 hours over a 11 month span in "in depth, broad range, and comprehensive sessions with [the Arizona volunteer] revealing his life, his mental status, observing and assessing his ability to process information, looking at his mood and . . . the modulation of his mood in response to various situations that arouse, looking for consistency and symptoms or behaviors over time"; interviewed personally "a number of people directly who would have had the short and long-term opportunity to review [the prisoner's] mental status"; and used contrary opinions of another psychiatrist to test and review her own professional opinion (*Comer v. Stewart* 2002: 1040, 1053).

The anguish of incarceration and life under a death sentence is also understated, even by the prisoners. While a few prisoners were

[46] *State v. Swift*, AP-75,186 (Tex. Crim. App.), Feb. 2, 2006 hearing at 19.

[47] *State v. Gonzales*, AP-72,253 (Tex. Crim. App), CR 47.

[48] *State v. Gonzales*, AP-72,253 (Tex. Crim. App), CR 46, 50.

[49] *Ex parte* Alexander Martinez, WR-61844-01 (Tex. Crim. App.), Aug. 10, 2004 hearing, Exh. 2 at 1 ("Mr. Martinez refused to allow this examiner to contact individuals who were familiar with him or his current situation. After reviewing his records and evaluating him on two occasions, this examiner decided to comply with his demands.").

[50] *State v. Tuttle*, AP-72,387 (Tex. Crim. App) at RR 42:188-91. The evaluator's report was based on a two-hour interview with Tuttle and a letter Tuttle wrote to the court seeking to waive appeals (*Ex parte* Tuttle, WR-36,793-01 (Tex. Crim. App.), Supp. CR 4:1)).

somewhat plaintive, most offered the court only thin descriptions of what made life in prison unbearable. They did not present accounts of suffering designed to evoke compassion, a common narrative in the context of physician-assisted suicide (Hillyard and Dombrink 2001). Their accounts left undisturbed assumptions about how prison has to be. Suffering in prison has become normalized, and even desirable, within the highly retributive American penality (Cusac 2009; Ribet 2010). It is an "illegitimate" and deserved pain (Kenney and Slowey 2010). That death-sentenced prisoners require special—and especially oppressive—prison housing is all but unquestioned (Ferrier 2004). The pains of life in isolation confinement and under a death sentence have been documented (Arriens 2005; Johnson 1990; Oleson 2006). While recording the prisoners' distress in living on death row, however, the mental health evaluations of volunteers did not address the psychological and psychiatric consequences of living under a death sentence or on death row. Instead, this distress became part of the narrative of rational choice, rather than an exploration of the conditions that cause suffering.[51]

Conceptual Frameworks of Free Will

Texas courts relied on the standard language and conceptual framework of guilty pleas in determining the voluntariness of these waivers, even though courts have acknowledged the possibility that prison conditions could coerce a waiver (*Comer v. Stewart* 2000; *Groseclose ex rel. Harries v. Dutton* 1984; *Smith v. Armontrout* 1987). Judges simply asked the prisoner whether some individual forced the prisoner into his decision ("Based on Defendant's statements, **no one** has coerced or persuaded Defendant to make his request";[52] "All right, has **anyone** threatened you or forced you in any way to answer any of my questions that I have asked you today?"[53]). As Ewick and Silbey noted, legal narratives prefer situating the litigant as an autonomous actor, removed from broader social forces (1995: 217). These legal narratives about the voluntariness of the prisoners' decisions are no exception.

In addition, the way in which problematic prison conditions were presented in the course of the volunteers' legal process, the courts had no power to address what may be genuinely unconstitutionally cruel and unusual conditions of confinement. Not only was the legal vehicle incorrect—the prisoner, after all, was not filing suit to reform his prison conditions—but, because of legal ethical

[51] See *Ex parte* Atworth, WR-42,070-01, 11.071 CR 47; *Simpson v. Quarterman*, No. 1:04-CV-485 (E.D. Tex.), June 9, 2009 hearing at 26; Rumbaugh 1985: 401.

[52] *State v. Hayes*, AP-73,830 (Tex. Crim. App.), July 6, 2000 hearing at 9.

[53] *State v. Stone*, AP-72,405 (Tex. Crim. App.), June 19, 1996 hearing at 5–6.

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rules discussed below, the prisoner's counsel may have been reluctant to present to the court evidence about particularly painful or degrading prison conditions that would make the prisoner's decision look more like a statement of suicidal despair.

Non-adversarial Litigation

None of the successful Texas volunteers appears to have had an adversarial hearing in which, for example, counsel marshaled lay and expert witnesses to attack assertions that the prisoner was competent and waiving his rights knowingly, voluntarily and intelligently.[54] This may be attributable at least in part to legal ethics rules that ostensibly limit the lawyers' role, as well as a broader, less adversarial Texas legal culture.

The legal ethics of representing a volunteer are the subject of considerable debate within the legal academy (Mello 1999; Oleson 2006). This study found that, though they expressed discomfort in enabling their clients' execution, and many sought to dissuade their clients from waiving appeals, in practice lawyers generally saw themselves as bound by the client's wishes.[55] This reflects the most straightforward reading of the Texas legal ethics rules, which require lawyers to act as their client's agent, except where the lawyer is convinced of the mental incompetence of the client.[56] The Texas Disciplinary Rules of Professional Conduct require that, under most circumstances, "a lawyer shall abide by a client's decisions . . . concerning the objectives and general methods of representation" (Rule 1.02 (a) (1)). If the lawyer doubts the client's competence, she is instructed to seek the appointment of a guardian (Rule 1.02 (g)). If she does not do that, however, she is required to accede to the wishes of her client. The rules impose no requirement upon a lawyer to obtain any kind of mental health evaluation of the client before concluding the client is competent, nor that the

[54] In two cases (Swift and Rodriguez), counsel actively advocated against their clients' wishes in the course of the hearing on the waiver, but in both cases, counsel relied primarily on legal argument. Through cross-examination they challenged some evidence, but they presented no evidence or experts of their own. According to a press report, Stephen Morin's counsel sought a stay of execution to raise the issue of mental competency, but the trial judge, based on his observations of Morin, concluded Morin was mentally competent and refused a hearing (Crouse and Donahue 1985). Ramon Hernandez's trial counsel unsuccessfully sought a stay of execution as a "next friend." Hernandez's former counsel argued that Hernandez's waiver was based on a mistake of law, not mental incompetence (*Lovelace v. Lynaugh* 1987).

[55] *State v. Foust*, AP-73,130 (Tex. Crim. App.), Oct. 6, 1998 Ford letter to TCCA; *Ex parte* Tuttle, WR-36,793-01 (Tex. Crim. App.), Jan. 9, 1998 hearing at 7, 43–44.

[56] One possible way out of this ethical quandary would be for courts to appoint counsel to represent the prisoner in seeking to waive his appeals, as well as counsel to challenge the legality of the waiver (*State v. Ross* 2005; *Comer v. Stewart* 2002; *O'Rourke v. Endell* 1998; *Mason By and Through Marson v. Vasquez* 1993).

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lawyer demonstrate any proficiency in assessing the client's mental competence (State Bar of Texas 2010).[57]

Once counsel decides her responsibility is to advocate on behalf of the client's goal—here, execution—no evidence will be tested. She cannot, and the attorneys for the State may be reluctant or unprepared to do so. Further, the Disciplinary Rules restrict the information an attorney may disclose regarding her client (Rule 1.05). In Danielle Simpson's hearing, the State's attorney was the first to stumble upon the inconsistency between Simpson's courtroom testimony about his history of anxiety and depression medications and what he told the examining psychiatrist. (The State's lawyer promptly terminated this line of questioning.) As noted above, no one questioned Simpson's assertion that he was prescribed an antipsychotic solely to help him sleep. While all lawyers are bound by an ethical duty to act with "candor toward the tribunal," in the context of volunteers, that responsibility is met by "not knowingly . . . mak[ing] a false statement of material fact . . . to a tribunal . . . or offer[ing] or us[ing] evidence that the lawyer knows to be false" (Rule 3.03(a)). The lawyer only "knows" a fact is false if she has "actual knowledge of the fact in question" (Texas Disciplinary Rules of Professional Conduct "Terminology"). Without asking TDCJ physicians whether they had prescribed Thorazine for sleep—a fact apparently not in the client's interest—the lawyer may not have actual knowledge that this contention was false, and she may believe it is disloyal to the client to investigate.

Further, counsel's ethical confusion is situated within Texas' legal culture, which historically has neither promoted nor funded the kind of aggressive adversarial litigation more common in other states (Steiker and Steiker 2006; Texas Defender Service 2000, 2002). Some publicity has surrounded Texas death sentences that were upheld despite compelling evidence that the defense lawyers in those cases were asleep or addicted to drugs and alcohol during trial (Duggan 2000). These cases represent only particularly colorful instances of Texas' systematically casual attitude toward the capital legal process. As Steiker and Steiker (2006) outline, until 1995, death-sentenced prisoners were not appointed counsel to investigate and prosecute state habeas appeals, even as trial judges set execution dates to move the litigation along. After state law changed in 1995 to provide counsel, courts provided limited funds

[57] Just as I do not second-guess the courts' decisions in these individual cases, I do not question here any of these attorneys' assessments of their clients' ability to waive appeals, nor do I discount the difficulty of the decisions they confronted in dealing with a death-seeking client. That is not the focus of this article. Although it may be possible to establish a legal standard for waivers that safeguards both the prisoner's and the legal system's interests (Blume 2005), here I present the current legal framework, which is premised upon principles of an adversarial system, within which these attorneys act.

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to pay counsel and to fund investigation and consultations with experts. No mechanism exists to help prisoners whose court-appointed lawyers failed to provide competent representation. Courts—especially state courts—rarely order hearings at which they can observe witnesses and rule on their credibility before adjudicating disputed facts. The lower courts generally decide the case based on the documents submitted by counsel, and rule on the case by adopting verbatim a proposed order drafted by the State's lawyers. The reviewing court usually issues a one-page order adopting the lower court's order without comment. Prisoners' lawyers almost never present oral argument during the state habeas process, and on direct appeal, where the reviewing court sets a date and time for oral argument, the prisoners' lawyers are permitted to—and sometimes do—waive their opportunity to present their arguments to the court and answer the court's questions (Steiker and Steiker 2006: 1880–1889). Some Texas condemned prisoners have more extended legal proceedings through some combination of aggressive defense counsel, less aggressive prosecutors, thoughtful (or slow to act) judges, and luck. However, as Steiker and Steiker observe:

> [T]he legal process that follows the return of a death sentence is far more likely to be nasty, brutish, and short. Counsel are less likely to file substantial briefs; reviewing courts are less likely to hold hearings; and the entire process moves much more quickly, often expedited by the early setting of execution dates. (2006:1915 (footnotes omitted))

Certainly in the volunteer cases, the prisoners' lawyers do not *appear* to have interrogated the complexities and limits of their ethical responsibility toward their clients. The court records do not reflect motions for appointment of unconflicted counsel. Similarly, the court records do not contain motions for the appointment of their own mental health expert to advise counsel, and instead the only experts involved in the case reported to the court. The general failure to contest the assessments of the court-appointed mental health professionals (with, e.g., experts or lay witnesses of their own) may stem from their interpretation of their duty to their clients, to evaluations and consultations that were never made part of the court record, or simply the low standard for legal competency. However, in light of the complete absence of any adversarial proceedings in any of the successful volunteer cases, it is impossible to discount the influence of this larger legal culture.

Judges also participate in and shape this legal culture. In *Beavers*, the prisoner's appointed counsel argued strenuously for production of Beavers' psychiatric records prior to determining his competency. In addition to denying the motion, the court treated

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the lawyer with impatience and irritation and enjoined him from any further contact with Beavers.[58] Another judge told a lawyer seeking a psychological assessment of her client's competency that he was not sure she was legally entitled to do so: "The Court is having problems finding that [the attorney] even has standing in bringing the Application for the Writ [raising the concern about competency] in that [the volunteer] has made statements quite contrary to the matters raised in the Application for the Writ."[59] While the court records do not reflect, e.g., counsel's motions for their own expert, judges may have discouraged counsel off-the-record from filing these motions by communicating that any motions for funds to retain experts would be denied.[60]

Given the fact that legal competency is seen as a low legal standard, one could argue that the lack of an adversarial culture is inconsequential—that is, a judge likely would have inevitably found the defendant competent to waive even with an adversarial process. However, a review of one outlier case—the only Texas case I have found in which the prisoner was found incompetent to waive his appeals—gives a glimpse of what can emerge in a genuinely adversarial process. In this singular case, counternarratives highlighting the social deviance of the request, rather than its normative conformity, emerged from hearing more information about the prisoner and persuaded the judge to deny his request.

In *Cockrum*, the prisoner's lawyers opposed the prisoner's efforts to drop his appeals and relied on conventional adversarial litigation techniques to overturn the conventional account (In re Cockrum 1994).[61] Cockrum expressed several reasons for wanting to waive his appeals, including some commonly cited by successful volunteers. He believed in capital punishment; his trial and appeals were fair; any further litigation was for delay and not reversal; continuing his appeal would be frivolous and harmful to those death row prisoners with meritorious claims; and continuing his frivolous appeal was a waste of public funds (1994: 488). Crucially (and enabled by Cockrum's lawyers' evidence and advocacy), the court did not simply take Cockrum's explanations at face value. Instead it examined them critically, concluding, for example, that "[a]lthough it may be rational in certain circumstances for an

[58] *Ex parte* Beavers, No. 465138 (Harris Cty, Tex.), March 2, 1994 hearing.

[59] *Ex parte* Barney, No. 351487-A (Harris Cty, Tex.), March 11, 1986 hearing at 5.

[60] The Supreme Court in *Panetti v. Quarterman* (2007) criticized a Texas trial court for considering only evidence from experts it appointed and for failing to appoint mental health experts to assist a habeas petitioner who, according to his counsel, was incompetent to be executed.

[61] Perhaps significantly, attorneys associated with a specialized death penalty defense organization were "heavily involved" in the litigation of this case (personal communication with subsequent counsel for Cockrum, Mandy Welch (9/9/11)).

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individual to conclude, based on his own acts and culpability, that he deserves the death penalty, the evidence demonstrates that the applicant has a different reason for wanting to die" (1994: 492). Through their own experts and evidence, Cockrum's lawyers created an alternate narrative that highlighted distress and suicidality. Where the court-appointed mental health experts had ruled out post-traumatic stress disorder (PTSD), in court, they agreed that Cockrum had been exposed to stressors that could have led to PTSD, namely the circumstances of his father's death, his violent victimization in childhood, and (in marked contrast to the other volunteer cases) his time on death row (1994: 486 n.2). The PTSD frame enabled the judge to revise his understanding of Cockrum's courtroom manner as the product of PTSD's "restricted affect." Cockrum's efforts to circumscribe inquiry into his father's death were seen as symptomatic of his mental distress, and consistent with an effort to suppress evidence of his symptoms in the course of the competency evaluations (1994: 487).

Where the court-appointed experts found no suicidal thoughts, the court was persuaded by the experts presented by Cockrum's lawyers and their articulation of "a broader range of self-destructive behavior, which [the psychiatrist] termed 'passive suicide,' and which they maintain has been life-long pattern for [Cockrum], continuing through his present desire to waive further review of his death sentence" (1994: 492). The federal district court opinion explicitly situated Cockrum's request to waive review within this larger framework: "The applicant's tragic personal history was universally viewed as critical to a determination of his current competency to waive further review" (1994: 484). The court described Cockrum's violent, abusive father, early use of illegal drugs, delinquent behavior, and identified a crucial turning point in Cockrum's life: when Cockrum shot his father during one of the father's abusive episodes. The father eventually died of his wounds, but told authorities that the shooting was an accident. Cockrum was never prosecuted, but in the court's view, this event weighed heavily on Cockrum in the years following, and led to his marital instability, escalating drug use, suicide attempts, and ultimately the drug-fueled murder that landed him on death row (1994: 485–486). Even though *Rumbaugh* makes clear that neither suicidal thoughts nor actions are necessarily contrary to legal competency, the court in *Cockrum* refused to find Cockrum competent to waive appeals.

Cockrum's case suggests aggressive, independent litigation could affect the narrative produced by the legal process. Certainly, a lawyer may not always be able to change the narrative, whether because she lacks resources to obtain expert assistance, because diligent investigation of the client's situation reveals no viable alternative explanation, or because the court simply does not want to

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hear one. Cockrum's case serves as an example, however, of the ways in which a non-adversarial legal process can obscure more complex volunteer narratives.

Discussion

This study found that "volunteers" most commonly used four themes to try to win permission to drop their appeals: the death penalty was a fairly imposed, appropriate punishment; the prisoners had a right to make this decision; death was better than continued life on death row; and Christian beliefs made them want to expedite their deaths. These accounts are grounded in narratives of the moral legitimacy of the death penalty. The system's success in convicting only the guilty spares the court from endorsing the notion that the appellate process was a meaningless and futile exercise for death-sentenced prisoners. Their embrace of the fairness and justness of their death sentences, particularly when combined with fundamentalist Christian beliefs, reaffirms deeply rooted ideas that some crimes deserve the death penalty and that the death penalty spurs spiritual redemption. The Christian narrative also helps mute concerns that the prisoner (rather than God perhaps) seeks to take away the power to punish from the courts. In addition, they "demonstrate[e] obeisance to law" because "the prisoner's desire is not for death *qua* death but for responsibility and recompense" (Schmeiser 2011: 75).

For a prisoner to voice the brutishness, pointlessness, and hopelessness of prison gratifies popular retributive preferences for prison life (Clear 1994; Garland 2001; Mason 2006). That the convict's incorporation of those aspects into his narrative could be persuasive to a judge (especially a popularly-elected state court judge) is unsurprising. Narratives that emphasize the pains of imprisonment safeguard a retributive return otherwise diminished by a consensual execution. At the same time, these prisoners' invocation of their legal rights and autonomy enables courts to frame volunteer requests as an opportunity to demonstrate a cultural commitment to the sanctity of the individual. Recognizing some fundamental autonomy of the condemned—while having formally denied him the right to live—is consistent with important cultural and legal imperatives, but is also somewhat unexpected in light of broader hegemonic ideas of the criminal and the efforts in capital trials to dehumanize the defendant and construct him as monstrous and fundamentally other (Garland 2010: 95–96; Haney 2005: 141–161).

This contradiction may explain some courts' efforts to transform the volunteer's identity. Some judges complimented the

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prisoners on their courtroom manner, intelligence, or articulateness, signaling that these are the "good" death row prisoners. One judge remarked that the letter the prisoner sent seeking to waive his appeals was "probably one of the most rational, concise, articulated expressions of opinion that a defendant has sent to the Court regarding his case that I've ever received. And I've been on the bench for thirteen years."[62] In at least two cases,[63] the judges deviated from well-established courtroom norms for adult litigants by referring to the prisoners repeatedly by their first names.[64] The judge in Beavers' case positioned himself as the condemned's protector, asking him whether he wanted the attorney enjoined from communicating with him.[65] (The attorney sought to delay the prisoner's execution date until documents pertaining to his mental competence could be obtained and reviewed.) Perhaps by demonstrating commitment to norms of accountability and/or religious faith, some of these prisoners overcame the fundamental otherness ascribed to them. By speaking their commitment to mainstream values, they promoted their claims to autonomy (Duff 2001: 76). At the same time, treating the condemned as childlike, vulnerable, and requiring the judge's protection against his attorney is in tension with granting only the adult and mentally healthy the privilege of autonomy.

Undergirding all these accounts are powerful narratives of rationality and free will. The prisoners' waivers must, after all, be mentally competent, knowing, and intelligent. Voluntariness is narrowly construed by separating the condemned from his environment. These legal rubrics square nicely with conventional views of criminals as calculating free actors and "reproduce[] the ideology of individualism" (Dunn and Kaplan 2009: 265). In affirming cultural constructions of the death-sentenced, these narratives help resolve anxieties about death-seeking and bypassing appeals in a death penalty case.

These accounts echoing stock penal stories are also noteworthy in what they do not do. Unlike Theodore Kaczynski (Mello 1999),

[62] *Ex parte* Tuttle, WR-36,793-01 (Tex. Crim. App.), Jan. 9, 1998 hearing at 7.

[63] *State v. Gonzales*, AP- 72,253 (Tex. Crim. App.) RR 2:12, RR 6: 2, 4, 5; *Ex parte Beavers*, No. 465138 (Harris Cty, Tex.), Aug. 3, 1993 hearing at 8, March 2, 1994 hearing at 16, 25–26.

[64] Judges have a duty to maintain courtroom decorum by treating participants with dignity and courtesy (Alfini et al. 2007: 3–1-3–46). This injunction is generally understood to require addressing participants by their last names. See, e.g., Travis County Courts at Law (2011: 19) ("The Judge, the attorneys, and other officers of the court will refer to and address other court officers and other participants in the proceedings respectfully and impersonally, as by using appropriate titles and surnames rather than first names."); Rozier E. Sanchez Judicial Education Center of New Mexico (2011: 7–1) ("Address all individuals by last name and appropriate titles in the public setting.").

[65] *Ex parte* Beavers, No. 465138 (Harris Cty, Tex.), March 2, 1994 hearing at 10.

these volunteers do not assert radical or subversive narratives. They do not, for example, claim they are prisoners trapped in a racist, rigged legal system that provides only notional due process and is incapable of truly administering justice. They do not say their anguish at their crime or their living conditions makes them want to kill themselves. Only two prisoners, Charles Tuttle and Michael Rodriguez, clearly expressed remorse at the time of the waiver.[66] Otherwise, only a few thin expressions of remorse made their way into the courtroom. Stephen Morin (for whom no competency hearing was apparently held) told the jury in closing argument at his trial, "I ask you to believe from the evidence that has been presented every penance is made or was made and there is a very deep remorse to what transpired." He then quoted Bible verses about God wiping away tears and eliminating "pain for the former things passed away."[67] The report on the mental health evaluation in Stone's case began with a description of why he sought to waive his appeals, citing his confession, continuous assertion of guilt, the fairness of his trial, his preference for death over life in prison, and not wanting to waste time on appeals. Finally, only on the last page (of three), under a section entitled "special preoccupations" that listed his annoyance with jail conditions, his problems with drinking, his pride that drinking never interfered with his work, and his experience with occasionally hearing things that others did not, did the report state without elaboration that Stone "felt terrible about killing his ex-wife and her daughter."[68]

Perhaps prisoners were afraid that expressing these feelings might make them appear driven to suicide because of guilt. Ben Stone responded to his attorney's request for a competency evaluation by saying, "I've already been given competency tests and stuff like that before trial to make sure I wasn't crazy. I know exactly what's going on. I'm not grief stricken. I'm not just doing this out of grief either."[69] In addition, the court inquiry surrounding the waiver could marginalize expressions of remorse because it is focused on other legal questions. At Danielle Simpson's waiver hearing, the mental health evaluator was asked whether Simpson had expressed remorse or a sense of responsibility. The evaluator responded, "Well, the issue of the purpose of the execution, the purpose of his punishment, did not come up. I didn't ask that; he didn't express that."[70]

[66] By contrast, at least three others expressed remorse in their final statements (Texas Department of Criminal Justice 2012).

[67] *State v. Morin*, AP-69,028 (Tex. Crim. App.), RR 23:133.

[68] *State v. Stone*, AP-72,405 (Tex. Crim. App.), Nov. 7, 1996 letter to court.

[69] *State v. Stone*, AP-72,405 (Tex. Crim. App.), Oct. 30, 1996 hearing at 9.

[70] *Simpson v. Quarterman*, No. 1:04-CV-485 (E.D. Tex.), June 9, 2009 hearing at 23.

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The legal proceedings systematically minimized evidence that increased the deviance of the desire to die, particularly by marginalizing the discovery of evidence that could be linked to suicidality. These data reveal that the legal system—at least in Texas—did not complicate the volunteer narratives, instead reinscribing hegemonic beliefs through a non-adversarial process. Truncated mental health inquiries disconnected the prisoner's decision from his broader social and psychological environment. Formal ethical rules mandating the lawyer's loyalty to his client's goals, as well as through a generally non-adversarial legal culture limited alternative narratives. As *Cockrum*—the case in which defense counsel successfully challenged their client's competency—makes clear, while *Rumbaugh* created a legal rule, it did not necessarily overcome normative anxiety about desires to hasten death.

In sum, the narratives studied here trade in ideas of the death penalty as fair, deserved, and for some, soul-saving. Prison is so tough that it breaks even these criminals. And these narratives are those of criminals—rational and calculating—rather than of vulnerable, traumatized, mentally impaired individuals. As scholars of the sociology of accounts have observed, these accounts incorporate prevailing normative frameworks. At the same time, the legal process, itself embedded within these normative frameworks, contributes to narratives about the necessity and appropriateness of the death penalty by making contradictory narratives harder to see. Studying accounts in this context offers a window on how legal structures organize how narratives are developed even before courts are called upon to rule on their merits.

Future Directions for Research

At least three other areas warrant further investigation. First, this study is obviously limited by its examination of a subpopulation within another subpopulation. It is further constrained by spotty data in some of the court files. While Texas offers a larger population of volunteers than any other state, its enthusiastic imposition, legal affirmance, and administration of the death penalty are also unusual even within the United States. Courts in other states have appointed counsel to advocate the position that the prisoner is incompetent (*Comer v. Stewart* 2002; *Mason By and Through Marson v. Vasquez* 1993; *O'Rourke v. Endell* 1998; *State v. Ross* 2005). It could be illuminating to see whether adversarial proceedings altered interpretations of the prisoner's account and the dynamics of persuasion (Orbuch 1997). In addition, some of the courts in states that have executed volunteers almost exclusively (such as Washington, Oregon, and Nevada)

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may operate within a normative environment that is different from Texas's with respect to the administration of the death penalty and local cultures of legal practice.

Further, while representing a peculiar type of competency and waiver proceeding, this study invites further sociolegal inquiry into any kind of competency assessments where defendants ask for the court's permission to do things normatively believed to be self-destructive or contrary to their interests, such as representing themselves in a complex trial. What narratives of mental illness, criminality, and/or penality emerge in those determinations? How robust are the legal proceedings scrutinizing those narratives? Examining these questions should yield insight into theoretical questions of deviance and penality, as well as the sociolegal context of legal narratives.

Finally, while other regimes of legally hastening death are currently largely embedded within a medical framework, expanded availability of physician-assisted suicide could increase judicial involvement in those decisions. The legal process of examining decisions to hasten death among death-sentenced prisoners not only reminds us of problems with the operation of the death penalty generally, but it also suggests that if courts become more involved in adjudicating decisions to hasten death for other individuals, we should also attend to the operation of legal regimes in that context.

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