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Richard W. Garnett
University of Notre Dame, rgarnett@nd.edu

SECTARIAN REFLECTIONS ON LAWYERS' ETHICS AND DEATH ROW VOLUNTEERS

*Richard W. Garnett**

In a recent episode of the award-winning juris-drama, *The Practice*, Rebecca Ward—one of the idealistic, if occasionally overzealous, young lawyers in Bobby Donnell's high-powered trial boutique—is asked to assist John Mockler, a legendary capital defense lawyer, by serving as local counsel in a federal death penalty case.[1] Rebecca's enthusiasm for the project wanes briefly upon learning that the condemned inmate, Walter Dawson, has elected not to fight his impending execution, but quickly waxes again as she sets out for the federal prison in Indiana, determined to convince him to cling to life.

She fails. Dawson insists that he is not afraid to die. He assures Rebecca that, having accepted from Christ the gifts of redemption and forgiveness, and committed himself to God's service, he is ready to accept the punishment he believes his "atrocities" require. "But it's

* Assistant Professor of Law, Notre Dame Law School. Thanks are due to A.J. Bellia, Rev. John Coughlin, Nicole Stelle Garnett, Fred Marczyk, Diane Meyers, Teresa Phelps, Robert Rodes, Thomas Shaffer, Howard Sklamberg, Jay Tidmarsh, and especially to my teachers Robert Burt, David Luban, and Joseph Goldstein (*R.I.P.*).

1 *See The Practice: Killing Time* (ABC television broadcast, Sept. 30, 2001). The details and quotations that follow are taken from my memory from watching this episode. One of the many things I have learned from my colleague Tom Shaffer is that it is alright—it is a good idea, actually—for law students and teachers to watch a lot of television. *See, e.g.*, Thomas L. Shaffer, *Lawyer Professionalism as a Moral Argument*, 26 GONZ. L. REV. 393, 399 (1990/1991); Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 971–72 (1987) [hereinafter Shaffer, *Legal Ethics*]. And so—*Propter Honoris Respectum*—I do.

For more on *The Practice*, see, for example, William H. Simon, *Moral Pluck: Legal Ethics in Popular Culture*, 101 COLUM. L. REV. 421 (2001) (arguing that such fictional portrayals deserve to be taken seriously as ethical discourse), and Jeffrey E. Thomas, *Legal Culture and* The Practice*: A Postmodern Depiction of the Rule of Law*, 48 UCLA L. REV. 1495 (2001) (examining the significance of the postmodern view of the law illustrated by narratives such as *The Practice*). And for another excellent television show's take on the death row volunteer problem, see *Law & Order: Bad Girl* (NBC television broadcast, Apr. 29, 1998) (troubled young woman confesses to cop-killing, becomes a Christian, refuses to present mitigating evidence, is sentenced to death, waives appeal, and is executed).

possible to serve God with your *life*, as well," she presses him. "Think how much good you could do! Think how many souls could you save!" Dawson hesitates. He appears to take these entreaties to heart. In the end, though, he is unmoved.

Later, outside the prison, Mockler scolds Rebecca: "Do you really think you did any good?," he asks. "The one thing he had, you just took away from him. . . . He *will* die, but perhaps more painfully now." Dawson, he reminds her, "is a human being, not a cause."

Rebecca's efforts, and Mockler's rebuke, raise the question: What should we lawyers think about, and how should we respond to, "death row volunteers?"[2] When a defendant accused of a capital crime attempts to plead guilty, or instructs his lawyer not to present a particular defense;[3] when a convicted killer refuses to permit the introduction of potentially life-saving mitigating evidence—or even urges the jury to impose a death sentence[4]—at the sentencing phase of a death-eligible case; when a condemned inmate refuses to file, or to appeal the denial of, habeas corpus and other post-conviction petitions for relief; when he elects not to object to a particular capital-punishment method, to call into question his own competence to be executed, or to file an eleventh-hour, last-ditch appeal citing newly discovered evidence of his innocence—what should lawyers do?

These are not questions of merely professional interest, narrowly conceived, for lawyers and judges. They are staples of headlines and news programs, both serious and sensational. They fascinate pop-culture purveyors and consumers alike, though little is novel about them.

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2 I realize that the word "volunteer" seems out-of-place, and perhaps even oxymoronic, following the words "death row" or "execution." *See, e.g.*, Michael Mello, *A Letter on a Lawyer's Life of Death*, 38 S. TEX. L. REV. 121, 171 (1997) (referring to "execution volunteers"); *see also* Tom Beyerlein, *Ohio Executes Scott*, DAYTON DAILY NEWS, June 15, 2001, at 1A (noting that Wilford Berry, executed by Ohio in 1999, "earn[ed] . . . the nickname The Volunteer" after he waived his appeals).

3 *See, e.g.*, Brewer v. Lewis, 989 F.2d 1021, 1022–23 (9th Cir. 1993) (noting that although the defendant pleaded guilty to capital crime and refused to present any mitigating evidence, the trial court ordered the presentation of such evidence over Brewer's objection).

4 One of Indiana's more notorious murderers, Steven Judy, threatened jurors and their families in his (successful) effort to convince them to impose the death sentence. *See* Laura Lane, *The Killing Aftermath*, SOUTH BEND TRIB., Oct. 21, 2001, at F1 ("Judy asked if he could address the jurors. . . . In a chilling moment, Judy threatened them, one by one, saying he would come after them and their families if he ever got out."); *see also* Brewer v. Lewis, 997 F.2d 550, 551 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of en banc review) ("Brewer had expressed a wish to die. . . . Although the state did not believe capital punishment to be appropriate, Brewer overcame the prosecutor's arguments for a lesser sentence and persuaded the trial judge to order his execution.").

After all, Plato told us in the *Crito*[5] that Socrates refused his friends' entreaties that he escape to Thessaly and thereby avoid execution-by-suicide for corrupting the youth,[6] and Dickens contended that Sidney Carton did a "far, far better thing" than he had ever done in submitting to the death sentence imposed on another.[7] More recently, Norman Mailer's sprawling "novel," *The Executioner's Song*,[8] relates the pathetic bravado with which convicted killer Gary Gilmore—a self-styled combination of Nietzschean *ubermench* and Marlboro man—demanded that the State of Utah strap him to an office chair, in front of a filthy mattress, facing a black curtain with holes cut out for the executioners' rifles. Professor Michael Mello has offered a gripping, if less lurid, account of the trial of the "Unabomber," Ted Kaczinski, and of his (continuing) efforts to risk a death sentence rather than to permit his lawyers to present his letter-bombing campaign and rambling neo-Luddite "manifesto" as the work of a madman.[9] And until the discovery of the FBI's document-production errors presented a too-good-to-be-true opportunity to embarrass the federal government, domestic terrorist and murderer Timothy McVeigh ostentatiously refused to seek post-conviction review of his conviction and death sentence.[10]

Still, notwithstanding his headliner status and prime-time appeal, the death row volunteer is of particular interest *to* lawyers because he

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5 *See* PLATO, *Crito, reprinted in* THE LAST DAYS OF SOCRATES 79–96 (Hugh Tredennick trans., Penguin Classics 1969).

6 *Id.* at 96 ("[G]ive it up, Crito, and let us follow this course, since God points out the way.").

7 CHARLES DICKENS, A TALE OF TWO CITIES 352 (Bantam Books 1983) (1859); *id.* at 332 ("Are you dying for him?," she whispered. "And his wife and child. Hush! Yes.").

8 NORMAN MAILER, THE EXECUTIONER'S SONG (1979).

9 *See* MICHAEL MELLO, THE *UNITED STATES V. THEODORE JOHN KACZINSKI*: ETHICS, POWER, AND THE INVENTION OF THE UNABOMBER (1999) (exploring how Kaczinski was represented by lawyers and the media). *See also generally* Michael Mello & Paul Perkins, *The Non-Trial of the Century: Representations of the Unabomber*, 24 VT. L. REV. 417 (2000); Michael Mello, *Ted Kaczinksi's Diary*, 22 VT. L. REV. 83 (1997) (concluding that the American impulse to record thoughts in a diary is, and should continue to be, protected from government searches). Kaczinski's "manifesto," *Industrial Society and Its Future*, along with other Unabomber-related materials, is available at http://www.unabombertrial.com (last visited Oct. 15, 2001).

10 McVeigh was executed by lethal injection on June 11, 2001, after insisting in a written statement, "I am the master of my fate: I am the captain of my soul." *Final Written Statement of Timothy McVeigh* (June 11, 2001), *available at* http://www.cnn.com/2001/LAW/06/11/mcveigh.02/.

poses particularly "chilling" problems[11]—"legal ethics" problems—*for* lawyers.[12] In fact, *The Executioner's Song* is a legal ethics text as much as it is anything else.[13] After all, at the end of Gilmore's life, lawyers were everywhere, doing and saying things that the reader is challenged to evaluate and to judge. Lawyers sought and won his death sentence and execution; they sold his story, marketed his death, and supervised his estate; they struggled creatively to keep him alive against his will, to protect other death row inmates and to publicize opposition to the death penalty; and they tried to save taxpayers' money and to spare his mother the pain of losing her son to what looked like his shallow and deluded machismo.[14]

Not surprisingly, then, more than a few lawyers and law teachers have attempted to map the "ethical" course for attorneys whose clients, in one way or another, elect or acquiesce in execution.[15] Profes-

11 *See* Mello, *supra* note 2, at 170 ("Perhaps the most chilling questions involve what a lawyer should do if her client decides not to pursue further attempts to ward off the executioner.").

12 *See* C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death-Row Volunteering*, 25 LAW & SOC. INQUIRY 849, 849 (2000) ("When death row inmates elect to waive appeals and proceed directly to execution a series of problematic legal and ethical questions are raised."); Michael Mello, *"In the Years When Murder Wore the Mask of Law": Diary of a Capital Appeals Lawyer (1983–1986)*, 24 VT. L. REV. 583, 1182 n.516 (2000) ("How lawyers should respond to such death wishes is hotly contested among lawyers who specialize in death work."); Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 855 (1987) (noting that the death row volunteer presents a "special dilemma" for capital defense specialists). *But see id.* at 857 ("In the view of [capital defense attorneys], however, the defendant's expression of [a desire to die] posed an obstacle to effective representation rather than an ethical dilemma.").

13 *See generally* Barbara Allen Babcock, *Gary Gilmore's Lawyers*, 32 STAN. L. REV. 865 (1980) (reviewing the work of lawyers portrayed in *The Executioner's Song*).

14 *See generally id.*

15 *See generally* Richard J. Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363 (1988) (reviewing questions presented in appellate review of death sentences, prisoners' wishes to abandon appeals, and prisoners' refusals to assist their lawyers' efforts); Julie Levinsohn Milner, *Dignity or Death Row: Are Death Row Rights To Die Diminished? A Comparison of the Right To Die for the Terminally Ill and the Terminally Sentenced*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 279 (1998) (arguing that because the right to die is acceptable for the terminally ill, it should be acceptable for death row inmates); G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness, and the Propriety of Third-Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860 (1983) (arguing that the Supreme Court's response to volunteers has been inadequate because of failure to correctly apply competency standards); White, *supra* note 12, at 857–61 (detailing specific choices some defense attorneys have made to balance the ethical dilemma with their personal opposition to the death penalty); Christy Chandler, Note, *Voluntary Executions*, 50 STAN. L. REV. 1897 (1998) (examining attorney-client relationship in capital defense cases and proposing to shift the burden of proving competence to

sor Mello's recent, powerful, and impassioned defense not only of Kaczinski's "autonomy"-based right to employ strategy and tactics likely, if not calculated, to result in the death penalty, but also of his own decision to assist, is one such effort.[16] This Essay is another, though I should admit at the outset that it is grounded more in unease and dissatisfaction—and perhaps also in self-interest[17]—than in confidence or zeal.

It seems to me that something is missing from our thinking, and from our conversations, about the death row volunteer problem. It is not that we have misread the relevant canons and codes or misunderstood the relevant legal doctrine. The problem, instead, is that our arguments—which sound primarily in the *Casey*-esque register of choice, competence, and autonomy[18]—reflect and proceed from an unsound "moral anthropology." That is, they proceed from a flawed account of what it *is* about the human person that does the work in moral arguments about what we ought or ought not to do and about how we ought or ought not to be treated.[19] They miss what it means,

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the State and ultimately give the client autonomy over all decisions); Richard C. Dieter, Note, *Ethical Choices for Attorneys Whose Clients Elect Execution*, 3 GEO. J. LEGAL ETHICS 799 (1990) (exploring the legal and ethical grounds for an attorney to act against a client's wish to die; comparing the "right to die" in capital cases with the "right to die" in other situations); Kathleen L. Johnson, Note, *The Death Row Right To Die: Suicide or Intimate Decision?*, 54 S. CAL. L. REV. 575 (1981) (suggesting ways to accommodate both state and individual interests in capital cases by allowing the capital defendant to waive appeals and by limiting "next friend" standing); Jane L. McClellan, Note, *Stopping the Rush to the Death House: Third Party Standing in Death Row Volunteer Cases*, 26 ARIZ. ST. L.J. 201 (1994) (providing an in-depth study of a death row volunteer, the policy implications of intervention, the motives to volunteer, and the future of appellate review of capital cases); John R. Mitchell, Comment, *Attorneys Representing Death Row Clients: Client Autonomy over Personal Opinions*, 25 CAP. U. L. REV. 643 (1996) (presenting a case history to suggest that a capital defendant can get lost in the ideological battle for the case, and in doing so, lose control over his life).

16 *See, e.g.*, MELLO, *supra* note 9.

17 I currently assist another lawyer in representing a death row inmate who has several times informed prosecutors and courts of his sadness, his remorse, his desire to discharge his lawyers, and his wish to be executed. Each time, he has changed his mind, and a state trial-court judge is currently considering, inter alia, whether the ineffective assistance of counsel he received at sentencing requires re-sentencing.

18 *See* Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (joint opinion) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.").

19 *See, e.g.*, MICHAEL J. PERRY, THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES 7 (1998) (arguing that because "every human being is sacred," there are "some things that ought *never* . . . to be done to any human being"). There are, to be sure, other ways to use this term. *See, e.g.*, Ronald Dworkin, *Darwin's New Bulldog*, 111 HARV. L. REV. 1718, 1719 (1998) (using "moral anthropology" to mean the examination of

and what follows from the fact, that a condemned and resigned inmate "is a human being, not a cause." The unfortunate result, it seems to me, is that the professed commitment to "human dignity"[20] that drives and sustains so many capital defense lawyers[21] is often undermined by these same lawyers' responses to death row volunteers.

Tom Shaffer—my colleague, my mentor, and the deserving recipient of the *Notre Dame Law Review*'s respects—once offered the counter-cultural observation that "[e]thics properly defined is thinking about morals. It is an intellectual activity and an appropriate academic discipline, but it is valid only to the extent that it truthfully describes what is going on."[22] Morality, in other words, is about truth; it is about what *is*. He is right, I think. And this leads me to wonder if my own dissatisfaction with the death row volunteer literature is rooted in a nagging worry that it does *not* "truthfully describe what is going on," that it has missed—or is, at least, unable to explain—what we are and why it matters. In any event, because Professor Shaffer's work is to blame, at least in part, for pulling me in to this disquiet, it seems only fair, in this short Essay, to enlist his help in finding a way out.

"[w]hat best explains how human beings developed the disposition to make judgments of moral right and wrong"); *see also, e.g.*, THOMAS L. SHAFFER WITH MARY M. SHAFFER, AMERICAN LAWYERS & THEIR COMMUNITIES: ETHICS IN THE LEGAL PROFESSION 235, 236 (1991) [hereinafter SHAFFER & SHAFFER, AMERICAN LAWYERS] (aiming at a moral anthropology that describes excellences in our moral culture); Thomas L. Shaffer & Mary M. Shaffer, *Character and Community:* Rispetto *as a Virtue in the Tradition of Italian-American Lawyers*, 64 NOTRE DAME L. REV. 838, 879 (1989) [hereinafter Shaffer & Shaffer, *Character*] (using "moral anthropology" to mean a creature that comes to be only in relation to other humans).

20 *See, e.g.*, Bonnie, *supra* note 15, at 1391 ("[T]he law's duty to respect individual dignity is heightened, not diminished, when choices are made in the shadow of death."); Mello, *supra* note 2, at 171 ("For me the issue of how to respond to execution volunteers comes down to a question of respecting the human dignity that remains in the person even after living for a time on death row.").

21 For a moving portrait of several leading capital defense attorneys and what moves them, see Claire Schaeffer-Duffy, *Rare Breed: Death Penalty Lawyers Defend Rights of Politically Invisible*, NAT'L CATH. REP., Oct. 5, 2001, at 13.

22 Shaffer, *Legal Ethics*, *supra* note 1, at 965; *see also* Timothy W. Floyd, *Realism, Responsibility, and the Good Lawyer: Niebuhrian Perspectives on Legal Ethics*, 67 NOTRE DAME L. REV. 587, 590 (1992) (defending an "ethic of responsibility" which requires, first, that we "truthfully examine what is going on in the lawyer-client relationship").

I.

The death row volunteer problem is not as exotic or "anomalous"[23] as it might at first sound: Five of the first eight men executed after the Supreme Court in 1976 re-authorized the death penalty were (in one way or another) volunteers,[24] and according to one writer, "[o]f the 302 inmates executed between 1973 and 1995, thirty-seven, or twelve percent, gave up their appeals."[25] In fact, according to one experienced capital defense litigator, *every* capital defendant, at one point or another, expresses a preference for execution over life in prison.[26] Most of them, though, change their minds.[27]

The case of John Brewer, executed by the State of Arizona in 1993, is probably as typical of these cases as any one can be.[28] Brewer strangled his girlfriend, Rita Brier (and killed his unborn child), after she threatened to leave him in order to "prove [to him] he could live by himself."[29] He confessed to the crime, was determined to be "competent," and pleaded guilty to capital murder. At his sentencing hearing, he refused to present evidence in mitigation (the court ordered his counsel to present such evidence anyway, over Brewer's objection). Instead, "throughout the[ ] proceedings, [Brewer] voiced his support for the state's death penalty statute and expressed his belief that he should be executed for the confessed crimes."[30] He was, evidently,

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23 *See* Strafer, *supra* note 15, at 861 (noting that "instances of citizens 'volunteering' to be executed are by no means uncommon and certainly not 'unique in the annals of the Court'") (quoting Gilmore v. Utah, 429 U.S. 1012, 1013 n.1 (1976) (Burger, C.J., concurring)); White, *supra* note 12, at 854 ("The phenomenon of a defendant electing execution is by no means uncommon."); Chandler, *supra* note 15, at 1902.

24 Strafer, *supra* note 15, at 860–61.

25 Chandler, *supra* note 15, at 1902 & n.42; *see also* Dieter, *supra* note 15, at 800 ("Over ten percent of the executions carried out in this country since the Supreme Court approved the revised death penalty laws in 1976 have been of those who elected to die.").

26 White, *supra* note 12, at 855. *See generally id.* at 855–61 (discussing the ethical issues confronting the lawyer for a death row volunteer).

27 *Id.* at 855.

28 Brewer's case is described and analyzed in careful detail in McClellan, *supra* note 15, at 202–09; *see also* Brewer v. Lewis, 997 F.2d 550 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of en banc review); Brewer v. Lewis, 989 F.2d 1021 (9th Cir. 1993); State v. Brewer, 826 P.2d 783, 788 (Ariz. 1992), *cert. denied*, 506 U.S. 872 (1992).

29 *Brewer*, 826 P.2d at 788.

30 *Id.* at 789; *see also Brewer*, 997 F.2d at 551 (Reinhardt, J., dissenting from denial of en banc review) ("Although the state did not believe capital punishment to be appropriate, Brewer overcame the prosecutor's arguments for a lesser sentence and persuaded the trial judge to order his execution.").

defiantly unrepentant. To ensure his own execution, he claimed—possibly falsely[31]—to have engaged in sexual intercourse with Ms. Brier's corpse. He was sentenced to death; his guilty plea and death sentence were affirmed on mandatory appeal (over his objection);[32] and he "then opposed every legal effort to save his life."[33] In particular, he won the dismissal of a state-law petition for post-conviction relief that was filed without his consent, and he never filed a federal habeas corpus petition. His mother tried, without success, in state and federal courts, to contest Brewer's competency and to proceed on her own behalf and as her son's "next friend." Although Brewer had apparently come to believe that the co-deity and man-elf "Fro" had been reincarnated on Earth as Brewer's murdered girlfriend and that he would re-join "Fro" on the planet Terracia after his execution, the federal court of appeals found no basis for disturbing other courts' determinations that Brewer was competent to waive further review. Through all this, Brewer continued to insist, "I'm here to pay the penalty . . . . I just don't think I deserve to live."[34] He even informed the Arizona Board of Pardons and Paroles that, if he had it to do over, he would kill Ms. Brier again, in an even grislier fashion. On March 3, 1993, Brewer was executed by lethal injection.[35]

Why so many volunteers? There is no simple answer.[36] We might start with this picture:

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31 *See Brewer*, 826 P.2d at 799 ("Dr. Bayless testified that he did not believe defendant had sex with the corpse, and that defendant fabricated the act so that he would receive the death penalty and fulfill his homicide-suicide mission.").

32 Brewer wrote to the Clerk of the Arizona Supreme Court, seeking to abandon all appeals. The court treated the letter as a motion to dismiss, which it denied on the ground that "the propriety of the death penalty is not for the defendant or the trial court alone to decide." *Id.* at 791.

33 *Brewer*, 997 F.2d at 551 (Reinhardt, J., dissenting from denial of en banc review).

34 Abraham Kwok & Pamela Manson, *Brewer Is Executed, 1st Lethal Injection Given in Arizona*, ARIZ. REPUBLIC, Mar. 3, 1993, at A2.

35 *Id.*

36 *See generally* Ann Althouse, *Standing, in Fluffy Slippers*, 77 VA. L. REV. 1177, 1184–85 n.36 (1991) (criticizing the Supreme Court's narrow view of standing in capital defense cases); Bonnie, *supra* note 15, at 1375–77 (suggesting that a condemned prisoner may agree with the sentence or may prefer death to "pains" of imprisonment); Strafer, *supra* note 15, at 864–75 (grouping volunteers into categories of those who have suicidal impulses and those physically and psychologically burdened by death row conditions); White, *supra* note 12, at 871–75; Dieter, *supra* note 15, at 801–03 (suggesting that reasons for volunteers include physical conditions of imprisonment and a capital defendant's wish to receive the death sentence prior to the crime); McClellan, *supra* note 15, at 213–16 (cataloging potential motivations of death row volunteers).

> There are 2,859 people awaiting execution in the United States .... If death row were really a row, it would stretch for 2.6 miles, cell after six-foot-wide cell. In each cell, one person, sitting, pacing, watching TV, sleeping, writing letters. Locked in their cells nearly twenty-four hours a day, the condemned communicate with each other by shouts, notes, and hand-held mirrors, all with the casual dexterity handicapped people acquire over time. Occasionally there is a break in the din of shouted conversations—a silent cell, its inhabitant withdrawn into a cocoon of madness.[37]

Certainly, depression, mental illness, and psychological impairment—"ranging from gentle neurosis to flamboyant talking-to-spaceships delusional psychoses"[38]—are common on death rows and among those convicted of capital crimes. There also is a grim awareness that the odds against securing a new trial or sentence through petitions and appeals are long and growing longer, as the courts iron out the remaining wrinkles in the substantive law that governs the death penalty, as legislatures streamline and scale back post-conviction and habeas corpus remedies, and as competition increases for the time of experienced—or even competent—capital defense attorneys.[39] It is understandable that condemned inmates facing the anxiety and tedium of waiting years—sometimes decades—under a death sentence might want to give up.[40]

Still, we should hesitate before chalking up a volunteer's choice to despair, fatigue, mental illness, or misplaced machismo. It could

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37 Mello, *supra* note 2, at 166.

38 *Id.* at 167.

39 On the other hand, more than a few death row inmates have been exonerated and released in recent years, thanks to the sophisticated methods and hard work of many students, journalists, lawyers, and "innocence projects." *See generally* JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000).

40 *See* Mello, *supra* note 2, at 170 ("Anyone who has been inside the Medieval fortress of Florida State Prison can appreciate that a reasonable person could conclude that death is preferable to the uncertainty of death row and even to life imprisonment in a maximum-security prison.").

Some argue that long stays on death row are themselves unconstitutionally "cruel and unusual." *See, e.g.*, Elledge v. Florida, 525 U.S. 944, 944 (1998) (Breyer, J., dissenting from denial of certiorari) ("Petitioner in this case has spent more than 23 years in prison under sentence of death. His claim—that the Constitution forbids his execution after a delay of this length—is a serious one."). *But see* Knight v. Florida, 528 U.S. 990, 990 (1999) (Thomas, J., concurring in denial of certiorari) ("I write only to point out that I am unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed.").

just as easily spring from stoic resignation, genuine remorse, the assurances of faith, or the peace that follows contrition.[41] Gilmore himself insisted, "I know what I did. . . . I know the unlawful effect it had on the life of two families. I'm willing to pay ultimately. Let me!"[42] As then-Justice Rehnquist once noted, acquiescing to execution might simply be seen as a way of "plac[ing] [one's] debts on a new existence in some world beyond this."[43]

Whatever the reasons, certainly there is little in the law that governs and structures the imposition of capital punishment and the review of death sentences that places much of an impediment in volunteers' way. Generally speaking, the law allows "competent" defendants to plead guilty to capital crimes, to represent themselves in capital cases, and to refuse to present mitigating evidence at sentencing.[44] And while it is true today[45] that all death penalty states require some form of appellate review in capital cases,[46] nothing requires a convicted killer to file habeas corpus or other post-conviction petitions for relief. What's more, courts are reluctant to allow family

41 *See, e.g., Nevada Executes Man Who Killed Ex-Girlfriend* (Oct. 5, 1998), *at* http://www.foxnews.com/national/100598/execution.sml (describing the execution of Roderick Abeyta, who "stopped fighting his death sentence because he no longer wanted to 'manipulate the system,'" who wanted "'to be held accountable for [his] actions,'" and who, before he was executed, apologized to his victim's family).

42 Open Letter from Gary Gilmore to the American Civil Liberties Union, *reprinted in* R. COVER ET AL., PROCEDURE 441, 442 (1988); *cf.* United States v. Hammer, 239 F.3d 302, 305 (3d Cir. 2001) (Nygaard, J., dissenting from denial of petition for en banc rehearing) ("The opinion broadly states that Hammer 'accepts his punishment.' But the meaning of such a statement is unclear since Hammer only accepts the government's ceremony of death, without any indication that he even nods toward its altar or recognizes a whit of his moral debt or need for penitence.").

43 Evans v. Bennett, 440 U.S. 1301, 1305 (1979).

44 *See* Godinez v. Moran, 509 U.S. 389, 392 (1993) (noting that defendant pleaded guilty to capital murder, and waived his right to counsel, in order to "prevent the presentation of mitigating evidence at his sentencing").

45 This was *not* true in Utah when Gilmore was executed. *See* MAILER, *supra* note 8, at 892 ("[O]nly an idiot Legislature could pass a statute that didn't insist on an appeal for the death penalty.").

46 *See* Milner, *supra* note 15, at 284–85 (describing the "current state of the law"). That said, the Supreme Court has never held squarely that appellate review is required, and may not be waived, in capital cases; *cf.* Whitmore v. Arkansas, 495 U.S. 149, 170 (1990) (Marshall, J., dissenting) ("[M]uch of this Court's death penalty jurisprudence rests on the recognition that appellate review is a crucial means of promoting reliability and consistency in capital sentencing."); Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503, 553 (1992) ("[W]hile the Court has never formally held that appellate review is constitutionally necessary in the capital context, it has clearly viewed appeals as an integral part of any constitutionally acceptable capital sentencing scheme.").

members, activists, clergy, taxpayers, attorneys, "uninvited meddlers,"[47] and other third parties to proceed with such petitions and appeals—either as "next friends"[48] or to protect their own interests—when a competent inmate has opted against them. In Gilmore's case, for instance, the American Civil Liberties Union filed a taxpayers' suit to block the use of public funds for Gilmore's execution;[49] a lawyer tried to intervene to protect the interests of his own client who, he claimed, would be more likely to be executed under Utah's death penalty statute if Gilmore gave up;[50] and the Supreme Court of the United States determined that even Gilmore's own mother lacked standing to second-guess him.[51] It is against this legal backdrop—decorated with the technical, bloodless language of standing, jurisdiction, "cases," and "controversies"—that condemned inmates volunteer and their lawyers struggle for a response.

Now, as a general matter, it strikes me as both reasonable and correct for courts to let litigants control the course, and the end, of their cases, to treat such cases as discrete controversies between partic-

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47 *Whitmore*, 495 U.S. at 164 (citation and quotation marks omitted).

48 *Id.* at 165.

> [O]ne necessary condition for "next friend" standing in federal court is a showing by the proposed "next friend" that the real party in interest is unable to litigate his own cause . . . . That prerequisite . . . is not satisfied where an evidentiary hearing shows that the defendant has given a knowing, intelligent, and voluntary waiver of his right to proceed, and his access to court is otherwise unimpeded.

Id.; *see also* Demosthenes v. Baal, 495 U.S. 731, 735 (1990) (determining that a death row inmate was competent to waive further post-conviction review, notwithstanding his parents' attempt to intervene as "next friends").

49 *See* MAILER, *supra* note 8, at 836, 896–909. When Gilmore learned about this, he exploded, "A taxpayers' suit. I'll pay for it myself." *Id.* at 907.

50 *See id.* at 846–64; *see also Whitmore*, 495 U.S. at 157 (rejecting as "speculative" Whitmore's claim that another inmate's decision not to oppose execution would prejudice his own case).

51 *See* Gilmore v. Utah, 429 U.S. 1012 (1976) (terminating stay of execution); *see also id.* at 1016 (Burger, C.J., concurring) ("[Given] the record establishing a knowing and intelligent waiver of Gary Mark Gilmore's right to seek appellate review . . . , it is plain that the Court is without jurisdiction to entertain the "next friend" application filed by Bessie Gilmore."). *But see id.* at 1019 (Marshall, J., dissenting).

> I cannot agree with the view expressed by the Chief Justice that Gilmore has competently, knowingly, and intelligently decided to let himself be killed. Less than five months have passed since the commission of the crime; just over two months have elapsed since sentence was imposed. That is hardly sufficient time for mature consideration of the question, nor does Gilmore's erratic behavior—from his suicide attempt to his state habeas petition—evidence such deliberation.

Id.

ular parties, and to resist the attempts of even well-meaning, deeply concerned outsiders to direct litigants in the direction and for the purposes the outsiders prefer.[52] I am not convinced that lawsuits and litigation should serve as vehicles for the resolution of "big issues," and I worry about the patronizing elitism that can result when the client becomes a cause. Still, and especially in death penalty cases,[53] this backdrop and its individualistic—even atomistic—presuppositions are not uncontroversial.

Professor Althouse, for example, in her essay on the *Gilmore* and *Whitmore* cases, criticized the Court for its "willful exclusion of emotion and real context from its decisions, its misguided characterizations of this exclusion as heroic, and its deliberate and activist narrowing of standing to serve the publicly stated goal of freeing the states to kill."[54] In her view, while Mailer tells a story with a "maddening lack of boundary," he also "portrays the grand, interconnected mass of humanity that formed around even the least worthy person and illustrates how his fate included it all."[55] The *Gilmore* decision, though, was about Gilmore, and no one else, and this was its failing. The Court made us strain, she thinks, to "glimpse some faint sign of the real, unwieldy world seeping out" from its narrow holding.[56] She might also have said, borrowing from Tom Shaffer, that the Court in these cases failed to "truthfully describe[ ] what is going on."[57] And she might have added that the individualistic backdrop to the would-be volunteer's struggle against "meddlers" requires still more dishonesty from "next friends," who insist disingenuously that they seek only to vindicate the volunteer's interests, and also from other third parties, who purport to represent only their own.[58]

Others might insist that we do not have to turn to Norman Mailer, but simply to the Eighth Amendment, for a critique of the

52 *See* MAILER, *supra* note 8, at 505 (Gilmore told his trial attorneys to "quit f[***]ing around with my life."). That said, I realize that my use of "their" and "outsiders" might beg the very question in dispute. For different approaches, see the sources cited in Althouse, *supra* note 36, at 1182 n.21.

53 For at least twenty-five years, the Court has insisted that in many ways, and for many purposes, "death is different." *See, e.g.*, Gregg v. Georgia, 428 U.S. 123, 188 (1976) (plurality opinion).

54 Althouse, *supra* note 36, at 1178.

55 *Id.* at 1180, 1183.

56 *Id.* at 1180.

57 Shaffer, *Legal Ethics*, *supra* note 1, at 965.

58 *See* Althouse, *supra* note 36, at 1183 ("The doctrine of standing (and litigation itself) breaks people into separately functioning units. Literature reveals connections.").

law's apparent indifference to the volunteer.[59] Our Constitution, the argument goes, is not simply a catalog of waiveable privileges; it is also an exercise in self-paternalism,[60] "our insulation from our baser selves."[61] It is, therefore, at least a hurdle, if not a barrier, in a would-be volunteer's path. As Justice Marshall put it in his *Whitmore* dissent,

> [The volunteer] invites the State to violate two of the most basic norms of a civilized society—that the State's penal authority be invoked only where necessary to serve the ends of justice, not the ends of a particular individual, and that punishment be imposed only where the State has adequate assurance that the punishment is justified. The Constitution forbids the State to accept that invitation.[62]

This was, actually, also the American Civil Liberties Union's response to Gilmore's demand, in an "open letter," that it "butt out of [his] life" and "butt out of [his] death"[63]: "We don't think the world is obliged to be governed by your preference. . . . We are not imposing our wants and attitudes on you; we are seeking to impose humanity and decency upon the State of Utah[.]"[64] And even one of Gilmore's many transient literary "agents" admitted that he "didn't see where any criminal had the right to tell society what to do with him. . . . Society, after all, set the rules."[65]

But, again, Gilmore's death sentence was never reviewed and its constitutionality never evaluated. In a case like this—and also in cases where, for example, a defendant's determination to plead guilty or

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59 On the other hand, at least one judge has suggested that it would be cruel *not* to allow an inmate to accept gracefully his execution. *See* Lenhard *ex rel.* Bishop v. Wolff, 603 F.2d 91, 94 (9th Cir. 1979) (Sneed, J., concurring in the stay of execution) (insisting that to ignore the prisoner's request would be "to incarcerate his spirit—the one thing that remains free and which the state need not and should not imprison").

60 *See generally* GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 12 (1985); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111–15 (1972) (arguing that even though the individual knows best, self-paternalism may require certain social conditions to exist prior to alienation).

61 Furman v. Georgia, 408 U.S. 238, 344–45 (1972) (Marshall, J., concurring).

62 Whitmore v. Arkansas, 495 U.S. 149, 173 (1990) (Marshall, J., dissenting).

63 Open Letter from Gary Gilmore to the American Civil Liberties Union, *supra* note 42, *reprinted in* R. COVER ET AL., PROCEDURE 441 (1988).

64 Open Reply to Mr. Gary Mark Gilmore from Barry Schwarzschild, Director, Capital Punishment Project, American Civil Liberties Union (Jan. 3, 1977), *reprinted in* R. COVER ET AL., 442–43 (1988). In a similar vein, Justice Holmes once stated that "[j]ust as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent, determines what shall be done." Biddle v. Perovich, 274 U.S. 480, 486 (1927).

65 MAILER, *supra* note 8, at 589.

refusal to fight the death penalty at sentencing has arguably undermined the reliability of the process[66]—Justice Marshall's plea that we spurn the volunteer's "invitation" to "violate [our] basic norms" is a powerful one. Still, an inmate who decides not to resist his death sentence could in most cases reasonably note, in response to this plea, that his conviction and sentence *has*, in fact, been reviewed—several times; that he *is*, in fact, guilty of a crime for which the death penalty has been prescribed; and that whatever constitutional errors did taint his trial and sentencing—ineffective assistance of counsel, for instance[67]—are not likely to be corrected through further litigation. Even conceding that the Eighth Amendment is best regarded as a non-waiveable constraint on the conduct of government,[68] it is hard to see how even a self-paternalistic Constitution would require us to override his decision.

So, death row inmates legally may, and for many reasons do, "volunteer" for execution. Still, that the law clearly allows, and might even enable, defendants to elect execution does not answer lawyers' questions about what they should think and do in response. An attorney's awareness that few legal obstacles stand in a volunteer's way, and few legal avenues exist for second-guessing, does and should not end his ethical and *moral* inquiries.

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66 The Supreme Court has read the Constitution as requiring death penalty states to structure their capital-sentencing procedures so as to ensure individualization (by allowing all relevant evidence in mitigation) and reduce arbitrariness (by narrowing, through "aggravating factors" and other means, the class of death-eligible defendants). *See, e.g.*, Romano v. Oklahoma, 512 U.S. 1, 7 (1994) ("States must ensure that capital sentencing decisions rest on [an] individualized inquiry, under which the character and record of the individual offender and the circumstances of the particular offense are considered." (internal citation and quotation marks omitted)); Lowenfield v. Phelps, 484 U.S. 231, 244 (1988) ("[A] capital sentencing scheme must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (internal citation and quotation marks omitted)).

67 *See generally* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994) (examining deficient representation and suggesting that, until more resources are provided to ensure quality representation, capital punishment should not be authorized).

68 *See generally* Jeffrey L. Kirchmeier, *Let's Make a Deal: Waiving the Eighth Amendment by Selecting a Cruel and Unusual Punishment*, 32 CONN. L. REV. 615 (2000) (concluding that the availability of a "choice" does not elevate an unconstitutional punishment to a constitutional punishment).

II.

What should lawyers think about, and how should we respond to, death row volunteers? How *do* they, in fact, think and respond?[69] We might begin by treating these as relatively straightforward "legal ethics" questions, and by turning for answers to the canons and codes of the profession. In this vein, one author (writing, appropriately enough, in the *Georgetown Journal of Legal Ethics*), after observing that "[a]ttorneys whose clients demand the death penalty are faced with a series of critical ethical decisions,"[70] and after examining thoroughly the possible "legal and ethical grounds for the attorney to act contrary to his or her client's wishes [to volunteer],"[71] concludes that, although "[t]he guidelines for professional conduct direct the lawyer to represent the client's best interests and leave the direction of the litigation up to the client":

> There is justification for an attorney to act contrary to the client's immediate wishes in a number of areas. Among the avenues open to the attorney are: persuading the client to appeal; negotiating plea options with the prosecution; raising the argument that mitigating evidence is constitutionally required; addressing the issue of incompetency; and proceeding through a next friend. Ultimately, the attorney may have to withdraw from representation, or she may be dismissed by the client.[72]

Let us start, then, with persuasion. Of *course* capital defense lawyers try to persuade (or dissuade) the would-be death row volunteers they represent. Such efforts are relatively uncontroversial, and certainly familiar. Super-novelist John Grisham, for instance, in his death row novel *The Chamber*, describes the attempt of an earnest young attorney to convince his Klansman client (also his grandfather) not to give in to his impending execution.[73] And in the film *Murder in the*

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69 Again, many scholars and lawyers have wrestled with these questions, and I cannot do justice here to these writers' analyses, their proposed solutions, or the richness of their conversation. And, again, there is no single death row volunteer problem: Defendants, convicts, and inmates "volunteer" at many points, in many ways, and for many reasons; the choices and challenges facing their lawyers are no less diverse.

70 Dieter, *supra* note 15, at 819.

71 *Id.* at 799. Mr. Dieter notes that "[r]eliance for ethical guidelines will predominantly be on the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981)[,] the MODEL RULES [OF PROFESSIONAL CONDUCT], and the STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE." *Id.* at 799 n.5. Tom Shaffer might ask whether the appeal of such sources is "not to conscience, but to sanction" and whether they sound in "mandate rather than insight." Shaffer, *Legal Ethics*, *supra* note 1, at 963.

72 Dieter, *supra* note 15, at 819–20; *cf.* Chandler, *supra* note 15, at 1913–18 (evaluating critically the legal ethics rules' response to death row volunteers).

73 *See generally* JOHN GRISHAM, THE CHAMBER (1994).

First, a crusading young public defender, hell-bent on bringing down Alcatraz, is forced to temporarily shelve his ambitions long enough to befriend and give hope to his miserable and lonely client, who is tired to the point of giving up.[74] It seems clear enough that one can concede that "the authority to make decisions is exclusively that of the client,"[75] yet still insist that *no* lawyer is "required to slavishly follow all the beliefs and goals of her client."[76] We may, and often should, put up a fight. The lawyer is, after all, not only a partisan, but also a counselor[77]—even a friend.[78]

True to form, seasoned and creative death penalty lawyers report having made every effort to convince, cajole, or even trick their clients into fighting their sentences, resisting resignation, and defeating despair.[79] In fact, in an early examination of the problem, Welsh White found that, for most death penalty specialists, an inmate's wish to accept execution is "an obstacle to effective representation rather than

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74 *See generally* MURDER IN THE FIRST (Warner Bros. 1995); *see also generally* Christopher J. Meade, Note, *Reading Death Sentences: The Narrative Construction of Capital Punishment,* 71 N.Y.U. L. Rev. 732 (1996) (discussing the narrative role of the death penalty as a symbolic attempt to create order in a chaotic world).

75 MODEL CODE OF PROF'L RESPONSIBILITY EC 7-7 (1980); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1983) ("A lawyer shall abide by a client's decisions concerning the objectives of representation . . . .").

76 Dieter, *supra* note 15, 811–12 (citing CRIMINAL JUSTICE STANDARDS, Standard 4-1.1(c)).

77 *See, e.g.,* MODEL RULES OF PROF'L CONDUCT R. 2.1 (1983) (requiring a lawyer to exercise independent professional judgment regarding "moral, economic, social and political factors [ ] that may be relevant to the client's situation"). *See generally* Thomas L. Shaffer & Robert F. Cochran, Jr., *Lawyers as Strangers and Friends: A Reply to Professor Sammons,* 18 U. ARK. LITTLE ROCK L. REV. 69 (1995) (describing the notion of lawyer as friend).

78 *See, e.g.,* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation,* 85 YALE L.J. 1060 (1976) (analyzing whether a lawyer who adheres to professional standards can be morally good); Shaffer & Cochran, *supra* note 77, at 69 ("The lawyer-as-friend is our preferred model.").

79 *See, e.g.,* Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases,* 58 N.Y.U. L. REV. 299, 323 (1983) ("[S]killful counsel may yet convince a recalcitrant capital defendant to fight for life. This may entail a time-consuming process of persuasion that depends as much on developing an emotional relationship through which counsel can effectively influence the defendant as on rational argument."); *see also, e.g.,* White, *supra* note 12, at 857–58 (describing how one attorney convinced his client—an alcoholic—not to volunteer by holding out the possibility of access to alcohol were he to secure a life sentence, how another suggested that the client might be able to escape were he assigned to the general prison population, and how still another asked the client to consider the teasing his children would face if he volunteered).

an ethical dilemma."[80] That is, Professor White found that a client's decision to volunteer is generally regarded by the lawyer as something to negotiate, overcome, get around, or get past, and not—at least, not usually—as a time for soul-searching or as a crisis of conscience. As one attorney put it, "[w]hen a defendant says that he wants to die, I generally don't worry too much about it because I'm confident that I can persuade him to change his mind."[81]

Now, at first blush, such an attitude, and such efforts, seem to be in tension with the "sacred stories" of our profession, and with the "central and recurring theme in [our] narratives," namely, that of the "lawyer as champion" whose "duty [is] to client first."[82] Perhaps. Still, it appears that, for all the appeal the "lawyer as champion" story holds for the capital defense bar, these lawyers look as much to Abraham Lincoln—who, as a young Springfield lawyer, reminded a prospective client that "some things legally right are not morally right"[83]—as to Lord Brougham.[84] It seems that they are inclined to ignore whatever constraints their role might otherwise impose on their exhortations.[85] They are inspired and nourished by stories of resistance, and even

80 White, *supra* note 12, at 857.

81 *Id.* (quoting Oklahoma defense lawyer Bob Ravitz). I should add that, although I have also—thank God—been successful in helping to persuade my own client to "change his mind" on those occasions when he has taken steps to volunteer, I have to admit that I worried quite a bit about it—both about whether he *would* change his mind and about what I should do if he did not.

82 Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1447, 1448, 1456 (1992).

83 *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 174 (1988) (citing 2 WILLIAM H. HERNDON & JESSE W. WEIK, HERNDON'S LINCOLN 345 (1889)); *cf.* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (1981) ("In assisting his client to reach a proper decision, it is often desirable for the lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.").

84 Brougham said, in support of his zealous defense of Queen Caroline against treason charges, that

> an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.

David Luban, *The Social Responsibilities of Lawyers: A Green Perspective*, 63 GEO. WASH. L. REV. 955, 973–74 (1995) (quoting 2 THE TRIAL OF QUEEN CAROLINE 8 (J. Nightingale ed., 1821)).

85 *Cf.* Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763, 795 (1995) (noting that the constraints of the professional role often keep civil rights lawyers from describing the truth about their clients' situations).

regret, but not dutiful acquiescence, suspended judgment, and dogged selflessness.[86]

Indeed, the death row lawyer who is overly fastidious about his "station and its duties" tends to come off badly in the lore.[87] Just by way of example, in *The Executioner's Song*, the often stoned and always uninspiring lawyer-media agent, Dennis Boaz, tells anyone who will listen about his respect for Gilmore's "intelligent decision."[88] Later, though, he shares with Geraldo Rivera the ineffable revelation he had received that he could not, after all, help Gilmore die.[89] Another lawyer, Ron Stanger, is sick when he learns that the execution will proceed.

> [He] wondered if he were going mad, because he would have bet a million Gary Gilmore would never be executed. It had made his job easy. He had never felt any moral dilemma in carrying out Gary's desires. In fact, he couldn't have represented him at all if he really believed the State would go through with it all. . . . He had seen himself as no more important than one more person on the stage.[90]

Volunteers' lawyers try to persuade volunteers to change their minds—but why? And what reasons for re-thinking do they offer? They appeal to clients' self-interest, clearly, and might work to portray as less "long" the long-shot chances of success. They might warn would-be volunteers that they are irrational and depressed and that their judgments are not to be trusted. Clients might also be urged to turn outward, to think about their family, friends, communities[91]—

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86 *Cf.* Bonnie, *supra* note 15, at 1367 ("In taking the position that I would honor a competent prisoner's wishes, I was conforming to the traditional conception of the attorney's role.").

87 *See generally* Rob Atkinson, *How the Butler Was Made To Do It: The Perverted Professionalism of* The Remains of the Day, 105 YALE L.J. 177, 180 (1995) (explaining how a careful examination of *The Remains of the Day* will "reveal" a more adequate professionalism).

88 *See* MAILER, *supra* note 8, at 522.

89 *Id.* at 593.

90 *Id.* at 946.

91 I am reminded here of the final scenes of the James Cagney film, *Angels with Dirty Faces*, where the Cagney character's childhood friend—now a parish priest in their old, still tough, neighborhood—pleads with Cagney to go against his character and act "yellow" at his impending execution, so that the neighborhood boys will not idealize and follow him. The priest says,

> This is a different kind of courage, Rocky. The kind that's well, that's born in heaven. Well, not the courage of heroics or bravado. The kind that you and I and God know about . . . . I want you to let them down. You see, you've been a hero to these kids . . . and now you're gonna be a glorified hero in death, and I want to prevent that, Rocky.

ANGELS WITH DIRTY FACES (Warner Bros. 1938).

even their lawyers.[92] My impression, though, is that what really does the work in motivating lawyers' efforts to persuade volunteers is their own fierce opposition to and disgust with the death penalty itself.[93] The litany of other reasons are, for the most part, "makeweights."[94] As one lawyer told Professor White, "[t]he state's goal of killing someone is immoral" and, therefore, "[my client's] desire to be killed is not important to me."[95] In other words, the goal is not so much to assist a client who has misperceived his own interests, or miscalculated the best way to achieve them, but to prevent even a willing client from acceding to what is in fact an "immoral" punishment.

This goal and such arguments are, I think, quite reasonable—at least at the "persuasion stage."[96] But what if persuasion fails (and, as we learned from *The Practice*, it sometimes does)? How can a lawyer continue to challenge an execution, in the teeth of a client's wishes to the contrary?[97] My impression is that unpersuasive capital defense lawyers respond in one of two ways: Either by acquiescing to the client's wishes, and perhaps even assisting him toward his objective; or by ignoring, and if necessary resisting, the volunteer's decision. My

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92 When my own client expressed the desire to end legal proceedings and speed up his execution date, I responded by emphasizing the pain and demoralization that his execution would visit on *me*.

93 *See* White, *supra* note 12, at 855 ("Most of these attorneys have chosen to represent capital defendants in part at least because they are personally opposed to capital punishment.").

94 *Id.* at 859.

95 *Id.*

> When I represent a capital defendant, I'm not there to let him kill himself. He can discharge me as his attorney if he wants to. But as long as I'm in the case, I will continue to oppose the death penalty by every available legal means.
>
> Thus, for these attorneys, the bottom line is that the goal of preventing the government from killing a human being outweighs a defense attorney's normal obligation to respect his client's autonomy.

Id. at 861 (quoting same lawyer).

96 *Cf.* David Luban, *Partisanship, Betrayal, and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellman*, 90 COLUM. L. REV. 1004, 1005 (1990).

> Morally activist lawyers hold themselves morally accountable for the means they employ and the ends they pursue on behalf of clients .... They may be forced to confront clients with moral objections to perfectly legal projects and their clients may regard this as unwarranted interference with autonomous choices or even as betrayal. The morally activist lawyer regrets this, but sees "advise client what he should have—not what he wants" as the minimum that legal ethics requires of her.

Id. (quoting PHILLIPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 40 (1984)).

97 *See* Dieter, *supra* note 15, at 799 (asking whether there are "legal and ethical grounds for the attorney to act contrary to his or her client's wishes").

sense is also, though, that these two very different responses proceed from common premises—"anthropological" premises—about human "dignity" and "autonomy."

Let's start with the first—and, maybe, the more difficult—option. Although, as I noted above, "[m]any lawyers who specialize in capital defense apparently take the position that their paramount obligation is to fight the executioner, regardless of their clients' wishes[,]" not all agree.[98] Richard Bonnie, for example, maintains that by honoring his client's decision to volunteer, he is "conforming to the traditional conception of the attorney's role."[99] As Professor Bonnie sees it, "the law's duty to respect individual dignity is heightened, not diminished, when choices are made in the shadow of death."[100]

Michael Mello agrees: "Preventing executions is very important to me, but it's not the only thing that's important to me. There are choices and decisions that the person whose life is on the line ought to be allowed to make, as a basic part of human dignity and autonomy."[101] In the same vein, he has also written that, for him, "the issue of how to respond to execution volunteers comes down to a question of respecting the human dignity that remains in the person even after living for a time on death row."[102] Professor Mello believes, for exam-

98 Bonnie, *supra* note 15, at 1367. On the divisions in the capital defense bar on this point, see, for example, Harrington, *supra* note 12, at 850.

99 Bonnie, *supra* note 15, at 1367.

100 *Id.* at 1391; *see also, e.g.*, Mitchell, *supra* note 15, at 669.

> It is one thing to oppose the death penalty when advocating your own beliefs; it is quite another to advocate opposition to the death penalty while at the same time being responsible for advocating the interests of a person on death row. When these beliefs are in concurrence, such opposition is within the client's best interests. When these beliefs are divergent, the client's must prevail.

Id.

101 Mello & Perkins, *supra* note 9, at 511; *see also id.* at 507–12 (contrasting the decision to commit suicide with the state's decision to execute a criminal); Mello, *supra* note 2, at 170–74 (arguing that the attorney should respect the client's decision, but must be conscious of the possibility that the client is suffering from clinical depression); Mello, *supra* note 12, at 1149 ("*Friday, August 8*: Airlie House: Slept until 9:30 a.m.; skipped most seminars; moot courted David Bruck for *Hall*; Argument with SH about volunteering execution and human dignity: short argument: she stomped off in a huff."); *id.* at 765 n.516 ("My own belief is that I should honor my client's decision to volunteer for execution, assuming the client is mentally competent to make the choice.").

102 Mello, *supra* note 2, at 171.

ple, that his client, Ted Kaczinski, no less than anyone else,[103] enjoys an autonomy-based right to end his life (and, therefore, to acquiesce in the government's decision to end his life). Moreover, he argues, this right imposes a moral obligation on Kaczinski's lawyers, *not* to resist execution at all costs, but to facilitate the imposition of the death penalty. As Professor Mello puts it, to achieve the "defining goal of [his] representation"—namely, client "empowerment"[104]—he would even "help [his] client help our government kill him."[105]

It is not that Mello's opposition to the death penalty evaporates when matched against a volunteer's death wish. Like (evidently) all capital defense counsel in that position, he *tried* to persuade Kaczinski. Still,

> while it was important to me that Kaczynski have a choice . . . , I have been trying to persuade him not to exercise it . . . . [But] [b]ecause that decision is Kaczynski's, and his alone—not mine, not his lawyer's, not his family's—I will continue to support his right to make it, even though it could well result in an outcome I abhor.[106]

For some lawyers, then, when persuasion fails, the same commitments to human "dignity" that animate their opposition to the death penalty, and that require them to at least try to rekindle resistance in their volunteering client, are thought, in the end, to require them to stand aside.

The other, apparently more common, option for volunteers' lawyers is to resist.[107] But wait—did we not all learn, while cramming for the multiple-choice MPRE, that "the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer?"[108] Yes, but we also likely learned that a client's mental or physical condition may place additional responsibilities on a lawyer.[109] After all, even the "standard

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103 Mello & Perkins, *supra* note 9, at 509 ("I believe that every mentally healthy adult has a sovereign right to end his life at the time of his choosing—without interference by the government for that person's 'own good.'").

104 *Id.* at 510.

105 *Id.* at 511.

106 *Id.* at 512.

107 *See* White, *supra* note 12, at 861 ("[O]f the attorneys with whom I spoke, not one indicated that he could imagine a case in which he would voluntarily allow a capital defendant to submit to execution.").

108 *See, e.g.*, MODEL CODE OF PROF'L RESPONSIBILITY EC 7-7 (1981).

109 *See, e.g., id.* EC 7-12, EC 9-7, DR 4-101; *see also* MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983).

conception"[110] of the lawyer's role presumes competent clients—even Professors Bonnie and Mello would defer only to "competent" would-be volunteers—and, in the minds of many capital defense lawyers, a death row volunteer's desire to die, or indifference toward death, raises a nearly irrebuttable presumption of incompetence. As one writer put it, "death row inmates cannot . . . be considered to be acting voluntarily when they demand their swift executions."[111]

It would be easy if this were true, if volunteers were always, per se, or even presumptively incompetent. After all, a lawyer need not worry about disregarding the stated wishes of an incompetent client any more than a parent need agonize over a child's objections to bedtime or Dostoyevsky. But it is *not* true. It is cheating to pretend otherwise. In fact, instead of claiming that death row inmates are categorically incapable of making a decision that is sufficiently voluntary, knowing, and "autonomous" to warrant our respect, we ought to admit that it is precisely those conditions that are said to undermine the competence of death row volunteers that make life under a death sentence so intolerable, and the preference for execution understandable.[112] "I have been close enough to smell the fear and despair of the place," Professor Mello writes, "and to imagine the utter lack of privacy or solitude that would be, for me, perhaps the worst part of living in that world."[113] We should concede that it is possible, even reasonable, for

110 For more on the "standard conception" of the lawyer's role—i.e., a vision that emphasizes neutral partisanship and nonaccountability, see generally LUBAN, *supra* note 83.

111 Strafer, *supra* note 15, at 892; *see also, e.g.*, HUGO ADAM BEDAU, THE COURTS, THE CONSTITUTION AND CAPITAL PUNISHMENT 123 (1977) ("Was not [Gilmore's] death wish itself pathological and to some extent the subtle product of social practices over which he had no control?").

112 There are many and complex reasons, not all pathological, why a defendant or inmate might prefer execution to life in prison. *See, e.g.*, White, *supra* note 12, at 871–72; McClellan, *supra* note 15, at 213–16. Gilmore insisted as much, for instance. *See* MAILER, *supra* note 8, at 466–67; *see also, e.g.*, Letter from Gary Gilmore to the Utah State Supreme Court (Nov. 8, 1976), *reprinted in* R. COVER ET AL., PROCEDURE 439 (1988) ("Look, I am sane, rational, and more intelligent than the average person. I've been sentenced to die. I accept that. Let's do it and to hell with all the bull[****]."); Open Letter from Gary Gilmore to the American Civil Liberties Union, *supra* note 42, *reprinted in* R. COVER ET AL., PROCEDURE 441 (1988) ("Frankly I am amazed that your clients chose to live in the abject fear that haunts and surrounds their meager existence."). *But see* Open Reply to Mr. Gary Mark Gilmore from Barry Schwarzschild, Director, Capital Punishment Project, American Civil Liberties Union (Jan. 3, 1977), *reprinted in* R. COVER ET AL., PROCEDURE 442 (1988) ("Whether you are sane or not we don't know . . . . The answer makes no difference at all in our opposition to your death sentence.").

113 Mello & Perkins, *supra* note 9, at 509.

a condemned inmate, aware of the state of the law, aware of his own guilt, resigned to the inevitable, hoping for peace, and perhaps even eager for the Beatific Vision, the Communion of the Church Triumphant, or some other reward, to decide not to resist.[114]

Moreover, the failure or refusal to concede as much seems to undermine the values and commitments on which capital defense attorneys' opposition to the death penalty rests. Rather than accept a client's submission to a punishment regarded by the lawyer as dehumanizing, the lawyer resists by calling into question his client's competence to exercise that autonomy, and by insisting that the substance of his client's choice is evidence of the unworthiness of that choice for respect.[115] Echoing Augustine, perhaps, the volunteer's lawyer says "give me client control and autonomy, but not yet!"[116] Of course, it is not so much that a capital defense lawyer who ignores or resists a volunteer's decision *really* believes that his client is "incompetent." Instead, it is simply that the lawyer disapproves of the project, and wishes to thwart it, while continuing to profess loyalty to the profession's autonomy-based norms of client control.[117]

More than twenty-five years ago, in a paper offered—as this one is—in tribute to a colleague, my own teacher Joseph Goldstein made a similar point.[118] Discussing three different situations in which the law

114 *Cf.* 2 *Machabees* (sic) 7:9 (Douay-Rheims trans., Baltimore, Md., John Murphy Co. 1899) ("Thou indeed, O most wicked man, destroyest us out of this present life: but the King of the world will raise us up, who die for his laws, in the resurrection of eternal life."); *id.* at 7:14 ("It is better, being put to death by men, to look for hope from God, to be raised up again by him . . . .").

115 This is not always true. As Professor White notes, some capital defense lawyers believe that "defendants who have an adequate understanding of the charges against them and are fully competent to communicate with counsel should nevertheless be barred from electing execution because they lack either the judgment or the emotional stability to make a firm and stable decision, much less an informed one." White, *supra* note 12, at 867.

116 ST. AUGUSTINE, CONFESSIONS bk. VIII, at 169 (R.S. Pine-Coffin trans., Penguin Books 1961). "I had prayed to you for chastity and said 'Give me chastity and continence, but not yet.' For I was afraid that you would answer my prayer at once and cure me too soon of the disease of lust, which I wanted satisfied, not quelled." *Id.*

117 *See* White, *supra* note 12, at 861 ("[For some, the] bottom line is that the goal of preventing the government from killing a human being outweighs a defense attorney's normal obligation to respect his client's autonomy."). On the difficulty of maintaining the appearance of fidelity to cherished values even as we undermine those values in difficult situations, see generally GUIDO CALABRESI & PHILIP BOBBIT, TRAGIC CHOICES (1978).

118 Joseph Goldstein, *For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain*, 84 YALE L.J. 683, 686 (1975); *cf.* Bonnie, *supra* note 15, at 1375 n.31 ("The view that the decisions of death penalty defendants

undertakes to evaluate the meaningfulness and worthiness of respect of persons' choices—entrapment, informed consent to human-subjects research, and plea bargaining—he argued that a disingenuous focus on a person's assumed state of mind, rather than on the proposed action itself, insults the very autonomy the focus purports to protect. The following observations—offered, admittedly, in a different context—are instructive:

> To assign to [others] the function of determining whether . . . an individual citizen's consent is informed or intelligently made is to attribute to such decisionmakers a capability they do not have. More importantly, in fulfilling that assignment, these agents of decision arrogate to themselves . . . that which deference to human dignity dictates is to remain with the adult citizen. They act to undercut, rather than to reinforce, respect for the individual's competence . . . .[119]

Even more to the point, Professor Goldstein highlighted the fact that it is those choices to which these "decisionmakers" object that are most likely to be perceived as "uninformed." These choices "may then be used as a justification for challenging the capacity of the citizen to decide what is best for himself. A finding of incompetence which deprives him of authority to decide for himself results from a successful challenge and constitutes the ultimate disregard of his human dignity."[120]

The problem has, as Professor White observed, "the elements of a tragic choice."[121] It seems that death row volunteers who will not be swayed require their lawyers to participate in their dehumanization—either by acquiescing in, if not facilitating, their execution, or by deconstructing disingenuously their capacity to make choices worthy of respect.[122]

III.

In the first Part of this Essay, I introduced a problem—a "legal ethics" problem, though not only that: Those charged with, and convicted of, capital crimes, and those awaiting imposition of the death

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or death row inmates are never competent or voluntary undermines respect for the prisoner's autonomy while pretending to honor it.").

119 Goldstein, *supra* note 118, at 686.

120 *Id.* at 691.

121 White, *supra* note 12, at 869.

122 *Cf.* Anthony V. Alfieri, *Mitigation, Mercy, and Delay: The Moral Politics of Death Penalty Abolitionists*, 31 HARV. C.R.-C.L. L. REV. 325, 330 (1996) (criticizing the "tendency of abolitionist ethical judgments to silence the moral voice of capital defendants and death row inmates").

penalty, often (for lack of a better word) "volunteer" for that punishment. In the second Part, in the hope of understanding, and perhaps even resolving, this problem, I briefly discussed the ways these volunteers' lawyers respond to it. It must be repeated that many lawyers have studied this problem and that, for many of these attorneys, the matter is more than a law school case study or bar exam hypothetical. Though the question of how a would-be volunteer's lawyer should respond has been posed to me, too—and not as a hypothetical—it would be presumptuous and ridiculous to pretend that it has hit me in the way it has the lawyers in Professor White's study, for example; or as it has Professors Mello and Bonnie; or as it did the many lawyers caught up in the tangle described in *The Executioner's Song*.

That said, what should we lawyers think about, and respond to, death row volunteers? What is the right thing to do? This is not just a technical point of professional responsibility, of the "law about lawyers." It is a moral question, just as "legal ethics" is a moral enterprise. As Tom Shaffer put it, "[e]thics properly defined is thinking about morals."[123]

Anyone familiar with Professor Shaffer's work will not likely be surprised at the suggestion that his work speaks powerfully to the questions posed in this Essay. And not only his work: Seven years ago, as a third-year law student in Professor David Luban's course on "the legal profession," I imposed on Professor Shaffer, whose work I had read but whom I had never met, some fifty rambling pages of thoughts and questions about faith, law, ethics, and death row volunteers. I still have in a file; I still appreciate; and I am still inspired by, his considerate, thoughtful, and condescending (in the word's old, not-insulting sense) response. In this last Part, then, I will mention just a few of the themes that I have heard in his work and that have helped me as I continue to think about the matter.

For starters, I agree with Professor Shaffer that a tour through the applicable rules, canons, and maxims of professionalism would, for the most part, miss the point. This is not to say that it is not worth knowing the views of the relevant ethics committee. It is simply to note that these views—appealing, as they likely would, "not to conscience, but to sanction" and sounding, as they likely would, in "mandate rather than insight"—could not be the end of the matter.[124] Because they do not really purport or aspire to provide moral guidance to lawyers (though maybe they should), it is not necessarily a criticism to note that they do not. It is no insult to the profession to

123 Shaffer, *Legal Ethics*, *supra* note 1, at 965.

124 *Id.* at 963.

maintain that its regulatory minima have not preempted the ethical field.

Professor Shaffer might point us instead to stories and to communities—to stories because they teach authentic moral deliberation through illustration and example,[125] and to communities because they are where such deliberation does and should take place. Time and again, he pulls us away from the case books and points toward the "good ones"—the books about lawyers and others looking for the ties between justice, truth, and persons.[126] We are referred by him less often to committee opinions and more to "good stories about good people,"[127] to the Bible and the Talmud, to William Faulkner, Louis Auchincloss, Walker Percy, and Harper Lee—even to *L.A. Law*—for advice.[128] And so he would agree, I think, that *The Executioner's Song* and *The Chamber* might serve as useful legal ethics texts for volunteers' lawyers and that lawyers' moral deliberation could be helped along by *The Practice, Murder in the First,* and *Law and Order.* The point here is not to intrude on the academic conversations about narrative theory

125 *Cf.* Teresa Godwin Phelps, Book Review, 39 J. LEG. EDUC. 463, 467 (1989) (reviewing WAYNE C. BOOTH, THE COMPANY WE KEEP: AN ETHICS OF FICTION (1988)). ("These stories make us better lawyers, not because they show us our moral duty, but because they show us how our membership in the legal profession relates to our general aim to live well, to live integrated, good lives.").

126 Professor Shaffer uses a scene from Faulkner, where Gavin Stevens is asked, "Ain't truth and justice the same thing?" Stevens responds, "In my time I have seen truth that was anything under the sun but just, and I have seen justice using tools and instruments I wouldn't want to touch with a ten-foot fence rail . . . ." "What book is that in?" he is asked. "It's in all of them . . . . The good ones, I mean." Thomas L. Shaffer, *On Lying for Clients,* 71 NOTRE DAME L. REV. 195, 195 (1996) (quoting *An Error in Chemistry, in* WILLIAM FAULKNER, KNIGHT'S GAMBIT 111, 131 (1949)); *see also, e.g., id.* at 203 (suggesting that "giving a central place to the relationships and the communities our stories show us may be more satisfactory in ethics than giving a central place to the analysis of statements"); *cf. id.* at 203 n.51.

> There is an art and a discipline for deciding what stories are good—that is, truthful in their description of the good person . . . . Part of the art and part of the discipline are aspects of faith. That is, the truthfulness of a story is related to its conformity with the "master story" revealed in Scripture.

Id.

127 Thomas L. Shaffer, *How I Changed My Mind,* 10 J.L. & RELIGION 291, 297 (1993/1994) ("Good people in stories always seem to be not only in determinative relationships but also in determinative communities.").

128 *See, e.g.*, Thomas L. Shaffer, *Growing Up Good in Maycomb,* 45 ALA. L. REV. 531 (1994); Thomas L. Shaffer, *The Legal Profession's Rule Against Vouching for Clients: Advocacy and "The Manner That is the Man Himself,"* 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 145 (1993); Thomas L. Shaffer, *Towering Figures, Enigmas, and Responsive Communities in American Legal Ethics,* 51 ME. L. REV. 229 (1999) [hereinafter Shaffer, *Towering Figures*].

or law-as-literature, but instead to make the more pedestrian claim that lawyers struggling with moral judgments might benefit from good books and stories about other lawyers struggling with moral judgments.

Tom Shaffer is an "ambivalent communitarian,"[129] the latter half of the term being a notoriously imprecise label associated with notoriously imprecise claims.[130] In his case, though, it means, among other things, that he believes the best moral deliberation happens in the little platoons of human-scale associations, particularly religious communities.[131] We are advised to take moral questions not just to the books or the bar, but "to the church"; we are told to submit them to the accumulated wisdom and judgment, and to the reflective deliberation, of believers gathered together. Lawyers learn more there, and are better instructed there, precisely because this submission and deliberation is rooted in shared faith and experience, not in license and sanction. In a sense, Shaffer urges us to do what capital defense lawyers already do. If Professor White's work is any guide, the discussions that assist and the arguments that move these lawyers do take place in what could fairly be called their "community"—the close-knit, beleaguered fraternity of death-work specialists. Their ethical judgments

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129 Shaffer, *supra* note 127, at 292.

130 *See, e.g.*, Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 686–87 (1992) ("[B]oth the content and target of communitarian claims remain surprisingly vague . . . . [W]hat it means to be a communitarian in the law remains extremely opaque.").

131 *See, e.g.*, Shaffer, *supra* note 127, at 299 ("The community that is critically important is the community of the faithful."); Shaffer, *supra* note 126, at 197 ("I . . . have suggested that the moral tradition Americans inherit accounts for the morals of good people by reference to relationships among good people and friendship in communities."); Thomas L. Shaffer, *Legal Ethics and Jurisprudence from Within Religious Congregations*, 76 NOTRE DAME L. REV. 961, 962 (2001) ("Morality finds its source and its nourishment in community. A community supplies an accumulated moral wisdom as its tradition expands to meet the ever-changing conditions of human life." (quoting Michael J. Scanlon, *Christian Anthropology and Ethics*, *in* VISION AND VALUES: ETHICAL VIEWPOINTS IN THE CATHOLIC TRADITION 27, 50 (Judith A. Dwyer ed., 1999))); Thomas L. Shaffer, *Should a Christian Lawyer Serve the Guilty?*, 23 GA. L. REV. 1021, 1032 (1989) [hereinafter Shaffer, *Christian Lawyer*].

> [M]ost people in law practice . . . carry around with them the morals they learned in their families, their neighborhoods, and their religious congregations. . . . There is a moral universe out there; people find it possible to be moral in it. . . . This serviceable moral universe is not private either. It is a communal phenomenon and a communal enterprise.

Id. *See generally, e.g.*, Shaffer, *Towering Figures*, *supra* note 128 (stating that lawyers must turn to one of several communities in which they exist when faced with moral questions).

emerge, for better or worse, from reflections on shared practices, in a community to which they are responsible.[132] Professor Mello, for example, has described and dissected his experiences with volunteers in books and for the world, but his moral deliberations have gone on in his capital defense community, and he writes to explain himself to that community as much as to instruct any of us.[133]

This ideal of ethical deliberation is not the only "communitarian" theme in Professor Shaffer's work. The claim is not just that our communities and associations are places where deliberation about moral problems happens. There is also the broader claim that the problems themselves, the persons they confront, and the lawyers who enter into them cannot be understood and described correctly using the "adversary ethic's" autonomy-centered vocabulary.[134] This refusal to frame legal ethics problems in narrow terms might remind us of Professor Althouse's discussion and critique of Gary Gilmore's case, and of her observation that where Norman Mailer, in *The Executioner's Song*, saw "the grand, interconnected mass of humanity that formed around even the least worthy person and illustrates how his fate included it all,"[135] the *Gilmore* court saw only a monad and meddlers.[136] Though I am inclined to agree with the Court's standing, next-friend, and third-party decisions (even in capital cases),[137] they have little to say to lawyers representing death row volunteers. They make sense, I believe, as a gloss on Article III, and as a constraint on the misuse of courts, but they cannot teach us what lawyers should do, if only because they do not "truthfully describe[ ] what is going on."[138] That, for prudential reasons, the Court's focus probably should be on Gary Gilmore, and not on his mother, other death row inmates, or aboli-

132 *See* Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697, 699–701 (1988).

133 Professor Shaffer has emphasized the importance in ethics of identifying the community to which we are responsible. *See, e.g.*, Shaffer, *Towering Figures*, *supra* note 128, at 230.

134 *See* Shaffer, *supra* note 132, at 707–08.

135 Althouse, *supra* note 36, at 1183.

136 *Cf.* Whitmore v. Arkansas, 495 U.S. 149, 157–61 (1990) (noting that speculative, vague, or generalized harms do not rise to the required level of cognizable injuries in fact).

137 For a very different view, see, for example, Owen M. Fiss, *Foreward: The Forms of Justice*, 93 HARV. L. REV. 1, 41 (1979) (arguing that judges need not turn their backs on claims or deny remedies because "each and every individual affected will not or cannot meaningfully participate in the suit").

138 Shaffer, *Legal Ethics*, *supra* note 1, at 965.

tionist organizations does not, it seems to me, mean that a lawyer should bring similar blinders to the task of moral deliberation.[139]

Professor Shaffer makes a similar point using the "Case of the Unwanted Will."[140] In this hypothetical, an estate-planning lawyer, after drawing a will for a married couple, speaks to one spouse alone and learns that the will does not really reflect her wishes. He also learns, though, that she does not want to make waves by disagreeing with her spouse. Now, in Shaffer's view, the standard "legal ethics" answers—specifically, the attorney should not have talked to the spouse alone, that lawyers represent only individuals, and that the lawyer is now caught in a conflict between antagonistic individuals' interests—are "sad, corrupting, and untruthful."[141] As he sees it, the client in the lawyer's office is not the solitary individual or even a contract-based conjunction of two such individuals, but is a family. To instruct lawyers otherwise is to "omit[ ] the social chemistry underneath the events normally invisible to the law"[142] and to blind them to the complex nature of the problems they confront and with whose resolution they are charged.

He uses also another example: When Louis Brandeis was nominated to the United States Supreme Court, opponents charged that he had unethically represented conflicting and antagonistic interests simultaneously (he had continued serving as attorney for a family-run business even after the family had a falling out and the business had to be restructured). Brandeis responded to his critics by stating, "I should say that I was counsel for the situation."[143] Now, this was, remains, and probably should be a controversial account of the lawyer's

139 My colleague Jay Tidmarsh suggested to me that such "prudential" concerns prevent judges from allowing their deliberations to be informed by those same moral communities to which I am arguing good lawyers should turn. The difference, it seems to me, is that lawyers are charged with the task of advising, counseling, persuading, and deliberating with their clients—a task that has an unavoidably moral dimension. I am not sure that the same can be said of the particular judicial task of identifying the bounds of Article III jurisdiction (though perhaps it *can* be said of other decisions judges are required to make).

140 Shaffer, *Legal Ethics*, *supra* note 1, at 968 (discussing Stanley A. Kaplan, *The Case of the Unwanted Will*, 65 A.B.A. J. 484 (1979)).

141 *Id.* at 970.

142 Eastman, *supra* note 85, at 766.

143 John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 STAN. L. REV. 683, 702 (1965); *see also* Shaffer, *Legal Ethics*, *supra* note 1, at 979–84; *cf.* Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445 (1996) (critiquing Brandeis's independent and directive approach to lawyering as an unwillingness to submit to the discipline of engagement with others that is required by the act of representation).

role. That said, it seems hard to get around the fact that lawyers represent "situations," and not just individuals, all the time.[144] Like Brandeis, they take up positions outside the confines of the adversary ethic; they confront persons who are situated, in contexts and communities; they allow the relationships between persons to construct, define, and guide their projects as lawyers.[145] And, in exercising moral judgment, they are not able to ignore those whom the client-centered norms of professionalism, or the doctrines governing third party standing, tell us are outsiders.

But what has for me been most helpful about Tom Shaffer's work is not that he sends me to fiction, as well as to the *Model Rules of Professional Conduct*, for guidance; it is not his respect for the prosaic ethical deliberation that takes place every day in our families, law offices, and church basements; and it is not even his recognition that the way a "situation" is framed for standing purposes is not the way it has to be framed by lawyers making moral judgments. It is, instead, his refreshing, unabashed, and inspiring lack of interest in conforming to the academic convention that, when publicly speaking to difficult questions, one must translate religious themes, segregate religious commitments, and mute religious witness: "The legal ethics I care most about is the legal ethics worked out in the church . . . ."[146] It is not, of course, that he is unaware of, or unengaged with, the law review debate concerning the proper role of religious arguments in public life.[147] He simply has established to his satisfaction (and mine) that a legal ethics conversation from which religious beliefs, faith commitments, and "sectarian" language are excluded can only be empty and uninspiring.[148] In other words, not only does he encourage us to

144 *See, e.g.*, GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 61–62 (1978) (discussing several settings in which lawyers represent the situation); DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 485–86 (1992) (describing other "common situations of simultaneous representation").

145 *See* Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 402–03 (1982–1983) (emphasizing the importance of the "truth which the court normally considers to be irrelevant to the legal resolution of the dispute").

146 Shaffer, *supra* note 127, at 301.

147 *See, e.g.*, Symposium, *Religiously Based Morality: Its Proper Place in American Law and Public Policy?*, 36 WAKE FOREST L. REV. 217 (2001).

148 *See* H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION 262 n.10 (1993) ("Christian theology . . . provides an intellectual and moral basis for a social criticism of American . . . law and politics that is both more radical and more truthful than that based upon secular leftist ideologies."); *cf.* STANLEY HAUERWAS, WITH THE GRAIN OF THE UNIVERSE: THE CHURCH'S WITNESS AND NATURAL THEOLOGY 16 (2001) ("I cannot help but appear

bring legal ethics problems to the Church (or the church), for his own part, he speaks without apology to these problems from the Church. "Ethics," done right, is an enterprise not only of the "gathered church," but of the "witnessing church" as well.

Professor Shaffer's stance is, in my view, liberating in at least two ways. First, a requirement that religious believers who are also lawyers cordon off religious claims and obligations from deliberations about what they ought to do distorts ethical judgment no less than any other failure to "truthfully describe[ ] what is going on."[149] With respect to death row volunteers, for example, I have come to believe that I cannot think about the problem except as a Christian. It seems clear to me that, for a lawyer who is a believer, any purported resolution of an ethical question whose premise is that religious lawyers should hamstring their deliberations by dis-integrating their lives is no resolution at all. After all, how can such a lawyer think about crime and punishment; about retribution, forgiveness, abuse of power, and the common good; about his client's despair, fear, contrition, and hope; or about corruption, redemption, damnation, and beatitude, if his faith is walled off from the conversation like a conflicted-out law partner?[150]

Shaffer's "sectarian" stance is attractive for another reason, too: It points toward a different moral anthropology—toward a better account of what it means to be human and of what it is about the human person that matters for moral inquiry.[151] After all, every legal problem, and every attempt at moral judgment, "reflects certain founda-

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impolite, since I must maintain that the God who moves the sun and the stars is the same God who was incarnate in Jesus of Nazareth. Given the politics of modernity, the humility required for those who worship the God revealed in the cross and resurrection of Christ cannot help but appear as arrogance."). The term "sectarian" is, of course, a "contentious" one. *See* Thomas L. Shaffer, *Erastian and Sectarian Arguments in Religiously Affiliated American Law Schools*, 45 STAN. L. REV. 1859, 1878 (1993). It has been used—and misused—in many different ways. *See generally, e.g.*, Richard A. Baer, Jr., *The Supreme Court's Discriminatory Use of the Term "Sectarian,"* 6 J. L. & POL. 449 (1990). For purposes of this Essay, I mean to follow Tom Shaffer in using the term to refer, among other things, to a distinctively, self-consciously, and unapologetically religious stance, one that might be described using words like "distinct, deviant, subversive, and peculiar." Shaffer, *supra*, at 1873.

149 Shaffer, *Legal Ethics*, *supra* note 1, at 965; *see also* POWELL, *supra* note 148, at 264 ("The norm of Christian social ethics is the obligation to see and speak truthfully.").

150 I was struck, in the above-mentioned episode of *The Practice*, by the fact that the lawyers seemed incapable of grasping (and, in fact, only of mocking) the inmate's desire to "accept[ ] punishment for [his] sins." This belief was, Bobby Donnell sputtered to a judge, evidence of "brainwashing." *See The Practice: Killing Time*, *supra* note 1.

151 John J. Coughlin, *Law and Theology: Reflections on What It Means To Be Human from a Franciscan Perspective*, 74 ST. JOHN'S L. REV. 609, 609 (2000) (noting the "peren-

tional assumptions about what it means to be human."[152] I suggested earlier that while contemporary death penalty lawyers whose clients make moves toward volunteering respond differently when their efforts at persuasion fail, their anthropological assumptions—generally speaking—are the same: The person is and should be regarded as untethered and alone;[153] he is autonomous not simply in the obvious sense that his choices are not determined, but because it is taken as given that the only standards against which those choices can be evaluated are those that are generated, or endorsed, by the self. True, there is frequent and sincere talk of "human dignity," but this "dignity" consists precisely in his being a self-governing chooser. The dignity of the person not only includes, but is reducible to, the capacity to make, and the right to act on, what we are willing to recognize as "autonomous choices."[154] On this view, the autonomy of atomized and rootless units is not only given, but is good in itself—its orientation unjudgeable; it is not regarded as a fragile gift that permits and facilitates the flourishing of the human person. Conduct is good because it is chosen, not chosen because it is good. We live, that is, in the world according to *Casey*, a world where we enjoy "the right to define [our] own concept of existence, of meaning, of the universe, and of the mystery of human life."[155]

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nial nature" of the "anthropological question": "'What does it mean to be a human being?'").

152 *Id.* at 610.

153 *See* Shaffer, *supra* note 127, at 295 ("By 'liberal' I mean an adherent of the . . . philosophy that teaches . . . that every person is her own tyrant—that each of us is, most radically, all alone."); Shaffer & Shaffer, *Character*, *supra* note 19, at 880 ("An anthropology of rights . . . . seems always to depend on the premise that the human person is fundamentally alone.").

154 Recall, again, Professor Mello's claim that the right of an inmate to volunteer is a "basic part" of his "human dignity and autonomy." Mello & Perkins, *supra* note 9, at 511; *see also, e.g.*, Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 605 (1985) ("In a society such as ours, which places the highest value on the dignity and autonomy of the individual, lawyers serve the public interest by undivided fidelity to each client's interest as the client perceives them.").

155 Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (joint opinion). For a provocative critique, grounded in faith, of the *Casey* anthropology, see generally Coughlin, *supra* note 151. To be clear, the problem with the *Casey* joint opinion is not that it emphasizes and celebrates our capacity to seek, choose, and embrace the good, but that it seems to *define* the good (for us) solely with reference to the fact of its having been chosen (by us). The opinion's weakness is not that it celebrates human autonomy, or even that it links the dignity of the person with his ability and right to engage in moral decisionmaking, but rather that it cannot supply any basis for situating and evaluating moral decisions. *See* Shaffer, *supra* note 132, at 699 n.7 (noting the view that "service to autonomy is related to a doctrine of human dignity

Given these anthropological presuppositions, lawyers for would-be volunteers have three choices: first, acquiesce out of respect for autonomy in the client's submission to (in the lawyers' eyes) a dehumanizing penalty; second, oppose and obstruct, admitting candidly that autonomy is being sacrificed to the even more pressing obligation to prevent executions; or, third, resist by treating the client's decision as conclusive evidence of his incapacity to make it and of its unworthiness of respect. The choice is resisted not on the merits (at least, not explicitly), but by infantilizing the chooser.[156] But given the autonomy-centered anthropological premises, and our elevation of choice and consent to "master concepts,"[157] each of these alternatives is bound to be unsatisfying.

Professor Shaffer's religious approach to legal ethics, and his willingness to bear witness to the products of "sectarian" deliberation, holds out the chance for something different and better, for a more edifying and inspiring account of the dignity of the human person.[158] I tend to think that post-modern Americans have settled on "autonomy" as the moral gold standard primarily because we have lost the ability to articulate or believe in anything better.[159] We need something, after all, to assure us that all is well, and the consent of a self-governing chooser serves as our green light.[160] We suspect, perhaps,

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that turns finally on the client's being a child of God"). I thank my colleagues A.J. Bellia and Jay Tidmarsh for reminding me of these points.

156 I do not mean to suggest that there are not, in fact, many condemned inmates who *do* suffer from debilitating mental illnesses and who *should be* regarded as incompetent to make important decisions. My claim here is simply that the desire to acquiesce in execution does not, by itself, establish such incompetence.

157 *See* Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 900 (1994) ("Consent is the master concept that defines the law of contracts in the United States."); *see also, e.g.*, Richard A. Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 HARV. L. REV. 1431, 1431 (1986) (noting that respect for consent is "the fundamental tenet of classical liberalism").

158 As John Coughlin notes, Pope John Paul II has "highlighted the importance of correct anthropology for law." Coughlin, *supra* note 151, at 610 n.1 (citing authorities); *see also, e.g.*, Teresa Stanton Collett, *Life and Death Lawyering: Dignity in the Absence of Autonomy*, 1 J. INST. FOR STUDY LEGAL ETHICS 177, 178 (1996) (suggesting that the "current understanding of clients as autonomous rights-bearers" be replaced "by an understanding which recognizes the intrinsic dignity of each person, deriving not from their capacity to . . . be autonomous, but rather from their innate capacity to seek, know, and move toward the objective good").

159 Alasdair MacIntyre makes a similar point. *See* A. MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 1–5 (2d ed. 1984) (offering the "disquieting suggestion" that "the language and the appearances of morality persist even though the integral substantive of morality has . . . been fragmented, and then in part destroyed").

160 *See* Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 386 (1985)

that there is more to us than a sovereign self, but "autonomy" is the best we can do.[161]

I believe, and I have learned in the community of faith to which both Professor Shaffer and I belong, that lonely autonomy is *not* the best we can do. That freedom of choice is a gift, and even that its value is "inestimable,"[162] does not make it the only valuable thing. That we are distinguished by our capacity for choice does not mean that our dignity is reducible to that capacity. We are not merely agents who choose, we are also spouses, members, friends, and colleagues. We are people who belong, who exist in and are shaped by relationships.[163] Tom Shaffer has convinced me that the "situations" lawyers confront—including the problem of death row volunteers—are misshaped and misdescribed when framed to accord with the individualism reflected in our profession's rules.

There is another account, though; one that turns our profession's (and, for the most part, our culture's) on its head.[164] On this account, the dignity of the human person consists not so much in his capacity to choose but in his status as a creature.[165] On this account, we live less in a state of self-sufficiency than in one of "reciprocal indebtedness."[166] Our dignity derives, oddly enough, less from autonomy and sovereignty than from dependence and incompletion.[167]

("Consent insulates . . . situations from moral criticism and renders them, without more, morally attractive.").

161 I owe this thought to my teacher, Robert Burt.

162 *See* Faretta v. California, 422 U.S. 806, 834 (1975) ("And whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice.").

163 *See* SHAFFER & SHAFFER, AMERICAN LAWYERS, *supra* note 19, at 13–29; *see, e.g.*, Shaffer, *Legal Ethics*, *supra* note 1, at 965–68 ("[O]rganic communities of persons are prior in life and in culture to individuals—in other words, . . . the moral agent is not alone.") (footnote omitted); *cf.* David Luban, *The Legal Ethics of Radical Communitarianism*, 60 TENN. L. REV. 589 (1993) (reviewing SHAFFER & SHAFFER, AMERICAN LAWYERS, *supra* note 19).

164 *See* Gilbert Meilaender, *Still Waiting for Benedict*, FIRST THINGS, Oct. 1999, at 48, 53 (reviewing ALASDAIR MACINTYRE, DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES (1999), and THE MACINTYRE READER (Kelvin Knight ed., 1998)) ("Many now argue . . . that only those human beings who are self-aware, rational, and free to make choices are 'persons' with full claims upon us for our care and concern. . . . [By arguing that persons are "dependent rational animals,"] MacIntyre charts a different course.").

165 *See* Coughlin, *supra* note 151, at 619–20 (discussing "creation and anthropology").

166 Meilaender, *supra* note 164, at 50.

167 *See generally* ALASDAIR MACINTYRE, DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES (1999) (arguing that human beings need virtuous behavior because of our vulnerability and dependence on others).

That which is our greatest source of pride is, at the same time, a constant call to humility.

Now, I admit, I am not yet sure what this might mean, or yield, in the death row volunteer discussion. I am not yet sure what difference it would make to our perception of the obligations we have to our clients, and of the lives *and deaths* of our clients themselves, if our understanding of their worth, respect-worthiness, and destinies rested on these anthropological presuppositions. I *am* sure, though, that it should make a difference. As Professor Shaffer observes,

> In our law offices, we lawyers begin as Solomon did with a view of human persons that precedes our being introduced to clients. The question during this prelude is, "Who are those persons who will come to see me?" That question is certainly jurisprudential, but in this context it is also and primarily ethical.[168]

And I *do* know that we are not diminished by a faith-inspired shift in focus from autonomy and choice to creaturehood and dependence. As C.S. Lewis once wrote, in his essay, *The Weight of Glory*:

> There are no ordinary people. You have never talked to a mere mortal. Nations, cultures, arts, civilisations—these are mortal, and their life is to ours as the life of a gnat. But it is immortals whom we joke with, work with, marry, snub, and exploit—immortal horrors or everlasting splendours.[169]

What, then, does a capital defense lawyer owe the glory-burdened yet—to the world, anyway—"repulsive"[170] immortal who is resigned to his execution?[171] What can he do to help secure "everlasting splendours" for them both? These are questions worth answering, and I believe that Tom Shaffer can help us to answer them.

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168 Thomas L. Shaffer, *Human Nature and Moral Responsibility in Lawyer-Client Relationships*, 40 AM. J. JURIS. 1, 2 (1995).

169 C.S. LEWIS, THE WEIGHT OF GLORY 19 (rev. & expanded ed. 1980) (emphasis omitted); *cf.* Shaffer, *supra* note 168, at 2 ("[T]he human person is 'the noblest work of God'—infinitely valuable, relentlessly unique, endlessly interesting.").

170 *See* Thomas L. Shaffer, *Christian Lawyer*, *supra* note 131, at 1026 (1989) ("The interesting thing that the Gospel says about revulsion . . . is that the moral thing to do is to turn toward the repulsive person, to reach out to that person, to reach through his repulsiveness.").

171 I am grateful to my colleague, A.J. Bellia, for reminding me that this is a question that should be asked not only of capital defense lawyers, but also of the many others who—perhaps by choice, perhaps not—live in obligation-generating relationship with the condemned inmate.