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Darkness to Light: Procedural Injustice as Crisis for Capital Punishment Legitimacy

Stephen K. Rice, Ph.D.

As opposed to the years preceding *Furman* when executions were conducted in relative obscurity, more recent calls for transparency in death penalty administration threaten to expose procedural injustices that facilitate the creation of multiple meanings of the ultimate sanction, a crisis that damages the moral order that contemporary penology and capital jurisprudence depend on. A selection of case studies and death chamber narratives support the thesis that procedural injustice ties to a coalescence of pity and terror, a morass that renders offenders tragic in the public's mind rather than recipient of just punishment. The incorporation of death chamber narratives supports calls by Garland, Sampson, Maruna, and others regarding the use of descriptive ethnography and discourse analysis as key components of criminological explanation.

Keywords: narrative criminology; capital punishment; death penalty; death row; death chamber; defiance; innocence; wrongful conviction; execution; procedural justice; final words; final statements; descriptive ethnography.

I. INTRODUCTION

California's 2005 execution of Stanley "Tookie" Williams provides a useful lens through which to consider the impact of procedural injustice and displays of identity as threats to capital punishment legitimacy. Williams, a cofounder of the Crips youth gang, was put to death for the murder of four people in 1979 amid an avalanche of violence in south Central Los

Angeles.¹ The execution, the twelfth in the state of California since 1978, received less attention for Williams' prominent position within the Crips than it did for his calls for nonviolence in the years afterward—efforts that spanned from memoirs to a series of children's books that inspired Nobel Prize nominations and a Hollywood movie.²

The case is also important because several criminological themes can help us better understand the days and years leading up to Williams' execution—themes including procedural and distributive injustice, all manner of general strain (i.e., goal blockage, presentation of negative stimuli, removal of positive stimuli),³ exposure to delinquent peer networks, and issues of mercy, redemption, and restoration.⁴ With regard to the latter themes which are so central to Braithwaite⁵ and others, California Governor Arnold Schwarzenegger made short shrift of Williams' pleas for mercy, arguing that “[w]ithout an apology and atonement for these senseless and brutal killings there can be no redemption. In this case, the one thing that would be the clearest indication of complete remorse and full redemption is the one thing Williams will not do.”⁶

¹ Sarah Kershaw, *Execution Ignites New Fire in Death Penalty Debate*, N.Y. TIMES, Dec. 14, 2005.

² See STANLEY WILLIAMS, *REDEMPTION: FROM ORIGINAL GANGSTER TO NOBEL PRIZE NOMINEE – THE EXTRAORDINARY LIFE STORY OF STANLEY TOOKIE WILLIAMS* (Milo Books 1997); STANLEY “TOOKIE” WILLIAMS & BARBRA C. BECNEL, *GANGS AND THE ABUSE OF POWER (TOOKIE SPEAKS OUT AGAINST GANG VIOLENCE)* (PowerKids Press 2003).

³ ROBERT AGNEW, *PRESSURED INTO CRIME: AN OVERVIEW OF GENERAL STRAIN THEORY* (Oxford University Press 2005).

⁴ See STANLEY WILLIAMS, *BLUE RAGE, BLUE REDEMPTION: A MEMOIR* (Damamli Publ'g Co. Nov. 13, 2007).

⁵ JOHN BRAITHWAITE, *CRIME, SHAME, AND REINTEGRATION* (Cambridge Univ. Press 1989).

⁶ Roger Cohen, *The Quality of Mercy is No Longer Mightiest*, N.Y. TIMES, Dec. 17, 2005.

As reflected by the general lack of restorative justice ethos in the United States,⁷ I will leave it to others to remark more extensively on Williams' relative lack of success in California vis-à-vis redemption and clemency. What I do argue, however, is that Williams' execution—and more specifically, the manner in which it, and similar, executions have been carried out—stands as a significant threat to the legitimacy of capital punishment. Punishment is a communicative act,⁸ and Williams' prominence cast an inordinately bright light on his execution. Within the context of political structure, “modern governors reveal themselves to be shallow when they are unready to talk about mercy and grace as an important part of just punishment.... We celebrate redemption in so many situations, but refuse that latitude in a criminal justice system still biased against the poor, particularly the African-American poor.”⁹

As has been the case in dozens of other documented executions post-*Furman*, Williams' execution joined not only a burgeoning aversion to racially biased distributions of death penalty sentences, but through its procedurally unjust implementation, is also remembered for its display of personal identity and degradation avoidance.¹⁰ Expressed another way, procedural injustice oftentimes breeds spontaneous, non-ritualized presentations of self between offenders who face imminent execution and an audience present requiring “face-work,” thus damaging the moral order that penology and capital jurisprudence rely on.¹¹

⁷ See Generally Leena Kurki, *Restorative and Community Justice in the United States*, 27 CRIME & JUST. 235 (2000).

⁸ DAVID W. GARLAND, *PUNISHMENT AND MODERN SOCIETY* (Clarendon Press 1990).

⁹ Cohen, *supra* note 6.

¹⁰ DAVID C. BALDUS, GEORGE G. WOODSWORTH & CHARLES A. PULASKI JR., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS*, (Northeastern Univ. Press 1989/1990).

¹¹ See Generally IRVING GOFFMAN, *INTERACTION RITUAL: ESSAYS IN FACE-TO-FACE BEHAVIOR* (1967); See also Phillip Smith, *Executing Executions: Aesthetics, Identity, and the Problematic Narratives of Capital Punishment Ritual*, 25 THEORY & SOC'Y 235 (1996).

As outlined by Smith, identity assertion and degradation avoidance in the execution chamber can create a crisis of ritual semiosis for the state.¹² Before discussing how Williams (and similar) cases directly relate to these themes, attention must be drawn to their ties to seminal work on punishment and fair and just procedures.

II. THE EXECUTION AS RITUAL

No matter the lens, contemporary executions are best viewed as *rituals*.¹³ Grounded in the unpredictable nature of the public and aversion to *amende honorable*,¹⁴ public executions were cast aside for modern, private rituals that seem intended to soothe the conscience of a public which supports the death penalty largely as an abstraction.¹⁵ As explained by Cullen and colleagues, “[t]he public shows a tendency to be punitive and progressive, wishing the correctional system to achieve the diverse missions of doing justice, protecting public safety, and reforming the wayward”.¹⁶

To scholars such as Giddens,¹⁷ the movement of punishment from public to private was explained as neo-Weberian narrative: the movement indoors as an “iron cage” with its figurative and material imprisonment.¹⁸ To Foucault, it was explained by a “slackening of the hold of the body,” or the substitution of discourse related to the body of the criminal to one centered on the soul.¹⁹ Where Giddens saw an expansion of state power vis-à-vis

¹² See generally Smith, *supra* note 11.

¹³ See generally Herb Haines, *Flawed Executions, the Anti-Death Penalty Movement, and the Politics of Capital Punishment*, 39 SOC. PROBS. 125, (1992).

¹⁴ MICHAEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Vintage Books 2d ed. 1978) (1991).

¹⁵ Haines, *supra* note 13.

¹⁶ Francis T. Cullen, Bonnie S. Fisher, & Brandon K. Applegate, *Public Opinion About Punishment and Corrections*, 27 CRIME & JUST. 1 (2000).

¹⁷ ANTHONY GIDDENS, *THE NATION-STATE AND VIOLENCE* (Univ. of Cal. Press 1985).

¹⁸ See generally Smith, *supra* note 11.

¹⁹ Foucault, *supra* note 14 at 10.

private executions, Foucault saw a newfound focus on *mens rea* and class-conscious mobilization.²⁰

In a multiparty, multifaceted criminal justice system whose meaning is both symbolic and variable, particular attention must be paid to questions rooted in interactionism, such as procedural justice.²¹ As opposed to the years preceding *Furman* when private executions could be conducted inconspicuously, the more recent calls for transparency in death penalty administration,²² capital sentencing decisions,²³ and media coverage²⁴ threaten to expose procedural injustices that create multiple meanings of the ultimate sanction, a crisis of ritual semiosis which threatens the legitimacy of authority.

III. CRISIS OF RITUAL SEMIOSIS

The barbarous spectacle of public executions could produce one of two undesired psychological results in spectators: (1) a failure to appreciate the horror of the crime, or (2) a failure to generate civil moral sentiments. Without a level of transparency, the more contemporary private execution (assessed vigorously by Giddens, others)²⁵ provided the state with the ability to re-assert its monopoly over meaning and eliminate unwanted

²⁰ Smith, *supra* note 11, at 238.

²¹ See generally, TOM R. TYLER, *WHY PEOPLE OBEY THE LAW*, (Yale Univ. Press 1990); John Hagan & Celesta Albonetti, *Race, Class, and the Perception of Criminal Injustice in America*, 88 AM. J. OF SOC. 329 (1982) and Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 431 (2003).

²² See generally Austin Sarat, *Killing Me Softly: Capital Punishment and the Technologies for Taking Life*, in *LAW, MEANING, & VIOLENCE* 43 (Austin Sarat ed., 2001).

²³ See generally DAVID R. DOW, *EXECUTED ON A TECHNICALITY: LETHAL INJUSTICE ON AMERICA'S DEATH ROW* (Beacon Press 2005); William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043 (1995).

²⁴ See Generally Henry Schwarzschild & Robert R. Bryan, *To See or Not to See: Televising Executions*, *THE DEATH PENALTY IN AM.: CURRENT CONTROVERSIES* 384, (Hugo Adam Bedau ed., 1997).

²⁵ Giddens, *supra* note 17.

“noise” in the semiotic system.²⁶ Semiosis concerns itself with the way words, images, sounds, and acts become signs that are vested with meaning—as something that is “signified” in the minds of human interpreters.²⁷

Figure 1 attempts to capture Smith’s thesis in the models of Saussure and Peirce.²⁸ In the dyad, the “signifier” is the form the sign takes; namely, the offender who has been judged and is being punished by death. The “signified” refers to what the death of an offender represents; here, the moral horror of crime. The triad is similar but divides the processes: the offender (“representamen”) is the form which the sign takes, the ultimate sanction (“object”) is what the sign refers to, and the moral horror of crime (“interpretant”) is the sense made of the sign. Understanding such signs and symbols is key to understanding culture in the sociology of punishment, or “those aspects of social action or social artifacts that are ideational, affective, or aesthetic”.²⁹ Within the present context, the state’s desire to open its walls more fully post-*Furman* may have the unintended effect of bringing procedural injustice to light, evoking performances that question the morality of the state and damage the long-term viability of such punishment.

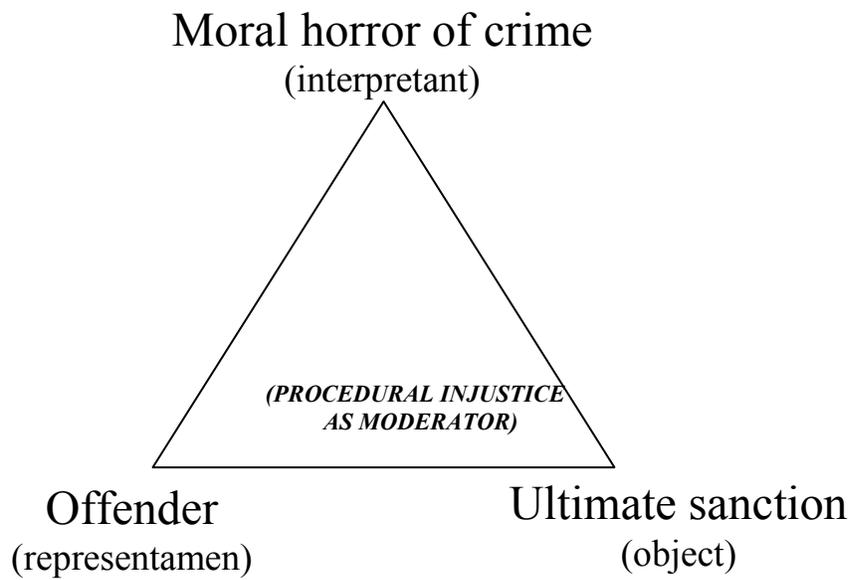
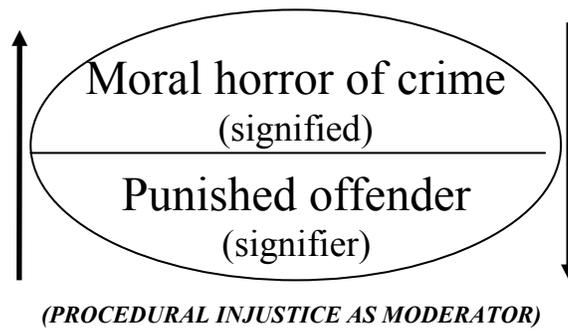
FIGURE 1: Smith’s (1996) Thesis Presented in the Form of Dyad (de Saussure) And Triad (Peirce).

²⁶ Smith, *supra* note 11.

²⁷ See generally DANIEL CHANDLER, SEMIOTICS: THE BASICS, (2nd ed. Routledge 2001).

²⁸ Smith, *supra* note 11; FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS (Charles Bally et al. eds., Roy Harris trans., Duckworth 1983); CHARLES S. PEIRCE, SELECTED WRITINGS (Philip P. Wiener ed., 1966) (Identity assertion and degradation avoidance in the execution chamber may create unwanted interference/noise in the symbolic system. In other words, from the perspective of the state the moral horror of crime may become replaced by competing (and undesirable) signs).

²⁹ David Garland, *Concepts of Culture in the Sociology of Punishment*, 10 THEORETICAL CRIMINOLOGY 419, 436 (2006).



IV. SYMBOLS OF PITY & TERROR: PROCEDURAL INJUSTICE,
STANLEY WILLIAMS, & OTHERS

As such, it is the presentation of self which plays to humanist discourse (norms that emphasize coercion and pain as violating justice) that will most centrally damage the ongoing viability of the death penalty. Just as the ideology of deterrence “was once confounded by a bravado which denied the sting of death,”³⁰ so too is the moral order vulnerable to performances that question the legitimacy of the state.³¹ To this point, support for capital punishment has been linked to distrust of government and the vigilante tradition.³²

As suggested earlier, scores of recent executions illustrate a joining of pity and terror, an entanglement that casts offenders as tragic in the public’s mind rather than inheritors of right and just punishment. The Stanley Williams case provides one such example. Although Williams consistently proclaimed his innocence, focusing on questions of fact with neither apology nor atonement (forming the basis for the California governor’s unwillingness to commute), Williams’ words in the weeks leading up to the execution also focused on points of law: procedural improprieties which, in Williams’ mind, impacted his ability to receive a fair trial and fair appeal. Among these was a petition filed by Williams’ lawyers on the Sunday prior to his execution that called for a reopening of the case on the grounds that, among other things, witnesses against Williams were “criminals who were given significant incentives to testify against him and ongoing benefits for their testimony.”³³ Consistent with other legal appeals that had already been rejected, the California Supreme Court refused to hear Williams’ petitions.

³⁰ Smith, *supra* note 11, at 255.

³¹ *Id.*

³² See generally Steven F Messner, Eric P. Baumer & Richard Rosenfeld, *Distrust of Government, the Vigilante Tradition, and Support for Capital Punishment*, 40 LAW & SOC’Y REV. 559 (2006).

³³ Sarah Kershaw, *No Word From Governor as Execution Approaches*, N.Y. TIMES, Dec. 12, 2005.

But as we know, petition refusals by state and federal courts are not unusual, and it remains to be seen whether claims of wrongful conviction on procedural grounds in capital cases will receive the empirical support found in process-based models of regulation.³⁴ What can be argued with few qualifiers, however, is the likely elicitation of pity and terror as a result of procedural improprieties in the machinery of death itself (in other words, in those cases when the state is unable to minimize offender individuality and personality through routinized execution procedures, behind-the-scenes staging, and blank imagery).³⁵

To the contrary, Williams' case was far from routinized. As *The New York Times* described Barbara Becnel's (an editor of Williams' books') experience at the execution:

She (Becnel) watched the execution, which took 36 minutes and 15 seconds, said reporters who witnessed it...as a nurse struggled for about 12 minutes to insert a needle into Mr. Williams' left arm.

Ms. Becnel described the procedure as 'an absolutely barbaric display of truly how cruel the punishment of the death penalty is.' 'It took the staff of San Quentin 35 minutes to kill Stan,' she said. 'During the course of their bumbling, we watched him grimace in pain, we watched him finally reach a point of frustration, where you saw him lift his head up, and you could see he was saying 'Can't you just do this?'

If one frames the execution as degradation ceremony, such moments are a high-stakes game: despite hopes for a routinized procedure, Williams' grimace and "can't you just do this?" *appropriated the moment* in that the narrative emphasized coercion and pain as violating justice.

³⁴ See Generally CRAIG HANEY, *DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM* (Oxford Univ. Press 2005); see also Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 *CRIME AND JUST.* 431, 431-505 (2003).

³⁵ See Generally Garland, *supra* note 29.

Similar to how the cultivation thesis shapes audience beliefs about crime,³⁶ another important question is whether Williams' international prominence "counted" more in the collective conscious's response to perceived barbarity. Williams' case was perhaps the most well-known, but he is but one in a long list of inmates who have experienced extraordinarily troubling problems in execution protocol.

Mirroring Williams' experience, since 1982 at least two executions using gas as method of execution experienced errors in administration, ten executions using electrocution, and 24 using lethal injection.³⁷ Specifics include insufficient or inappropriately administered electrical current (e.g., John Evans in Alabama; Alpha Otis Stephens in Georgia; William Vandiver in Indiana; Horace Dunkins, Jr. in Alabama), malfunctioning syringe and/or plastic tubing (e.g., Raymond Landry in Texas; Charles Walker in Illinois), allergic reactions to lethal injection drugs (e.g., Stephen McCoy in Texas; Robyn Lee Parks in Oklahoma) and numerous cases, like Williams', where medical technicians were unable to find a suitable vein to allow the execution to proceed in a timely manner.³⁸

Several specifics are horrific in nature. Tied to an executioner under the influence, Jimmy Lee Gray's botched asphyxiation in Mississippi was marked by the forced expulsion of witnesses from the chamber as Gray struggled to breathe while moaning and banging his head against a steel pole in the gas chamber.³⁹ Associated with a delay in time-of-death due to faulty hardware, Pedro Medina's electrocution in Florida featured a crown of foot-high flames shooting from the inmate's headpiece, while the placement of Allen Lee Davis' mouthpiece prior to electrocution in Florida is thought to have caused septal bleeding and partial asphyxiation prior to

³⁶ Ronald Weitzer & Charis E. Kubrin, *Breaking News: How Local TV News and Real-world Conditions Affect Fear of Crime*, 21 JUST. Q. 497, 497-520 (2004).

³⁷ Michael L. Radelet, *Botched Executions*, DEATH PENALTY INFO. CTR., (last visited Apr. 5, 2017), <http://www.deathpenaltyinfo.org/article.php?scid=8&did=478>.

³⁸ *Id.*

³⁹ *Bryan v. Moore*, 744 So. 2d 452 (Fla. 1999).

the administration of electrical current; legal filings post-execution describe it thusly: “After Davis’ airflow had been blocked by the mouth-strap, the face-mask, and his own blood, Davis made several sounds under the face-mask which were described variously as muffled screams, moans, or yells[...].”⁴⁰ As described by Florida Supreme Court Justice Leander Shaw, “... the color photos of Davis depict a man who, for all appearances, was brutally tortured to death by the citizens of Florida.”⁴¹

Stephen McCoy’s physical reaction to lethal injection drugs in Texas (gasping, choking, back arching off the gurney) was so violent that it led one witness to faint, while Robyn Lee Park’s reaction to the drugs in Oklahoma featured spasming of the muscles in his jaw, neck and abdomen and violent gagging that lasted until death came eleven minutes later. As one witness described it, “It was overwhelming, stunning, disturbing - - an intrusion into a moment so personal that reporters, taught for years that intrusion is their business, had trouble looking each other in the eyes after it was over.”⁴² Bennie Demps’ lethal injection in Florida included over thirty minutes of unsuccessful intravenous connection, leading officials to have to attempt a venous “cut down,” or search for a suitable vein elsewhere on the body. As Demps exhorted in his final statement, “They butchered me back there.... They cut me in the groin; they cut me in the leg. I was bleeding profusely. This is not an execution, it is murder.”⁴³ A more recent execution in 2016 is that of Ronald Bert Smith, Jr. of Alabama, who appeared to struggle for breath, heaved and coughed and demonstrated bodily movements after consciousness tests during his lethal injection.

⁴⁰ *Id.*

⁴¹ Radelet, *supra* note 37; *see also* Sarat, *supra* note 22.

⁴² Radelet, *supra* note 37.

⁴³ *Id.*

V. THEORIZING ONE'S OWN DEATH: FINAL STATEMENTS REFLECTING PROCEDURAL INJUSTICE

Pro-death penalty discourse has shifted from pragmatic considerations (deterrence) to moral considerations, where executions are seen to be aligned with collective consciousness, or *habitus*.⁴⁴ As discussed throughout this paper, narrative inflation that focuses on the state's use of power is of particular importance because of its downstream ties to legal authority and legitimacy. As Markel explains in his analysis of retributivism, "if the death penalty is distributed arbitrarily . . . the agents who impose it act without legitimacy, for they transgress the bounded use of power that itself permits their use of coercion over others."⁴⁵

Toward this end and harkening back to inmates such as Florida's Bennie Demps, in a great number of cases inmates facing imminent execution theorize their own deaths, contemplating the injustice of the ultimate sanction, their innocence, and the legal proceedings that brought them to that place. As such, the articulation of procedural injustice speaks to a debasement of the person and reminds us of the ferocity of state sovereignty over life and death.⁴⁶

Following is a selection of final statements by inmates executed by the State of Texas post-*Furman*. Texas death narratives are appropriate for a number of reasons. Texas is where more than a third of executions in the United States since 1976 have occurred, where approximately half of all capital cases are overturned on appeal, where a number of innocent men have been freed from death row, and where nearly a quarter of the

⁴⁴ See Generally Phillip Smith, *Executing Executions: Aesthetics, Identity, and the Problematic Narratives of Capital Punishment Ritual*, 25 THEORY AND SOC'Y 235, (1996).

⁴⁵ Dan Markel, *State, Be Not Proud: A Retributivist Defense of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407, 458 (2005).

⁴⁶ See Generally Austin Sarat, *Introduction: On pain and death as facts of legal life*, in PAIN, DEATH, AND THE LAW 1, 1-14 (U. of Michigan Press 2001); David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynching's in Twentieth-Century American*, 39 L. AND SOC'Y REV. 793 (2005).

condemned are represented by attorneys who have been disciplined for misconduct.⁴⁷ As Garland argues, hard-edged “material” aspects of penal practice (e.g., its technologies, economies, and politics) should be coupled with tools such as discourse analysis to better understand the meaning and sensibility attached to penal power.⁴⁸ Taken as a whole, narrative criminology has been found to be a powerful means toward understanding of the self.⁴⁹ Couple criminal event structures with such causal narratives, and one takes an important step toward “dynamic contextualism” in criminological thought.⁵⁰

Whereas public accounts of Southern lynchings in centuries past were extraordinary for their sheer banality (“their homely, small-town ordinariness”), the availability of final statement transcripts in the modern era provides a far more vivid display: that of pain, and death, that allows for their explication as facts of legal life.⁵¹

A. Final Statements Evoking Unjust Nature of Inmate’s Legal Proceeding

Henry Porter, executed July 9, 1985 for the death of a Fort Worth police officer:

What I want people to know is that they call me a cold-blooded killer when I shot a man that shot me first. The only thing that convicted me was that I am a Mexican and that he was a police

⁴⁷ See Generally, Alan Berlow, *The Texas Clemency Memos*, THE ATL. MONTHLY, July/Aug. 2003, at 91.

⁴⁸ Garland, *supra* note 29, at 419-447; see, e.g., Stephen Rice, Danielle Dirks, & Julie Exline, *Of guilt, defiance, and repentance: Evidence from the Texas death chamber*, JUST. Q. 26, (Apr. 15, 2009) (discourse analyses of Texas death chamber final statements by way of themes to include desires for forgiveness, exhortations of defiance, and repentance).

⁴⁹ See Generally, Maruna, S. (1997). Going straight: Desistance from crime and self-narratives of reform. 5 THE NARRATIVE STUDY OF LIVES, 5, 59. See also Lois Presser and Sveinung Sandberg, *Narrative Criminology, understanding stories of crimes* (NYU Press 2015).

⁵⁰ See Generally Robert J. Sampson, *Linking Time and Place: Dynamic Contextualism and the Future of Criminological Inquiry*, 30 J. RES. CRIME & DELINQUENCY (1993).

⁵¹ See Generally Garland, *supra* note 46, at 794; Sarat, *supra* note 46

officer. People hollered for my life, and they are to have my life tonight. The people never hollered for the life of the policeman that killed a thirteen-year-old boy who was handcuffed in the back seat of a police car. The people never hollered for the life of a Houston police officer who beat up and drowned Jose Campo Torres and threw his body in the river. You call that equal justice. This is your equal justice. This is America's equal justice. A Mexican's life is worth nothing. When a policeman kills someone he gets a suspended sentence or probation. When a Mexican kills a police officer this is what you get. From there you call me a cold-blooded murderer. I didn't tie anyone to a stretcher. I didn't pump any poison into anybody's veins from behind a locked door. You call this justice. I call this and your society a bunch of cold-blooded murderers. I don't say this with any bitterness or anger. I just say this with truthfulness. I hope God forgives me for all my sins. I hope that God will be as merciful to society as he has been to me. I'm ready, Warden.⁵²

William Chappell, executed November 20, 2002 for the retaliation killing of 50-year-old woman and her daughter in Fort Worth:

Jane, Grace and all of you all, I know you think I did this.... But, let me tell you something, there were two DNA tests run and none matched me. I wanted a third, but that never happened. Three people at different times confessed to killing these people – your parents. They did not know me. My request is that you get yourselves in church and pray for forgiveness because you are murdering me. I did not kill anyone in my life.... If you think I did this, you need to think again. There were three people in the house and have confessed to it.... All I was asking for was a DNA and I could not get it...⁵³

Henry Earl Dunn, Jr., executed February 6, 2003 for the shooting death of a 23-year-old male in Tyler:

⁵² TEX. DEP'T OF CRIM. JUST., http://www.tdcj.state.tx.us/death_row/dr_info/porterhenrylast.html (last visited Apr. 5, 2017).

⁵³ TEX. DEP'T OF CRIM. JUST., http://www.tdcj.state.tx.us/death_row/dr_info/chappellwilliamlast.html (last visited Apr. 5, 2017).

The death penalty in Texas is broke. When an attorney can be forced to represent you who is not qualified to represent you under Texas laws, the system does not work. When an attorney can dismiss your appeal process, by missing a filing deadline or for failing to file documents on behalf of a client, that's not due process of law as guaranteed under the Unites States Constitution, the system does not work.... Texas has executed innocent people, and tonight, Texas has shown just how broke and unfair its system is. There is no clemency in Texas, a process that needs to be reviewed, and fixed.⁵⁴

Gerald Tigner, executed March 7, 2002 for the shooting deaths of two men in Waco:

Yes. My last statement. I was wrongfully convicted of this crime against Michael Watkins and James Williams on 10th Street on August 31, 1993. I got convicted on a false confession because I never admitted to it, but my lawyer did not put this out to the jury....⁵⁵

Martin Vega, executed January 26, 1999 for the murder of a 36-year-old man in Caldwell County:

The thing is, my lawyers would not subpoena anyone, so they allowed the state to subpoena them to paint a picture to the jury that my own sister and niece was testifying against me..... They used false testimony of a woman that said I had raped her, when the test showed that the foreign pubic hair that was found on her body belonged to no one in that room. They found a drop of sposmosa (*sic*) in the crotch of her pants that was tied to blood type B. My blood type is A. Now the same woman there they brought to testify against this murder case. That woman was under indictment for possession of methamphetamine, delivery of

⁵⁴ TEX. DEP'T OF CRIM. JUST., http://www.tdcj.state.tx.us/death_row/dr_info/dunnhenrylast.html (last visited Apr. 5, 2017).

⁵⁵ TEX. DEP'T OF CRIM. JUST., https://www.tdcj.state.tx.us/death_row/dr_info/tignergeraldlast.html (last visited Apr. 5, 2017).

methamphetamine. She could have gotten out of both of those cases. Yet, she swore under oath that she had never been in trouble with the law and none of that mattered. So what does that make this great state? A very high-priced prostitute that sells itself, called justice, to the highest bidder.⁵⁶

Richard Wilkerson, executed August 31, 1993 for death of four males in a robbery-slating in Harris County (statement written through his sister):

This execution is not justice. This execution is an act of revenge! If this is justice, then justice is blind. Take a borderline retarded young male who for the 1st time ever in his life committed a felony then contaminate his TRUE tell all confession. Add a judge who discriminates plus an ALL-WHITE JURY. Pile on an ineffective assistance of counsel and execute the option of rehabilitation. Persecute the witnesses and you have created a death sentence for a family lasting over 10 years.⁵⁷

Richard Kutzner, executed August 7, 2002 for the murder of a Montgomery County woman:

Rebecca, I understand that you wanted this day to come, you got what you wanted. I didn't kill your mother. The two guys that worked for me killed your mother and they are still out there. If Mr. McDougal had allowed the DNA evidence, I would be exonerated. Mr. Tolson, I understand you are out there. If there is any justice in this world, please use this to keep other people from being where I'm at. Warden, this is murder just as surely as the people that killed Rebecca's mother.⁵⁸

⁵⁶ TEX. DEP'T OF CRIM. JUST.,
http://www.tdcj.state.tx.us/death_row/dr_info/vegamartinlast.html (last visited Apr. 5, 2017).

⁵⁷ TEX. DEP'T OF CRIM. JUST.,
http://www.tdcj.state.tx.us/death_row/dr_info/wilkersonrichardlast.html (last visited Apr. 5, 2017).

⁵⁸ TEX. DEP'T OF CRIM. JUST.,
http://www.tdcj.state.tx.us/death_row/dr_info/kutznerichardlast.html (last visited Apr. 5, 2017) (Mr. McDougal was the Montgomery County district attorney at the time of the execution. Mr. Tolson is a journalist).

B. Final Statements Evoking Unjust Nature of the Death Penalty

James Edward Smith, executed July 26, 1990 for the murder of a Houston businessman:

I go to my death without begging for my life. I will not humiliate myself. I will let no man break me. It just can't be done. There is a price to be paid. I want the people to wake up to the reality of executions. The price to be paid will be a dear one.⁵⁹

James Russell, executed September 19, 1991 for the murder of a Houston retail manager:

Wherever a death penalty is, there can be no civilization.... (to his family): Don't be sad. We will meet again and sing a sweeter song.⁶⁰

Miguel Richardson, executed July 26, 2001 for the murder of a San Antonio security guard:

There is no separation between you and me. There is no enemies, only family. I am a minister of love. I go out loving everyone and everything. God bless my...country. I shed tears of love may they nourish everyone. Stop killing start loving. Stop the violence. Let my death change society. You don't need any more killing. You don't need any minimum, maximum security, death row. You don't need the death penalty. We need more loving fathers and mothers. It is a good day to die. Take me God, Hold me in yours and carry me home.⁶¹

⁵⁹ Tom Kuntz, *Word for Word: The Condemned: As Executions Mount, So Do Infamous Last Words*, N. Y. TIMES, (July 30, 1994), <http://www.nytimes.com/1994/07/31/weekinreview/word-for-word-the-condemned-as-executions-mount-so-do-infamous-last-words.html>.

⁶⁰ *Texas Executes Man for Murder 17 years ago*, UNITED PRESS INT'L (Sept. 19, 1991), <http://www.upi.com/Archives/1991/09/19/Texas-executes-man-for-murder-17-years-ago/3219685252800>.

⁶¹ TEX. DEP'T OF CRIM. JUST., http://www.tdcj.state.tx.us/death_row/dr_info/richardsonmiguellast.html (last visited Apr. 5, 2017).

Reginald Reeves, executed May 9, 2002 for the murder of a minor female:

I pray that we all may learn to love and forgive so that we can have peace in the world. It is with loving and forgiveness and living to learn to love and loving to live that we can learn the power of forgiveness and learn to live as brothers and sisters on this earth. Until then, this will continue to happen—capital punishment; and if we don't forgive, sooner or later we will all self-destruct. You need to open up your heart and let God in.... Today, this does not bring you peace because this is not really the way. We should forgive and love and I do apologize with all my heart and soul and I love you and I know your spirit and God dwells within us and we are all one big family of humanity; we must all learn to love and live together. I will see you on the other side. Thank you for your hospitality.⁶²

Gary Graham (aka Shaka Sankofa), executed June 22, 2000 for the murder of a Houston man:

I would like to say that I did not kill Bobby Lambert. That I'm an innocent black man that is being murdered. This is a lynching that is happening in America tonight. There's overwhelming and compelling evidence of my defense that has never been heard in any court of America. What is happening here is an outrage for any civilized country to anybody anywhere to look at what's happening here is wrong..... I want to express my sincere thanks to all of ya'll. We must continue to move forward and do everything we can to outlaw legal lynching in America. We must continue to stay strong all around the world, and people must come together to stop the systematic killing of poor and innocent black people. We must continue to stand together in unity and to demand a moratorium on all executions. We must not let this murder/lynching be forgotten tonight, my brothers. We must take it to the nation. We must keep our faith. We must go forward..... What is here is just a lynching

⁶² TEX. DEP'T OF CRIM. JUST.,
http://www.tdcj.state.tx.us/death_row/dr_info/reevesreginaldlast.html (last visited Apr. 5, 2017).

that is taking place. But they're going to keep on lynching us for the next 100 years, if you do not carry on that tradition, and that period of resistance. We will prevail. We may lose this battle, but we will win the war. This death, this lynching will be avenged. It will be avenged, it must be avenged. The people must avenge this murder. So my brothers, all of ya'll stay strong, continue to move forward...⁶³

Napoleon Beazley, executed May 28, 2002 for the carjacking murder of a male in Tyler:

The act I committed to put me here was not just heinous, it was senseless. But the person that committed that act is no longer here - I am. I'm not going to struggle physically against any restraints. I'm not going to shout, use profanity or make idle threats. Understand though that I'm not only upset, but I'm saddened by what is happening here tonight. I'm not only saddened, but disappointed that a system that is supposed to protect and uphold what is just and right can be so much like me when I made the same shameful mistake. If someone tried to dispose of everyone here for participating in this killing, I'd scream a resounding, "No." I'd tell them to give them all the gift that they would not give me...and that's to give them all a second chance. I'm sorry that I am here. I'm sorry that you're all here. I'm sorry that John Luttig died. And I'm sorry that it was something in me that caused all of this to happen to begin with. Tonight we tell the world that there are no second chances in the eyes of justice... Tonight, we tell our children that in some instances, in some cases, killing is right.

This conflict hurts us all, there are no SIDES. The people who support this proceeding think this is justice. The people that think that I should live think that is justice. As difficult as it may seem, this is a clash of ideals, with both parties committed to what they feel is right. But who's wrong if in the end we're all victims? In my heart, I have to believe that there is a peaceful compromise to our ideals. I don't mind if there are none for me, as long as there

⁶³ TEX. DEP'T OF CRIM. JUST., http://www.tdcj.state.tx.us/death_row/dr_info/grahamgarylast.html (last visited Apr. 5, 2017).

are for those who are yet to come. There are a lot of men like me on death row - good men - who fell to the same misguided emotions, but may not have recovered as I have. Give those men a chance to do what's right. Give them a chance to undo their wrongs. A lot of them want to fix the mess they started, but don't know how. The problem is not in that people aren't willing to help them find out, but in the system telling them it won't matter anyway. No one wins tonight. No one gets closure. No one walks away victorious.⁶⁴

VI. CLOSING

The body in pain embedded in these defiant presentations is rendered a discursive artifact that speaks to sovereign power.⁶⁵ Surprisingly, there remains a dearth of scholarship on the intersections of pain, death, and the law.⁶⁶ There is, however, interesting scholarship tying pain to language itself, as in torture:

In the very processes it [torture] uses to produce pain within the body of the prisoner, it bestows visibility on the structure and enormity of what is usually private and incommunicable, contained within the boundaries of the sufferer's body. . . The physical pain is so incontestably real that it seems to confer its quality of "incontestable reality" on that power that has brought it into being.⁶⁷

⁶⁴ TEX. DEP'T OF CRIM. JUST., http://www.tdcj.state.tx.us/death_row/dr_info/beazleynapoleonlast.html (last visited Apr. 5, 2017).

⁶⁵ Timothy Kaufman-Osborn, *FROM NOOSE TO NEEDLE: CAPITAL PUNISHMENT AND THE LATE LIBERAL STATE*, 2002 (Ann Arbor: University of Michigan Press).

⁶⁶ Jonathan Simon, *The Vicissitudes of Law's Violence*, in *LAW, VIOLENCE, AND THE POSSIBILITY OF JUSTICE* 17, 17-48 (Austin Sarat ed., Princeton Univ. Press [2001]); see also Cover's "Violence and the Word" (1986) for its "insistence that law's violence be acknowledged, not just at the extremities of the legal order, but at the center of the process in judicial interpretation." Robert M. Cover, *VIOLENCE AND THE WORD*, 95 *YALE L.J.* 1601 (1986).

⁶⁷ Elaine Scary, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 27 (OXFORD U. PRESS 1985).

Complementing scholarship on legal partiality, retributive justice, and miscarriages of justice in capital contexts, one wonders how an imposing demonstration of state power can be counterbalanced by a lack of ideological control.⁶⁸ Exemplars of the coalescence of pity and terror are many, and speak of intractable problems for the state in years to come.

⁶⁸ See, e.g., DAVID R. DOW, EXECUTED ON A TECHNICALITY: LETHAL INJUSTICE ON AMERICA'S DEATH ROW (2005); See also Stephen B. Bright & Patrick J. Keenan, *Judges & the Politics of Death: Deciding Between the Bill of Rights & the Next Election*, 75 B.U. L. REV. 759, (1995); Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61-AUT LAW & CONTEMP. PROBS. 125 (1998); See also Michael L. Radelet, William S. Lofquist, & Hugo Adam Bedau, *Prisoners Released From Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 T.M. COOLEY L. REV. 907 (1996).