Sarat & Shoemaker

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WHO DESERVES TO DIE

CONSTRUCTING THE EXECUTABLE SUBJECT

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WHO DESERVES TO DIE

To my son,

Benjamin,

with love and thanks for the joy
he brings into my world (A.S.)

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Between the Promise of a Shared Moral World and the Utter Unintelligibility of Death Itself

An Introduction to the Construction of Executable Subjects

Austin Sarat and Karl Shoemaker

On December 13, 2005, the state of California executed Stanley "Tookie" Williams for the 1979 murders of four people, making him one of more than 1,100 put to death in the United States since the resumption of capital punishment after the United States Supreme Court's 1976 decision in *Gregg v. Georgia*.[1] Williams, who was infamous for his role in founding the Los Angeles Crips gang, renounced his gang affiliation while on death row and apologized for the Crips' founding. In addition, he became an antigang activist, co-wrote children's books, participated in efforts intended to prevent youths from joining gangs, and was nominated for the Nobel Peace Prize and the Nobel Prize in Literature by an array of college professors, a Swiss lawmaker, and others.

His case set off an intense campaign to persuade Governor Arnold Schwarzenegger to grant clemency and thereby spare his life, with celebrities, activists, and anti–death penalty advocates saying that Williams had shown himself to be "redeemed" and rehabilitated and that his antigang message from behind bars meant his life was worth saving.[2] Even the United States Court of Appeals for the Ninth Circuit, which had denied Williams's appeal, remarked on his "laudable efforts opposing gang violence from his prison cell" and suggested that his "good works and accomplishments since incarceration may make him a worthy candidate for the exercise of gubernatorial clemency."[3]

At the time he denied Williams's request for clemency, Schwarzenegger described clemency decisions as "always difficult and this one is no exception." Such a statement is typical in the genre of gubernatorial clem-

ency decisions, where often the governor portrays himself or herself as burdened by a godlike power and an agonizing decision,[4] the godlike power to spare someone's life or let that person die, the agonizing decision whether a human being "deserves" death for his or her crimes.

Schwarzenegger issued a lengthy statement detailing his reasons for denying clemency and, in so doing, gave us a glimpse of the basis on which he exercised his godlike power and reached his agonizing decision.[5] His statement offers an instructive example of the cultural categories and predispositions through which our legal and political systems construct an image of the "executable subject," of someone who deserves to die and someone whose life is worth saving.

As Schwarzenegger saw it, the heart of Williams's case rested on two incompatible claims. First, his life should be spared because he was not guilty of the crimes for which he was to be executed. Second, "he deserves clemency because he has undergone a personal transformation and is redeemed." Focusing first on redemption, the governor noted that "Williams claims that he is particularly deserving of clemency because he has reformed and been redeemed for his violent past. Williams' claim of redemption triggers an inquiry into his atonement for all his transgressions. Williams protests that he has no reason to apologize for these murders because he did not commit them. But he is guilty, and a close look at Williams' post-arrest and post-conviction conduct tells a story that is different from redemption."

Here Schwarzenegger constructs a picture of the executable subject in quasi-religious terms. To be worth sparing one must "atone" for one's crime, and atonement, in turn, requires an acceptance of responsibility and an apology. Appeals to religious belief and stories of finding god are, in turns out, staples of the arguments that defense lawyers make in the penalty phase of capital trials as well as of arguments made in clemency petitions.[6] Such appeals are designed to connect the person convicted of a capital crime to a community of believers where atonement and apology offer pathways to redemption.

Continuing his analysis of the reality of Williams's story of redemption Schwarzenegger noted that "Williams has written books that instruct readers to avoid the gang lifestyle and to stay out of prison." However, "the dedication of Williams' book 'Life in Prison,'" Schwarzenegger observed, "casts significant doubt on his personal redemption." He continues:

> This book was published in 1998, several years after Williams' claimed redemptive experience. Specifically, the book is dedicated to "Nelson Mandela,

> Angela Davis, Malcolm X, Assata Shakur, Geronimo Ji Jaga Pratt, Ramona Africa, John Africa, Leonard Peltier, Dhoruba Al-Mujahid, George Jackson, Mumia Abu-Jamal, and the countless other men, women, and youths who have to endure the hellish oppression of living behind bars." The mix of individuals on this list is curious. Most have violent pasts and some have been convicted of committing heinous murders, including the killing of law enforcement. But the inclusion of George Jackson on this list defies reason and is a significant indicator that Williams is not reformed and that he still sees violence and lawlessness as a legitimate means to address societal problems.[7]

Continuing his exploration of Williams's writings, Schwarzenegger noted:

> There is also little mention of atonement in his writings . . . for the countless murders committed by the Crips following the lifestyle Williams once espoused. The senseless killing that has ruined many families, particularly in African-American communities, in the name of the Crips and gang warfare is a tragedy of our modern culture. One would expect more explicit and direct reference to this byproduct of his former lifestyle in Williams' writings and apology for this tragedy, but it exists only through innuendo and inference. Is Williams' redemption complete and sincere, or is it just a hollow promise?[8]

Such doubt about the depth and sincerity of redemption stories is, of course, deeply part of the structure and meaning of personal transformation in a culture of performance. It is redoubled when claims about redemption are linked to pleas for mercy. If the executable subject is hardhearted and unrepentant, what can we make of repentance when it seems linked instrumentally to the effort to save a life?

Schwarzenegger's doubts about Williams's redemption, however, were heightened precisely by Williams's continuing claims of innocence and his resultant refusal to apologize. As Schwarzenegger put it: "It is impossible to separate Williams' claim of innocence from his claim of redemption. . . . Stanley Williams insists he is innocent and that he will not and should not apologize or otherwise atone for the murders of the four victims in this case. Without an apology and atonement for these senseless and brutal killings there can be no redemption. In this case, the one thing that would be the clearest indication of complete remorse and full redemption is the one thing Williams will not do."[9]

At the time of his execution, many commentators drew parallels between the Williams case and the celebrated case of Karla Faye Tucker.[10] In 1984, Tucker was convicted of the brutal murders of her ex-lover, Jerry Lynn Dean, and his companion, Deborah Thornton, and sentenced to the

death penalty. During her trial, Tucker admitted that she and her boyfriend at the time, Daniel Ryan Garrett, took a pickax and hacked Dean and Thornton to death while they were sleeping.

During her long stay on Texas's death row she had what most believed to be an authentic religious conversion.[11] In various pleas to save her life, Tucker's supporters claimed that the Tucker of 1998, the year of her impending execution, was not the same woman who had committed those brutal murders fourteen years earlier. Because of her conversion to Christianity, apparent rehabilitation, and virtually spotless disciplinary record while in prison, her supporters believed that Tucker should be spared the death penalty. As Charley Davidson, one of the prosecutors in the trial of Tucker, publicly stated, a month before Tucker was put to death "The Karla Tucker who killed Jerry Dean and Debra Thornton cannot be executed by the State of Texas because that person no longer exists. The Karla Tucker who remains on death row is a completely different person who, in my opinion, is not capable of those atrocities. As such, I believe the Governor should commute her sentence to life. Based not only on what she did but what she has become, I feel justice would have been done."[12]

Or, as another of her supporters explained:

> Karla Faye participates regularly in a Christian anti-drug programs, writing letters to youths and other persons with drug problems. She receives a large number of visitors, many of whom come to see her for counseling regarding their own rehabilitation issues. She has been featured repeatedly on the "700 Club" hosted by Rev. Pat Robertson, who has made a personal plea to the Governor for her clemency. Karla's faith in Jesus Christ is based on conviction and honesty. Her values, attitudes and worth as a contributing member of society are dramatically different from the way they were in the early 1980s. It is my opinion that Karla has become a productive member of our community.[13]

In the Tucker case, as in the Williams case, the line between the sacred and the secular was blurred as it often is when death is on the horizon. Theological claims were advanced as the grounds for deciding that Tucker did not deserve to die, that hers was a life worth sparing, but these claims were no more persuasive in the Tucker case than claims about redemption would be in the Williams case. Thus, as then Governor George W. Bush explained:

> When I was sworn in as the governor of Texas I took an oath of office to uphold the laws of our state, including the death penalty. My responsibility is to ensure our laws are enforced fairly and evenly without preference or special treatment.

> Many people have contacted my office about this execution. I respect the strong convictions which have prompted some to call for mercy and others to emphasize accountability and consequences.
>
> Like many touched by this case, I have sought guidance through prayer. I have concluded that judgment about the heart and soul of an individual on death row are best left to a higher authority.
>
> Karla Faye Tucker has acknowledged she is guilty of a horrible crime. She was convicted and sentenced by a jury of her peers. The role of the state is to enforce our laws and to make sure all individuals are treated fairly under those laws.
>
> The state must make sure each individual sentenced to death has opportunity for access to the court and a thorough legal review. The courts, including the United States Supreme Court, have reviewed the legal issues in this case, and therefore I will not grant a 30-day stay.
>
> May God bless Karla Faye Tucker and may God bless her victims and their families.[14]

Here the desire for divine authority sits side by side with fear of the monstrous criminal other. Unlike Schwarzenegger, Bush invoked divine authority as a basis for abjuring judgment about redemption. And, once redemption was put aside, Bush's only role was to ensure that the law was upheld, with everyone being treated fairly. Tucker was an executable subject because the law had determined her to be someone deserving death. Nothing more was needed; nothing more need be said.

What, though, are the legal grounds for determining that a person convicted of a capital crime deserves to die? In the jurisprudence of capital punishment conviction is a necessary but not sufficient condition for that determination. Thus, the question of whether someone deserves to die is separated from the question of their criminal guilt through the so-called bifurcated trial in which the penalty determination is only made after a separate fact-finding exploration of so-called aggravating and mitigating factors.[15]

Dahlia Lithwick calls this system of bifurcated trials a trial of the "head" followed by a trial of the "heart." As she puts it:

> We have become so accustomed to bifurcated capital trials in America—trials at which the guilt phase is separate from the sentencing phase—that we forget how truly bizarre this system can be. We end up with a "head" trial—a dispassionate hearing on what happened, in which evidence is sometimes cruelly limited to the cold, hard facts. That proceeding is closely followed by a "heart" trial—a mini hearing full of hearsay and legally irrelevant detail: The defendant was abused as a baby; the victim was a wonderful wife and mother. Witnesses are, in short, encouraged to take the stand and emote—describing how desperately they miss the victim, or how tragic

> the life circumstances of the defendant really were. And, instead of deciding guilt beyond a reasonable doubt, jurors are asked to engage in a subjective balancing test—weighing a list of aggravating factors (was the murder particularly heinous; was it done for financial gain; does the defendant have a violent criminal history?) against a list of mitigating ones (was the defendant abused as a child; was he on drugs or otherwise impaired in his judgment?).[16]

Lithwick goes on to note that "when the penalty phase opens, the court assumes that jurors need to know all the facts—both good and bad—since they are not just deciding about a particular case anymore; they are determining whether someone's life will be terminated. At the first phase, jurors make a backward-looking decision as to what happened; at the second phase, they make a forward-looking judgment as to whether the defendant's life might have any value. And that latter judgment evidently requires some quantum of emotional information that cannot be processed rationally."[17]

The Supreme Court has said that, in determining who deserves to die, "it is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than emotion."[18] Yet the Court also believes that "because of the 'severity and irrevocability'" of the death penalty, it is "qualitatively different from any other punishment"[19] and that it is "desirable for the jury to have as much information as possible when it makes the sentencing decision."[20] And, in *Lockett v. Ohio*, the Court held that the Eighth and Fourteenth Amendments of the United States Constitution required, in all but the rarest capital cases, that sentencers not be precluded from considering a range of mitigating factors before imposing the death penalty. These factors included *any* aspect of a defendant's character or record and *any* circumstances of the offense proffered as a reason for a sentence less than death.[21] It thus made individualized consideration of the background and character of the accused "a constitutionally indispensable part of the process of inflicting the penalty of death."[22]

In the penalty phase of a capital trial, while prosecutors emphasize the violence of the crime, the damage done to victims' families and communities, prior criminal record, and a lack of remorse to construct a picture of someone who deserves to die,[23] defense lawyers seek to save the lives of their convicted clients by trying to "humanize" them.[24] The strategy of trying to humanize the client is a response to the widely held belief that jurors and judges will only condemn those who they see as fundamentally

"other," as inhuman, as outside the reach of the community of compassionate beings."[25] "The key to your job," one death penalty lawyer has observed,

> is to give your client a human face. Judges, just like the rest of us, don't want to think that humans kill other humans. It as if the client who kills is really of a different species. Our job is to make the judges see something of themselves or if not themselves at least to recognize the human condition in the lives of our clients. It is your job to make them feel legitimate sympathy, based on real facts. . . . If you tell the whole story so they know what led up to the murder, . . . people will understand how that whole scenario would lead any one of us down a path of increasing anger and frustration to a killing somewhere down the line.[26]

"Death cases," another well-known member of the death penalty bar once argued,

> are all and always about the humanity of somebody who is about to be put to death. They are not about that in a technical legal sense, but they are if we are doing what we should. We have to tell their stories so that judges see them as people, people who have done a terrible thing. . . . I suppose what we are trying to do is make it harder to kill by reminding everyone that our clients are not just drug-crazed, twenty-five year olds who prey on little old ladies. We have to turn them into brain-damaged, mentally retarded, sexually abused, discriminated against people who end up over their heads in situations where they don't know what to do.[27]

Faced with arguments about who deserves to die and whose life is worth saving, juries have wide, although not unlimited, discretion. Indeed, in one sense, the jurisprudence of capital punishment recognizes that the jury's decision about who deserves to die is one that no set of legal rules can determine. The law can at best guide the jury to consider particular factors, but the decision itself is deeply personal and moral. As such it should not be surprising that the construction of the executable subject by juries, as well as by governors, prosecutors, and others involved in the death penalty process, would reflect society's conventions about what makes life worth saving as well as prejudices that devalue the lives of particular persons or groups of persons.[28]

Finally, in many aspects the death penalty process remains a high ritualized one. Although we have stripped it of many of its more elaborate rituals, we still seek to acknowledge some shred of dignity in the condemned by allowing them to choose a last meal and to make a statement just before death.[29] As Daniel LaChance argues, "The state's retention of these dramatic practices and the release of their contents to the media

appear to be at odds with the otherwise sterile, detached climate of contemporary executions."[30] However, as LaChance goes on to explain:

> The last meal requests and last words . . . [allow] for the representation of offenders as autonomous, volitional individuals within a structure that simultaneously maintains them as irredeemable, controllable others. I argue, specifically, that the practice or pretense of affording the condemned the right to speak and eat what they choose prior to death and the dissemination of information about their "choices" to the general public individualize those whom the state executes. Through these individualizing procedures, inmates are portrayed as autonomous actors endowed with free will and distinct personalities, in possession of both a kind of agency and authenticity. The state, through the media, reinforces a retributive understanding of the individual as an agent who has acted freely in the world, unfettered by circumstance or social condition. And yet, through myriad other procedures designed to objectify, pacify, and manipulate the offender, the state signals its ability to maintain order and satisfy our retributive urges safely and humanely. In so doing, it reinforces the construction of offenders in contemporary discourses as self-made monsters, as figures endowed with both agency and intrinsic evil. Ultimately, this kind of paradoxical representation is crucial for executions to retain their relevance and coherence.[31]

Determining who deserves to die and constructing the executable subject becomes both more important and more vexing as the number of death sentences and executions declines in the United States.[32] Since 1990, minors,[33] the mentally retarded,[34] child rapists,[35] and convicts who become mentally ill before execution[36] have all been removed from the reach of the capital sanction, each determined to be inappropriate subjects of execution. Each exclusion has, in principle, reduced the scope of legitimate state killing.

Each exclusion has also forced the Supreme Court to reflect more closely on the justifications for executing those who are of sufficient age, intelligence, and competency. At the same time, the Court's recent attempts to justify and refine the state's power to take life are occurring within a broader political and intellectual discourse that seeks to account for the penal severity that appears to distinguish the United States from much of the West.[37]

The continuing controversy about who deserves to die was vividly on display in the Court's June 2008 decision striking down a Louisiana statute that provided death sentences for child rapists. Writing for the majority of the Court, Justice Anthony Kennedy argued that "capital punishment must 'be limited to those offenders who commit 'a narrow category