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Legal Ethics in Capital Cases: Looking for Virtue in Roberts v. Dretke and Assessing the Ethical Implications of the Death Row Volunteer The Fourth Annual Symposium on Legal Malpractice and Professional Responsibility: Comment.

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LEGAL ETHICS IN CAPITAL CASES: LOOKING FOR VIRTUE IN *ROBERTS v. DRETKE* AND ASSESSING THE ETHICAL IMPLICATIONS OF THE DEATH ROW VOLUNTEER

J. CALEB RACKLEY

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I. INTRODUCTION

Thomists, followers of the theology and philosophy of the thirteenth century scholar Thomas Aquinas,[1] believe the existence of law is "good in its very nature."[2] Anarchists, on the other hand, see law as fundamentally immoral because it "requires obedience regardless of one's judgement [sic] about [its] merit[s]."[3] While Thomists and anarchists will undoubtedly debate the morality of law as long as law exists, neither can argue that the existence of law is exclusively good or bad.[4] Even Thomists must concede that our legal system can be used for corrupt purposes, and even anarchists must admit that it can be used to improve the human condition.[5]

Whether one values or laments the existence of laws, there is a more pertinent question: Are the laws that exist good or bad? The question of our time, when laws pervade every aspect of our lives, is not whether "law" is good or bad, but whether the laws enacted by our legislatures and courts serve useful or destructive ends. While the morality of law cannot be analyzed in simple black-and-white terms, neither can we examine any particular statute or court holding individually and determine its complete worthiness or complete lack thereof . . . or can we?

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1. *See* NORMAN L. GEISLER, THOMAS AQUINAS: AN EVANGELICAL APPRAISAL 35 (1991) (describing Thomas Aquinas's literary works). During his lifetime, Aquinas penned over ninety works, the most famous of which is *Summa theologiae*, a massive sixty-volume theological effort. *Id.*; *see also* ANTHONY KENNY, AQUINAS 1-30 (1980) (describing the life and philosophy of Thomas Aquinas). Thomas Aquinas was born in Naples, in 1225, and died on March 4, 1274. NORMAN L. GEISLER, THOMAS AQUINAS: AN EVANGELICAL APPRAISAL 25, 34 (1991). Pope John XXII declared him a Saint in 1323. ANTHONY KENNY, AQUINAS 27 (1980); *see also* CHARLES P. NEMETH, AQUINAS IN THE COURTROOM: LAWYERS, JUDGES, AND JUDICIAL CONDUCT 26 (2001) (applying Aquinas's philosophy to the modern legal system). Thomistic law "mirrors the fullness of God's creation." CHARLES P. NEMETH, AQUINAS IN THE COURTROOM: LAWYERS, JUDGES, AND JUDICIAL CONDUCT 26 (2001). Law "is the plan for a life consistent with . . . a life of virtue—and it is the order 'whereby man clings to God.'" *Id.* (quoting DANIEL MARK NELSON, THE PRIORITY OF PRUDENCE: VIRTUE AND NATURAL LAW IN THOMAS AQUINAS AND THE IMPLICATIONS FOR MODERN ETHICS 107 (1992)). The essence of law "is formulated in God Himself," as eternal law, then becoming divine law, and then gradually finding "its imprint in His creatures . . . by and through the imprints of the natural law," at which time it is manifested as human law. *Id.* at 25. Thus, "[d]oing good and avoiding evil is naturally known to all rational beings." *Id.* Consequently, human law must be just, or else it "lack[s] the status or nature of law." *Id.* According to Aquinas, "[l]aw is equated with happiness in both [the] individual and culture." *Id.* at 28. It must be "proportioned to the common good." *Id.*

2. Joseph Raz, *About Morality and the Nature of Law*, 48 AM. J. JURIS. 1, 1 (2003).

3. *Id.*

4. *Id.* at 2.

5. *Id.*

Indeed, few laws or court decisions are exclusively good. What an edict gives to one, it almost always takes from another. Is it possible, however, that a court's holding could be exclusively bad—that it gives to no one and takes from everyone? Is there such a thing as a law with no virtue?

Consider the law, as recently promulgated by Texas courts, and ultimately the United States Court of Appeals for the Fifth Circuit, in *Roberts v. Dretke*.[6] By the totality of their judgment, the courts upheld a death sentence, undermined the moral basis for capital punishment, and diluted the ethical duties of officers of the court in capital cases—and in so doing, made the legal system vulnerable to criticism from those on all sides of the death penalty debate.

In *Dretke*, the courts collaboratively viewed legal ethics and Supreme Court precedent through an amoral lens. As a result, a man was executed without the benefit of an adversarial proceeding, but the implications reach even further. The *Dretke* courts not only stripped capital punishment of its moral basis, but also weakened their own moral pedestal—a precarious position indeed for courts at any level in the judicial hierarchy.[7]

This Comment draws on *Dretke*'s rejection of habeas relief for a capital murder defendant to analyze the phenomenon of the "death row volunteer,"[8] the scenario that occurs when a defendant on trial for capital murder advises his lawyer to seek a conviction and death sentence. The phenomenon of the death row volunteer highlights the need for a new approach to legal ethics in capital cases—an approach that begins from the premise that all civilized societies value life.[9] As such, this Comment

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6. 381 F.3d 491 (5th Cir. 2004), *cert. denied*, 2005 WL 742671 (U.S. Apr. 4, 2005) (No. 04-7824).

7. *See* Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 378 (1993) (suggesting that ABA guidelines be incorporated into the *Strickland* standard so that courts can ensure that defendants are not unjustly executed because, otherwise, "the integrity of our system of justice" would be compromised).

8. *See generally* C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849 (2000) (offering a discussion about death row volunteering). The scenario described in this Comment, in which an individual on trial for capital murder instructed his attorney to actively seek a conviction and death sentence, can be distinguished from the seemingly more common scenario in which an *already* convicted and sentenced inmate advises his lawyer to cease all appeals. However, both situations raise serious questions regarding the proper role of the legal system in death penalty jurisprudence.

9. *See* Danuta Mendelson, *Historical Evolution and Modern Implications of Concepts of Consent to, and Refusal of, Medical Treatment in the Law of Trespass*, 17 J. LEGAL MED. 1, 35 (1996) (noting that Blackstone considered the "principle of sanctity of life . . . fundamental to a civilized society"); Joseph Raz, *About Morality and the Nature of Law*, 48 AM.

espouses a kind of *life ethic* that, above all, recognizes and respects the sanctity of human life and implicates legal ethics accordingly.[10]

Ironically, while a *life ethic* drives this Comment's bias in favor of capital punishment, it also accounts for its rejection of the death sentence imposed in *Dretke*. Additionally, it should be noted that the *life ethic* embodies shades of gray that do not always mesh with the black-and-white agenda at both ends of the political spectrum. Notably, a respect for the sanctity of human life can serve equally well as a basis for both advocating and rejecting society's use of the death penalty.[11] Yet, regardless of one's position on the merits of capital punishment, a *life ethic* must always frame the moral and ethical principles pertinent to imposing the ultimate, irrevocable penalty.

At least one commentator has written that death penalty proponents "support volunteering because they favor executions [and] consensual ones simply expedite the process."[12] While this may be true for some, this Comment argues that such a view is inconsistent with the moral basis for capital punishment. As such, it stands for the proposition that the death row volunteer should not be allowed to manipulate the legal system to achieve his suicidal ends. Part II first analyzes the relationship between our legal system and moral ideals, explaining the essential moral authority that inherently results, and then explores the history of capital punishment in the United States and the vigorous debate that surrounds its continued use. Part III discusses the facts of *Dretke*, as it originated in the trial court and worked its way up to the Fifth Circuit. Part IV examines the ethical issues that arose for the *Dretke* courts, and their largely improper response, when the defendant instructed his attorney to "steer the trial towards the imposition of the death penalty."[13] In light of the

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J. JURIS. 1, 3 (2003) (stating that "no legal system can be stable unless it provides some protection for life and property to some of the people to whom it applies").

10. Importantly, the *life ethic* espoused in this Comment is confined to the narrow phenomenon of the "death row volunteer" and should not be read as commenting on the equally important, but altogether different, issues surrounding the "right to die" and "right to life" political debates that exist outside of the criminal law context.

11. *Compare* Ernest van den Haag, *Death, Rehabilitation, the Bible, and Human Dignity, in* THE DEATH PENALTY: A DEBATE 257, 262 (1983) (stating that "[a] society that allows those who took the innocent life of others to live on—albeit in prison for a time—does not protect the lives of its members or hold them sacred"), *with* John P. Conrad, *Death, Rehabilitation, the Bible, and Human Dignity, in* THE DEATH PENALTY: A DEBATE 263, 267 (1983) (replying that "*all* human beings, even the least deserving among us, have an equal and inalienable right to live").

12. C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849, 850 (2000).

13. Roberts v. Dretke, 381 F.3d 491, 494 (5th Cir. 2004), *cert. denied*, 2005 WL 742671 (U.S. Apr. 4, 2005) (No. 04-7824).

necessity of maintaining the moral authority of the legal system, this section recognizes the need for an approach to interpreting Supreme Court precedent that accentuates the *life ethic*. Similarly, it identifies various state interests in capital cases, arguing that their preservation requires deference to them over the defendant's suicidal desires. Part V looks at the death row volunteer from the perspective of both the defense counsel and the prosecuting attorney in *Dretke*, and surveys the unique ethical obligations that governed each. Finally, Part VI concludes that *Roberts v. Dretke* failed on all fronts—from the perspective of death penalty advocates and opponents alike, it is truly a decision without virtue.

II. Background

A. *Moral Authority: Why Virtue is Important*

Our legal system is based on general moral principles.[14] Accordingly, it is reasonable to expect that the products of our legal system exhibit some virtue as well—such that, whether we agree with a specific policy outcome or not, we can, at a minimum, recognize in every court decision, statute, and regulation the existence of moral principles at work.

Of course, one would expect Aquinas to concur with, and the anarchist to object to, the notion that the law is related to morality, and neither disappoints. Under the principles of natural law, of which Aquinas was so fond, virtue and law are naturally linked because the law is "nothing

14. *See* Samuel Enoch Stumpf, Morality and the Law 9 (1966) (quoting legal theorist Roscoe Pound's assertion that "'the attempt to make law and morals identical by covering the whole field of morals with legal precepts, and by conforming existing precepts to the requirements of a reasoned system of morals, made the modern law'"); Norman Kretzmann, *Lex Iniusta Non Est Lex: Laws on Trial in Aquinas' Court of Conscience, in* Philosophy of Law 7, 8 (Joel Feinberg & Hyman Gross eds., 5th ed. 1995) (discussing how many great thinkers in history have viewed law and morality as one in the same). Plato saw "laws that fail to fulfill a certain moral condition [as] not [being] full-fledged laws." Norman Kretzmann, *Lex Iniusta Non Est Lex: Laws on Trial in Aquinas' Court of Conscience, in* Philosophy of Law 7, 8 (Joel Feinberg & Hyman Gross eds., 5th ed. 1995). Similarly, Aristotle believed that "laws in conformity with perverted constitutions are necessarily unjust." *Id.* Cicero stated that "those who formulated wicked and unjust statutes . . . put into effect *anything but laws.*" *Id.* Finally, Augustine said that "that which is not just does not seem to me to be a law," and Thomas Aquinas frequently repeated Augustine's statement. *Id.*; *cf.* Gerald Abrahams, Morality & the Law 20 (1971) (intimating that "[i]n no case does the law claim to be the sole repository of morals. Nor, however, should it ever be regarded as a moral vacuum."). *But see* Samuel Enoch Stumpf, Morality and the Law 8 (1966) (quoting Supreme Court Justice Hugo Black who, in protesting a reference to ethics by Justice Felix Frankfurter, wrote "the judicial error (in this case) . . . is slight compared to the error of interpreting legislative enactments on the basis of the court's preconceived views on 'morals' and 'ethics'"); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593, 598 (1958) (rejecting the notion that law and morality co-exist).

more than reason's rule and measure of human activity," and reason is the means for all virtuous activity.[15] But to the anarchist, the law possesses no virtue.[16] Morality, at least as it relates to law, is the absence of law.[17]

A more practical alternative, when attempting to determine whether morality and law are related, is to examine whether there is a general moral obligation on the part of individuals to obey the law. In other words, assuming one does not sit squarely in either the Thomist "natural law" or anarchist "no law" camp, most would argue that, at least under some circumstances, there is a moral obligation on the part of individuals to obey the laws that exist.[18]

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15. CHARLES P. NEMETH, AQUINAS IN THE COURTROOM: LAWYERS, JUDGES, AND JUDICIAL CONDUCT 59-60 (2001).

16. *See* ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM 93 (1970) (stating that "[t]he effect of the social contract," in which citizens give up individual rights to the state, "is to destroy the moral symmetry of the state of nature"); Joseph Raz, *About Morality and the Nature of Law*, 48 AM. J. JURIS. 1, 1 (2003) (observing that "[s]ome strands in political anarchism claim that it is of the essence of law to have features which render it inconsistent with morality").

17. *See* Joseph Raz, *About Morality and the Nature of Law*, 48 AM. J. JURIS. 1, 1 (2003) (declaring that, to some anarchists, "the law is essentially immoral"); *cf.* ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM 17, 34 (1970) (advocating that, because morality demands that individuals achieve autonomy from authority "wherever and whenever possible," America's representative democracy should—if possible—be replaced by a "direct democracy" in which every home is equipped with electronic voting machines).

18. *See* ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM 104 (1970) (granting "that many mature, serious, reflective students of politics believe that we have a *prima facie* obligation to obey the valid laws of a constitutional democracy"); Joel Feinberg, *Civil Disobedience in the Modern World*, *in* PHILOSOPHY OF LAW 121, 124 (Joel Feinberg & Hyman Gross eds., 5th ed. 1995) (noting that "the problem civil disobedience raises for our moral judgments derives from the almost universal belief that every citizen in a constitutional democracy with at least approximately just institutions has a general obligation to obey the valid laws and lawful commands of his government"); Martin Luther King, Jr., *Letter From Birmingham Jail*, *in* PHILOSOPHY OF LAW 113, 115 (Joel Feinberg & Hyman Gross eds., 5th ed. 1995) (arguing that "[o]ne has not only a legal but a moral responsibility to obey just laws"); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 35 (1959) (withholding all support for "anyone who claims legitimacy in defiance of the courts," because to do so is "the antithesis of law"); *cf.* Richard A. Wasserstrom, *The Obligation to Obey the Law*, *in* ESSAYS IN LEGAL PHILOSOPHY 274, 279 (Robert S. Summers ed., 1968) (showing that, of those who argue that there is sometimes a moral obligation to obey the law, they generally take one of at least three positions). First, there is the view that there is an "absolute obligation to obey the law," meaning "disobedience is never justified." Richard A. Wasserstrom, *The Obligation to Obey the Law*, *in* ESSAYS IN LEGAL PHILOSOPHY 274, 279 (Robert S. Summers ed., 1968). Second, some argue that there is an obligation to obey the law, "but this obligation can be overridden by conflicting obligations." *Id.* Finally, others argue that there is no "special obligation to obey the law, but it is in fact usually obligatory, on other grounds, to do so." *Id.* These "other grounds" would be present when, for example, despite feeling no moral obligation to obey a law simply

Specifically, many argue that while there is a general moral obligation on the part of citizens to obey the law of their country, civil disobedience can be justified by superseding conflicting moral obligations.[19] Hence, while individuals are in most instances morally obligated to obey the law, the sit-ins of the civil rights movement, for example, were nonetheless justified—if not required—by the existence of immoral laws requiring racial segregation.[20] Thus, the question inevitably arises: If a democratic system of government is ultimately responsible to the people, and not the other way around, and if there exists a general moral obligation to obey the law, is there not a reciprocal duty on the part of the law to be moral? Certainly, at least with regard to criminal law, such a duty does in fact exist,[21] and other areas of the law are inescapably linked with morality as well.[22]

Of course, it was Justice Oliver Wendell Holmes, Jr. who wrote in 1897 of "the distinction between morality and law,"[23] but his point has been

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because it is the law, an actor feels obligated to obey the law because he or she associates a particular act of disobedience with some other action that he or she views as morally unacceptable. *Id.* *But see* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 233 (1979) (noting that some argue there is never an obligation to obey the law, "even in a good society whose legal system is just"); ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM 104 (1970) (arguing against the notion that citizens of a constitutional democracy have a *prima facie* obligation to obey the law).

19. *See* Susan Tiefenbrun, *Civil Disobedience and the U.S. Constitution*, 32 SW. U. L. REV. 677, 685 (2003) (recognizing that civil disobedience "is a means by which the disobedient can accomplish a higher moral or political purpose" than obeying the law). Tiefenbrun emphasizes that "[c]ivil disobedience is a non-violent act of breaking the law openly and publicly, without harming others," and is accompanied by a willingness on the part of the actor "to accept punishment." *Id.* at 684.

20. *See* Joel Feinberg, *Civil Disobedience in the Modern World*, *in* PHILOSOPHY OF LAW 125 (Joel Feinberg & Hyman Gross eds., 5th ed. 1995) (observing that "[d]uties of course can be overridden in particular cases by a 'higher duty,' or in a 'higher cause'"); Susan Tiefenbrun, *Civil Disobedience and the U.S. Constitution*, 32 SW. U. L. REV. 677, 685 (2003) (writing that "Martin Luther King Jr. believed that one has a moral duty to disobey unjust law").

21. *See* IGOR PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT 6-9 (1989) (characterizing "justice" as the infliction of morally acceptable punishment and noting that such punishment is ethical under "utilitarian or retributive theories of punishment").

22. *See* LON L. FULLER, THE MORALITY OF LAW 162 (2d ed. 1969) (arguing that moral principles are implicit in the concept of law); SIMON LEE, LAW AND MORALS 18 (1986) (reporting that "the most basic aspects of civil law rest squarely on a moral code"); DAVID LYONS, ETHICS AND THE RULE OF LAW 61 (1984) (concluding that "[t]here seems little doubt that law interacts with moral opinions").

23. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458-69 (1897); *see also* ROSCOE POUND, LAW AND MORALS 34 (Augustus M. Kelley Publishers 1969) (1924) (asserting that many scholars incorrectly conclude that law is "devoid of any moral content" because, like Justice Holmes, they analyze the law only after first washing their findings "'in cynical acid'" (quoting OLIVER WENDELL HOLMES, COLLECTED PAPERS

undermined by his successors on the bench.[24] While Holmes may have been correct with regard to the law of contracts in his time, subsequent generations of "courts have been quietly loading his typical unmoral legal rule with exceptions and . . . [the] law is continually devising new means of evading it."[25] Thus, whether we want to admit it or not, the basis of modern law has not changed a great deal from its beginnings when, in the fifth century before Christ, the Greeks established it on moral precepts.[26]

Indeed, "the most basic aspects of civil law rest squarely on a moral code."[27] Tort law and the law of negligence in particular are "at least superficially[ ] bound up with the moral principle that you should not harm your neighbour and that if you do you should compensate him."[28] Property law and the whole notion of ownership are "full of moral im-

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174 (1920))). Even before Holmes, the 19th century English statesman Historicus wrote, "'[T]he provinces of law and morality are not co-extensive,'" and gave as evidence what Holmes would later point out as well: Individuals are legally obligated, not to keep all of their promises, but to keep only "'those which are made for valuable consideration.'" ROSCOE POUND, LAW AND MORALS 40 (Augustus M. Kelley Publishers 1969) (1924) (quoting Historicus (Sir William Vernon Harcourt)).

24. *See* SAMUEL ENOCH STUMPF, MORALITY AND THE LAW 9, 31 (1966) (relating Justice Cardozo's view that "[t]he scope of legal duty has expanded in obedience to the urge of morals" and arguing that there are at least "six ways in which the moral element is referred to in the opinions of the [Supreme] Court"). First, "[a] given action may lie well within the limits of the law but may be so questionable morally that a judge will consider the case from the moral standpoint." *Id.* at 32. Second, "[t]here are times when, although there is agreement on the moral element in a case, the judges find themselves unable to translate this moral duty into legal rights." *Id.* at 34. Third, "[t]he moral element enters most frequently in cases where there is a conflict of competing values." *Id.* Fourth, "a moral end is achieved on technical legal grounds with no moral arguments appearing in the majority opinion." *Id.* at 37-38. Fifth, "[s]tatutory interpretation provides another occasion for the inclusion of moral judgments in Supreme Court opinions." *Id.* at 39. And finally, "the doctrine of natural moral law continues to figure in the opinions of the Court, though not without vigorous intramural opposition." *Id.* at 41.

25. ROSCOE POUND, LAW AND MORALS 41 (Augustus M. Kelley Publishers 1969) (1924).

26. *See id.* at 12 (noting that "[t]he Greeks put a theoretical moral foundation under law by the doctrine of natural rights"); *cf.* GEORGE ANASTAPLO, *The Moral Foundation of the Law, in* THE AMERICAN MORALIST: ON LAW, ETHICS, AND GOVERNMENT 185, 198 (1992) (indicating that, specific to American law, the notion of a moral foundation to political institutions, and by extension to the legal institutions thereby created, is evidenced by "the right of revolution set forth in the Declaration of Independence"). Consequently, the founders' "sense of rightness, grounded in nature" endows our modern-day political and legal institutions with both the "moral authority" and "obligation" to shape society in ways that correspond with their original vision, as judged by contemporary standards of justice. GEORGE ANASTAPLO, *The Moral Foundation of the Law, in* THE AMERICAN MORALIST: ON LAW, ETHICS, AND GOVERNMENT 185, 198 (1992).

27. SIMON LEE, LAW AND MORALS 18 (1986).

28. *Id.*

port," especially when one considers, for example, the morality of adverse possession of property or the conflict between the "liberty of the landlord to profit from his own property" and the right of society to ensure that all individuals "have a roof over [their] head[s] at a 'fair' rent."[29] And finally, returning to Justice Holmes's purportedly amoral contract law, it has been said that "'[t]he law reflects to a considerable extent the moral standards of the community in which it operates.'"[30] The common law of contract, in fact, is based in large part on "'the simple moral principle that a person should fulfil [sic] his promises and abide by his agreements.'"[31]

In criminal law, justice is attained by inflicting morally acceptable punishment in proportion to the severity of offenses committed.[32] For most, the "moral justification" for such punishment lies in either "utilitarian or retributive theories of punishment."[33] Utilitarianism posits that "punishment is morally justified by its good consequences"—reformation, deterrence, and education.[34] Retributivists, on the other hand, believe that "punishment is morally justified because it is just."[35] Regardless of which theory of punishment to which one subscribes, the purpose of the criminal justice system is to achieve justice, and justice is grounded in a morally acceptable form of punishment.

Accordingly, having established a necessary connection between law and morality, it is reasonable to question any facet of the law that is lacking therein. Because, as we have seen, the authority of "the law" is steeped in moral principles, legal authority is undermined when "laws" do not exhibit moral and ethical virtues. Quite simply, "a legal system that contains immoral norms lacks the moral authority a legal system ought to have."[36]

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29. *Id.* at 19.

30. *Id.* at 18 (quoting P.S. ATIYAH, AN INTRODUCTION TO THE LAW OF CONTRACT 2-3 (3d ed. 1981)).

31. *Id.* (quoting P.S. ATIYAH, AN INTRODUCTION TO THE LAW OF CONTRACT 2-3 (3d ed. 1981)).

32. *See* IGOR PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT 6 (1989) (advocating that "for punishment *to be* punishment it must be just—the suffering or deprivation must fit the crime").

33. *Id.* at 9.

34. *Id.* at 10-11.

35. *Id.* at 12. In other words, according to retributionism, "punishment is just because it is deserved by the offense." *Id.*

36. Kenneth Einar Himma, *Situating Dworkin: The Logical Space Between Legal Positivism and Natural Law Theory*, 27 OKLA. CITY U. L. REV. 41, 110 n.188 (2002).

The importance of moral authority cannot be overstated—it is the glue that holds our institutions together.[37] Courts govern through both legal and moral authority,[38] but in a judicial system such as ours, legal authority becomes meaningless to the extent that the moral authority upon which it stands is weakened. After all, the Constitution does not give the Supreme Court and its ancillaries independent enforcement powers.[39] Instead, courts must rely on the executive and legislative branches, and the citizenry, as well, respecting their authority.[40] As such, the legal system's moral authority is vital, especially as it concerns divisive issues such as the continued use of capital punishment in many states.[41]

B. *Capital Punishment in the United States*

1. History of the Death Penalty

Not surprisingly, the imposition of capital punishment in the United States dates back to its colonial beginnings when the laws of each colony were strongly influenced by the Puritan religious beliefs of the day.[42] The earliest confirmed death sentence, in fact, was carried out in colonial Vir-

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37. *See* THEODORE H. WHITE, BREACH OF FAITH: THE FALL OF RICHARD NIXON 322 (1975) (arguing that the true tragedy of the Watergate Affair was the destruction of the myth of equality before the law "that binds America together"). This communal faith in the law "surmounts all daily cynicism," and without it, "America would be a sad geographical expression where . . . each community within the whole would harden into jangling, clashing contentions of prejudices and interests that could be governed only by police." *Id.* at 322-23.

38. Carey N. Vicenti, *The Social Structures of Legal Neocolonialism in Native America*, 10 KAN. J.L. & PUB. POL'Y 513, 513 (2000).

39. *See generally* U.S. CONST. art. III (providing no enforcement power for the judicial branch).

40. *See generally* United States v. Nixon, 418 U.S. 683 (1974) (demanding that the President turn over Watergate tapes to the Independent Prosecutor, but leaving the world to wonder what would occur if the President refused); Cooper v. Aaron, 358 U.S. 1 (1958) (leaning on the state of Arkansas to de-segregate its schools, in compliance with the Supreme Court directive, but not threatening any consequence if it failed to do so).

41. *See* Death Penalty Information Center, *Facts About the Death Penalty*, *available at* http://www.deathpenaltyinfo.org/FactSheet.pdf (Mar. 1, 2005) (listing thirty-eight states that still have death penalty statutes in effect).

42. *See* CAPITAL PUNISHMENT IN THE UNITED STATES: A DOCUMENTARY HISTORY 12-13 (Bryan Vila & Cynthia Morris eds., 1997) (insisting that "'[t]he [m]urderer is to be put to death by the hand of [p]ublick [sic] [j]ustice,'" and arguing that, besides the fact that equity requires retaliation, biblical scripture calls for the murderer to "'be put to [d]eath'" (quoting Increase Mather, *A Sermon Occasioned by the Execution of a Man Found Guilty of Murder*, *in* EXECUTION SERMONS 11-12 (Sacvan Bercovitch ed., 1994))). The Massachusetts Bay Colony, for example, enacted twelve laws declaring twelve different crimes—from idolatry to murder to sodomy—punishable by death. *Id.* at 8-9.

ginia in 1608,[43] and there would be a total of 162 executions before the seventeenth century came to a close.[44] The eighteenth century saw a sharp increase in the use of capital punishment,[45] and, while the abolition movement began in earnest in the nineteenth century,[46] the number of executions in America continued to rise. In the nineteenth century, for example, there were 5374 executions carried out under state and local authority, compared with only 1553 in the previous two centuries combined.[47]

The twentieth century, however, saw the trend reverse.[48] While the number of executions reached its peak during the 1930s with 1567 executions, capital punishment rates began a rather rapid decline thereafter.[49] In the 1950s, 717 people were executed and the number fell to 191 in the 1960s.[50]

In 1972, in *Furman v. Georgia*,[51] the Supreme Court "invalidated capital punishment laws in some forty states"[52] as "cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[53] The

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43. James R. Acker et al., *America's Experiment with Capital* Punishment, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 5 (James R. Acker et al. eds., 1998).

44. RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA 4 (1991).

45. *See id.* (showing that the number of executions performed under state and local authority increased from 162 during the seventeenth century to 1391 during the eighteenth century).

46. *See* CAPITAL PUNISHMENT IN THE UNITED STATES: A DOCUMENTARY HISTORY 37 (Bryan Vila & Cynthia Morris eds., 1997) (describing how, "[a]fter the abuses and discord of the post-Civil War era, a progressive [abolitionist] spirit began to take hold near the turn of the century").

47. *See* RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA 4 (1991) (breaking down the number of executions in the nineteenth century according to the pre-Civil War era, the post-Civil War era, and the last two decades of the nineteenth century). The number of executions increased, from 162 during the seventeenth century and 1391 during the eighteenth century, to a total of 5374 during the nineteenth century, including over 2000 between 1880 and 1900 alone. *Id.*

48. *See id.* at 10 (noting that the number of executions dropped from 155 in 1930 to only fifteen in 1964).

49. *See id.* at 10-11 (documenting the number of executions between 1930 and 1970 with a line graph that shows a dramatic decline, from over 150 executions in 1930 to almost zero executions in 1970).

50. *See id.* at 10 (breaking down the number of executions by year, from 1930 to 1969).

51. 408 U.S. 238 (1972) (per curiam).

52. RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA 18 (1991). "As a result of the *Furman* decision over 600 condemned persons were resentenced to life terms . . . ." *Id.*

53. Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (per curiam).

Court placed a temporary moratorium on the death penalty, declaring unconstitutional state laws that "granted juries unguided and virtually unregulated discretion."[54] Four years later, in 1976, the Court reinstated capital punishment in *Gregg v. Georgia*,[55] upholding newly-written state statutes that gave juries only "guided discretion" in imposing the death penalty,[56] and required a sentencing phase separate from the guilt or innocence part of the trial.[57]

Although the death penalty returned in 1976, the downward trend continued.[58] In the fourteen year period beginning in 1976 and ending in 1989, for example, only 120 executions were carried out.[59]

However, the downward trend reversed itself in the last decade of the twentieth century.[60] There were 478 executions in the 1990s,[61] an almost five-fold increase over the previous decade.[62] The execution rate peaked at almost one hundred in 1998 alone,[63] and "the number of states conducting executions at some point during the decade . . . more than doubled, from thirteen in the 1980s to twenty-nine in the 1990s."[64]

The twenty-first century has seen 339 executions to this point, but the pace seems to be trending downward again, with only fifty-nine executions occurring in 2004, the lowest yearly total since 1996.[65] Currently,

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54. RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA 19 (1991).

55. 428 U.S. 153 (1976).

56. RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA 21 (1991).

57. Cecil A. Rhodes, *The Victim Impact Statement and Capital Crimes: Trial by Jury and Death by Character*, 21 S.U. L. REV. 1, 4 (1994).

58. *See id.* at 22 (displaying a chart that shows only 140 executions were carried out between 1977 and 1990).

59. Death Penalty Information Center, *Facts About the Death Penalty*, *available at* http://www.deathpenaltyinfo.org/FactSheet.pdf (Mar. 1, 2005).

60. *See id.* (displaying a bar graph showing the number of executions standing at twenty-three in 1990 and rising to ninety-eight in 1999); *cf.* RAYMOND PATERNOSTER, CAPITAL PUNISHMENT IN AMERICA 21 (1991) (declaring that, despite the increase in executions during the 1990s, the number of executions has never returned to pre-1960's levels).

61. *See* Death Penalty Information Center, *Facts About the Death Penalty*, *available at* http://www.deathpenaltyinfo.org/FactSheet.pdf (Mar. 1, 2005) (showing the number of executions rising from twenty-three in 1990 to a high of ninety-eight in 1999).

62. FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 144 (2003).

63. Death Penalty Information Center, *Facts About the Death Penalty*, *available at* http://www.deathpenaltyinfo.org/FactSheet.pdf (Mar. 1, 2005).

64. FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 144 (2003).

65. *See* Death Penalty Information Center, *Facts About the Death Penalty*, *available at* http://www.deathpenaltyinfo.org/FactSheet.pdf (Mar. 1, 2005) (documenting eighty-five executions in 2000, sixty-six in 2001, seventy-one in 2002, sixty-five in 2003, and fifty-nine in 2004).

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thirty-eight states still have death penalty statutes on the books,[66] and Texas leads the nation in numbers of executions since 1976.[67]

2. The Contemporary Death Penalty Debate

One constant throughout the evolution of the death penalty in America has been the general public's strong support for it.[68] For as long as polls have been taken on this subject, the majority of Americans have always favored capital punishment.[69] Public support for the death penalty remained strong throughout the twentieth century[70] and, according to a recent Gallup poll, sixty-five percent of Americans remain convinced that it is a "morally acceptable" form of punishment.[71]

Still, there exist many well-founded objections regarding the current use of the death penalty that require the closest scrutiny. Critics allege that a lethal combination of systemic discrimination[72] and ineffective, incompetent, and indifferent legal counsel[73] has led to a crisis in the legal system, the effect of which is three-fold.

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66. *Id.*

67. *See id.* (listing thirty-eight states with death penalty statutes and showing that Texas far outpaces all other states in the number of executions since 1976). As of December 2004, Texas led the nation (for the number of executions since 1976) with 339 executions, followed by Virginia with 94, and Oklahoma with 75. *Id.* Also, as of December 2004, five states had carried out only one execution since 1976. *Id.*

68. *See* Robert M. Bohm, *American Death Penalty Opinion: Past, Present, and Future*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 25 (James R. Acker et al. eds., 1998) (noting that "[s]ince 1966 . . . support [for] capital punishment . . . has increased an average of more than one percentage point per year [and i]n no year for which polls are available has a majority of Americans opposed capital punishment").

69. *Id.*

70. *See id.* (observing that no poll has ever shown a majority of the American people opposing the death penalty).

71. Lydia Saad, *The Cultural Landscape: What's Morally Acceptable?*, The Gallup Organization, *available at* http://www.gallup.com/poll/content/print.aspx?ci=12061 (June 22, 2004) (on file with the *St. Mary's Law Journal*).

72. *See* David C. Baldus & George Woodworth, *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 385, 398 (James R. Acker et al. eds, 1998) (revealing substantial racial disparity in the imposition of capital punishment throughout the United States); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1836 (1994) (describing the discriminatory impact on the poor of inadequately funded public defender systems).

73. *See* TEXAS DEFENDER SERVICE, LETHAL INDIFFERENCE, at x (2002) (exposing "the frequency with which appointed lawyers are either filing the wrong kind of claims, failing to support the claims, copying verbatim claims that had been previously raised and rejected or otherwise neglecting to competently represent their clients"); Stephen B.

First, statistics suggest that the death sentence is inequitably applied. In 1990, a General Accounting Office survey of twenty-eight empirical studies conducted by researchers in the post-*Furman* era generated an astonishing finding regarding the impact of race in death penalty cases: Eighty-two percent of the studies concluded that defendants who murdered whites were "more likely to be sentenced to death than those who murdered blacks."[74]

The second consequence of capital punishment cited by those opposed to the death penalty is class discrimination. "Poor people accused of capital crimes are often defended by lawyers who lack the skills, resources, and commitment to handle such serious matters,"[75] because many jurisdictions do not have "comprehensive public defender systems whose resources can parallel the prosecutorial functions of the district attorney's offices."[76] Quite simply, critics lament, the lawyer market is like all others—you get what you pay for.[77] Of course, the "wealth gap" between Latinos and African Americans on one hand, and Whites on the other, exacerbates the problem even further.[78]

Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1842 (1994) (reporting "that capital trials are 'more like a random flip of the coin than a delicate balancing of the scales' because" defense lawyers are too often poorly trained, unprepared, and underpaid (quoting Marcia Coyle et al., *Fatal Defense: Trial and Error in the Nation's Death Belt*, NAT'L L.J., June 11, 1990, at 30)).

74. David C. Baldus & George Woodworth, *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 385, 398 (James R. Acker et al. eds., 1998). *But see* David C. Baldus & George Woodworth, *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 385, 399 (James R. Acker et al. eds., 1998) (stressing that the same General Accounting Office report found that "the relationship between race of defendant and outcome varied across studies").

75. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1836 (1994).

76. *Id.* at 1849.

77. *See* Amy R. Murphy, *The Constitutional Failure of the* Strickland *Standard in Capital Cases Under the Eighth Amendment*, 63 LAW & CONTEMP. PROBS. 179, Summer 2000, at 186 (noting that, as a result of "underfunded defense investigations and public defender systems," poor defendants "'are often represented by inexperienced lawyers who view their responsibilities as unwanted burdens, have no inclination to help their clients, and have no incentive to develop criminal trial skills'" (quoting Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1849-50 (1994))).

78. *See* Rakesh Kochhar, *The Wealth of Hispanic Households: 1996 to 2002,* PEW HISPANIC CENTER 1-2 (2004), http://pewhispanic.org/reports/report.php?ReportID=34 (observing that the median wealth of White households in 2002 was $88,651, compared with $7,932 for Hispanics and $5,988 for African Americans). The Pew Report also shows that "[t]he percentage of White households who owned homes in 2002 was 74.3[%]," compared

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Finally, death penalty opponents point to the most serious consequence of a defective justice system—execution of the innocent. While "documented cases in which the wrong person is executed are quite rare,"[79] and the exact number of innocent persons who either have been wrongfully executed or are currently on death row is exceedingly difficult, if not impossible, to pin down,[80] the extraordinary number of documented death row exonerations is indeed disturbing. According to the House Judiciary Subcommittee on Civil & Constitutional Rights, "since 1973, over 100 people have been released from death row with evidence of their innocence."[81] Another thirty-five death row inmates have been exonerated in this decade alone.[82]

These concerns have added fuel to the fire of those who oppose the death penalty. Death penalty opponents ultimately view the purportedly unfair way in which the death penalty is administered as the evil by-product of an immoral system. Quite simply, they argue, capital punishment cannot be morally justified in light of their belief that it is wrong to intentionally take a human life.[83]

Nevertheless, despite the current controversies surrounding its implementation and the widespread opposition to the death penalty in academic and other circles, capital punishment itself—if it is implemented as accurately, painlessly, and equitably as possible—is a morally justified form of punishment.[84] Death penalty advocates generally point to two moral arguments in particular.[85]

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with only 47.3% of Hispanic households and 47.7% of African American households. *Id.* at 2. Furthermore, between 1999 and 2001, "the net worth of Hispanic and Black households fell by 27[%] each," while "[t]he net worth of White households increased by 2[%]." *Id.*

79. Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177, 1182 (1981).

80. Michael L. Radelet & Hugo Adam Bedau, *The Execution of the Innocent*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 223 (James R. Acker et al. eds., 1998).

81. Death Penalty Information Center, *Facts About the Death Penalty*, *available at* http://www.deathpenaltyinfo.org/FactSheet.pdf (Mar. 1, 2005).

82. *Id.*

83. Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177, 1177 (1981).

84. *See* Bryan Vila & Cynthia Morris, *Introduction* to CAPITAL PUNISHMENT IN THE UNITED STATES: A DOCUMENTARY HISTORY, at xxvi (Bryan Vila & Cynthia Morris eds., 1997) (noting that "plausible moral arguments can be made" on both sides of the capital punishment debate).

85. *See id.* (stating that "[t]wo moral arguments have remained particularly important throughout the death penalty debate: retribution and the sanctity of life").

First, some believe that capital punishment is morally justified as retribution for certain crimes.[86] Yet, while retributionism prescribes punishment that fits "the gravity of the crime and the culpability of the criminal,"[87] it is incorrectly cited as a moral theory of punishment because it advances merely an emotional response to criminal acts, as the desire for retribution is a feeling that can be proven neither right nor wrong.[88] Additionally, retributivists argue from an immoral premise, as punishment merely for the sake of punishment can hardly be justified.[89]

Second—and more correctly—it is often argued that society's respect for the sanctity of human life makes capital punishment of certain crimes

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86. *See id.* (noting that retribution and the sanctity of life are two important moral arguments for capital punishment).

87. *See* Ernest van den Haag, *Justice, Deterrence and the Death Penalty*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 139 (James R. Acker et al. eds., 1998) (arguing that justice entails giving what is deserved—the idea of retribution—and the level of punishment, therefore, varies depending on the nature of the crime and the criminal's level of culpability).

88. *See* Ernest van den Haag, *The Retributivist's Case Against Capital Punishment*, *in* THE DEATH PENALTY: A DEBATE 28, 28-29 (1983) (describing how the Retributivists' argument at first sounds like a theory, but is ultimately not a theory at all, and is therefore a morally neutral argument because it cannot be proven right or wrong). Initially, of course, retributivists attempt to ascertain the moral justification of punishment. *Id.* at 29. Nevertheless, retributionism is merely "an expression of an emotion universally felt"—the notion that punishment (and death in the context of capital punishment) is justified when it is deserved. *Id.* As such, retributionism is really not a theory at all because "[a] theory must tell or explain something in ways that ultimately can be tested by experiment or by observation such that the theory is found to be correct or incorrect." *Id.* at 28. Thus, the retributivist executioner punishes in the name of revenge—a feeling that, unlike theory, can be proven "neither right nor wrong." *Id. But cf.* Ernest van den Haag, *Justice, Deterrence and the Death Penalty*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 139, 145 (James R. Acker et al. eds., 1998) (writing fifteen years later that "[t]he paramount moral purpose of punishment is retributive justice"). Thus, van den Haag believes, while retributionism is not a moral theory for punishment, it *is* a moral justification for punishment. *Id.* This Comment disagrees.

89. *See* IGOR PRIMORATZ, JUSTIFYING LEGAL PUNISHMENT 83 (1989) (stating that "[o]ne of the more popular objections to the retributive theory is . . . that it is in fact a philosophical rationalization of vengefulness"). *But see* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 103 (7th ed. 2001) (justifying criminal punishment based upon society's "'right of retaliation'" (quoting IMMANUEL KANT, THE PHILOSOPHY OF LAW (W. Hastie trans., 1887))); 2 SIR JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81 (1883) (explaining how the criminal law is based on the notion "that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting upon criminals punishment[ ] which express[es such hatred]").

a moral necessity.[90] As such, the concept of capital punishment itself, notwithstanding the controversies surrounding its implementation, rests squarely on moral ground because it "send[s] a signal . . . [that] is a necessary defense against the desecration of life and of social authority."[91] First, a respect for the sanctity of human life—a *life ethic*—makes the threat of execution a moral imperative in instances where the murderer's actions confirm his manifest disrespect for the life of another.[92] Quite simply, "it is our willingness to execute the murderer which affirms the high value that all participants in the debate place on human life."[93] Second, imposition of the death penalty "recognize[s] and asseverate[s] the humanity of the convict, even though he himself may have repudiated it by his crime."[94] The difference between humans and animals is that humans are responsible for their actions.[95] Thus, of course, "criminals are responsible for their actions because they are human."[96] As such, an appropriate punishment—punishment that affirms the high value of human life—acknowledges the criminal's "responsibility and, thereby, [his] humanity."[97]

In addition, like all forms of punishment, the death penalty serves the utilitarian purpose of deterring future disregard for human life by

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90. *See* Bryan Vila & Cynthia Morris, *Introduction* to CAPITAL PUNISHMENT IN THE UNITED STATES: A DOCUMENTARY HISTORY, at xxvi (Bryan Vila & Cynthia Morris eds., 1997) (noting that "retribution and the sanctity of life" are the "[t]wo moral arguments [that] have remained particularly important throughout the death penalty debate").

91. *See* Ernest van den Haag, *The Symbolic Meaning of the Death Penalty*, *in* THE DEATH PENALTY: A DEBATE 273, 275 (1983) (arguing that death penalty advocates use capital punishment as a signal "to defend the 'sanctity of life'" as well as "the moral rules expressed by the law").

92. *See* Ernest van den Haag, *Justice, Deterrence and the Death Penalty*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 139, 143-44 (James R. Acker et al. eds., 1998) (countering Justice William Brennan's view that capital punishment is inconsistent with the sanctity of life by pointing out that the notion of the sanctity of life may have come from the Roman term *homo homini res sacra*—meaning "man is a sacred object to man"—and it translated in ancient Rome into the widely-accepted view that "the sanctity of life [was] best safeguarded by executing murderers who had not respected it").

93. Richard O. Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177, 1177 (1981).

94. Ernest van den Haag, *Justice, Deterrence and the Death Penalty*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 139, 143 (James R. Acker et al. eds., 1998).

95. *Id.* at 143-44.

96. *Id.* at 143.

97. *Id.* at 143-44.

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strengthening moral inhibitions.[98] The way to discourage pre-meditated, aggravated murder—the ultimate crime against other people and society as a whole—is to impose the ultimate punishment.[99] In so doing, society expresses "the vehemence of the social disapproval of murder."[100] "'The idea is that punishment as a concrete expression of society's disapproval of an act helps to form and to strengthen the public's moral code . . . .'"[101] While the "moralizing effect" of imposing the ultimate punishment may or may not deter the hard core criminal from committing a capital crime,[102] it is an invaluable link in the chain of societal values that prevent both law abiding citizens from becoming criminals in the first place and prevent petty criminals from becoming hard core, capital criminals.[103]

III. *ROBERTS V. DRETKE*

In August 2004, the Fifth Circuit upheld two lower courts' denials of habeas relief on dual grounds. First, the court held that a capital murder defendant's court-appointed counsel was not deficient in his performance when he acquiesced to the defendant's self-destructive instructions to

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98. *See* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U. L. REV. 453, 468-78 (1997) (claiming that "the criminal law influences the powerful social forces of normative behavior control through its central role in the creation of shared norms").

99. *See* Ernest van den Haag, *The Symbolic Meaning of the Death Penalty*, *in* THE DEATH PENALTY: A DEBATE 273, 275 (1983) (explaining that "the way to discourage [murderers] . . . is to take the life of those who take innocent life").

100. *Id.*

101. SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 122 (7th ed. 2001) (quoting Johannes Andenaes, *General Prevention—Illusion or Reality?*, 43 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 176, 179-80 (1952)).

102. *Compare* Ernest van den Haag, *The Deterrent Effect of the Death Penalty*, *in* THE DEATH PENALTY: A DEBATE 63, 65 (1983) (noting that one study concluded that each execution may result in an average of seven or eight fewer murders per year), *with* John P. Conrad, *Deterrence, the Death Penalty, and the Data*, *in* THE DEATH PENALTY: A DEBATE 133, 140 (1983) (responding that "[i]t is now as clear as a consensus of econometricians can make it that there is no reason to believe that executions have any effect in deterring murder").

103. *See* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 Nw. U. L. REV. 453, 472 (1997) (arguing that "social science suggests that the criminal law builds and maintains societal norms in several related ways"). Robinson and Darley argue that the "'severity of penalty for a particular offense may influence the public's feeling for the seriousness or moral repugnance of [the] offense.'" *Id.* (quoting Philip J. Cook, *Punishment and Crime: A Critique of Current Findings Concerning the Preventive Effects of Punishment*, 41 LAW & CONTEMP. PROBS. 164, Winter 1977, at 172). Over time, "for those crimes in which 'moral inhibition' plays an important role, announcing high severity of punishment may be an important communication." *Id.* at 472-73.

guide the trial towards a conviction and death sentence[104]—even though the court acknowledged that the consequence of the attorney's strategy was that "neither the conviction nor the [imposition of capital] punishment were contested in any meaningful way."[105] Second, the court held that the trial court did not err when it did not conduct a competency hearing to determine whether Roberts was competent to stand trial and to direct his trial strategy.[106]

Several hours after Douglas Alan Roberts abducted another man from the parking lot of a San Antonio apartment complex and killed him while under the influence of drugs, he sobered up and turned himself in to Austin police.[107] Roberts confessed to the killing and was charged with murder—a crime for which he was eventually executed.[108]

Immediately after the state of Texas appointed counsel to represent him, Roberts requested that the attorney "steer the trial towards the imposition of the death penalty."[109] While the attorney initially attempted to discourage such a strategy, he nevertheless complied with Roberts's instructions and succeeded in achieving the death penalty.[110] In the words of the Fifth Circuit, the court-appointed counsel:

> waived *voir dire*, chose jury members who favored the death penalty, did not interview family members before trial, called no witnesses during the guilt/innocence phase of the trial, called no witnesses during the punishment phase . . . and made no argument in favor of a life sentence. [He] spent a total of fifty hours preparing for Roberts's trial.[111]

During the pre-trial phase, the attorney requested and was granted funding for a psychiatrist to evaluate Roberts's mental state.[112] Shortly before the trial began, the psychiatrist interviewed Roberts for two hours and determined that he could not conclude that Roberts suffered from "any significant degree of depression" or other psychiatric problems that

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104. Roberts v. Dretke, 381 F.3d 491, 499-500 (5th Cir. 2004), *cert. denied*, 2005 WL 742671 (U.S. Apr. 4, 2005) (No. 04-7824).

105. *Id.* at 495.

106. *See id.* at 498 (commenting that a *per se* rule requiring a competency hearing is not necessary when it is obvious that the defendant's choices and conduct are likely to result in a conviction).

107. *Id.* at 494.

108. Sheila Hotchkin, *San Antonio Man's Killer Executed*, SAN ANTONIO EXPRESS-NEWS, Apr. 21, 2005, at 2B.

109. *Dretke*, 381 F.3d at 494.

110. *Id.* at 494-95.

111. *Id.* at 495.

112. *Id.*

would coerce him "into seeking the death penalty."[113] The report noted that Roberts "denied any past psychiatric history," but acknowledged that he had reached a period in the past where "he wanted to commit suicide."[114] However, the evaluation was based on incomplete information. Neither the psychiatrist nor the attorney consulted Roberts's medical records, which indicated a recent psychiatric hospitalization.[115] In addition, neither spoke with any of Roberts's family members or former physicians about his psychiatric history, and the attorney neglected to inform the psychiatrist "about a head injury that Roberts suffered as a child."[116] Still, the psychiatrist did not "request any further information regarding Roberts's mental health history."[117]

Based on the psychiatric evaluation, the attorney was satisfied with Roberts's competency and chose not to request a competency hearing.[118] Again, in the words of the Fifth Circuit, "[t]he trial judge never saw [the psychiatrist's] report," and Roberts "was subsequently convicted and sentenced to death."[119]

In his direct appeal and state habeas application, Roberts challenged his conviction and sentence.[120] Roberts was appointed new counsel for the state habeas proceedings.[121] After an unsuccessful "oral inquiry to the Texas Court of Criminal Appeals regarding the possibility of . . . further funding,"[122] the new attorney staked his claims on Supreme Court precedent—*Pate v. Robinson*[123] and *Strickland v. Washington*.[124] *Pate* held that a trial court must conduct a competency hearing when there is evidence before the court that objectively creates a bona fide question as to whether the defendant is competent to stand trial.[125] In 1984, *Strickland v. Washington* specifically defined the Sixth Amendment right to counsel.[126] The Court had interpreted the Sixth Amendment fourteen years previously, in *McMann v. Richardson*,[127] as conferring a "right to

113. *Id.*
114. *Dretke*, 381 F.3d at 495.
115. *See* Roberts v. Dretke, 381 F.3d 491, 495 (5th Cir. 2004), *cert. denied*, 2005 WL 742671 (U.S. Apr. 4, 2005) (No. 04-7824) (summarizing the analysis in the report).
116. *Id.*
117. *Id.* at 499.
118. *Id.* at 495.
119. *Id.*
120. *Dretke*, 381 F.3d at 495.
121. *Id.* at 496.
122. *Id.*
123. 383 U.S. 375 (1966).
124. 466 U.S. 668 (1984).
125. Pate v. Robinson, 383 U.S. 375, 385 (1966).
126. Strickland v. Washington, 466 U.S. 668, 688 (1984).
127. 397 U.S. 759 (1970).

effective assistance of counsel."[128] *Strickland* defined exactly what "effective" means.[129] The Court set forth a two-part test to determine the effectiveness of counsel.[130] Courts will not reverse convictions or death sentences unless the convicted defendant can show: (1) that his counsel performed below "an objective standard of reasonableness;" and (2) that the deficient performance prejudiced his defense in such a way "as to deprive the defendant of a fair trial."[131]

Texas's appeals and habeas courts denied Roberts relief, concluding that "both the trial judge and [defense counsel] reasonably relied on their own observations of Roberts"—and the defense counsel reasonably relied on the psychiatrist's report—in concluding "that a competency hearing was unnecessary and that Roberts was competent to direct his trial strategy towards a death sentence."[132]

In response, Roberts brought a federal habeas petition in federal district court, where a third attorney was appointed to represent him.[133] Ultimately, the federal district court denied Roberts's petition.[134] With regard to Roberts's *Pate* claim, in which he argued that the trial judge

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128. *See* McMann v. Richardson, 397 U.S. 759, 771 (1970) (holding that "defendants facing felony charges are entitled to the effective assistance of competent counsel").

129. *Strickland*, 466 U.S. at 687.

130. *Id.*

131. *Id.* at 687-88. In addition, the Court stated that although assessing a lawyer's particular decisions requires "a heavy measure of deference to counsel's judgments," decisions "not to investigate must be directly assessed for reasonableness in all circumstances." *Id.* at 691.

132. Roberts v. Dretke, 381 F.3d 491, 495-96 (5th Cir. 2004), *cert. denied*, 2005 WL 742671 (U.S. Apr. 4, 2005) (No. 04-7824). While the state habeas court ultimately denied Roberts's *Pate* and *Strickland* claims, the court's conclusion came only after it first found that the psychiatrist's medical conclusions "were based on an incomplete understanding of Roberts's medical and psychiatric history." *Id.* at 496. Roberts was appointed new counsel during the state habeas proceedings and the new counsel made several funding requests to further investigate Roberts's claim. *Id.* The court granted a portion of the funding and denied the rest. *Id.* The new counsel made a second request for funding, through an oral inquiry to the Texas Court of Criminal Appeals, to secure a full mental health examination for Roberts and to obtain expert testimony regarding Roberts's mental health. *Id.* The Texas Court of Criminal Appeals denied the funding because Roberts had "met the funding cap set for [his] case." *Id.* The counselor then requested that the state habeas trial judge hold an evidentiary hearing to challenge Roberts's original court-appointed counsel's conclusions that Roberts was competent to direct trial strategy and challenge the psychiatrist's diagnosis of Roberts's mental health at the time of trial. *Id.* The Texas habeas court refused to hold the hearing and "denied habeas relief on all claims." *Id.*

133. *Id.*

134. *See id.* at 494 (noting the federal district court's denial of Roberts's *Pate* and *Strickland* claims). Roberts's new attorney requested an evidentiary hearing, a period of discovery, and funding for a mental health exam for Roberts—all of which were denied by the federal district court. *Id.*

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should have ordered a competency hearing, the court agreed.[135] However, the court added, while "the state habeas court's [denial of Roberts's *Pate* claim] was incorrect, it was not unreasonable."[136]

The federal district court also denied Roberts's *Strickland* claim of ineffective assistance of counsel.[137] Among other things, it found that Roberts could not establish prejudice during the guilt/innocence phase of the trial because evidence of his guilt was overwhelming.[138]

The Fifth Circuit ultimately affirmed the federal district court's conclusion that the state habeas court's denial of Roberts's claims was "neither unreasonable nor contrary to Supreme Court precedent."[139] First, in response to Roberts's *Pate* claim that the trial court violated his due process rights by failing "to hold a competency hearing to determine whether he was competent to stand trial and direct his trial strategy," the court ruled against Roberts.[140] It held that the trial court did not err in failing to conduct a competency hearing because there was no evidence before the trial court that he was insane or unable to participate in the proceedings.[141] Because Roberts instructed his attorney to secure the death penalty, the court found he was actually competent to direct the trial strategy.[142] Roberts claimed that the instructions were irrational, which should have suggested to the court that his competency was in question.[143] The court disagreed:

> [W]e decline to adopt a *per se* rule that, as a matter of law, a trial court must doubt a capital punishment defendant's competency . . . simply because it is obvious to the court that the defendant is causing

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135. *Id.* at 496.

136. *Dretke*, 381 F.3d at 496-97.

137. *See id.* at 496 (explaining that the federal district court denied Roberts's *Strickland* claim because it found that Roberts could not satisfy *Strickland*'s prejudice requirement).

138. *Id.* at 497. The court also held that counsel's performance was not deficient because he was simply following Roberts's orders regarding trial strategy. *Id.* Still, the district court granted an additional certificate of appealability (COA) on Roberts's assertion that the state habeas court erred in denying his *Pate* claim that the trial court should have ordered a competency hearing. *Id.* Upon Roberts's request that the Fifth Circuit expand the COA to include his *Strickland* claims, the court granted a COA only as to whether the initial counsel rendered ineffective assistance of counsel by failing to properly develop evidence of Roberts's mental illness or by failing to make adequate use of Roberts's court-appointed psychiatrist. *Id.*

139. *Id.* at 498.

140. *Id.* at 497.

141. *Dretke*, 381 F.3d at 498.

142. Roberts v. Dretke, 381 F.3d 491, 498 (5th Cir. 2004), *cert. denied*, 2005 WL 742671 (U.S. Apr. 4, 2005) (No. 04-7824).

143. *Id.*

his trial to be conducted in a manner most likely to result in a conviction and the imposition of the death penalty.[144]

Second, Roberts argued in his *Strickland* claim that his trial lawyer did not satisfy *Strickland*'s reasonableness standard when he failed to investigate Roberts's medical history.[145] Roberts contended that the trial counsel did not contact Roberts's treating physicians, did not collect medical records relating to Roberts's previous "suicide ideation," and chose not to contact Roberts's family members regarding either his previous suicide ideation or head injury.[146] As a result, Roberts claimed, it was not reasonable for the lawyer to rely on the psychiatric report because he had not fully informed the psychiatrist of Roberts's suicidal past and had not provided the psychiatrist with Roberts's medical records.[147]

The court denied Roberts's *Strickland* claim for two reasons. First, it concluded that the defense counsel reasonably relied on the psychiatrist's report to conclude that Roberts was competent to stand trial and direct his trial strategy.[148] Second, it found that Roberts was not prejudiced by his attorney's reliance on the psychiatric report.[149]

The court pointed to several factors that led to the attorney's decision not to investigate further. First, based on the psychiatric evaluation and on his own observations, the attorney concluded that Roberts was competent to stand trial and direct his trial strategy.[150] Furthermore, because the attorney knew that the psychiatrist was aware of Roberts's past suicidal thoughts, and because the psychiatrist included in his report strong conclusions about Roberts's mental health, it was reasonable for the attorney to conclude that no further investigation was needed.[151] Likewise, because the psychiatrist did not request any further information on Roberts's history, there was no reason, according to the court, for the attorney to investigate further.[152]

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144. *Id.*

145. *Id.* The state of Texas countered that the trial lawyer did satisfy *Strickland* by having the court-appointed psychiatrist interview Roberts and produce a psychiatric evaluation. *Id.* at 499. Furthermore, according to the state, the lawyer's decision to halt investigation into Roberts's background was what any reasonable defense attorney would have done because the psychiatrist's report confirmed the lawyer's already-held belief that Roberts was not suffering from any mental illness and, thus, was able to direct his own trial strategy. *Id.*

146. *Id.*

147. *Dretke*, 381 F.3d at 499.

148. *Id.*

149. *Id.* at 500.

150. *Id.* at 495.

151. *Id.* at 499.

152. *Dretke*, 381 F.3d at 499.

Turning to the prejudice issue, the court held that Roberts was not prejudiced by his defense attorney's reliance on the psychiatric report because, in the court's view, there was no evidence in the record suggesting that the psychiatrist's conclusions about Roberts's mental health or competence to stand trial were suspect in any way.[153] While Roberts's attorney "failed to submit medical records from his episode of suicide ideation or affidavits from the treating physicians," and also did not turn over records regarding "his childhood head injury, or affidavits from Roberts's family members documenting a history of mental illness," the court determined that there was no evidence that a full review of the medical records would have changed the psychiatrist's diagnosis.[154]

IV. Ethical Considerations for the Court

A. *Moral Authority Requires that Precedence Be Read from a Life Ethic Perspective*

As noted above, the Fifth Circuit Court of Appeals rejected Roberts's *Pate* and *Strickland* claims. Instead, the court affirmed the federal district court's decision that (1) the trial court did not err in not holding a competency hearing to determine whether Roberts was competent to stand trial and direct his trial strategy,[155] and (2) that Roberts's court-appointed attorney met the *Strickland* standard and therefore was not "ineffective."[156]

Regrettably, Roberts's fate was determined by the *Dretke* courts' amoral interpretation of Supreme Court precedent. The essential nexus between law and morality, paired with the eternal implications of capital punishment, require that *Pate* and *Strickland* be read from a *life ethic* perspective. If this had occurred, Roberts may well have ended up on death row, but the moral authority of the *Dretke* courts would have been enhanced rather than diminished.

1. *Pate v. Robinson*

In *Pate*, the Supreme Court affirmed the Seventh Circuit's holding that a murder defendant "was constitutionally entitled to a [competency] hearing" because the evidence "raise[d] a '*bona fide* doubt' as to [the] defendant's competence to stand trial."[157] Yet *Dretke* stood *Pate* on its head by finding "no evidence" that Roberts was insane or unable to par-

153. Roberts v. Dretke, 381 F.3d 491, 500 (5th Cir. 2004), *cert. denied*, 2005 WL 742671 (U.S. Apr. 4, 2005) (No. 04-7824).

154. *Id.*

155. *Id.* at 498.

156. *Id.* at 499-500.

157. Pate v. Robinson, 383 U.S. 375, 377, 385 (1966).

ticipate in the proceedings.[158] The Fifth Circuit rejected Roberts's claim that his "death wish" instructions were irrational—and therefore should have caused the court pause—and it also refused to adopt a "*per se* rule" that a court must doubt a capital defendant's competency simply because he attempts to achieve a conviction and death sentence.[159]

Whereas *Pate* underlined the importance of a capital defendant's competency, *Dretke*'s interpretation of *Pate* minimizes it—an amoral and incorrect reading of *Pate* because it throws by the wayside *Pate*'s safeguard against trying, convicting, and sentencing to death an incompetent defendant.[160] Conversely, an ethical reading and application of the *Pate* standard would have required the court to conduct a competency hearing, inasmuch as "'there is considerable reason for supposing that attempts at suicide . . . are *prima facie* evidence of mental disturbance.'"[161] *Pate* requires the judge to "impanel a jury and conduct a sanity hearing" when evidence "raises a '*bona fide* doubt' as to a defendant's competence to stand trial."[162]

While *Dretke* ostensibly aimed to protect "a capital defendant's individual autonomy," which is clearly an important consideration as well,[163] reconciling "state and inmate interests" requires an examination of "the actual 'voluntariness' of volunteering."[164] Roberts told the court-appointed psychiatrist that he "didn't want to be locked up the rest of his life."[165] Because Roberts's only alternative to execution was the bleak future of life imprisonment, he was "put to the Hobson's choice of pro-

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158. *Dretke*, 381 F.3d at 498.

159. *Id.*

160. *See* THOMAS GRISSO, COMPETENCY TO STAND TRIAL EVALUATIONS: A MANUAL FOR PRACTICE 2 (1988) (outlining the importance of the doctrine of competency to stand trial). "This concern traditionally has been based on two underlying values." *Id.* First, the legal system requires competency "to maintain the *fairness* of the criminal trial process." *Id.* Second, it has been used "to promote the *accuracy* of the trial's results." *Id.*; *see also* NORMAN G. POYTHRESS ET AL., ADJUDICATIVE COMPETENCE 1 (2002) (noting that "[t]he requirement that criminal defendants be competent to participate in the adjudication of their cases is deeply rooted in Anglo-American law," and serves "to promote fairness in the criminal justice system").

161. *See* Kathleen L. Johnson, *The Death Row Right to Die: Suicide or Intimate Decision?*, 54 S. CAL. L. REV. 575, 576 n.12 (1981) (quoting commentator Hugo Bedau).

162. Pate v. Robinson, 383 U.S. 375, 385 (1966).

163. Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 864 (1987).

164. *See* C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849, 851 (2000) (noting that most scholars reconcile "state and inmate interests" by asking whether the inmate's decisions are truly voluntary).

165. Roberts v. Dretke, 381 F.3d 491, 495 (5th Cir. 2004), *cert. denied*, 2005 WL 742671 (U.S. Apr. 4, 2005) (No. 04-7824).

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longed torture by incarceration or . . . execution."[166] Thus, instead of protecting Roberts's death-wish strategy as legitimate autonomous decision-making, the trial court should have recognized it as satisfying *Pate* by, at the very least, "rais[ing] a '*bona fide* doubt' as to [his] competence."[167]

2. *Strickland v. Washington*

The *Dretke* courts' reading of *Strickland* was also ethically flawed. *Strickland* held that an attorney's performance is not ineffective unless it is objectively unreasonable and prejudices the defendant such that it deprives him of a fair trial.[168]

Roberts argued that his attorney did not satisfy *Strickland* when he failed to investigate his medical history.[169] In response, the Fifth Circuit held that, based on the psychiatrist's report, the attorney acted reasonably when he did not contact Roberts's treating physicians, did not collect records relating to Roberts's previous suicide ideation, and did not contact Roberts's family members regarding either his previous suicide ideation or head injury.[170]

However, as Roberts made clear, the attorney performed deficiently in that he did not fully inform the psychiatrist of Roberts's medical history and suicidal past.[171] The court's conclusion otherwise is illogical at best. It is incomprehensible how the court judged the attorney's reliance on the psychiatric report "reasonable" when he knew that the report was ill-informed. Considering the finality of capital punishment, such a view is incompatible with a *life ethic*. Regrettably, while trying and punishing Roberts for murder, the court unintentionally demonstrated and sanctioned the same type of mindset—albeit to a considerably lesser degree—that the criminal law purports to reject.[172]

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166. *See* G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860, 863 (1983) (commenting that "[a]n inmate's 'choice' of [execution] over [incarceration] is no more voluntary than a confession beaten out of a police suspect during a custodial interrogation"). The death row volunteer "cannot, with any intellectual honesty, be considered to be acting voluntarily" because his decision to die is "[s]tripped of the 'psychological integrity' necessary to make a fully rational decision." *Id.* at 892.

167. Pate v. Robinson, 383 U.S. 375, 377, 385 (1966).

168. Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

169. *Dretke*, 381 F.3d at 498.

170. *Id.* at 499.

171. *Id.* at 498.

172. *See* MODEL PENAL CODE § 210.2 (1962) (defining murder as criminal homicide that "is committed recklessly under circumstances manifesting extreme indifference to the value of human life").

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Furthermore, what happened in *Strickland* is a far cry from the facts of *Dretke*. In *Strickland*, the defendant confessed and pled guilty to "'three brutal stabbing murders, torture, kidnapping, severe assaults, attempted murders, attempted extortion, and theft,'" all against his lawyer's advice.[173] The lawyer, "[a]fter experiencing 'a sense of hopelessness about the case,' . . . did only minimal preparation for the [defendant's] sentencing hearing."[174] Justice O'Connor, in writing the Court's majority opinion, attributed the trial lawyer's minimal preparation to this sense of hopelessness and found the lack of preparation objectively reasonable.[175] However, while it may have been reasonable that the *Strickland* defense attorney's hopelessness translated into minimal preparation for the sentencing phase, such minimal preparation does not equate to what occurred in *Dretke*—the defense counsel's concerted effort to achieve a conviction and death sentence for his client. "[A]ttorneys are ethically obligated to attempt dissuading [defendants] from pursuing execution," and it is widely accepted amongst defense attorneys that "it is morally unacceptable for defense attorneys to facilitate or assist the client in his efforts to be executed."[176]

Roberts also satisfied *Strickland*'s prejudice requirement because his defense clearly suffered to the extent that he was deprived of a fair trial. Initially, the federal district court held that "Roberts could not establish prejudice during the guilt/innocence phase of the trial because the evidence of his guilt was overwhelming."[177] Then, the Fifth Circuit concluded that Roberts was not prejudiced because the record was "devoid of any medical evidence that would put [the psychiatrist's] conclusions as to either Roberts's mental health or his competence to direct trial strategy into doubt."[178] Neither court got it right.

The federal district court missed the issue altogether. While the evidence of Roberts's guilt may indeed have been "overwhelming," a defendant's guilt or innocence can only be correctly decided in a fair trial. Roberts's attorney's reliance on the psychiatric report had nothing to do

173. Amy R. Murphy, *The Constitutional Failure of the* Strickland *Standard in Capital Cases Under the Eighth Amendment*, 63 LAW & CONTEMP. PROBS. 179, Summer 2000, at 189 (quoting Strickland v. Washington, 466 U.S. 668, 672 (1984)).

174. *Id.*

175. *Id.* at 190.

176. *See* C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849, 861 (2000) (noting that "[w]hile defense attorneys describe volunteering as one of the most divisive issues in their community, there are" several points on which a consensus exists).

177. Roberts v. Dretke, 381 F.3d 491, 497 (5th Cir. 2004), *cert. denied*, 2005 WL 742671 (U.S. Apr. 4, 2005) (No. 04-7824).

178. *Id.* at 500.

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with Roberts's guilt or innocence. Instead, it dealt with whether Roberts was competent to stand trial. The court acknowledged that Roberts's attorney failed to submit to the psychiatrist those medical records pertaining to Roberts's previous suicide ideation and childhood head injury.[179] Thus, Roberts's defense was prejudiced—in the sense that he was judged guilty in an unfair trial—when his attorney knowingly relied on the deficient psychiatric report in determining that Roberts was competent.[180] If the psychiatrist had conducted a full review of the medical records and had deemed Roberts incompetent, even an infinite amount of evidence suggesting his guilt would not have changed the diagnosis and its effect. Roberts's attorney would have moved for a competency hearing and the court would have been obligated to grant it.[181] At a minimum, the jury would have found Roberts guilty after the court had conducted a hearing and found Roberts competent. Still, it is quite possible that the hearing would have resulted in the court's declaration of Roberts's *in*competence, and his guilt or innocence would have been judged in a fair trial after his competence was restored.

That said, the Fifth Circuit erred as well. After conceding that the psychiatric report was conducted on the basis of incomplete information,[182] the court went on to draw an astounding conclusion. The court held that Roberts was not prejudiced by the attorney's reliance on the faulty psychiatric report because there was no evidence that the psychiatrist would have changed his diagnosis of Roberts's competency had he reviewed Roberts's medical records.[183] But, save for a psychic prophecy on the part of the psychiatrist that there existed medical records relating to a childhood head injury and Roberts's hospitalization for a suicidal episode, and subsequent documentation on his part that a review of the records might have caused him to change his diagnosis, the evidence the court required would never be present. As such, the court made a psychi-

179. *Id.* at 499.

180. *See* Grant H. Morris et al., *Competency to Stand Trial on Trial*, 4 HOUS. J. HEALTH L. & POL'Y 193, 193 (2004) (stating that "the requirement that a criminal defendant be mentally competent before the trial can proceed assures that the defendant will receive a fair trial").

181. *See* Pate v. Robinson, 383 U.S. 375, 385 (1966) (requiring judges to order competency hearings when they have a "*bona fide* doubt" as to the defendant's competency to stand trial); *see also* 18 U.S.C. § 4241(a) (2000) (authorizing both the defense attorney and the prosecutor to move the court for a competency hearing and requiring the court to grant the motion "if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense").

182. *Dretke*, 381 F.3d at 495.

183. *Id.* at 500.

atric judgment that it was not qualified to make.[184] Admittedly, "'[t]he medical opinions expressed by the doctor[ ] are but one factor that must be placed in the judicial balance,'"[185] but there is no way to tell whether a review of the medical records may or may not have changed the psychiatric conclusion reached by a trained, licensed psychiatrist. While the court clearly has the authority to weigh the recommendations of the psychiatrist,[186] it does not have the authority to supplement the psychiatrist's findings as it sees fit.[187]

Consequently, regardless of whether a review of the medical records ultimately would or would not have changed the diagnosis, the defendant was deprived of a fair trial because he was denied the benefit of an adequate psychiatric evaluation.[188] As one commentator has stated, this type of approach wherein "virtually all challenges to counsel can be readily rejected" on the basis of a lack of prejudice, "reveals at best an insensitive attitude toward a very serious problem."[189] Again, a *life ethic*, with all of the finality and irrevocability of capital punishment, demands that the state execute only defendants who are *undoubtedly* competent.[190]

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184. *See* TEX. OCC. CODE ANN. § 155.001 (Vernon 2004) (allowing only licensed practitioners to practice medicine); RICHARD I. FREDERICK ET AL., EXAMINATIONS OF COMPETENCY TO STAND TRIAL: FOUNDATIONS IN MENTAL HEALTH CASE LAW, at v (2004) (explaining that an assessment of competency to stand trial requires "mental health professionals [to] marry clinical judgments with the legal standards that define competency").

185. *See* ARTHUR R. MATTHEWS, JR., MENTAL DISABILITY AND THE CRIMINAL LAW: A FIELD STUDY 102 (1970) (quoting United States v. Sermon, 228 F. Supp. 972, 974 (W.D. Mo. 1964)); *see also* Richard C. Dieter, *Ethical Choices for Attorneys Whose Clients Elect Execution*, 3 GEO. J. LEGAL ETHICS 799, 806 (1990) (relating that "[c]ompetency is ultimately an evaluation for the court to make").

186. *See* ARTHUR R. MATTHEWS, JR., MENTAL DISABILITY AND THE CRIMINAL LAW: A FIELD STUDY 102 (1970) (noting that "[t]he trier of fact . . . has the difficult job of interpreting the expressions of psychiatric opinion and of translating these expressions into factual propositions which bear on the legal question of whether the accused understands his situation and is able to assist in his defense").

187. *See* TEX. OCC. CODE ANN. § 155.001 (Vernon 2004) (prohibiting the practice of medicine without a license).

188. *See* THOMAS GRISSO, COMPETENCY TO STAND TRIAL EVALUATIONS: A MANUAL FOR PRACTICE 2 (1988) (stating that the competency requirement works to maintain "the *fairness* of the criminal trial process"); NORMAN G. POYTHRESS ET AL., ADJUDICATIVE COMPETENCE 1 (2002) (noting that "[t]he requirement that criminal defendants be competent to participate in the adjudication of their cases" is intended to "promote fairness in the criminal justice system").

189. Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 87 (1986).

190. *See* Grant H. Morris et al., *Competency to Stand Trial on Trial*, 4 HOUS. J. HEALTH L. & POL'Y 193, 193 (2004) (declaring that "the requirement that a criminal defendant be mentally competent before the trial can proceed assures that the defendant will receive a fair trial").

B. *Moral Authority Requires that State Interests Trump a Defendant's Death-Wish*

While several commentators would frame the issue of Roberts's election of the death penalty as one involving a constitutional "right to die,"[191] any such right "should virtually always" remain secondary to "the governmental interest in ensuring that the death penalty is administered in a constitutional manner."[192] Adherence to a *life ethic* requires that the death penalty be administered with the utmost care to ensure "'that death is the appropriate punishment in a specific case.'"[193] The resulting procedural safeguards, which protect the interests of the state at the expense of the defendant's autonomy, serve to maintain the moral authority of the legal system.[194]

Various authors have outlined a number of "state interests" in capital cases.[195] Six of them stand out in particular. The government has an

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191. *See* Norman L. Cantor, *A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life*, 26 RUTGERS L. REV. 228, 243 (1973) (grounding a right to die in the fundamental right to privacy); Edward M. Kay, Note, *The Right to Die*, 18 U. FLA. L. REV. 591, 604 (1966) (proclaiming that no act could better represent the "dignity and individuality of man than the right to decide for himself exactly what concepts and beliefs are worth dying for"). *Contra* Robert M. Byrn, *Compulsory Lifesaving Treatment for the Competent Adult*, 44 FORDHAM L. REV. 1, 17 (1975) (documenting the New Jersey Supreme Court's holding that "'there is no constitutional right to choose to die'" (quoting John F. Kennedy Mem'l Hosp. v. Heston, 279 A.2d 670, 672 (N.J. 1971))); Kathleen L. Johnson, *The Death Row Right to Die: Suicide or Intimate Decision?*, 54 S. CAL. L. REV. 575, 595 (1981) (emphasizing that, despite the rhetoric of "right to die" advocates, this purported "right" is inconsistent with the principles of the U.S. Constitution because the Constitution "characterizes life as one of three fundamental rights, that no man may be deprived of without due process of law").

192. G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860, 896 (1983).

193. Kathleen L. Johnson, *The Death Row Right to Die: Suicide or Intimate Decision?*, 54 S. CAL. L. REV. 575, 595-96 (1981) (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)).

194. *See id.* at 576 (writing that careful appellate review "serves to maintain public confidence in the legal system's ability to properly administer capital punishment").

195. *See* C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849, 851 (2000) (recognizing state interests including suicide prevention, upholding the Eighth Amendment to the U.S. Constitution, ensuring that innocent persons are not executed, ensuring the validity of the conviction and sentence through the appellate process, and expressing an interest in not allowing inmates to choose their own sentencing); Kathleen L. Johnson, *The Death Row Right to Die: Suicide or Intimate Decision?*, 54 S. CAL. L. REV. 575, 595-98 (1981) (identifying governmental interests including the state's interest in protecting life, "society's need to see that 'justice is done,'" and the state's interest in ensuring that convicted criminals not be allowed to choose their own sentencing); G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860, 896-906 (1983) (discussing governmental interests including

interest in the following: (1) preserving life;[196] (2) ensuring that innocent persons are not executed;[197] (3) ensuring the validity of the conviction and sentence through an adversarial system;[198] (4) preventing suicide;[199] (5) not allowing defendants to choose their own sentencing;[200] and (6) protecting the integrity of the legal profession.[201]

"[p]reservation of [l]ife and the [l]ikelihood of [s]urvival," "[e]nsuring the [f]airness of the [p]roceedings," "[p]revention of [s]uicide," "[p]rotecting the [i]ntegrity of the [p]rofession," and "[p]rotection of the [f]amily"); Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 864 (1987) (recognizing the state's interest in providing an adversarial proceeding).

196. *See* Kathleen L. Johnson, *The Death Row Right to Die: Suicide or Intimate Decision?*, 54 S. CAL. L. REV. 575, 595 (1981) (detailing "the premium placed by society on the preservation of life"); G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860, 896 (1983) (noting that the preservation of life is the government's most powerful interest).

197. *See* C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849, 851 (2000) (listing as one of several state concerns the interest "in ensuring that innocent persons not be executed"); *cf.* G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860, 899 (1983) (emphasizing the importance of "guaranteeing that the procedures adopted by state legislatures and construed by state judicial systems comply with federal constitutional standards," so that the fairness of the proceedings can be ensured).

198. *See* Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 864 (1987) (emphasizing the importance of "the integrity of the fact-finding" mission of the sentencing phase and arguing that it must be adversarial in nature).

199. *See* C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849, 851 (2000) (listing the state's interest in preventing suicide as one of several such interests); G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860, 903 (1983) (claiming that "the State has a strong interest in the prevention of suicide"); *cf.* Kathleen L. Johnson, *The Death Row Right to Die: Suicide or Intimate Decision?*, 54 S. CAL. L. REV. 575, 590-91 (1981) (outlining abolitionist Hugo Bedau's argument that death row inmates do not have a "right to die," not because it violates the state's interest in preventing suicide, but because he opposes the death penalty and views it "'no less [barbarous] on those occasions when a murderer welcomes his own legal execution'" (quoting HUGO BEDAU, THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT 122-23 (1977))).

200. *See* C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849, 851 (2000) (relating the state's "interest in not allowing inmates to choose their own sentencing"); Kathleen L. Johnson, *The Death Row Right to Die: Suicide or Intimate Decision?*, 54 S. CAL. L. REV. 575, 598 (1981) (declaring that allowing convicted criminals to choose their own punishment would defeat the purpose of punishment).

201. *See* G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860, 904 (1983) (maintaining that "[t]he State . . . has an interest in protecting the integrity of the legal profession").

1. The State's Interest in Preserving Life

The state's most powerful interest, its interest in preserving life, is rooted in our founding documents. The Constitution reflects the paramount importance of the government's interest in preserving life to the fullest extent possible, and the Declaration of Independence lists the right to "Life," alongside the rights to "'Liberty and the pursuit of Happiness'" as "self-evident truths" to which all are entitled.[202] "The right to life is also inherent in the common law's proscriptions against homicide and suicide."[203]

The state's interest in the preservation of life routinely "serves as a limitation on individual autonomy."[204] Mandatory seatbelt laws, for example, limit individual autonomy and enhance the government's interest in "'discourag[ing] irrational and wanton acts of self-destruction which violate fundamental norms of society.'"[205] In the context of capital punishment, "the governmental interest in overriding individual autonomy" is magnified by the possibility that an innocent defendant could be executed.[206] As noted previously, there have been well over one hundred defendants convicted, sentenced to death, and subsequently exonerated since 1973.[207]

2. The State's Interest in Protecting the Innocent

The government has a significant interest in ensuring that innocent defendants are not executed—"society's need to see that 'justice is done.'"[208] Just as "[t]he concept of justice is timeless, [so] is the corresponding concern about convicting an innocent person."[209] Yet when the

202. *Id.* at 896 n.143.

203. *Id.*

204. *Id.* at 898.

205. *Id.*

206. G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860, 898 (1983).

207. Death Penalty Information Center, *Facts About the Death Penalty*, *available at* http://www.deathpenaltyinfo.org/FactSheet.pdf (Mar. 1, 2005).

208. Kathleen L. Johnson, *The Death Row Right to Die: Suicide or Intimate Decision?*, 54 S. CAL. L. REV. 575, 596 (1981) (quoting Commonwealth v. McKenna, 383 A.2d 174, 174 (Pa. 1978)); *see also* C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849, 851 (2000) (declaring that the state has "an interest in ensuring that innocent persons not be executed").

209. C. RONALD HUFF ET AL., CONVICTED *BUT* INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY, at xxi (1996).

defense is allowed to join with the prosecution in seeking a conviction and death sentence, the legal system cannot guarantee accuracy.[210]

The state's interest in not convicting innocent persons is twofold, in that it "concerns a problem that affects not only an individual's right to due process and a fair trial, but also a serious public safety concern."[211] First, convictions of innocent defendants strike at the very heart of the court's moral authority.[212] "Society must be reassured that the death penalty is not being abused by judges or juries—that *all* executions are legally and morally justified."[213] Thus, courts must "carefully scrutiniz[e] the procedures employed in the imposition of each death sentence," regardless of the defendant's sentencing desires.[214] Second, "every time an innocent offender is wrongfully convicted, the actual offender typically remains free to continue victimizing the public."[215]

3. The State's Interest in Protecting the Adversarial Process

As alluded to above, the government's interest in protecting the innocent is achieved, in part, by protection of the state's interest in providing the accused with an adversarial proceeding.[216] Without an adversarial proceeding, "innocent people will likely be executed."[217] However, when a defendant volunteers for execution, "the adversarial process on which our justice system is based breaks down."[218]

Under the bifurcated system required by *Gregg v. Georgia*, "the death penalty determination is in some respects more analogous to the guilt determination than to other [non-death penalty] sentencing decisions"

210. *See* Richard C. Dieter, *Ethical Choices for Attorneys Whose Clients Elect Execution*, 3 GEO. J. LEGAL ETHICS 799, 818 (1990) (explaining that without an adversarial process, "innocent people will likely be executed").

211. C. RONALD HUFF ET AL., CONVICTED *But* Innocent: Wrongful Conviction and Public Policy, at xxiii (1996).

212. *See* Kathleen L. Johnson, *The Death Row Right to Die: Suicide or Intimate Decision?*, 54 S. CAL. L. REV. 575, 596-97 (1981) (arguing that careful scrutiny of the procedures employed in imposing the death penalty helps "to maintain society's confidence in the integrity of the legal system").

213. *Id.* at 597.

214. *See id.* at 596 (emphasizing the importance of proper oversight in the capital punishment context).

215. C. RONALD HUFF ET AL., CONVICTED *But* Innocent: Wrongful Conviction and Public Policy, at xxiii (1996).

216. *See* Richard C. Dieter, *Ethical Choices for Attorneys Whose Clients Elect Execution*, 3 GEO. J. LEGAL ETHICS 799, 818 (1990) (explaining that it is contrary to "higher societal interests" when the adversarial process is undermined as a result of the simultaneous "seeking [of] the same goal" by the prosecution and defense).

217. *Id.*

218. C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849, 851 (2000).

because it is "an adversary proceeding in which the sentencer's decision depends to some extent on findings of fact."[219] Thus, "[i]f the guilt trial is viewed as the appropriate model" for the sentencing trial, a defendant must not have the "right to seek his own execution."[220] Otherwise, "society's interest in maintaining the integrity of the fact-finding" function of the punishment phase will be forfeited.[221] Accordingly, a defendant facing the death sentence cannot waive the adversarial proceeding because it is not his to waive.[222]

4. The State's Interest in Preventing Suicide

The next governmental interest that must be protected is related to the state's paramount interest in preserving life.[223] Specifically, "the State has a strong interest in the prevention of suicide."[224] Thus, the *Dretke* courts' protection of Roberts's death wish strategy is regrettable because it "amounts to 'nothing less than state-administered suicide.'"[225] At common law, suicide was "the equivalent of murder,"[226] and the law "dealt

219. Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 864 (1987).

220. *Id.*

221. *Id.*

222. *Cf.* G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860, 899 (1983) (arguing that an inmate under sentence of death cannot waive appellate review because it is essential to the "[f]airness of the [p]roceedings").

223. *See id.* at 903 (writing that the state's interest in preventing suicide is a "corollary" to its interest in preserving life).

224. *Id.*; *see also* Robert M. Byrn, *Compulsory Lifesaving Treatment for the Competent Adult*, 44 FORDHAM L. REV. 1, 16 (1975) (describing "[t]he [s]tate [i]nterest in [p]reventing [s]uicide" as a reason for not allowing medical patients to refuse lifesaving medical treatment). Byrn outlines "four objections to suicide." Robert M. Byrn, *Compulsory Lifesaving Treatment for the Competent Adult*, 44 FORDHAM L. REV. 1, 20 (1975). First, suicide "'is contrary to the [natural] rules of self-preservation.'" *Id.* (quoting Hales v. Petit, 75 Eng. Rep. 387 (C.B. 1562)). Second, it de-values human life. *Id.* Third, "'the care of human life and happiness, and not their destruction, is the first and only legitimate object of good government.'" *Id.* at 21 (quoting THOMAS JEFFERSON, 16 WRITINGS OF THOMAS JEFFERSON 310 (Lipscomb & Bergh eds., 1903)). Thus, Byrn argues, the life of a man "'cannot be lawfully taken by himself.'" *Id.* (quoting Commonwealth v. Mink, 123 Mass. 422, 425 (Mass. 1877)). Finally, Byrn points out that "[t]o the extent that any killing invites imitation, active self-destruction may serve as an 'evil example' to other susceptible members of society." *Id.* at 22. As such, he concludes, it is "within the power of government to bar conduct which will encourage suicide." *Id.*

225. Kathleen L. Johnson, *The Death Row Right to Die: Suicide or Intimate Decision?*, 54 S. CAL. L. REV. 575, 591 (1981) (quoting Lenhard v. Wolff, 444 U.S. 807, 808 (1979) (Brennan & Marshall, JJ., dissenting)).

226. Robert M. Byrn, *Compulsory Lifesaving Treatment for the Competent Adult*, 44 FORDHAM L. REV. 1, 16 (1975).

with situations in which an individual purposefully set in motion a death-producing agent with the specific intent of effecting his own destruction."[227] Still today, while "[n]one of the modern codifications treats attempted suicide as a crime,"[228] aiding and abetting another's effort at suicide is a crime.[229]

While some attempt to parallel the capital defendant's plight to that of the terminally ill—thereby justifying what is in their view a constitutional "right to die"—"the death row inmate's reasons for asserting such a right fall far afield of this justification."[230] Moreover, "even if a condemned prisoner has the right to take his own life, it does not follow that he has the right to compel the state to take it for him in the name of punishment."[231] This, of course, leads to the fifth governmental interest that must be protected—the state's interest in refusing to allow convicted criminals the right to choose their own punishment.[232]

5. The State's Interest in Not Allowing Defendants to Choose Their Own Sentencing

Convicted criminals should not be allowed "to choose their own sentencing."[233] First, just as "an individual who has not been convicted of a criminal offense has no right to demand that he be executed by the state," neither does the capital defendant have the "right to dictate to the government which of the two authorized penalties, death or life imprisonment, should be imposed."[234] In all criminal cases, "the sentencing authority should determine the appropriate penalty based on the criteria set forth in the sentencing statute."[235] Second, as the goal of criminal law

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227. Kathleen L. Johnson, *The Death Row Right to Die: Suicide or Intimate Decision?*, 54 S. CAL. L. REV. 575, 591 (1981).

228. WAYNE R. LAFAVE, CRIMINAL LAW 699 (3d ed. 2000).

229. David A.J. Richards, *Constitutional Privacy, the Right to Die and the Meaning of Life: A Moral Analysis*, 22 WM. & MARY L. REV. 327, 372-73 (1981).

230. *See* Kathleen L. Johnson, *The Death Row Right to Die: Suicide or Intimate Decision?*, 54 S. CAL. L. REV. 575, 590-91 (1981) (pointing out that there is quite a difference between the plight of "persons suffering from 'intractable pain, incurable illness, or severe impairment of faculties'" and the typical death row inmate who desires execution (quoting HUGO BEDAU, THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT 122 (1977))).

231. *Id.* at 591.

232. C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849, 851 (2000) (arguing that the government has "an interest in not allowing inmates to choose their own sentencing").

233. *Id.*

234. Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 863 (1987).

235. *Id.*

is "to prevent harm to society . . . by punishing such harmful conduct," allowing defendants the privilege of choosing their sentencing "would defeat the purpose of criminal sanctions."[236]

6. The State's Interest in Protecting the Integrity of the Legal Profession

Finally, the state has "an interest in preserving the integrity of the legal profession."[237] As such, judges and lawyers alike share in the responsibility for ensuring that it is protected.[238] Both have ethical obligations to intervene when, as occurred in *Dretke*, the defendant's mental condition becomes suspect.[239] Adherence to a *life ethic* requires the defense counsel and prosecutor to request a competency hearing[240] and, even if they do not, it requires the judge to conduct one on his own motion.[241] But the ethical obligations of the defense attorney and prosecutor go much further.

V. Ethical Considerations for the Defense Counsel and Prosecutor

To a large degree, responsibility for protecting the moral authority of the legal system rests not only with the court, but with the prosecution and defense as well. As the ethical standards make clear, the court "must be viewed as a tripartite entity consisting of the judge[,] . . . counsel for the prosecution, and counsel for the accused."[242] Thus, both the defense

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236. Kathleen L. Johnson, *The Death Row Right to Die: Suicide or Intimate Decision?*, 54 S. Cal. L. Rev. 575, 598 (1981).

237. G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. Crim. L. & Criminology 860, 904 (1983).

238. *See* Standards Relating to the Admin. of Criminal Justice 4-1.2(a) (1991) (stating that a criminal court "properly constituted" should be viewed as "a tripartite entity" consisting of the judge, the prosecutor, and the defense attorney).

239. *See* G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. Crim. L. & Criminology 860, 904 (1983); *see also* Pate v. Robinson, 383 U.S. 375, 385 (1966) (requiring judges to "impanel a jury and conduct a sanity hearing" when evidence "raises a '*bona fide* doubt' as to a defendant's competence to stand trial").

240. *See* Criminal Justice Mental Health Standards 7-4.2(b) (1984) (requiring the defense attorney to move the court for a competency hearing when he has "a good faith doubt as to the defendant's competence"); *cf.* 18 U.S.C. § 4241(a) (2000) (stating that either the prosecutor or the defense counsel "may file a motion for a hearing to determine the mental competency of the defendant").

241. *See* Pate v. Robinson, 383 U.S. 375, 385 (1966) (requiring judges to conduct competency hearings when they have a "*bona fide* doubt" as to the defendant's competence).

242. Standards Relating to the Admin. of Criminal Justice 4-1.2(a) (1991).

counsel and the prosecutor share responsibility with the court for preserving the *life ethic* that is so vital to capital punishment adjudication.

While the scenario that occurred in *Dretke* may seem extraordinary, it is more common than most might imagine. Between 1976 and 1990, for example, over ten percent of the executions carried out in the United States were "of those who elected to die."[243] Thus, attorneys on both sides of the criminal docket must be prepared to confront the moral "dilemmas of [death row] volunteering."[244]

The leading theory governing the moral responsibilities of attorneys toward their clients is the "hired-gun" approach, which emphasizes client autonomy above all else.[245] Hired guns experience "no moral conflict because they totally identify with the professional role and disassociate themselves from moral responsibility for the outcome."[246]

Despite the prevalence of the "hired-gun" approach, it is important to remember that in addition to being "an advocate for a particular criminal defendant," the defense attorney "is also the advocate of the ideals and values of our society and legal system."[247] Similarly, the prosecutor has duties to the legal system that go well beyond winning convictions.[248] Thus, regardless of the popularity of the "hired-gun" approach, "the ethi-

243. Richard C. Dieter, *Ethical Choices for Attorneys Whose Clients Elect Execution*, 3 GEO. J. LEGAL ETHICS 799, 800 (1990).

244. C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849, 871 (2000).

245. *See* THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY 18 (1994) (outlining four generally accepted theories governing the moral responsibilities of attorneys toward their clients). First, there is the "hired-gun" approach, which places a premium on client autonomy. *Id.* The second role lawyers may assume in response to *Dretke*-like moral dilemmas is that of the "godfather." *Id.* at 8. The godfather lawyer is just the opposite of the "hired-gun." *Id.* Godfather lawyers "either decide what their clients' interests are, without consulting their clients, or they persuade their clients to accept lawyers' views on what their interests are." *Id.* The third theory is that of the "guru." *Id.* at 31. Like the godfather lawyer, the guru lawyer is also in control, but he makes his decisions based on his perception of "the right moral direction," rather than solely on his view of the client's interests alone. *Id.* Finally, there is the "lawyer as friend" approach. *Id.* at 44. The goal of the "lawyer as friend" model is the goodness of the client. *Id.* These attorneys are concerned primarily with "the client as a whole person," and as a result their goals are "client success, client freedom, and client rectitude." *Id.*

246. C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849, 871 (2000).

247. John B. Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*, 32 STAN. L. REV. 293, 336 (1980).

248. *See* Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 613 (1999) (insisting that the prosecutor "'represents the public interest, which can never be promoted by the conviction of the innocent'" (quoting Hurd v. People, 25 Mich. 405, 415-16 (Mich. 1872))).

cally appropriate approach to practicing [criminal] law should be somewhere between" the hired-gun, who never feels morally conflicted regarding professional obligations, and the attorney who selectively avoids professional obligations in favor of his or her personal moral beliefs.[249]

Specifically, the *Dretke* scenario presents the defense counsel, and to a lesser degree the prosecutor as well, with unique ethical challenges. The remarkable character of a capital punishment trial, coupled with the twist provided by the defendant's insistence on a suicidal strategy, heighten the ethical implications for both participants and present them with an array of moral obligations. "[A]ll lawyers . . . have dual roles in the sense that the standards of conduct that govern them draw on the cooperative and adversarial views about how lawyers should act in litigation."[250] Additionally, prosecutors are obligated to "a dual role as advocates and ministers of justice,"[251] and the defense attorney's obligation "to the administration of justice . . . is to serve as the accused's counselor and advocate with courage and devotion,"[252] which implicates responsibilities not only to the client, but to the legal system as well.[253]

A. *The Defense Counsel*

The defense attorney "has additional responsibilities in capital cases that are unlike those of counsel in all other criminal trials."[254] These additional obligations result from "both the special procedures that are constitutionally required in capital trials and the uniqueness of death as a punishment."[255] A *life ethic* requires that the role of a defense attorney representing a capital defendant be "characterized as a form of cause

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249. *See* C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849, 871 (2000) (arguing that "the ethically appropriate approach to practicing law should" fall between "[m]aximum [r]ole [i]dentification" and "[m]inimum [r]ole [i]dentification").

250. Kevin C. McMunigal, *Are Prosecutorial Ethics Standards Different?*, 68 FORDHAM L. REV. 1453, 1461 (2000).

251. *Id.*; *see also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.10.1, at 759 (1986) (explaining that prosecutors are not only responsible for winning convictions, but "also bear alone the state's considerable responsibility to see that no innocent person is prosecuted, convicted, or punished").

252. STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE 4-1.2(b) (1991).

253. *See* John B. Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*, 32 STAN. L. REV. 293, 336 (1980) (arguing that "[t]he defense attorney plays a far broader role than serving as an advocate for a particular criminal defendant" because he is "also the advocate of the ideals and values of our society and legal system").

254. Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 317 (1983).

255. *Id.*

lawyering[,] . . . [a role different] from other forms of legal work in its rejection of the idea of moral nonaccountability."[256] Under this model, the "hired-gun" mentality is inappropriate.[257] "Cause lawyers . . . believ[e] instead they share with their clients responsibility for the ends sought through legal representation."[258]

"[T]he legal procedures developed and approved by our legislatures and courts reflect two fundamental assumptions: that people who are alive want to stay alive, and that when people's 'interest in living is threatened they will fight to remain alive.'"[259] Yet, when a defendant volunteers, "the adversarial process on which our justice system is based breaks down."[260] Thus, it is "contrary to higher societal interests" for the prosecution and the defense to both seek the defendant's death by execution.[261] Accordingly, "it is morally unacceptable for defense attorneys to facilitate or assist the client in his efforts to be executed."[262] Regrettably, the *Dretke* courts failed to recognize the ethical neglect that accompanied every stage of Roberts's defense.

At the outset, the defense attorney owes his or her client, and the legal system, the twin duties of diligent preparation and zealous representation. First, because a death sentence "differs from other criminal penalties in its finality," defense attorneys in capital cases must "[make] extraordinary efforts on behalf of the accused."[263] While Roberts's trial attorney accumulated a mere fifty hours of preparation,[264] the American Bar Association (ABA) reports that a proper discharge of "the duty to investigate, prepare and try both the guilt/innocence and mitigation phases [of a capital punishment trial] today requires an average of almost

256. *See* C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849, 858 (2000) (characterizing the work of defense lawyers who defend capital murder defendants).

257. *See id.* (explaining that "cause lawyers" reject the image of the morally indifferent "hired-gun" lawyer).

258. *Id.*

259. *Id.* at 851 (quoting David A. Davis, *Capital Cases: When the Defendant Wants to Die*, THE CHAMPION, June 1992, at 45).

260. *Id.*

261. C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849, 851 (2000).

262. *Id.* at 861.

263. STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE 4-1.2(c) (1991).

264. Roberts v. Dretke, 381 F.3d 491, 495 (5th Cir. 2004), *cert. denied*, 2005 WL 742671 (U.S. Apr. 4, 2005) (No. 04-7824).

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1900 hours, and over 1200 hours even where a case is resolved by guilty plea."[265]

Second, defense lawyers "have an obligation to zealously represent their clients."[266] In general, "[t]he guidelines for professional conduct direct the lawyer to represent the client's best interests and leave the direction of the litigation up to the client."[267] Still, "[t]here is justification for an attorney to act contrary to the client's immediate wishes."[268] The *Texas Disciplinary Rules of Professional Conduct* require that "a lawyer shall abide by a client's decisions,"[269] but make an exception "whenever the lawyer reasonably believes that the client lacks legal competence and that such action should be taken to protect the client."[270] As will be discussed in greater detail below, a moral reading of ethical guidelines obligates the defense attorney to request a competency hearing, even against his or her client's wishes, when the client seeks a death sentence.[271] Furthermore, the lawyer who respects the sanctity of human life has additional grounds for not heeding his or her client's suicidal instructions. The *Criminal Justice Standards* "are written to encourage zealous protection of the client's legitimate interests within an adversary system of justice."[272] Accordingly, the standards articulate a duty on the part of defense counsel to "present to the court any ground which will assist in reaching a proper disposition favorable to the accused."[273] While "favorable" is left undefined, the "the unnecessary death of the client" is not compatible with a *life ethic*.[274]

Still, the ethical responsibilities of the defense attorney faced with the *Dretke* scenario reach further, governing all stages of the defense pro-

265. THE TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM n.19 (2002), *available at* http://www.abanet.org/legalservices/downloads/sclaid/10principles.pdf (last visited Mar. 18, 2005).

266. C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849, 856 (2000).

267. Richard C. Dieter, *Ethical Choices for Attorneys Whose Clients Elect Execution*, 3 GEO. J. LEGAL ETHICS 799, 819 (1990).

268. *Id.*

269. TEX. STATE BAR R. art. X, § 9, Rule 1.02(a), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005).

270. TEX. STATE BAR R. art. X, § 9, Rule 1.02(g).

271. *See* CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-4.2(b)-(c) (1984) (requiring both the defense counsel and prosecutor to move the court for a competency hearing when they reasonably believe that the defendant is not competent to stand trial).

272. Richard C. Dieter, *Ethical Choices for Attorneys Whose Clients Elect Execution*, 3 GEO. J. LEGAL ETHICS 799, 809 (1990).

273. *Id.*

274. *See id.* at 810 (explaining that, while "favorable" is left undefined in the *Criminal Justice Standards*, the unnecessary death of the client is arguably unfavorable).

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ceedings: the pre-trial phase, the guilt/innocence phase, and the sentencing phase.

1. Pre-Trial

A *life ethic* requires the defense attorney's deference to two primary concerns during the pre-trial phase: (1) the obligation to conduct proper voir dire and (2) the duty to attempt plea bargain negotiations. First, proper voir dire during the jury selection process is crucial.[275] Clearly, "[c]ounsel can increase the probability that the penalty hearing will be meaningful through voir dire and has an obligation to attempt to obtain a jury of persons open to an appeal for a life sentence."[276] Unfortunately, Roberts's trial attorney "waived voir dire [and] chose jury members who favored the death penalty."[277]

Second, the defense counsel should make an attempt at plea negotiations because plea bargaining "might save the defendant's life."[278] Plea negotiations go hand-in-hand with the Model Code's[279] provision that the defense counsel should inform the client of all legal options.[280] While the ethical guidelines reserve for the defendant "'[t]he authority to make decisions'"[281] regarding the acceptance or rejection of plea offers, the defense counsel's negotiations with the prosecutor are "not the same as deciding to take an offer."[282] Thus, the defense counsel has an ethical duty to inform the death row volunteer "that a plea-bargain offers a way out."[283] Of course, Roberts's attorney was not able to reach a plea agreement, and there is no indication that he attempted plea negotiations.

Admittedly, in many capital cases where "the evidence of guilt is overwhelming," the prosecutor often "will not bargain for a sentence less than

275. *See* Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 325 (1983) (urging that the attorney who chooses jurors in a capital case "is selecting those persons who may eventually judge his client's worthiness to live").

276. *Id.*

277. Roberts v. Dretke, 381 F.3d 491, 495 (5th Cir. 2004), *cert. denied*, 2005 WL 742671 (U.S. Apr. 4, 2005) (No. 04-7824).

278. Richard C. Dieter, *Ethical Choices for Attorneys Whose Clients Elect Execution*, 3 GEO. J. LEGAL ETHICS 799, 804-05 (1990).

279. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (1983).

280. *See id.* (articulating a lawyer's responsibility to ensure that his or her client is informed of all relevant considerations before making decisions).

281. Richard C. Dieter, *Ethical Choices for Attorneys Whose Clients Elect Execution*, 3 GEO. J. LEGAL ETHICS 799, 805 (1990) (quoting MODEL CODE OF PROF'L RESPONSIBILITY EC 7-7 (1983)).

282. *Id.* Importantly, "[t]he *Criminal Justice Standards* do not require the client's advance consent before engaging in plea discussions with the prosecutor." *Id.*

283. *Id.*

death."[284] In these cases, as may have been the case in *Dretke*, the defense attorney should then focus his or her attention on the often difficult task of appropriate "guilt phase advocacy."[285]

2. Guilt Trial

The guilt trial requires an array of challenges for the defense attorney representing a death row volunteer such as Roberts. First, the defense attorney in the position of Roberts's trial counsel—where the client insists on a suicidal strategy—should "encourage her client to take another course of conduct on moral grounds."[286] The ethics guidelines make clear that she "is not required to slavishly follow all the beliefs and goals of her client."[287] To his credit, Roberts's trial attorney "tried to discourage Roberts" from his death-wish strategy.[288] Ultimately, however, his efforts were to no avail and "the cooperation essential for constructing an effective . . . trial [did] not exist."[289]

Second, as mentioned previously, the defense attorney has the option of "pursuing a declaration of incompetency."[290] Some believe that it is a sign of mental illness when an otherwise healthy person chooses "to hasten his own death."[291] "At a minimum, it is an indication that further mental problems might be present."[292] As such, the ABA's *Criminal Justice Mental Health Standards* obligated Roberts's attorney to move for a

284. *See* Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 329 (1983) (noting that plea bargaining is often not an option in capital cases where the defendant's guilt is overwhelming because either the prosecutor will not negotiate "for a sentence less than death" or "the defendant will not accept a sentence of life imprisonment without possibility of parole").

285. *See id.* (warning that "if the guilt phase case is virtually indefensible, inappropriate guilt phase advocacy could so prejudice the sentencer that no persuasive case for a life sentence can be made at the sentencing phase").

286. Richard C. Dieter, *Ethical Choices for Attorneys Whose Clients Elect Execution*, 3 GEO. J. LEGAL ETHICS 799, 812 (1990).

287. *Id.* at 811.

288. Roberts v. Dretke, 381 F.3d 491, 494 (5th Cir. 2004), *cert. denied*, 2005 WL 742671 (U.S. Apr. 4, 2005) (No. 04-7824).

289. *See* Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 323 (1983) (commenting that if the defense counsel fails in persuading the defendant to "take an interest in his or her life," the defense counsel will have a difficult time of forging a successful trial strategy).

290. Richard C. Dieter, *Ethical Choices for Attorneys Whose Clients Elect Execution*, 3 GEO. J. LEGAL ETHICS 799, 813 (1990).

291. *Id.*

292. *Id.*

competency hearing.[293] The standards require such action when the "defense counsel has a good faith doubt as to the defendant's competence."[294] As much of our society does not believe it is reasonable for a person to ever choose death over life, the prevalence of that viewpoint should have, at a minimum, raised some doubt in the attorney's mind as to Roberts's competence.[295]

Furthermore, the Supreme Court's standard for determining the defendant's competency, as laid out in *Dusky v. United States*,[296] should have caused the defense attorney pause. The standard focuses primarily on the kind of rationality at issue, providing that a defendant will be deemed incompetent to stand trial when he lacks the "present ability to consult with his lawyer with a reasonable degree of rational understanding," and when he lacks "a rational as well as factual understanding of the proceedings against him."[297] Adherence to a *life ethic* would have resulted in recognition of the inherent irrationality of Roberts's suicidal instructions. Unfortunately, Roberts's defense counsel chose not to request a competency hearing on the basis of an incomplete psychiatric evaluation.[298]

Next, "in a situation where no meeting of [the] minds is possible" because persuasion has failed,[299] or where the defendant "is believed to be competent by his attorney or is deemed competent by the courts after a formal hearing,"[300] many "believe [the defense attorney's] only ethical option is to withdraw from the case."[301] While a court-appointed attor-

293. *See* CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-4.2(c) (1984) (obligating defense counsel to move the court whenever he has a good faith doubt as to the defendant's competency to stand trial).

294. *Id.*

295. *See* Kathleen L. Johnson, *The Death Row Right to Die: Suicide or Intimate Decision?*, 54 S. CAL. L. REV. 575, 599 (1981) (stating that "[i]t is commonly thought that, given a choice, the 'reasonable person' would prefer life over death").

296. 362 U.S. 402 (1960) (per curiam).

297. Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam).

298. Roberts v. Dretke, 381 F.3d 491, 495 (5th Cir. 2004), *cert. denied*, 2005 WL 742671 (U.S. Apr. 4, 2005) (No. 04-7824).

299. Richard C. Dieter, *Ethical Choices for Attorneys Whose Clients Elect Execution*, 3 GEO. J. LEGAL ETHICS 799, 813 (1990).

300. C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849, 868 (2000).

301. *Id.* (illustrating the prevalence of the view, among lawyers from all schools of thought, that withdrawal is preferable to assisting a client in achieving a death sentence); *see also* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS: THE CLIENT-LAWYER RELATIONSHIP § 32(3)(f) (1998) (providing that "a lawyer may withdraw from representing a client if the client insists on taking action that the lawyer considers repugnant or imprudent"); Richard C. Dieter, *Ethical Choices for Attorneys Whose Clients Elect Execution*, 3 GEO. J. LEGAL ETHICS 799, 813 (1990) (noting that Professor Wolfram views withdrawal as the lawyer's only option when he or she "'believes that a course of action that the client

ney's withdrawal will be subject to the court's approval, the attempt itself, whether or not it is permitted, "send[s] a strong message of disagreement."[302] The attorney's withdrawal serves two purposes: Above all, it is the ethically correct thing to do,[303] and it also may assist in persuading the client to "take an interest in his or her life."[304] Again, Roberts's trial attorney failed in this regard.[305]

Another of the defense attorney's special responsibilities in the capital defendant's guilt trial concerns the viability of future appeals. While the issue exists in all trials, the extraordinary nature of capital punishment highlights its importance.[306] Ethical guidelines reflect "the importance of protecting the client's rights against later contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited."[307] In other words, the defense counsel should craft the trial strategy in such a way that preserves the defendant's right to appeal and improves his chances of success if appeal becomes necessary. This is critical because death penalty appeals "have a high rate of success"; over forty percent of the cases "reviewed by the federal courts for constitutional error are sent back to the lower courts."[308] Moreover, the impact of the appeal can reach even further by determining "[t]he fate of hundreds of [other] lives."[309] Every other similarly situated death row inmate is affected "[w]hen the Supreme Court overturns either a conviction or a death sentence."[310]

While it does not appear that Roberts's likelihood of success on future appeal was diminished by his trial counsel's performance, his state habeas counsel's actions during the state habeas proceedings adversely affected

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insists upon is immoral or otherwise repugnant'" (quoting CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 4.3, at 158 (1986))).

302. Richard C. Dieter, *Ethical Choices for Attorneys Whose Clients Elect Execution*, 3 GEO. J. LEGAL ETHICS 799, 813 (1990).

303. *See id.* (stating that a lawyer must withdraw when a client takes a course of action the lawyer considers immoral).

304. Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 323 (1983).

305. *See generally* Roberts v. Dretke, 381 F.3d 491 (5th Cir. 2004), *cert. denied*, 2005 WL 742671 (U.S. Apr. 4, 2005) (No. 04-7824) (mentioning no instances in which Roberts's attorney ever attempted to withdraw from the case).

306. *See* Richard C. Dieter, *Ethical Choices for Attorneys Whose Clients Elect Execution*, 3 GEO. J. LEGAL ETHICS 799, 810 (1990) (noting that death row appeals have a surprisingly high rate of success).

307. American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 1028 (2003).

308. Richard C. Dieter, *Ethical Choices for Attorneys Whose Clients Elect Execution*, 3 GEO. J. LEGAL ETHICS 799, 810 (1990).

309. *Id.*

310. *Id.*

his federal habeas petition.[311] During the state habeas proceeding, Roberts's counsel "determined that he needed both expert testimony regarding Robert's [sic] mental health and a full mental health examination."[312] Accordingly, the attorney requested further funding from the Texas Court of Criminal Appeals and was denied.[313] Regrettably, however, the attorney's inquiry was an *oral* inquiry—a fact that the federal habeas court later cited as "not constitut[ing] due diligence in developing the factual record" when it denied yet another request for a mental health exam and evidentiary hearing.[314]

Finally, the defense attorney has a responsibility to begin an investigation of mitigating factors in preparation for the possibility that the defendant is found guilty and the trial moves to a sentencing phase.[315] Ensuring "a meaningful [sentencing] hearing in capital cases" requires "that the client be presented to the sentencer as a human being."[316] Thus, the attorney "has a duty to investigate the client's life history[ ] and emotional and psychological make-up."[317] Of course, because of the irrevocability of the death penalty, the importance and thoroughness of the investigation "cannot be overemphasized."[318] The obligation of thoroughness, however, means that "[t]he timing . . . is critical."[319] An attorney that awaits the guilty verdict before commencing the investigation will have waited too long.[320] Any continuance that is granted will "likely . . . be too brief to afford defense counsel the opportunity to conduct a substantial investigation."[321]

3. Penalty Phase

When the sentencing phase arrives, the attorney is required to present the mitigating evidence discovered in the investigation.[322] The attorney

311. Roberts v. Dretke, 381 F.3d 491, 496 (5th Cir. 2004), *cert. denied*, 2005 WL 742671 (U.S. Apr. 4, 2005) (No. 04-7824).

312. *Id.*

313. *Id.*

314. *Id.*

315. Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 324 (1983).

316. *Id.* at 321.

317. *Id.* at 323-24.

318. *Id.* at 324.

319. *Id.*

320. Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 324 (1983).

321. *Id.*

322. *See* Richard C. Dieter, *Ethical Choices for Attorneys Whose Clients Elect Execution*, 3 GEO. J. LEGAL ETHICS 799, 807 (1990) (pointing out that "[w]hen the Supreme Court was faced with a state statute that prevented the defendant from presenting certain

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"must present all potentially beneficial evidence from [the] defendant's life tending to illustrate his humanity."[323] Otherwise, there will be no assurance, as the Supreme Court required, "that the defendant and his crime are particularly deserving of the death penalty as compared to others who committed similar offenses."[324] It is important to note that it does not matter if the defendant objects to the counsel's presentation of mitigating evidence.[325] The defense attorney need not worry about "violat[ing] her duty to abide by her client's instructions"[326] because "[t]he *Model Code* requires that an attorney's conduct be 'within the bounds of the law or [be] supportable by a good faith argument for an extension, modification, or reversal of the law.'"[327]

Here again, Roberts's defense counsel fell short of his ethical obligations. He "did not interview family members before [the] trial,"[328] conducted an incomplete investigation into Roberts's medical background,[329] "called no witnesses during the punishment phase,"[330] and "made no argument in favor of a life sentence."[331]

B. *The Prosecutor*

The *Dretke* scenario creates special ethical obligations for the prosecutor as well, the effects of which are vitally important. The prosecutor's ethical fiber is tested daily, "and through him, in large measure, the rectitude of the system of justice."[332]

While in many instances "the standard of conduct for the prosecutor is identical to the standard for the criminal defense lawyer,"[333] it is widely accepted that the prosecution, in general, has broader ethical obligations

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pieces of mitigating evidence, it found the statute unconstitutional, holding that consideration of mitigating factors is constitutionally required by the eighth amendment").

323. Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 338 (1983).

324. Richard C. Dieter, *Ethical Choices for Attorneys Whose Clients Elect Execution*, 3 GEO. J. LEGAL ETHICS 799, 807 (1990).

325. *See id.* (noting that "the defense attorney may argue that the penalty phase cannot constitutionally go forward without the presentation of mitigating evidence").

326. *Id.*

327. *Id.* (quoting MODEL CODE OF PROF'L RESPONSIBILITY EC 7-4 (1983)).

328. Roberts v. Dretke, 381 F.3d 491, 495 (5th Cir. 2004), *cert. denied*, 2005 WL 742671 (U.S. Apr. 4, 2005) (No. 04-7824).

329. *Id.*

330. *Id.*

331. *Id.*

332. H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145, 1145 (1973).

333. Kevin C. McMunigal, *Are Prosecutorial Ethics Standards Different?*, 68 FORDHAM L. REV. 1453, 1453 (2000).

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than the defense.[334] This heightened ethical role stems from the prosecutor's obligation to "seek justice,"[335] which requires him to both prosecute the guilty and protect the innocent.[336]

Dretke underlines the prosecutor's ethical responsibilities in at least two important respects. In light of his dual responsibilities as advocate for the state and "'minister of justice,'"[337] the prosecutor fell short on two counts, both of which stemmed from his failure to raise the competency issue himself. First, the ABA's *Criminal Justice Mental Health Standards* clearly provide that even though the defense counsel failed to ask the court for a competency hearing, the prosecutor should have done so on his own motion.[338] The standards require that "the prosecutor . . . move for evaluation of defendant's competence to stand trial whenever [he] has a good faith doubt as to the defendant's competence."[339] Again, the *life ethic* would require evaluating Roberts's insistence on a suicidal strategy as "prima facie evidence of mental disturbance,"[340] and therefore should have raised for the prosecutor a "*bona fide* doubt" as to Roberts's competence to stand trial.[341]

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334. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 13.10.1, at 759 (1986) (affirming that prosecutors "are the only governmental officers responsible for obtaining convictions of the guilty . . . but they also bear alone the state's considerable responsibility to see that no innocent person is prosecuted, convicted, or punished").

335. Kevin C. McMunigal, *Are Prosecutorial Ethics Standards Different?*, 68 FORDHAM L. REV. 1453, 1453 (2000).

336. *See* STANDARDS RELATING TO THE ADMIN. OF CRIMINAL JUSTICE 3-1.2(c) (1992) (advising that "[t]he duty of the prosecutor is to seek justice, not merely to convict").

337. Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511, 1513 (2000) (quoting MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (1999)).

338. *See* Grant H. Morris et al., *Competency to Stand Trial on Trial*, 4 HOUS. J. HEALTH L. & POL'Y 193, 198-99 (2004) (stating that "to assure that the defendant is not deprived of the due process right to a fair trial," both the prosecutor and the defense attorney "have an obligation to raise the issue whenever reasonable cause exists to believe that the accused is incompetent"). Specifically, the standard provides that "[t]he prosecutor should move for evaluation of defendant's competence to stand trial whenever the prosecutor has a good faith doubt as to the defendant's competence." CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-4.2(b) (1984); *accord* 18 U.S.C. § 4241(a) (2000) (stating that "the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant").

339. CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-4.2(b) (1984).

340. *See* Kathleen L. Johnson, *The Death Row Right to Die: Suicide or Intimate Decision?*, 54 S. CAL. L. REV. 575, 576 (1981) (explaining that at least one commentator, Hugo Bedau, "would dismiss any condemned prisoner's 'death wish' as prima facie evidence of mental disturbance").

341. *See* Pate v. Robinson, 383 U.S. 375, 385 (1966) (holding that a murder defendant is entitled to a competency hearing when there is a "'*bona fide* doubt' as to [his] competence to stand trial").

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Second, the *Dretke* prosecution can be criticized in another respect, although it concerns an admittedly less significant issue. The prosecutor's role as an officer of the state imposes on him a responsibility to use the state's resources as efficiently as possible.[342] Lengthy appeals "have serious ramifications to both society and the defendant."[343] In this case, the prosecution's failure to raise the competency issue may have armed the defendant with a legitimate argument on appeal. Had the prosecutor moved the court for a competency hearing, the court likely would have conducted the hearing[344] and, regardless of the outcome, Roberts would no longer have had a legitimate argument under either *Strickland* or *Pate*.

There is no question that prosecutors have broad discretion in the performance of their duties in the courtroom.[345] Importantly, however, "[v]irtue is the cherished ingredient in his role."[346] "The ethical standards of a particular prosecutor can influence the outcome of discretionary decisions."[347] And, just as a prosecutor's "[d]ecisions that reflect high moral values . . . inspire a heightened respect for our judicial system,"[348] prosecutorial decisions that reflect an absence of moral values result in diminished respect for the legal system.

VI. CONCLUSION: A DECISION WITHOUT VIRTUE

The debate over capital punishment will likely continue for many years into the future, just as it has persisted for many years in the past. Regardless of one's views on the morality of law itself or the morality of the law as it is applied to capital punishment in the United States, there is a point

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342. *See* W. PAUL BISHOP, HOW STATE AND LOCAL GOVERNMENTS CAN ECONOMIZE BY IMPLEMENTING CRIMINAL JUSTICE STANDARDS, at iii, 4 (1976) (noting that, "[i]n a period in which state and local governments are being squeezed for each possible dollar," all phases of the criminal justice system require the prosecutor to "carefully balance the power of his office among the competing demands for more successful prosecutions with resulting incarceration, the Constitutional rights accorded the individual defendant and the financial resources available to the community to support its criminal justice system"). "Only through the efficient utilization of available financial . . . resources will the criminal justice system promote effective law enforcement." *Id.* at v.

343. *Id.* at 27.

344. *See Pate*, 383 U.S. at 385 (requiring the judge to commence a competency hearing when there is a bona fide doubt as to the defendant's competency to stand trial).

345. *See generally* Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511 (2000) (discussing the many facets of prosecutorial discretion in the modern justice system).

346. H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145, 1145 (1973).

347. Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511, 1534 (2000).

348. *Id.* at 1514.

on which all must agree—the importance of society's respect for the sanctity of human life.[349] Whichever faction ultimately wins the debate in the legislature, all must insist that if capital punishment is imposed, it be imposed in a way that underlines the considerable moral impetus behind it. Society must consider the unspeakable injustice done to capital murder victims and their families, but also must confront the injustices and inequities that plague the capital punishment system as it currently exists.

While the *life ethic* can serve as a basis for the abolitionist position, this Comment contends that it requires society to impose the ultimate punishment for the ultimate crime against another human being. Paradoxically, it also requires that we reject the notion of the death row volunteer. Regardless of whether a capital defendant values his life, the legal system must. Its moral authority depends on it.

As a result, the *Dretke* scenario requires courts and attorneys on both sides of the courtroom aisle to step in and affirm the *life ethic* by insisting on an adversarial process. Only in an adversarial system can society be sure that citizens are tried and sentenced solely on the basis of their guilt or innocence—something that does not occur when we allow the prosecution and the defense to collaborate for the defendant's demise.[350] Courts must protect the dignity of human life by reading precedent from a *life ethic* perspective and ensuring that essential state interests are protected. Similarly, both the defense counsel and the prosecutor—while serving the interests of the defendant and the state, respectively—must do the same without violating the interests of the legal system and society as a whole. The defense attorney's responsibility to serve his or her client's best interests is not compatible with facilitating a death sentence, and the prosecutor's effort to seek conviction and punishment must not sacrifice his or her heightened ethical role "to seek justice."[351]

Regrettably, *Roberts v. Dretke* stands as a failure all the way around. The courts and the attorneys involved fell short of the *life ethic* because their actions failed to demonstrate a respect for the sanctity of human

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349. *See* Danuta Mendelson, *Historical Evolution and Modern Implications of Concepts of Consent to, and Refusal of, Medical Treatment in the Law of Trespass*, 17 J. LEGAL MED. 1, 35 (1996) (reciting Blackstone's belief that the "principle of sanctity of life [is] . . . fundamental to a civilized society"); Joseph Raz, *About Morality and the Nature of Law*, 48 AM. J. JURIS. 1, 3 (2003) (stating that "no legal system can be stable unless it provides some protection for life and property to some of the people to whom it applies").

350. *See* C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849, 851 (2000) (observing that the adversarial system breaks down when the prosecutor and the defense attorney both seek the execution of the defendant).

351. Kevin C. McMunigal, *Are Prosecutorial Ethics Standards Different?*, 68 FORDHAM L. REV. 1453, 1453 (2000).

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life. Consequently, neither death penalty advocates nor death penalty opponents can find virtue in the ultimate result or the process that led to it.