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The Waiver and Withdrawal of Death Penalty Appeals as "Extreme Communicative Acts"

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Abstract: *Since Gregg v. Georgia, 428 U.S. 153 (1976)—the Supreme Court case that permitted the resumption of capital punishment in the United States—1203 executions have been carried out. One hundred and thirty-four (134) executions have involved "volunteers" of all races—individuals who waive or withdraw appeals at a point when viable claims still exist in their cases. This paper explores the power struggle between the State and the condemned over the timing and conditions under which an inmate is executed. It begins with a discussion of current public opinion about the death penalty and the ways in which the death penalty has been resisted. Next, it describes capital defendants who elect execution over life imprisonment and considers some of the reasons proffered for waiver and withdrawal. This paper then contemplates whether some instances of "volunteering" should be regarded as "extreme communicative acts" (Wee 2004, 2007)—non-linguistic communicative acts that are usually associated with protest, especially in the context of a lengthy political struggle (such as hunger strikes, self-immolation, and the chopping off of one's fingers). In so doing, this paper weighs in on the larger questions of who ultimately controls the body of the condemned and what governmental opposition to waiver and withdrawal may reveal about the motives and rationale for the death penalty. This paper also furthers research on how the prison industrial complex is resisted and how State power more generally is negotiated.*

Keywords: death penalty/death row; hunger strike; power; protest; resistance; self-immolation; volunteer; waiver; withdrawal

INTRODUCTION

According to the 2008 year-end report by the Death Penalty Information Center (DPIC), a research and anti-death-penalty advocacy group, use of capital punishment in the United States has continued to wane (Death Penalty Information Center 2008; see also Moore 2008). State and federal courts executed thirty-seven inmates in 2008—a fourteen-year low. The thirty-seven executions also represent a continued downward trend from a peak of ninety-eight in 1999. In addition, state and federal courts sentenced 111 criminal defendants to death in 2008, the lowest number of per annum condemnations in three decades. Most significantly, the lull in executions defied expectations that more inmates would be put to death after the U.S. Supreme Court's 2008 ruling in *Baze v. Rees*, which upheld Kentucky's method of lethal injection and

ended a *de facto* eight-month moratorium (from September 2007-April 2008). Instead, twenty-five executions were stayed in the aftermath of *Baze v. Rees*, as courts wrestled with issues involving mental illness, actual innocence, and ineffective assistance of counsel. The case of Troy A. Davis, in particular, has attracted international attention because seven of the nine witnesses against the Georgia inmate have recanted their testimony (Brown 2008a).

This is not to suggest that the country as a whole is uniformly moving in the direction of abolition. A Gallup poll conducted in October 2008 revealed that a majority of the public still supports the death penalty, although the numbers are down—64 percent of those surveyed indicated that they were in favor of the death penalty for a person convicted of murder in comparison to 69 percent in 2007 (Saad 2008). In the aftermath of a Georgia jury's

failure to agree on the death sentence for Brian G. Nichols, who killed four people in an Atlanta courthouse escape in 2005, Georgia legislators have begun lining up to introduce bills that would end the requirement of a unanimous jury verdict for a death sentence (Brown 2008b). In December 2008, a New Hampshire jury issued the state's first death sentence in almost fifty years (Zezima 2008). And in 2008, the U.S. Supreme Court declined to expand the death penalty to non-homicide offenses, striking down Louisiana's death penalty for the rape of a child in *Kennedy v. Louisiana*, yet its decision in *Medellín v. Texas* the same year allowed a foreign national from Mexico to be executed in Texas, despite a ruling by the International Court of Justice entitling him to review and reconsideration of his U.S. state-court conviction.

Still, Richard C. Deiter, executive director of DPIC and author of the year-end report, claims that the drop in executions shows that the popularity of the death penalty is declining: "Revelations of mistakes, cases reversed by DNA testing, all of these things have put a dent in the whole system and caused hesitation. I don't think what is happening is a moral opposition to the death penalty yet, but there is greater scrutiny applied to the death penalty that wasn't there before" (as quoted in Moore 2008). Similarly, Stephen B. Bright, director for the Southern Center for Human Rights and currently a lecturer at Yale Law School, asserts that the Gallup poll results are misleading and that distrust of the death penalty is much higher: "To get 12 people to decide to kill somebody is a difficult undertaking. People are overwhelmingly in favor of the death penalty when the Gallup poll calls. But when you ask them in a courtroom to actually impose the death penalty, a lot of people feel very uncomfortable" (as quoted in Brown 2008b). While Deiter and Bright may be correct that more people are expressing reservations about the death penalty as a result of concerns about innocence, disproportional imposition (racial and geographic), inept representation, failure to deter murder, and cost, most of the resistance to the death penalty comes from outside the prison walls—from capital defense attorneys to organizations working to end the death penalty (such as Amnesty International-U.S.A., DPIC, the National Coalition to Abolish the Death Penalty, the Quixote Center, the Religious Organizing Against the Death Penalty Project, and the Southern Center for Human Rights) to small, church-based groups opposed to the death penalty on moral, spiritual, or religious grounds.¹

In this paper, I examine what I refer to as "intramural" death penalty resistance—resistance from the very individuals who have received capital sentences and who are now sitting on death row. My focus, however, is not on their litigation (such as the cases mentioned above) or their writing in opposition to the death penalty (see, e.g., Abu-Jamal 1995; see also Davis 2001), but to a form of opposition that, at first blush, may seem like the antithesis of death penalty resistance: "volunteering"—when

individuals waive or withdraw appeals at a point when viable claims still exist in their cases (see, e.g., Bonnie 1988, 1990a, 1990b, 2005; Brisman 2009a; Harrington 2000, 2004; Strafer 1983; Urofsky 1984; White 1987). Granted, there are instances in which a death row inmate's volunteering would constitute acquiescence, rather than resistance, such as where the prisoner feels persistent guilt and sorrow about the crime(s) committed (Brisman 2009a; Harrington 2000) or where the prisoner feels that his appeals are hopeless and that he would rather die than grow old in prison. Likewise, volunteers suffering from mental illness (Brisman 2009a; Brodsky 1990; Cunningham and Vigen 2002) or "Death Row Syndrome" (also known as "Death Row Phenomenon") – "the theory that the mental stress of prolonged exposure to death row can cause incompetency in inmates" (Blank 2006:749) – would also not qualify as death penalty resisters. But the prisoner who volunteers to seize control over "the roller-coaster experience of the habeas appeals process" (Harrington 2000:850) or who positions his volunteering as a rebuff to the State (Brisman 2009a) might well be considered a death penalty resister.

This paper seeks to cast doubt on the depiction of all volunteers as "docile bodies" in either normative or Foucauldian terms (Brisman 2008a; see also Brisman 2009a). To substantiate the argument that some volunteers are not "docile bodies"—that some instances of volunteering may constitute a form of death penalty resistance—this paper contemplates death penalty volunteering in light of linguist Lionel Wee's (2004, 2007) concept of "extreme communicative acts" (ECAs)—non-linguistic communicative acts that are usually associated with protest, especially in the context of a lengthy political struggle (such as hunger strikes, self-immolation, and the chopping off of one's fingers). While Wee's discussion of ECAs is essentially an analytical exercise in the pragmatics of communication, this paper argues for a more capacious conception of ECAs, the goal of which is to contribute to an understanding of how resistance to the death penalty, to the prison industrial complex, and to State power, more generally, may be negotiated by the very persons at whom tremendous State powers are wielded. Because, as this paper contends, volunteering evokes ECAs and features thereof, treating volunteering as an ECA can encourage a greater movement of resistance and stronger linkages between death penalty inmates and extramural opponents (who sometimes appear to be fighting separately the same sources of power). Linking death penalty volunteering to ECAs can also open the lines of communication between death penalty resisters and those who in engage in ECAs in the name of other causes. Drawing connections between death penalty resisters and other activists working for social justice carries with it the potential for the individual groups to better articulate their messages, improve understanding of their core issues, expand their numbers, and broaden their techniques for

protest (see generally Eisinger 1973:26).

This paper begins with an overview of Wee's notion of ECAs. It describes three central features of ECAs and then discusses some of the examples of ECAs offered by Wee. With this foundation, the second part of this paper assesses volunteering under Wee's conception of ECAs. This section demonstrates that while volunteering stretches the bounds of the features of ECAs, as set forth by Wee, it does so without harming the overall metaphor. The second part of this paper thus argues that death penalty volunteering can be viewed as a type of ECA—one that simultaneously represents a symbolic non-linguistic communication *and* social resistance. The paper concludes (in the third part) with suggestions for how an assessment of death penalty volunteering as an ECA can foster greater interest in death penalty resistance by those on death row and can help link death penalty resistance to resistance to social and political injustice(s) more generally.

WEE'S CONCEPT OF EXTREME COMMUNICATIVE ACTS

"Speech acts" specifically refer to linguistic communication (see Searle 1969); "communicative acts" comprise both linguistic and non-linguistic communication (Wee 2004). Wee identifies a subset of non-linguistic communicative acts, which he refers to as "extreme communicative acts" (ECAs). These devices, by which illocutionary force is boosted rather than attenuated, aim to "maximize the likelihood of achieving the perlocutionary goal" (2004:2163).² According to Wee, ECAs possess a number of features:

First, ECAs are typically associated with protests, particularly in the context of a political conflict (and usually a lengthy political struggle at that).³ Prior protests are "typically verbal," Wee explains (2004:2171), "so that the recourse to ECAs becomes the climax of a series of increasingly strident expressions of protest."

Second, ECAs "occur 'late' in the interactional sequence, that is, after a number of less dramatic expressions of protest have already been employed" and are typically "seen as a 'last resort' when other, less extreme, forms of protest have failed" (2004:2163, 2166). The actors—those performing or committing the ECAs—"all seem to feel that the addressees have failed to behave in a manner that recognizes the actors' rights and legitimate expectation, and these actors consequently want the addressees to do something or to refrain from doing something" (2004:2162 n.4). As Wee (2004:2172) further explains:

an ECA is not something one resorts to in the first instance. To immediately embark on a hunger strike, for example, just because one's initial demand is not met would be seen as overreacting. The hunger strike, as an ECA, must

be seen as an act that is resorted to precisely because earlier and less dramatic expressions of protests were unsuccessful. And this, I suggest, is a crucial component of how ECAs work as boosters of illocutionary force. The context for the use of ECAs includes earlier expressions of the strength of the actors' commitment to a disputed position, and crucially, these earlier expressions must have failed to achieve their perlocutionary goals.

That the dramatic expression occurs late in the interactional sequence after "normal channels of communication have broken down" relates to a third property of ECAs—they "involve some form of self-inflicted harm, which can sometimes be fatal" (2004:2169, 2163). Wee acknowledges that ECAs bear a close resemblance to the notion of martyrdom. The difference, according to Wee, is that with martyrs, the suffering is usually imposed on them by others. The suffering experienced by the actors engaging in ECAs, on the other hand, is self-inflicted, although those engaging in ECAs (particularly those undertaking hunger strikes) try to present themselves as having exhausted all other avenues of redress and thus having no alternative but to engage in the ECA. Wee stresses the importance of self-infliction because self-infliction helps express the strength of the actors' own commitment to a specific position. Notwithstanding this distinction between martyrs and actors engaging in ECAs, the crucial point is that the suffering, whether imposed or self-inflicted, "is intended to evoke sympathy for the sufferer, particularly from those not directly involved in the political struggle, and this might even spur these others to take up the cause on the sufferers' behalf" (2004:2171-72). To explicate these properties of ECAs, Wee offers three examples: hunger strikes, self-immolation, and the chopping off of one's fingers.

Hunger Strikes

Although the term "hunger strike" may seem self-explanatory, the act of depriving oneself of food or food and drink does not by itself constitute a hunger strike (Wee 2004; see also Brisman 2008b). As Wee (2004:2168, 2170-71) explains, abstaining from food is not a hunger strike if it is part of a dietary regime or a sign of anorexia; "[f]or it to count as a hunger strike, there must be some 'issue' which the striker is protesting against ... A hunger strike ... is no longer a hunger strike if one were to be deprived of food against one's own will." In the same vein, an individual depriving himself of food for the purpose of apocarteresis—suicide by starvation—whether as part of a religious ritual or to hasten death in the face of a terminal illness would not constitute a hunger strike (see Radford 2002; see also Wilford 2002).

While self-starvation dates back hundreds of years, the hunger strike as a political weapon is only slightly more than 100 years old, having been undertaken as both individual displays of opposition and as part of a collective efforts to protest a situation or event or to bring about some sort of change (Brisman 2008b; see also Hamill 1981). Examples of the former include Gandhi, famous for using the hunger strike as a means of calling attention to his various campaigns; Nelson Mandela, who fasted in opposition to apartheid; Nabil Soliman, who refused to accept food from the Immigration and Naturalization Service (INS) because he believed doing so would constitute acceptance of his “illegal detention;” Saddam Hussein, who fasted four times to protest his trial and the level of security afforded his defense lawyers; and Gary Gilmore, the first volunteer, who gained international attention for his demand that his death sentence be fulfilled and who undertook a twenty-five day hunger strike to protest the delay of his execution (Brisman 2008b). Examples of politically driven collective hunger strikes include a hunger strike by Attica prisoners in 1971 in honor of George Jackson, the revolutionary prisoner in California, who was murdered by guards during an escape attempt, as well as hunger strikes by Palestinians to oppose their treatment by their Israeli captors, and detainees held at the American military prison at Guantanamo Bay, Cuba, in protest of the conditions and length of their confinement (Brisman 2008b). Wee (2004, 2007) offers two examples of collective hunger strikes: 1) the 2001 hunger strike by prisoners in Turkey to protest their transfer from dormitory-style prisons to newer facilities with individual cells on the grounds that the move would leave them isolated from other prisoners and vulnerable to torture—a hunger strike noteworthy for its long duration, number of deaths, and fact that it was also undertaken by former inmates and individuals outside prison who had no direct connection with the inmates in the new prisons (see also Brisman 2008b); and 2) the hunger strike in the early 1980s led by Bobby Sands, in which he and other members of the Irish Republican Army (IRA) fasted to protest the British government’s treatment of them as “criminals,” rather than grant them Special Category Status (i.e., as “political prisoners” or “prisoners of war”).⁴

Several aspects of hunger striking distinguish it from other ECAs. First, while “one can embark on a hunger strike for a number of reasons” (Wee 2004:2165) and to varying degrees (e.g., abstention from food and drink, abstention from food only, abstention from food but with ingestion of liquids, salt, sugar, and vitamin B₁), the hunger strike is, as evidenced by the examples above, a popular tool of protest for prisoners. Indeed, it is “[o]ne of the few weapons available to prisoners” (Powell 1983:714) and “one of the few ways in which a person without access to weapons or poisons can make a life or death decision” (Oguz and Miles 2005:170). In contrast to Wee’s other examples of ECAs, while prisoners often fashion shanks

out of metal, they are unlikely to be able to locate or craft a knife sufficiently heavy enough to sever digits; they are even less likely to be able to obtain a sufficient amount of flammable liquid in order to engage in self-immolation (although many prisoners do smoke and have access to matches or the equivalent).

Second, while a hunger strike entails depriving oneself of food, thereby satisfying the self-inflicted property of ECAs in a way that deprivation of food against one’s own will would not, hunger strikers (especially those in prison) are occasionally force-fed in order to prevent permanent damage or death. Whether the method employed is nasogastric tube feeding, intravenous feeding, or percutaneous endoscopic gastrotomy is irrelevant; each is physically invasive and poses various degrees of medical risks (Brisman 2008b). Although the *hunger strike* remains the ECA, not the force-feeding, the hunger striker who is fed against his will may find the fact of force-feeding to accentuate his commitment to the cause and to further boost the illocutionary force of his action.

Third, while hunger strikes, as noted above, most often “occur ‘late’ in the interactional sequence ... after a number of less dramatic expressions of protest have already been employed” (Wee 2004:2163), there is some disagreement as to whether they should be seen as a “last resort.” Wee (2004:2171) implies that they are and points to the fact that “the IRA prisoners decided on the hunger strikes only after they felt that their demands for political status were being ignored”—a position that is strengthened when one considers that Sands and nine other hunger striking IRA prisoners died. Anderson (2001:44), on the other hand, observes that:

[a] hunger strike might seem to be an act of ultimate desperation, a weapon of last resort for the powerless, but the reality is a bit more complex. Politically motivated hunger strikes tend to occur in a very specific kind of society and at a very specific time: namely, in places with a long history of official repression, but where that repression has gradually begun to loosen. If it is the institutionalized nature of abuse that fuels the strikers to such extreme action, it is the cracks of liberalization that lead them to believe that such a course might shame the government into change—and often they are right.

Thus, for Anderson, whose work predates Wee’s and thus does not engage the notion of ECAs, the hunger strike need not be something that someone or some group engages in when all else has failed and when there is little hope or recourse, but rather a catalyst timed to make the push across the goal-line. The difference, then, between Wee and Anderson is subtle, but important. Both see the hunger strike as coming late in the interactional sequence—and potentially, the last expression. But

whereas Wee couches it in terms of despair, Anderson regards the hunger strike as far more calculated.

Finally, all ECAs also gain some of their potency from the amount of time involved in the action. But whereas self-immolation and the chopping off of the tips of one's fingers are powerful for their immediacy (and irreversibility), hunger strikes are slower endeavors that build strength as communicative acts as the strikers lose their physical strength. Each day that a hunger striker abstains from food places a greater burden on those in power to act in response. As Wee (2007:65) explains, "while the strikers gladly ascribe intention to themselves for initiating the strike, they impute intention for the consequences of the strike to the authorities and absolve themselves of any responsibility for the suffering they experience." Hunger strikers, self-immolators, and those who chop off their fingers all attempt to portray their actions as unavoidable—these actors feel and wish to convey that they had few, if any, options other than the ECA. But only with the hunger strike are institutional authorities likely to be held responsible for the death or permanent damage to the actor (Wee 2007).

Self-immolation

Although the dictionary defines "self-immolation" as "a deliberate and willing sacrifice of oneself" (Webster's 2002:2060), it is most commonly associated with suicide by fire. Despite the pain self-immolators must endure, lighting oneself on fire, like hunger strikes, has been a popular method of protest.⁵ For example, in 1996, Kathleen Chang, a Philadelphia performance artist, who called herself "Kathy Change" to emphasize her commitment to political and social change, set herself on fire on the University of Pennsylvania campus "to protest the present government and economic system and the cynicism and passivity of the people" (Change 1996; Fisher 1996a, 1996b; Matza and Gibbons 1996; Pereira 1997). In 2006, to offer another instance, Malachi Ritscher, a musician and anti-war activist, self-immolated along the Kennedy Expressway in Chicago, Illinois, to protest the war in Iraq (Newbart 2007; Roeper 2006). But perhaps the most famous incident of self-immolation occurred on June 11, 1963, when the Buddhist monk, Thich Quang Duc, burned himself at a busy intersection in Saigon, Vietnam, to protest the American-backed South Vietnamese regime of Ngo Dinh Diem and its policies on religion (Halberstam 1963a, 1963b, 1965). American journalist and photographer Malcolm Browne captured the image of Duc's self-immolation—a picture that shocked the world and helped bring attention to the Diem regime and United States involvement in Vietnam. Shortly afterwards, President John F. Kennedy proclaimed that "no news picture in history has generated so much emotion around the world as that one" (quoted in Moon 2008). Self-immolation by Buddhist monks, as well as U.S.

presence in Vietnam, however, would continue (see "Newsmen Beaten by Saigon Police" 1963).

Wee's (2004) own example is from February 1999, when a number of Kurds living in Europe set themselves ablaze after Turkish agents arrested the Kurdish rebel leader, Abdullah Ocalan, who had been conducting an international search for political asylum (see also Cohen 1999; Sharkey 1999; Wee 2007). The Kurdish self-immolators were demanding Ocalan's release, which might raise the question of whether their actions could be considered a "last resort," coming at the tail end of a prolonged (and failed) interactional sequence. But as Wee (2004) explains, the 1999 Kurdish self-immolations must be seen in light of Kurdish outrage at Western governments' attitudes toward the plight of Turkey's Kurdish minority—a struggle that arguably stretches back to the 1920s when the Treaty of Sèvres promised a homeland to Kurds (see Cohen 1999; Sharkey 1999)—leaving little doubt that these acts or more broadly, self-immolation *as protest*, constitute an ECA.

What is perhaps most striking about self-immolation, which has been referred to as "a kind of noble death by protest" (Fisher 1996b) and as the "ultimate protest" (Pereira 1997:6), is its finality. According to William P. Harmon, a religious studies professor and expert on religious attitudes toward public suicide, "There are few forms of political statement more impressive than deliberately setting yourself on fire ... When someone does it, essentially they are saying, 'I gave my life.' The act itself makes it very clear what the lines are between the committed and the uncommitted" (quoted in Sharkey 1999:4).

Wee would actually disagree with Pereira and Harmon's descriptions of self-immolation on two counts. First, Wee (2004) claims that a self-immolator need not give his or her life and that one could boost illocutionary force by burning just a particular part of the body, such as a hand. Strictly speaking, burning one's hand would not constitute self-immolation, which, as noted above, means "a deliberate and willing sacrifice of *oneself*," not "a deliberate and willing sacrifice of *part of oneself*." Wee (2004:2169) contends that "it is not clear that burning oneself completely counts as a stronger form of self-immolation than burning just a particular body part." Arguably, however, self-immolation has a corollary in the "internal scale" of the hunger strike whereby "a hunger strike without food or drink is possibly more powerful than one where the striker drinks but does not eat" (2004:2169). That is, burning a particular body part is a potentially less powerful gesture; it is less shocking and damaging, for example, than self-immolation where the protestor expects (and hopes) to die.

Second, Wee claims that ECAs as a category of communicative acts lack "contrastiveness" or "paradigmaticity"—"where different linguistic devices represent competing possibilities that can be chosen from a

fairly delimited set” (2004:2168). Thus, Wee asserts that ECAs differ from pitch and volume—both linguistic devices that may be employed to increase the force of speech acts—and thus “ECAs, even if taken together, do not form a paradigmatic set where a decision to engage in self-immolation . . . might be said to convey a stronger boosting of illocutionary force than . . . a hunger strike” (2004:2168). But ECAs do possess paradigmaticity and a decision to engage in self-immolation can convey a stronger boosting of illocutionary force than a hunger strike where one abstains from food and drink (which in turn, can convey a stronger boosting of illocutionary force than a hunger strike where one refrains from consuming only food). Indeed, some hunger strikers have threatened self-immolation if their demands were not met (Shorto 2007); some self-immolators have undertaken hunger strikes before engaging in self-immolation (Apple, Jr. 1966; Halberstam 1963c; Langguth 1965; see generally Smith 2001).⁶ While certain actions may carry greater currency in some cultures than in others—for example, Charans, a caste in India, are revered for their readiness to perform self-immolation, whereas Change’s self-immolation was viewed by some as offensive and obscene (Pereira 1997)—a hunger strike where the striker drinks is undoubtedly less powerful an image or statement than self-immolation.

Perhaps Wee rejects the paradigmaticity of ECAs, as well as an internal scale to the ECA of self-immolation, in order to stress that ECAs always boost and never attenuate illocutionary force—a point with which I would agree. My purpose in arguing that ECAs may in fact constitute a paradigmatic set and that setting oneself on fire possesses an internal scale is not to engage in linguistic (and discursive) debate. Rather, my intention is to demarcate the boundaries of and explore the degree of elasticity in Wee’s notion of ECAs in order to best contemplate the waiver and withdrawal of death penalty appeals as a type of ECA—which I examine in Part II after the following section’s discussion of Wee’s third example of an ECA: the chopping off of one’s fingers.

Chopping Off of One’s Fingers

On August 13, 2001, twenty Korean men, all dressed in black, lined up in front of the Independence Gate in Seoul, Korea (a former prison for independence fighters during Japan’s colonial rule of Korea) to protest Japanese Prime Minister Junichiro Koizumi’s planned visit to Yasukuni Shrine—a Shinto shrine located in Chiyoda, Tokyo, honoring Japan’s war dead. The men, members of the “Save the Nation” organization, shouted, “Apologize, apologize!” for offenses they claim the Japanese had committed against the Korean people, and denounced Prime Minister Koizumi’s decision to make the trip to the shrine (as well as his refusal to order revisions to middle-school textbooks that Korea had officially criticized for

largely dismissing Japanese colonialism and militarism in northeast Asia). Wielding heavy knives, the men chopped off the tips of their little fingers and bandaged them with pieces of the Korean flag. One of the protestors then gathered all the tips in another flag and folded it in front of the group (Kirk 2001).

According to Wee (2004; see also 2007), the chopping off of finger tips constituted a form of protest in the context of a political conflict—ongoing anti-Japanese sentiment in Korea stemming from Japan’s occupation of Korea from 1910 until Japan’s defeat in World War II in 1945⁷—thereby satisfying the first property of ECAs. The actors also chopped off the tips of their own fingers—the third feature of ECAs. With respect to the second property of ECAs—dramatic expression late in the interactional sequence or as a last resort after normal channels of communication have broken down—Wee explains that the this incident occurred only after numerous attempts had been made to dissuade Prime Minister Koizumi from visiting the shrine. Wee acknowledges that the chopping off of finger tips might have been more of an expression of the actors’ outrage at a forthcoming offensive event than an attempt to redress perceived wrongs, as was (and is often) the case with hunger strikes and self-immolation. But Wee does not completely negate the possibility of a perlocutionary goal motivating the act, positing that self-mutilation could (also) have been an effort to discourage future visits to the Yasukuni shrine. In fact, this potential interpretation becomes more salient when one considers the Korean gangster ritual of severing fingers in order to show loyalty to the leader of the gang (Kirk 2001).⁸ Kirk (2001:A8) reports that in the case of the finger tip-chopping protesters, the acts “demonstrated [their] loyalty to their country.” It is possible, then, that the finger tip-chopping boosted the illocutionary force of protesting, but did *not* constitute a last resort. Rather, the reference to Korean gangster ritual could have been intended to foreshadow Save the Nation’s abandonment of peaceful protesting and turn towards gangster-type violence.

Wee does not ponder the possibility of Save the Nation turning to threats, intimidation, and forms of interpersonal violence to make its point. Wee does, however, briefly consider whether suicide bombings constitute ECAs and clarifies that such “acts of terror” do not because “[a]n important feature to bear in mind is that ECAs involve *only* harm to the actors themselves, not to any others, and most certainly not to innocent bystanders. Acts of terror, in contrast, deliberately target innocents” (2004:2162n.3; see also 2007:73n.1). In so doing, Wee reveals some of the bounds of his conception of ECAs—something I explore in the next section of this paper as I turn to a discussion of death penalty volunteering as an ECA.

VOLUNTEERING AS AN ECA

As noted above, Wee's ECAs possess three main features: 1) ECAs are typically associated with protests, particularly verbal protests in the context of a political conflict (and usually a lengthy political struggle at that); 2) ECAs occur later in the interactional sequence—often as a last resort—after normal methods and avenues of communication have broken down; and 3) the harm suffered by the actor is both self-inflicted and limited to the actor. I consider each of these features in turn, highlighting where volunteering constitutes an ECA under Wee's formulation and extending Wee's conception where it does not.

Is Volunteering Associated with Protest?

Since *Gregg v. Georgia*—the 1976 U.S. Supreme Court case that permitted the resumption of capital punishment in the United States⁹—1203 executions have been carried out, 134 of which have involved “volunteers” (about 11%).¹⁰ The stated reasons for volunteering—for waiving or withdrawing appeals at a point when viable claims still exist in cases—have ranged from guilt and remorse to perceptions of justice and fairness to avoidance of death row conditions to depression and suicidal urges to macho and hypermasculine notions of pain and death, where the volunteer wishes to die in a “blaze of glory” (Strafer 1983:875n.56; see also McClellan 1994:214).

To my knowledge, none of the 134 volunteers have specifically stated a desire to waive or withdraw death penalty appeals on the stated grounds of death penalty protest.¹¹ This does not mean that a death row inmate has not volunteered solely or primarily to express opposition to the death penalty in general or as applied to him. Making a decision that will effectively end one's life is arguably the most difficult and emotionally trying choice an individual can make—regardless of the circumstances under which the individual must make the determination. Emotions, as Calhoun (2001) points out, are incredibly difficult to observe, analyze, and assess—a task that is further complicated with a restricted population, such as death row inmates, who are hardened over their years in prison and conditioned not to expose their emotional states. Thus, it is entirely possible that a death row inmate has indeed regarded his volunteering as an manifestation of opposition to the death penalty in general or even as applied to him.¹²

Although a specific example of a death row inmate volunteering solely or primarily to express opposition to the death penalty is lacking, death penalty volunteering can constitute a more general form of protest. A death row inmate may possess multiple motivations for volunteering and may emphasize one over another depending on circumstances and the progress (or lack thereof) of his proceedings or to prove that he is competent to waive or withdraw his appeals (Brisman 2009a).¹³ Protest could be

one of those motivations, as is the case with those who position their volunteering as a rebuff to the State. In other words, given the State's interest in preserving life and preventing suicide, safeguarding the integrity of the proceedings and the legal profession, and protecting the interests of the inmate's family (see, e.g., Harrington 2000; McClellan 1994; Strafer 1983; White 1987), the volunteer might regard the waiver or withdrawal of his death penalty appeals as an anti-State position (see Brisman 2009a; see generally Brodsky 1990; Harrington 2000, 2004).

The volunteer could also possess a commitment to a specific, political position that predates his incarceration (and/or may regard his crime(s) in political terms, i.e., as a comment on class structure or socio-economic status). He might consider his volunteering to be part of that political struggle—a battle that he waged through public demonstrations (e.g., marches, rallies, picketing), written demonstrations (e.g., petitions, letter writing campaigns), civil disobedience, and direct action before his incarceration, and which may include the crime for which he received the death penalty.

Even with an example of a death row inmate volunteering to express opposition to the death penalty in general, as applied to him,¹⁴ or to communicate something about a cause unrelated to the death penalty (although this may well exist), volunteering does not meet the first requirement of an ECA as set forth by Wee. Wee might claim that whether volunteering constitutes a form of protest is different from whether volunteering represents an ECA. While ECAs are associated with protest, not all acts associated with protest constitute ECAs. For Wee, what might lead him to disqualify volunteering as an ECA is the range of reasons for which one can volunteer. According to Wee (2004:2169), ECAs lack “contextual flexibility,” where the same act can boost or attenuate illocutionary force depending on the context. In contrast to speaking with a softer volume, which could boost or attenuate illocutionary force, ECAs are always and only boosters: “One would be hard-pressed to find cases where hunger strikes or acts of finger-chopping are used as attenuators of illocutionary force. ECAs, then, serve to boost, never to attenuate, features of the illocutionary act such as the actors' commitment to their demands, their claims of entitlement to their demands being met, and their claims that the addressees of the ECAs are indeed obligated to meet these demands” (Wee 2004:2170). Thus, while the possible reasons for hunger-striking or chopping off one's finger tips are fairly broad, they are *too* broad in the context of volunteering. In other words, because volunteering could be an act of acquiescence to State power *or* an act of protest—as an attenuator or as a booster of illocutionary force (whereas the hunger strike can only be considered a booster), Wee would categorically reject the waiver and withdrawal of death penalty appeals as an ECA.

Although ECAs lack “contextual flexibility” (they are always and only boosters) whereas volunteering possesses some “contextual flexibility” (it can boost or attenuate illocutionary force), some flexibility with respect to the “contextual inflexibility” feature of ECAs is necessary because prisoners are limited in their means, methods, and opportunities for protest.¹⁵ Such an elastic conception of ECAs still fits the general premise and spirit of his argument. Accordingly, we can consider volunteering as an ECA when the death row inmate volunteers to express his opposition to the death penalty or some other cause.

Does Volunteering Occur Late in the Interactional Sequence or as a Last Resort?

At first blush, volunteering meets this standard in a fairly straightforward way. Volunteering can be viewed as akin to self-immolation, whose power as a communicative act derives, in part, from its finality. Because a communicative act cannot occur after death (although other members of the struggle will likely continue to engage in communicative acts), the volunteer can be likened to the self-immolator, but only if less dramatic expressions of protest have been attempted and have failed. While this is certainly possible, the difference is that many individuals sentenced to death attempt to waive or withdraw their appeals. Bonnie (1988:1380), drawing on anecdotal evidence, notes that “a significant proportion of defendants charged with capital murder express a preference for a death sentence at some point during the course of interactions with their attorneys.” Most of these defendants, however, tend to change their minds again and express a preference to fight the conviction and/or sentence. Indeed, many defendants (who later become inmates) wind up changing their minds numerous times about the desirability of post-conviction relief.¹⁶

If this stopping and starting of the appeals process is an expression of uncertainty or waffling on the part of the death row inmate, then volunteering does not constitute an ECA according to Wee’s criteria. As noted above, engaging in an ECA reveals “the strength of the actors’ commitment to a disputed position” (Wee 2004:2172). Or as Professor Harmon claims in the context of self-immolation, “[t]he act itself makes it very clear what the lines are between the committed and the uncommitted” (quoted above and in Sharkey 1999:4). Thus, if an ECA is an expression of commitment to a cause, then waffling on the part of the death row inmate undoubtedly undermines the communicative power of volunteering and therefore does not possess the spirit of the second feature of ECAs. The issue is not so much whether the death row inmate who changes his mind does so out of uncertainty or as a ploy and part of his protest,¹⁷ but the fact that ambiguity would exist. Part of the force of an ECA is its clarity of commitment to a particular cause so that the communicative act boosts illocutionary force. The fact that

one can waive and file and withdraw and resume for potentially very different reasons implies that volunteering cannot be said to occur late in the interactional sequence or as a last resort—at least not in all cases.

Is the Harm to the Volunteer Self-Inflicted?

Although hunger-strikers occasionally receive assistance with their protest (especially late in their protest with the ingestion of liquids, salt, sugar, and vitamins) and self-immolators are sometimes doused in petrol by supporters, the harm that the actors experience is still self-inflicted. Such is not the case with death row inmates who volunteer. They do not pull the triggers of the firearms of the firing squad, flip the switch on the electrical chair, or inject the “cocktail” of sodium thiopental, pancuronium bromide, and potassium chloride. While a strict reading of this feature would disqualify volunteering as an ECA, it is important to remember why the “self-inflicted” feature of ECAs exists. As noted above, an individual who is deprived of food, burned at the stake, or mutilated would not be engaging in an ECA not simply because the suffering is imposed by someone else, but because the *choice* to suffer is not his to make. Essentially, it is one thing to suffer harm or die for a cause at the hands of an oppressor; it is quite another matter—and a much stronger statement of the actors’ own commitment to a specific position—if the harm or death is self-inflicted.

What, then, of the death row inmate who commits suicide days or hours before his scheduled execution—especially if the inmate does so to beat the State to the punch, so to speak? Putting aside the fact that death row inmates are usually placed on “suicide watch” and closely observed in the short time before their executions, therefore making suicide difficult to accomplish, what renders volunteering closer to the spirit of an ECA is its role in the power dynamics between inmate and State. As Wee (2004:2173) asserts, “there is an asymmetrical power relationship where the actor who engages in an ECA is in the position of lesser power.”

While a prisoner’s suicide possesses the potential to boost illocutionary force, particularly if he is able to publicly convey his purpose and reason for suicide, the statement is stronger if the inmate undercuts the State’s heightened interest in preventing its system of justice from being transformed into an “instrument of self-destruction” (*Faretta v. California* (Burger, C.J., dissenting)). In other words, the State has an interest in preserving life and preventing suicide. The volunteer is better able to undermine the State’s legitimacy by waiving or withdrawing his death penalty appeals and forcing the State to commit the act than by directly ending his life himself.

One way to better understand why volunteering, rather than suicide, may more closely resemble an ECA, is to recall Wee’s (2007:65) comment, noted above, that “while

the [hunger] strikers gladly ascribe intention to themselves for initiating the strike, they impute intention for the consequences of the strike to the authorities and absolve themselves of any responsibility for the suffering they experience.” With suicide, the inmate bears some responsibility, as do the guards and prison authorities for not monitoring the inmate more closely. With volunteering, the inmate ascribes intention for the consequences of the execution to a wider range of individuals and institutions. Not only do prison authorities bear some responsibility, but so does the State as a whole, as evidenced by the contentious debate over whether defense attorneys should honor the condemned’s wishes and desire for personal autonomy (see Bonnie 1988) or disregard the would-be volunteer’s request and continue with the duty of zealous defense (see Strafer 1983; White 1987). Thus, the volunteer, like the hunger striker, may be able to impute intention for the consequences of the waiver or withdrawal of appeals to the State and absolve himself of any responsibility for the suffering he experiences, even if the actual harm is not self-inflicted.

In sum, the waiver and withdrawal of death penalty appeals does not fit within Wee’s current conception of ECAs. But as I have suggested, Wee’s formulation is a bit too rigid. Under certain circumstances, volunteering evokes ECAs and features thereof and his notion of ECAs should be modified to allow for greater flexibility. In the next and final section, I propose that conceiving of volunteering as an ECA can open the lines of communication between death penalty resisters and those who in engage in ECAs in the name of other causes.

IMPLICATIONS AND FUTURE DIRECTIONS

At the turn of the millennium, Lilly (2002:326) wrote that “[r]esistance to the death penalty in the US is experiencing a renaissance unseen since its 1960s heyday.” Lilly (2002:330) concluded, however, that this resistance, combined with “domestic doubt and international pressures,” was not enough to abolish capital punishment for two reasons. First, death penalty resistance has not reached the status of a “movement,” such as the civil rights or anti-war movements of the 1960s to 1970s. “Today it seems that death penalty resistance is a one-off subject that struggles to get attention in the face of dropping crime rates and the economic attractiveness of prison growth” (Lilly 2002:331). Second, Lilly (2002:331) drew a link between approval of the death penalty and support for the right to bear arms, rationalizing that endorsement of the latter contributed to the perpetuation of the former: “capital punishment still has core appeal in a nation with more guns *per capita* than any nation in the world.” Yet, he posited that private prison growth in rural areas might

eventually lead to a preference for life without parole in order to ensure that these facilities remain filled.

Lilly is correct that death penalty resistance does, indeed, lack the benefit of “movement” status. It neither possesses “enduring, concerted action, often carefully planned and supported by formal organization”—integral features of social movements, according to Calhoun (2001:48)—nor has death penalty resistance succeeded in joining forces with or piggy-backing on other social justice causes to achieve its desired results. Part of this failure may be due to the lack of resistance by death row inmates (or other inmates, for that matter), because, as Eisinger (1973:15) points out, “[p]rotest is not likely to occur in extremely closed (repressive) systems.” Death penalty resistance may also lack the benefit of movement status because of inadequate attention to resistance by prisoners facing the death penalty, the overshadowing of intramural resistance (i.e., death row inmates’ resistance) by those operating outside prison walls (where such intramural resistance exists), or some combination thereof.

While intramural resistance—resistance from the very individuals who have received capital sentences and now are sitting on death row—may take multiple forms, in this paper, I call attention to certain instances/aspects of “volunteering” by considering whether the waiver and withdrawal of death penalty appeals constitute ECAs—non-linguistic communicative acts that are usually associated with protest, especially in the context of a lengthy political struggle. Although the theoretical exercise demonstrates that volunteering does not possess the features of ECAs as set forth by Wee (2004, 2007), I argue for a more elastic application of Wee. I suggest that by recognizing similarities in these forms of resistance—between ECAs and “volunteering as death penalty protest”—death penalty opponents may also acknowledge similarities in sources of injustice and the sources of power to be resisted. Indeed, as Eisinger (1973:26) contends, “protest action is frequently successful as a strategy for mass mobilization. Protest may be undertaken primarily as a recruiting activity for organizations, for it is a way of cutting through communal apathy and attracting membership through its sheer excitement. Protest also helps ... manipulate constituents’ understanding of issues...” This is not to suggest that everyone on death row should suddenly drop their appeals, or even that were they to do so it would constitute a collective ECA, although the death penalty in the United States might undergo serious transformation if the more than 3,300 individuals on death row simultaneously waived or withdrew their appeals.¹⁸ But conceptualizing volunteering as protest and grouping “volunteering as death penalty protest” with other ECAs—essentially, recognizing similarities between volunteering and other *means* of protest—may help improve understanding of death penalty resistance and its affinity to organized opposition to inequities in the criminal justice

system, and, more broadly, to other forms racial, economic, and social injustice.

What role do criminologists play in this process? Criminologists, especially those working in a critical or radical vein, have done an admirable job exposing injustices in the legal system and in society at large (see, e.g., Chambliss 1973; Chambliss and Zatz 1993; Chesney-Lind 2006; DeKeseredy 2004; DeKeseredy, Alvi, Schwartz, and Tomaszewski 2003; Gabbidon and Taylor Greene 2005; Gordon 1971, 1973; Matthews and Kauzlarich 2000; Mauer and Coyle 2004; Michalowski and Carlson 1999; Quinney 1977). But they have devoted significantly less attention to how these injustices have been resisted (*cf.* Brisman 2007; Brisman 2009b; Ferrell 1993). By looking at intramural death penalty resistance and by linking various forms of resistance (regardless of whether the concept of ECAs is employed), criminologists can play a vital role in bringing about some of the changes and reforms they purportedly wish to see.

Endnotes

¹ Although outside the scope of this paper, there has been significant scholarly debate about the United States' retention of capital punishment (see Garland 2005; Monkkonen 2005; Whitman 2005; Zimring 2005; see also Garland 2002). For an overview of this debate and the reasons proffered for retention, see Kaplan (2006).

² The *locutionary* mode of an utterance refers to what is actually said, and the *perlocutionary* mode refers to what is achieved by the utterance. In contrast, the *illocutionary* mode refers to what is intended by the utterance. The *illocutionary point* of an utterance is the speaker's basic purpose in making that utterance, such as to assert something, to promise or commit to doing something, to get someone to do something, to express an attitude towards or an emotion about something, or to bring about a state of affairs with the utterance. The *illocutionary force* consists of the illocutionary point of the utterance and certain background beliefs or attitudes that must accompany that point. An *illocutionary act* refers to a speech act consisting of the propositional content of the utterance (i.e., the constant meaning of the sentence or clause) and the illocutionary force (which is subject to change) whereby the speaker asserts, demands, suggests, promises, or vows. A *locutionary act*, then, is the act of uttering something. A *perlocutionary act* is a speech act that produces an intended or unintended effect in the person to whom one is speaking as a result of the speaker's utterance—in other words, an act that is performed (see, e.g., Austin 1975; Crystal 1980, 1985; Searle 1969, 1976; Searle and Vanderveken 1985).

³ Wee (2004) acknowledges that there may be ECAs with forces other than that of protesting, but he limits his discussion to non-linguistic communicative acts involving

actors whose perlocutionary goals are associated with protest.

⁴ Prisoners granted "Special Category Status" were not required to wear prison uniforms or to perform otherwise compulsory prison work (Brisman 2008b; Mulvihill 2001; Silver 2005). There is some debate as to whether Sands' aim was to achieve "Special Category Status" or generate international publicity (see, e.g., Downie 1981), although the two are not mutually exclusive. Sands' hunger strike was recently the subject of the major motion picture, *Hunger* (McQueen 2008).

⁵ Note that not all instances of self-immolation involve protest. For example, *suttee* or *sati* is "the act or custom of a Hindu widow willingly cremating herself or being cremated on the funeral pile of her husband as an indication of her devotion to him" (*Webster's* 2002:2304).

⁶ In at least one instance, an individual intending to join a group hunger strike self-immolated instead, claiming beforehand that the hunger strike had "achieved no results" and that the situation had grown more desperate (Mishra 2005).

⁷ There are no formal diplomatic ties between South Korea and Japan, although the two countries did sign the Treaty on Basic Relations between Japan and the Republic of Korea in 1965 in an effort to work towards the establishment of formal diplomatic ties. Korean-Japanese relations remain tense in part because of territorial disputes regarding the Liancourt Rocks and repeated visits by Japanese politicians to the Yasukuni Shrine (see, e.g., Onishi 2006).

⁸ Wee (2004) suggests that there might be a cultural dimension to ECAs, whereby certain groups prefer specific ECAs. But one should not take this to mean that particular ECAs are the province of specific groups—a point with which Harman (quoted in Sharkey 1999) might agree. As Harman explains, "the practice [of self-immolation] springs from no single cultural tradition and shares ancient philosophical origins with religious sacrifices and martyrdom, including the crucifixion of Christ" (see Sharkey 1999). Indeed, Ocalan, the Kurdish rebel leader, is known to have called his followers' attention to the Vietnamese Buddhists' use of self-immolation as a method of protest (Cohen 1999).

To offer another illustration, in 2002, the French performance artist, Pierre Pinoncelli, cut off the tip of one of his own fingers at an exhibition at an art museum in Cali, Columbia to protest the kidnapping of French-Colombian politician, Ingrid Betancourt, by the guerrilla group, the Revolutionary Armed Forces of Columbia—People's Army (*Fuerzas Armadas Revolucionarias de Colombia—Ejército del Pueblo* or "FARC") (BBC News 2002; de la Durantaye 2007; Riding 2006; Umpster 2006). Pinoncelli, who donated the severed finger to the museum,

explained that “[t]he idea was to share in Colombia’s violence. Indrig Betancourt symbolises the courage of all those fighting against corruption, and that is why I am rendering her homage” (quoted in BBC News 2002). Note that Pinoncelli’s performance did not achieve its perlocutionary goal because she was never voluntarily released by FARC; Betancourt, who was taken hostage on February 23, 2002, was rescued on July 2, 2008—six years, four months, and nine days after her abduction (Romero 2008).

⁹ In 1972, following a five-year moratorium on executions, the United States Supreme Court held in *Furman v. Georgia*, 408 U.S. 238 (1972), that Georgia’s death penalty statute violated the Eighth Amendment’s prohibition against cruel and unusual punishment. In *Gregg v. Georgia*, 428 U.S. 153 (1976), the United States Supreme Court upheld Georgia’s newly-passed death penalty statute and ruled that the death penalty did not always constitute cruel and unusual punishment. Gary Mark Gilmore, a volunteer executed by firing squad on January 17, 1977 was the first person put to death after *Gregg* (see *Gilmore v. Utah*, 429 U.S. 1012 (1976); see also Brisman 2009a).

¹⁰ As of May 11, 2010. Visit the Death Penalty Information Center’s “Searchable Execution Database,” <<http://deathpenaltyinfo.org/executions>>, for the most recent figures.

¹¹ I refer to volunteers as males because of the 134 volunteers, only three have been women: Christina Riggs, executed by lethal injection in Arkansas on 5/2/2000; Lynda Lyon Block, executed by electrocution on 5/10/2002 in Alabama; and Aileen Wournos, executed by lethal injection in Florida on 10/9/2002.

¹² Future research could entail qualitative study of death row inmates and their attorneys (especially “capital cause lawyers”) focusing on the impetus for volunteering and the possibility that volunteers could intend the waiver or withdrawal of appeals as a form of protest against the death penalty.

¹³ The standard used to determine whether an individual is competent to waive or withdraw one’s death penalty appeals and forego any further legal proceedings was first set forth in *Rees v. Peyton*, where the Supreme Court indicated that courts must evaluate “whether [the prisoner] has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises” (*Rees v. Peyton*, 384 U.S. 312, 314 (1966)).

¹⁴ Note that volunteers have indicated both opposition to and support for the death penalty. For example, in *Comer v. Stewart*, the inmate explained that his decision to

withdraw his appeals grew out of a lengthy process of introspection whereby he came to regret his actions, to recognize the hurt he had caused many people in his life, and to accept and participate in the punishment awarded for his crime. Acknowledging a debt to the friends and family of his victim, as well as a desire to spare his own family and friends ongoing pain, Comer declared: “I started thinking about my victims, thinking about everything. It’s just time to end it now... I’ve been saying for a year-for, you know, the last couple of years, at least, I killed this guy...I stuck a gun in the guy’s ear, pulled the trigger...” Comer did not express a true desire to die, nor did he indicate support for the death penalty in general as a form of punishment. But in his arguments to the district court, he indicated his wish to waive his appeals and expedite his death sentence because he accepted the finality of his punishment—reasons that the district court found persuasive. In contrast, the death row inmate in *Hamblen v. State*, 527 So.2d 800, 802 (Fla. 1988), expressed no reservations about capital punishment as a matter of course. But like Comer, Hamblen agreed with its imposition in his own case. To the best of my knowledge, in neither situation was the death penalty as a political or penological issue the stated reason (or even a stated reason) for volunteering.

¹⁵ Prisoners are both physically and politically limited in their means, methods, and opportunities for protest. For a discussion of the interrelationship between political environment variables and political behavior (including protest), see Eisinger (1973).

¹⁶ It is impossible to specify the number of defendants charged with capital murder who express a preference for a death sentence during the course of their trials or to pinpoint exactly the number of inmates on death row who indicate a desire to halt post-conviction proceedings. But as numerous commentators and courts have noted, it is by no means uncommon for defendants and death row prisoners to request a waiver or withdrawal of their appeals. For a discussion, see Brisman (2009a); Harrington (2000, 2004); White (1987); see also *Smith v. Armontrouth*, 812 F.2d 1050, 1052 (8th Cir. 1987); *State v. Dodd*, 838 P.2d 86, 103 (Wash. 1992) (Utter, J., dissenting).

¹⁷ The stopping and starting of the appeals process could be a ploy on the part of the individual sentenced to death. The appeals process in capital cases is remarkably costly, complicated, and time-consuming—even without the death row inmate changing his mind. The death row inmate could very well maintain commitment to his cause throughout, but simply use the switching back and forth as a form of protest—as a way of throwing a monkey wrench in the wheels of the criminal justice system.

¹⁸ An even more extreme scenario—and one even more likely to result in the transformation of the death

penalty—would entail the more than 3,300 individuals on death row simultaneously waiving or withdrawing their appeals at the same time that all capital defense attorneys went on strike and/or refused to take any new cases. I am indebted to Paul Kaplan for suggesting this scenario.

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