

## What Is a Death Sentence?

On May 20, 1997, after spending seventeen years on death row in Texas, Clarence Allen Lackey was executed by lethal injection. Two years before, Lackey had sought review of his sentence by the U.S. Supreme Court on the grounds that his execution following such a lengthy incarceration would violate the Eight Amendment's prohibition of cruel and unusual punishment. In dissenting from the Court's denial of Lackey's petition, Justice Stevens suggested that the question of whether an execution conducted after such an extended delay would still advance the purposes of retribution and deterrence deserved examination by state and lower federal courts. It is at least arguable, Stevens wrote, that "the acceptable state interest in retribution has been satisfied by the severe punishment already inflicted," and hence that execution following such protracted incarceration would exceed what is necessary to fulfill its claims. Moreover, "the additional deterrent effect from an actual execution now, on the one hand, as compared to seventeen years on death row followed by the prisoner's continued incarceration for life, on the other, seems minimal" (*Lackey v. Texas*, 115 S. Ct. 1421 [1995], 1421).<sup>1</sup>

One year after Lackey was executed, dissenting from the Supreme Court's refusal to review a similar claim advanced by William Elledge (*Elledge v. Florida*, 119 S. Ct. 366 [1998]), and then again in 1999 in the cases of Thomas Knight and Carey Dean Moore (*Knight v. Florida*, 120 S. Ct. 459 [1999]), Justice Breyer argued that, because "these cases involve astonishingly long delays flowing in significant part from constitutionally defective death penalty procedures" (*Knight v. Florida*, 120 S. Ct. 459 [1999]); and because courts in several other nations (India, Jamaica, and Zimbabwe, for example) as well as the European Court of Human Rights have concluded that extended delay prior to execution constitutes cruel and unusual punishment; and, finally, because considerable

evidence indicates that many inmates on death row suffer from depression, suicidal tendencies, and sometimes insanity, the nation's highest court should now address this question.

Without exception, since 1995, when Lackey was denied review, lower courts in the United States have found the claims that now bear his name to be without merit.<sup>2</sup> While more polemical than most, the general thrust of these rejections is expressed well by Justice Luttig, of the Fourth Circuit Court of Appeals:

It is a mockery of our system of justice, and an affront to law-abiding citizens who are already rightly disillusioned with that system, for a convicted murderer, who, through his own interminable efforts of delay and systemic abuse has secured the almost-indefinite postponement of his sentence, to then claim that the almost-indefinite postponement renders his sentence unconstitutional. This is the crowning argument on behalf of those who have politicized capital punishment even within the judiciary. With this argument, we have indeed entered the theater of the absurd, where politics disguised as "intellectualism" occupies center stage, no argument is acknowledged as frivolous, and common sense and judgment play no role. And while this predictable plot unfolds with our acquiescence, if not our participation, we lament the continuing decline in respect for the courts and for the law. (*Turner v. Jabe*, 58 F. 3d 924 [1995], 933)<sup>3</sup>

Expressly citing this quotation in explaining his rejection of Breyer's argument for review of the claims advanced by Knight and Moore, and after reciting the various cases in which "Lackey claims" have been rejected by state and lower federal courts, in 1999, Clarence Thomas urged his fellow justices on the Supreme Court to "consider" this "experiment concluded" (*Knight v. Florida*, 120 S. Ct. 459 [1999]).

My concern in this chapter is not with the specifically constitutional question of whether extended incarceration as a preface to execution does or does not violate the Eighth Amendment. What does concern me can be intimated by asking why the rejection of this argument by Justice Luttig (and, by implication, by Justice Thomas) is so vituperative. How exactly does such a claim "mock" our system of justice? How does judicial consideration of this argument foster a "decline in

respect for the courts and for the law"? How do "Lackey claims" serve to "politicize" capital punishment? Is it possible, as I contend in this chapter, that these claims can be given their due only at the risk of calling into question the legitimacy of a liberal legal order, and that it is this risk that explains the vehemence with which they are so often rejected?

One way to answer these questions is to note how "Lackey claims" effectively highlight what may well be an irreconcilable conflict in contemporary capital punishment jurisprudence. As interpreted by the Supreme Court in *Gregg v. Georgia* in 1976, the Fourteenth Amendment requires a "meaningful appellate review" in order to insure that death sentences are not "imposed capriciously or in a freakish manner" (428 U.S. 153 [1976], 195). One result of this due process requirement is an increase in the average length of incarceration on death row prior to execution (currently about ten years). If, as a result of a successful "Lackey claim," such extended incarceration were to be deemed a violation of the Eighth Amendment, then courts would find it necessary to choose between violating the Fourteenth in order to satisfy the requirements of the Eighth, or vice versa. Arguably, it is just this sort of contradiction that might in time press the Supreme Court to ask whether the practice of capital punishment can be ever conducted in a way that comports with the U.S. Constitution.

Another possible way to answer these questions, one that edges closer to my topic of concern here, is to note how "Lackey claims" threaten to complicate death penalty jurisprudence by rendering constitutionally salient the question of psychological suffering. As I show in my chapter on the electrocution of Allen Lee Davis, for the most part, in dealing with capital punishment cases, contemporary U.S. courts have construed pain in narrow physicalist terms; doing so, they render pain radically solipsistic and, in consequence, virtually impossible to make verifiably real in the eyes of the law. Claims of the sort advanced by Lackey, however, point to pain that takes the form of mental anguish caused by anticipation of one's imminent death. For example, when the California Supreme Court declared that state's death penalty statute unconstitutional more than two decades prior to *Lackey v. Texas*, it concluded that the "cruelty of capital punishment lies not only in the execution itself and the pain incident thereto, but also in the dehumanizing effects of the lengthy imprisonment prior to execution during which the judicial and administrative procedures essential to due

process of law are carried out. Penologists and medical experts agree that the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture" (*People v. Anderson*, 6 Cal. 3d 628, 493 P. 2d 880 [1972], 894–95). If incarceration prior to execution is indeed a form of "torture," then we must acknowledge that it is possible for the state to injure without leaving any trace in the flesh of those hurt; and that, by casting doubt on the mind/body dualism that buttresses most contemporary capital punishment jurisprudence, might dramatically expand our conception of what counts as constitutionally impermissible harm.

Even that, though, is not quite my concern in this chapter. Anticipating his claims in *Lackey*, in 1981, Justice Stevens wrote: "If the death sentence is ultimately set aside, or its execution delayed for a prolonged period, the imprisonment during that period is nevertheless a significant form of punishment" (*Coleman v. Balkcom*, 451 U.S. 949 [1981], 952). To the extent that this is so, it becomes more difficult to represent incarceration prior to execution as a mere means, which, as such, is categorically distinct from the judicially mandated punishment of death. If, in fact, incarceration is an immanent part of the punishment imposed on one sentenced to death, if imprisonment on death row is a sort of living death that culminates in, but is not neatly distinguishable from, the act of execution proper, then in some important sense the pronouncement of a death sentence is itself an act of violence and the speaker of that sentence, a judge, is its agent. That, though, cannot be; for, as we were all supposed to learn in high school civics, liberal political orders are predicated on a functional distinction between those who make the law, those who adjudicate violations of that law, and those who execute the law's sentences. The task of this chapter, accordingly, is to explore this conundrum, first, by reminding readers why and how, in accordance with the imperatives of liberal political doctrine, the pronouncement of a death sentence is distinguished from its actual infliction; and, second, by indicating how this demarcation can be rendered problematic by considering the sense in which a death sentence is, to invoke a category invented by J. L. Austin, a *performative utterance*. To illustrate this argument, although any other capital case culminating in a sentence of death would suffice equally well, I consider the conviction, sentence, and execution of Westley Allan Dodd in a Washington State penitentiary in 1993.

*Judge, Jury, and Executioner*

What is wrong with this picture? (fig. 1). Commissioned by several radical booksellers in London, and designed to protest the government's response to the Captain Swing uprising of 1830, Heath's *Merry England* is politically scandalous at least in part because of its conflation of the roles of judge and executioner. Doing so, it effectively undoes the haphazard but cumulative processes by means of which judges throughout Europe, beginning in the early years of the fifteenth century, extricated themselves from the actual infliction of violence. As Markus Dubber (1996) explains, in medieval Germany, the class of judges known as *scabini liberi* imposed sentences on malefactors and then executed them as well. In Amsterdam, until well into the eighteenth century, judicial magistrates would tell executioners precisely when to administer the final blow to those condemned to die on the wheel. Even after the conduct of capital sentences was moved behind the walls of penitentiaries, which occurred in most Western nations during the nineteenth century, trial court judges were often required by statute to witness execution of the sentences they had imposed. Today, however, with few exceptions, the occasional judge who attends a U.S. execution does so in the capacity of a spectator who has no official role in the matter at hand:<sup>4</sup> "By separating the private infliction of punishment behind impenetrable prison walls from its public imposition in a court of law under judicial supervision," summarizes Dubber, "the modern system of punishment restricted the judge's participation in the system of punishment to its imposition and relieved him of his participation in its infliction" (1996, 552).<sup>5</sup>

Heath's print compromises, indeed obliterates, the disjunction between punishment's imposition and infliction; and it does so in a way that is arguably fatal to the law's legitimacy. Violence is an essential moment within the law, argues Austin Sarat (1995), in at least three ways: "(1) it provides the occasion and method for founding legal orders; (2) it gives law (as the regulator of force and coercion) a reason for being; and (3) it provides a means through which law acts" (1111–12). However, in order to maintain its legitimacy, the law must either deny its complicity with violence or, when that proves impossible, secure a strict line of demarcation between its own violence and that which it punishes:



Fig. 1. *Merry England*, by William Heath (1831). (Copyright © The British Museum.)

Violence stands before the law, unruly; it defies the law to protect us from its cruelest consequences. It demands that law respond in kind, and requires law to traffic in its own brand of force and coercion. It is thus that point of departure from which complete departure is impossible. It is the task of law and of much legal theory to insist, nonetheless, on the difference between the force that law uses and the unruly force beyond its borders. Legal theorists name the superiority of the former by calling it legitimate. (Sarat and Kearns 1995, 212)

The need to manufacture this distinction and then police the border dividing each form of violence from the other proves all the more pressing when the law commands the irrevocable form of harm that is an execution.<sup>6</sup> If capital punishment is to be something other than what Albert Camus (1968) called an “administrative assassination” (138), if it is to be something other than an unthinking expression of what Justice Potter Stewart, in *Furman v. Georgia*, called “the instinct for retribution” (408 U.S. 238 [1972], 308),<sup>7</sup> the law must assiduously distinguish its acts of killing, delineated in terms of their rationality, their fairness, their humaneness, from those constructed in terms of their irrationality, their unpredictability, their cruelty. How is this end to be accomplished?

Consider the representation of judges in capital trials as passive agents doing the bidding of an impersonal system of law. That representation, which distinguishes the law’s violence from that animated by personal vengeance or private gain, is the unstated premise of Justice Rehnquist’s citation of a quotation he attributes to a certain Judge Parker: “I never hanged a man. It is the law” (*Coleman v. Balkcom*, 451 U.S. 949 [1981], 962).<sup>8</sup> Relatedly, consider the practice of using various metonymic forms (e.g., *court* or *bench*) to refer to judges. Such usage suggests that the rulings of judges are as impersonal as is the law they apply; and that appearance is still more effectively manufactured when judges, in addition to distancing themselves from punishment’s infliction, can dissociate themselves from its imposition by presenting themselves as detached servants of jurors who, in the last analysis, determine who is to live and who is to die.<sup>9</sup> Next, consider the American judiciary’s commitment to what Margaret Radin has dubbed “super due process” (1980) in capital cases. To cite but one example, the

requirement of bifurcated trials, carefully segregating the determination of guilt or innocence from the determination of punishment, makes clear how scrupulous the law is, unlike those accused of capital crimes, when it comes to extinguishing life.<sup>10</sup> Finally, consider the shift of virtually all states that retain the death penalty to the method of lethal injection, which, in virtue of its similarity to a scientifically rational medical procedure, also distinguishes the state's modus operandi from the less refined ways typically employed by nonstate actors.

Each of these devices occludes the law's entanglement with violence by helping to sustain the distinction between its illegitimate and legitimate forms. Although each is worthy of careful analysis, of greater concern to me in this chapter is that which is suggested when we ask how Heath's drawing might be "fixed." To do so, it seems clear, we must first remove the judicial wig from the gallows and place it back atop a judge in the circumscribed space that is a courtroom; and, second, we must endeavor to maximize the distance between gallows and courtroom. This latter end, argues Dubber, is presently achieved through the proliferation of what he calls "responsibility-shifting mechanisms." In asking how we collectively manage to evade "the central problem of modern punishment since the enlightenment," that of "justifying the infliction of punitive pain on a fellow human being" (1996, 545), Dubber suggests that

[t]he capital punishment system has evolved into a complex sequence of tasks, each of which is assigned to a different participant and all of which are necessary, but none of which is sufficient, to inflict the death penalty on a given person. . . . Complementing this personal distribution of responsibility, a temporal distribution of responsibility has become crucial to the American system of capital punishment. Participants shift responsibility not only onto other participants but also onto earlier or later events in the process. The delay separating imposition and infliction of capital sentences, which has attracted the ire of death penalty proponents, therefore in fact helps maintain the capital punishment system by permitting its participants to shift responsibility onto an occurrence in the comfortable future (in the case of those who impose the death sentence) or in the comfortable past (in the case of those who inflict it). (547)

The “responsibility-shifting mechanisms” analyzed by Dubber do not merely separate punishment’s imposition from its infliction. They also accomplish the internal fragmentation of each of these two moments into a “myriad of tasks and sub-tasks and sub-sub-tasks” (565). For example, at the infliction end, Dubber shows how the Missouri lethal injection protocol assigns discrete tasks to, among others, the nurse who inserts the IV, the doctor who monitors the EKG, the exterior door operator, the deputy director who maintains a telephone line to the attorney general, the psychologist who attends to the condemned’s mind, the chaplain who ministers to his or her soul, the guard who operates the blinds on the windows between the death chamber and the witness room, and so forth and so on. At the imposition end, prosecutors represent themselves as agents who seek but do not determine the death sentence, jurors represent themselves as citizens who simply do what the law requires, judges represent themselves as officials who merely do the bidding of jurors, and all know that their efforts are merely provisional given the state and federal appeals that invariably follow any given death sentence’s pronouncement.

In a way, given the success of the contemporary system of capital punishment in distancing wig from gallows, and then deconstructing each into so many distinct pieces, it’s a wonder that the statement of a death sentence ever culminates in the production of a dead body. The most obvious way to explain this accomplishment is to trace out the network of bureaucratic connections, the chain of command, traveling between and so linking courtroom and death chamber. That, I take it, is what Robert Cover means to indicate when he writes:

The judge in imposing a sentence normally takes for granted the role structure which might be analogized to the “transmission” of the engine of justice. The judge’s interpretive authorization of the “proper” sentence can be carried out as a deed only because of these others; a bond between word and deed obtains only because a system of social cooperation exists. The system guarantees the judge massive amounts of force—the conditions of effective domination—if necessary. It guarantees—or is supposed to—a relatively faithful adherence to the word of the judge in the deeds carried out against the prisoner. (1986, 1619)<sup>11</sup>

But is this way of construing the relationship between wig and gallows entirely adequate? Cover's metaphor of the engine transmission implies that word and deed are distinguishable sorts of entities, just as are the transmission shaft and the crankshaft in a fluid or friction clutch, and that the link between the two is mechanical in the sense that the execution proper, the deed, is not in any meaningful sense immanent within the imposition of that sentence, the word. That, I take it, is the presupposition of his claim that "judges do not *ever* kill the defendants themselves," and hence that they must "set in motion the acts of others which will in the normal course of events end with someone else killing the convicted defendant" (1622).<sup>12</sup> The task of this chapter, however, is to suggest that word and deed, imposition and infliction, sentence and execution, cannot be separated quite so neatly, and that any analysis that presupposes their categorical distinguishability, as does Cover (sometimes), will fail to understand what William Heath and Clarence Lackey intuitively grasped about the conditions of a liberal legal order's legitimacy and so what threatens that legitimacy as well.

### *Performing a Death Sentence*

On November 15, 1989, in Vancouver, Washington, Westley Allan Dodd was charged with the crime of aggravated first-degree murder of four-year-old Lee Iseli and William and Cole Neer, ages ten and eleven, respectively. In June of the following year, Dodd changed his initial plea to guilty on all counts; and, one month later, a special sentencing proceeding was convened. The twelve members of the jury impaneled for this purpose were not asked, in so many words, whether Dodd should die. Rather, they were asked: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" (Revised Code of Washington 10.95.060 [4]).<sup>13</sup> Washington state law mandates that if all members of a jury answer this question in the affirmative, as they did in Dodd's case, "the defendant shall be sentenced to death" and the "trial court may not suspend or defer the execution or imposition of the sentence" (RCW 10.95.080 [11]). Following the jury's submission of a Special Sentencing Verdict form, its determination was announced by Clark County Superior Court Judge Robert Harris; and, twelve days later, on July 26, after

stating that he did not believe that “continuation of the story of Westley Allan Dodd serves a purpose” (Snell 1990, 23), Harris signed a Judgment and Sentence form, which “ordered that the defendant be punished by death” and, to that end, “commanded” the sheriff of Clark County “to take and deliver the defendant to the Washington State Penitentiary in Walla Walla.” Two and a half years later, in Walla Walla, after the state supreme court completed its mandatory review, affirmed the original sentence, and remanded the case to the Clark County Superior Court for issuance of a death warrant, an unnamed official secured a noose around Dodd’s neck, placing the knot snugly behind his left ear. At the press of a pedal, the automatic trapdoor on which he stood sprang open, plunging his body into the lower half of a split-level execution chamber. Falling exactly seven feet and one inch, the distance deemed necessary to transect his spinal cord by dislocating his uppermost cervical vertebra, Dodd died before sixteen witnesses seated on the far side of a plate glass window. Although the exact cause of death, an autopsy later revealed, was not the so-called hangman’s fracture, but rather a combination of nerve damage and strangulation, he expired with no visible sign of distress. “Surgical precision” (*Walla Walla Union-Bulletin*, January 11, 1993, 1), declared one observer, marked the affair from beginning to end, and so, on January 5, 1993, at 12:09 A.M., the “story” of Westley Allan Dodd came to an end.

How are we to think about the relationship between Judge Robert Harris’s imposition of a death sentence on July 26, 1990, and Westley Allan Dodd’s execution on January 5, 1993, between the signing of a Judgment and Sentence form in a courtroom on the west side of Washington and the coroner’s certification of Dodd’s death on its east side? To answer this question, and to do so in a way that indicates the inadequacy of any account of the interconnection between sentence and execution that is parasitic on an untenable distinction between word and deed, a distinction that serves all too well the interest of the judiciary in disjoining sentence from execution, I appropriate J. L. Austin’s category of performative utterance.

Austin’s primary concern is with utterances, which, when spoken, accomplish a deed through the very conduct of their enunciation.<sup>14</sup> His preferred examples include the making of a promise (which creates a moral obligation that was previously absent); the taking of wedding vows (which brings into being a legal relationship that did not hitherto

exist); and the christening of a ship (which gives this vessel a name it lacked till now). Utterance of the words that accomplish these ends does not describe an antecedent reality in a way that can be deemed true or false. When I say, "I do," for example, I am not offering a characterization of what I am doing, one that might be contested on the grounds that it is inaccurate to the facts of the matter. Rather, when done under the appropriate circumstances (e.g., in the presence of an official authorized by the state to perform wedding ceremonies and in accordance with the verbal conventions regulating the conduct of such ceremonies), this utterance performs the action named, in this case, the taking of a marital vow. Like the rule-governed moves in a chess game, each of which refashions the relationship among its players, the speaking of these words in a prescribed manner creates a reality that did not exist before they were uttered.

At the close of "Performative Utterances" (1970), Austin suggests the need to amplify his account by elaborating a distinction between what an utterance *means* and what its *force* is: "We may be quite clear what 'Shut the door' means, but not yet at all clear on the further point as to whether as uttered at a certain time it was an order, an entreaty or whatnot" (251). As noted above, when considering performative utterances, language is not referential in the conventional sense whereby statements are taken to be mimetic reflections of the antecedently real. When I command you to "shut the door," my utterance does not derive its sense *as an order* by pointing to, by making reference to, something apart from that utterance itself. Granted, the presence of a door may be a condition of this utterance's intelligibility, but it certainly does not exhaust its sense. For, in this case, the meaningful referent, the order qua order, is produced by the utterance as its own effect. The force of a performative utterance, considered as a deed, is therefore always in excess of its meaning, construed in representationalist terms.

In his *How to Do Things with Words* (1962), Austin develops this insight by distinguishing between utterances construed as locutionary, illocutionary, and perlocutionary acts. To illustrate these terms using a modified version of an example from Austin's text, consider this hypothetical incident of extrastate violence:<sup>15</sup> Two thugs, one menacing and the other somewhat less so, stand on either side of a man who has failed to make good on his gambling debts. The first turns to the second and says, "Shoot him." The second, after some hesitation, raises a pistol and

kills the hapless debtor. Shortly after having read Austin's posthumous text, I observe this event. In my capacity as witness, I describe what I saw to the police: "The first man said to the second, 'Shoot him,' meaning by 'shoot' to fire a gun and by 'him' to refer to the deceased." This statement more or less captures what Austin calls the *locutionary* act, that is, it *describes* the meaning of the statement's terms in relation to one another. But, my philosophical sensibilities primed, I soon realize that this does not exhaust what transpired via this utterance; and so I explain to the police that the second man wavered, and hence that he must have been *persuaded* by the words of the first to commit this deed. This expresses what Austin calls the "perlocutionary" act, that is, it provides an account of the consequences that are set in motion by this verbal deed. And yet, I explain to the now exasperated officers, there is still more to this utterance, for I have yet to capture the sense in which it was itself an action. Specifically, when the first man said, "Shoot him," he *ordered* the second to do so. Although that utterance may indeed have set in motion the train of actions that led to the debtor's death, it was also a deed in its own right; and that is what Austin labels the "illocutionary" act. A bit too neatly, we might sum up the distinction between these last two senses of the performative, as does Austin, by saying that the illocutionary act is the deed performed *in* saying something, whereas the perlocutionary act is the deed performed *by* saying something.

What might we learn by considering a death sentence in light of Austin's analysis of performative utterances? What exactly is it that a death sentence *does*? To take an initial step toward answering these questions, let us ask in what sense the force of a death sentence is illocutionary; or, better still, let us first ask in what sense it is not. Imagine that Judge Harris is akin to the God of Genesis, that incredible entity whose words are sufficient to call a world into being. Now imagine that at the precise moment when Harris concludes his enunciation of Dodd's penalty, as an unseen period brings this sentence to a close, the latter falls dead on the spot, a corpse displaying no visible signs of the violence necessary to accomplish this end. On this account, the death sentence is an illocutionary act in the sense that its mere articulation is sufficient to accomplish, to make palpably real, its import. So construed, Judge Harris's utterance is not unlike hate speech or, alternatively, what the Supreme Court, in *Chaplinsky v. New Hampshire* (315 U.S. 568 [1942]), dubbed "fighting words," that is, words that are

“experienced as a blow” and so “by their very utterance inflict injury” (572). What distinguishes the death sentence from mere fighting words, on this construction, is the fact that it issues from a judge who, in his capacity as officer of the sovereign state, has the ability as well as the authority not merely to wound but to kill via his utterances. His voice is the source of the agency that abolishes the distinction between wig and gallows.

This, obviously, will not do as an account of the illocutionary force of the death sentence qua performative utterance. The failure of this version, however, should not lead us to conclude that a death sentence bears no force of this sort. When Westley Allan Dodd stands before Judge Robert Harris on July 26, 1990, prior to the formal act of sentencing, technically speaking, he is guilty but not yet condemned. After that act, he is both; and, in that sense, much like a promise that creates an obligation that had no existence prior to its utterance, the death sentence is a performative whose enunciation does what it says and, in so doing, creates its own referent. How are we to explain the capacity of this utterance to produce such a transformation? What are the conditions of the exercise and efficacy of such power? Is that power entirely resident within the speech act itself?

According to Austin, the illocutionary force of any given performative is conditional upon the existence of what he typically calls a *convention* (although he sometimes augments this term by invoking the terms *ritual* and *ceremonial*). The utterance “I promise” will bring nothing into being absent an antecedent convention, a commonly accepted practice, of promising. Relatedly, where a convention already exists but a performative is not uttered in accordance with its stipulations, it will not accomplish its end. For example, if Judge Harris encounters me in the streets of Walla Walla and, irked by my refusal to grant his words the status of a divine performative, sentences me to death, his utterance will be of no account, for it will not have been invoked, as it must, in a court of law. So, too, should Judge Harris’s mother, seeking to avenge the affront to her son, declare, “I sentence you to death,” even though we are both in a court of law, this performative will also be void, for it will not have been invoked, as it must, by a party authorized to do so. In both cases, these acts are, to use Austin’s term, *infelicitous* and, as such, without force.

These two hypotheticals, but especially the latter, suggest a point

that, according to Pierre Bourdieu (1991), Austin does not adequately appreciate. Austin is to be commended, Bourdieu acknowledges, for identifying the category of performative utterances and so calling into question any facile opposition between words and deeds. However, because he does not go beyond an ill-defined appeal to "convention" in explaining the efficacy of performatives, too often Austin is inclined to analyze their logic in formal linguistic terms and, in doing so, to leave untheorized the structured relations of power that afford them their force. To remedy this deficiency, Bourdieu argues that the illocutionary efficacy of any given performative is contingent on the existence of what he, in a broad use of the word, calls an "institution." With this term, Bourdieu means to suggest any durable set of power-laden relations that effectively authorizes the utterances of certain classes of persons and, in doing so, renders those verbal deeds binding on others. "The use of language, the manner as much as the substance of the discourse, depends on the social position of the speaker, which governs the access he can have to the language of the institution, that is, to the official, orthodox and legitimate speech" (Bourdieu 1991, 109). As my two hypotheticals suggest, absent that social position (in this case, of judge) and/or the conditions that situate the occupant of that position in an appropriate context (in this case, the courtroom), the result will be an unhappy performative issued by what Bourdieu calls an "imposter" (109).

What happens when we apply Bourdieu's criticism of Austin to a consideration of the performative that is a death sentence? Doing so, we must conclude that whatever illocutionary force that sentence bears is not a function of its utterance, narrowly construed. Rather, that force is a fruit of the *institution* of capital punishment, that is, the network of practices that encompasses judge as well as executioner and, indeed, the larger structure of domination in which that institution is embedded and by which it is authorized: "The authorized spokesperson is only able to use words to act on other agents and, through their actions, on things themselves, because his speech concentrates within it the accumulated symbolic capital of the group which has delegated him and of which he is the *authorized representative*" (Bourdieu 1991, 111). This recalcitrant complex of state power, whose symbols pervade the microcosm that is Judge Harris's courtroom (the flag, the robe, the gavel), is a necessary condition of the death sentence's intelligibility qua performative and, consequently, its illocutionary capacity to trans-

form Dodd into a condemned man. "The limiting case of the performative utterance is the legal act which, when it is pronounced, as it should be, by someone who has the right to do so, that is, by an agent acting on behalf of a whole group, can replace action with speech, which will, as they say, have an effect: the judge need say no more than 'I find you guilty' because there is a set of agents and institutions which guarantee that the sentence will be executed" (75).

But is Bourdieu's criticism of Austin altogether adequate? Bourdieu argues that, in order to understand the force of performative utterances, we must "establish the relationship between the properties of discourses, the properties of the person who pronounces them and the properties of the institution which authorizes him to pronounce them" (1991, 111). As we have seen, according to Bourdieu, because Austin pays insufficient heed to the second and third parties to this relationship, he veers toward an "internal," that is, formalistic, analysis of performative utterances and their illocutionary force. To counter that error, Bourdieu insists that the institution that guarantees the force of any given performative utterance is "external" to it and, correlatively, that the speaker of such an utterance, qua "delegate," "represents" the authority of that institution.<sup>16</sup>

This account of the relationship between utterance, utterer, and institution is unhappy for several reasons, although not all are of concern to me in this context.<sup>17</sup> To suggest that the institution of capital punishment stands "outside" or "apart" from the verbal deed that is a death sentence is to leave unexplained the generation of that institution's authority as well as the discursive means by which it is "represented" by one who acts as its "delegate." It is better, I would argue, to think of a judge who issues a death sentence as an agent who, in reciting this authoritative act, draws on conditions of illocutionary felicity that are immanent but not, for that reason, strictly confined to the immediate scene of its utterance. This, I take it, is what one of Austin's better students, Judith Butler, is getting at when she states, although not expressly in reference to capital punishment, that Bourdieu "fails to take account of the way in which social positions are themselves constructed through a more tacit operation of performativity. Indeed, not only is the act of 'delegation' a performative, that is, a naming which is at once the action of entitlement, but authorization more generally is to a strong degree a matter of being addressed or interpellated by prevailing forms of social power" (1997, 156–57).<sup>18</sup>

To illustrate this argument, we can return once more to Judge Harris. Part of the problem with my initial account of the death sentence's illocutionary force, which represented it as a divine performative that kills by means of words alone, is that it misrepresented the character of his agency. While Harris, and possibly his mother, are perhaps tempted to imagine that his utterance issues forth from a sovereign voice, the fact that he is statutorily bound to abide by the jury's verdict suggests otherwise, as does the administrative requirement that he complete the Judgment and Sentence form in order to give full legal force to his utterance. From these two constraints, it is possible to tease an emendation of Austin's argument, one that is predicated on a criticism that in a sense reverses that made by Bourdieu. Bourdieu takes Austin to task for failing to consider the structures of power that *invest* a judge's utterance with illocutionary force. I now want to suggest that these same structures *constrain* and indeed *constitute* the identity as well as the agency of that judge. Although Austin is aware of the requirements imposed by what he calls *conventions*, this does not prompt him to subject to critical interrogation the "I" who utters this or that performative and, more specifically, to call into question its status as an autonomous speaking agent. Butler, however, does so as follows:

The authority/the judge (let us call him "he") who effects the law through naming does not harbor that authority in his person. As one who efficaciously speaks in the name of the law, the judge does not originate the law or its authority; rather, he "cites" the law, consults and reinvokes the law, and, in that reinvocation, reconstitutes the law. The judge is thus installed in the midst of a signifying chain, receiving and reciting the law and, in the reciting, echoing forth the authority of the law. When the law functions as ordinance or sanction, it operates as an imperative that brings into being that which it legally enjoins and protects. The performative speaking of the law, an "utterance" that is most often within legal discourse inscribed in a book of laws, works only by reworking a set of already operative constraints. And these conventions are grounded in no other legitimating authority than the echo-chain of their own reinvocation. (1993, 107)

The performative that is a death sentence is not, in other words, an undetermined verbal deed performed by a sovereign "I." Were it such,

it could and would bear none of the authority that it derives from its status as an “echo” of the cumulative invocations that constitute the institutionally circumscribed practice of death sentencing.

Because the identity of the “I” who speaks the death sentence, qua judge, is a creature of the institutional conventions that simultaneously enable and constrain this utterance, and because those conventions necessarily exceed Judge Harris’s utterance in time and space, in a sense that is not altogether metaphorical it is not entirely clear just “who” imposes that sentence, nor just “when” or “where” it is pronounced. A death sentence, on this account, is not well understood as a singular deed, as an action that transpires and expires at a discrete moment in time. Rather, to use Butler’s term, it is a *citational* moment within a power-laden activity whose legacy reaches into the past as well as the future, neither of which, qua constitutive context, can be demarcated with absolute precision. The bureaucratic diffusion of sovereign power identified by Dubber, which makes it impossible to identify unequivocally an agent who is responsible for either the infliction or the imposition of a death sentence, thus finds its complement in an account of speech acts that implies that neither the conditions of the death sentence’s intelligibility nor its illocutionary force can be located in the agent who utters this performative. In sum, in ways he can acknowledge only at the cost of rendering his own authority problematic, Judge Harris is not his own man, and that is perhaps most true when he is within his own courtroom. That he thinks otherwise is to be explained, quoting Butler again, by the fact that “what is *invoked* by the one who speaks or inscribes the law is *the fiction* of a speaker who wields the authority to make his words binding, the legal incarnation of the divine utterance” (1993, 107).<sup>19</sup>

This fiction cannot be manufactured absent the legal conventions whose repeated reinvocation is the indispensable condition of whatever illocutionary force a death sentence bears. Its force, *pace* Bourdieu, is not a property that comes to it from outside this chain of conventions; rather, the authority that is the condition of its capacity to do what it says is one of the *effects* produced by their ritualized reiteration in cases dispersed across time and space. One more time, Butler:

The judge who authorizes and installs the situation he names invariably *cites* the law that he applies, and it is the power of this

citation that gives the performative its binding or conferring power. And though it may appear that the binding power of his words is derived from the force of his will or from a prior authority, the opposite is more true: it is *through* the citation of the law that the figure of the judge's "will" is produced and that the "priority" of textual authority is established. Indeed, it is through the invocation of convention that the speech act of the judge derives its binding power; that binding power is to be found neither in the subject of the judge nor in his will, but in the citational legacy by which a contemporary "act" emerges in the context of a chain of binding conventions. (1993, 225)

If the statement of a death sentence is a citational utterance in the sense suggested by Butler, one whose authority draws on but at the same time occludes its derivative status, then the distinction Austin draws between illocutionary and perlocutionary acts begins to assume the character not of categorical opposition, but of mutual constitution.<sup>20</sup> Specifically, when Harris sentences Dodd to death, that sentence's illocutionary force can only be understood in relation to and in fact is constituted by the chain of perlocutionary consequences set in motion by its predecessors. Correlatively, the perlocutionary consequences occasioned when Harris sentences Dodd to death include generation of the authority, the binding power, that will enable future death sentences to exert illocutionary force. This is not to deny the distinction between illocutionary and perlocutionary acts, but it is to suggest that they are interdependent in a way that spells trouble for any effort to distinguish categorically between a death sentence's imposition and infliction. Because anything that threatens to erode that distinction bears the capacity, at least in principle, to disclose the sense in which the law's performatives only acquire illocutionary force by citing the contingent "institution" of capital punishment—an institution that encompasses imposition as well as infliction, judicial wig as well as scaffold—it becomes all the more imperative to deny Clarence Lackey his claim.

### *What Is an Execution?*

When did the execution of Westley Allan Dodd take place? Most of us are inclined, I suspect, to answer January 5, 1993, at 12:05 A.M., the

moment when the trapdoor release mechanism, a steel pedal embedded in the death chamber's wooden floor, was engaged. But is this answer entirely adequate? The noun *execution* suggests that this was a well-bounded event (as does the phrase *death sentence*, which I have now rendered problematic), and hence that we should be able to specify with some degree of precision the temporal boundaries that distinguish this event from those that led up to and followed it. But if that is so, then just when did this execution begin and when did it end? Those who witnessed this event stated that, although his body turned slowly in a counterclockwise direction, Dodd appeared quite lifeless almost immediately after he arrived at the end of his rope (*Walla Walla Union-Bulletin*, January 5, 1993, 1). Should we therefore say that this execution concluded when he died (leaving aside the complications posed by the absence of unequivocal criteria for the determination of biological death)? Or, given that penitentiary protocol stipulates that an execution is not officially over until a pronouncement to this effect is issued by a physician, should we conclude that it did not end until 12:09 A.M.? But if that is so, should we then conclude that the anonymous physician who issued this declaration was party to this killing and so, in some significant sense, an accomplice to it? But that cannot be since the code of ethics issued by the American Medical Association expressly enjoins physicians from participating in executions (*Current Opinions of the Council on Ethical and Judicial Affairs of the American Medical Association* [article 2.06]).<sup>21</sup> To evade this conclusion, should we assume that, from the standpoint of the medical profession, the act of pronouncing Dodd dead occurred after he was already biologically dead, whereas, from the standpoint of the state, Dodd was not certifiably dead until he was declared to be so? More generally, and in light of these complications, should we now infer that the legitimation requirements of medicine and law generate divergent responses to the question of when the "story" of Westley Allan Dodd ended, and hence that determination of its conclusion is an affair of discursive construction that cannot be resolved through appeal to the "facts" of the matter?

Matters prove equally thorny when we ask when the execution of Dodd began. Did this event begin when the trapdoor vanished beneath Dodd's feet? Or did it begin when the hood was placed over his head and the rope around his neck? Or did it begin when, offered the opportunity to speak his final words, he muttered something, first, about sex

offenders and, then, about the peace that comes with finding Jesus? Or did it begin when Dodd exited the holding cell and walked some thirty feet to the death chamber? Or did it begin when, the previous day, he was moved to that cell from solitary confinement in the Intensive Management Unit? At some point in this regression, it seems clear, we will want to say that event X or Y is not a part of the execution proper. Should we be unable to do so, what is to prevent us from concluding that Dodd's execution commenced in Judge Harris's courtroom and at the moment he was sentenced to die? But what nonarbitrary criteria can we deploy in drawing that line of demarcation? The answer is not clear, and it is that uncertainty that opens up the possibility of affirming a credible "Lackey claim."

Thus far, I have suggested that the death sentence, when considered as an illocutionary performative, complicates the effort of liberal law to draw and sustain an unambiguous line of demarcation between its imposition and infliction. In this section, as the puzzle elaborated above is intended to suggest, I revisit this complication, but this time through reference to the perlocutionary force of performative utterances. Recall that an illocutionary act is one that accomplishes something via its mere utterance, and that it can do so because such an utterance invokes what Austin calls a "convention" but Bourdieu reconfigures as an "institution." A perlocutionary act, by way of contrast, is an utterance that initiates a set of consequences that are nonnecessary in the sense that they are not produced by that utterance as its own effect and, for that reason, are temporally distinct from the saying itself. Illocutionary acts prove infelicitous when the necessary conditions prescribed by a "convention" or "institution" are not observed, as when an unauthorized party enacts a particular performative, or when such an utterance is issued under inappropriate circumstances. Perlocutionary acts, in contrast, prove infelicitous when the sequence of actions designated by a performative is not executed by all participants correctly and/or completely. No doubt in anticipation of my argument, Austin labels such infelicities "misexecutions," and they can be occasioned, for example, by a misunderstanding on the part of some participant in the procedure set in motion by the performative or, alternatively, by a failure of what Austin calls "uptake" (1962, 116), as when a participant refuses or neglects to do what it prescribes.

At first blush, it might appear that conventional accounts of the

relationship between a death sentence's imposition and infliction rely on something akin to Austin's notion of perlocutionary force. On those accounts, the act of sentencing is taken to be an instrumental action that has the effect of putting in play a bureaucratically articulated chain of linkages, as state officials move the condemned from courthouse to penitentiary to holding cell and, finally, to death chamber. Wig and gallows are thereby disjoined in the sense that imposition of the death sentence occurs prior to its infliction, but they remain connected insofar as this utterance sets in motion a series of consequences that, barring a reversal, pardon, escape, unsuccessful execution, or some other infelicity, culminates in the production of a corpse.

Perhaps the most sophisticated version of this account is provided, as I noted in the second section of this chapter, by Robert Cover. When imposing a death sentence, Cover contends, a judge ordinarily presupposes the operative adequacy of "the *conditions of effective domination*" (1986, 1616).<sup>22</sup> Absent those conditions—the links joining the judicial sentence to the administrative execution—"the law may come over time to bear only an uncertain relation to the institutionally implemented deeds it authorizes" (1617). For example, and appealing to something much like Austin's notion of perlocutionary infelicity, Cover suggests that "if the warden should cease paying relatively automatic heed to the pieces of paper which flow in from the judges according to these arbitrary and sometimes rigid hierarchical rules and principles, the judges would lose their capacity to do violence" (1626) and their performatives would assume the character not of orders but of exhortations. The prospect of such failure leads Cover to argue, in a way that is reminiscent of my contention that the "institution" of capital punishment is an immanent condition of the illocutionary force of a death sentence, that in the absence of the conditions of effective domination a judicial command will prove "morally unintelligible" (1621).

However, as I have already intimated, Cover's analysis is vitiated by his construction of word and deed as distinct sorts of entities as well as his mechanistic representation of the former as "triggers" (1986, 1613) that precipitate the latter. Austin's argument implies that, because performative utterances are themselves forms of conduct, imposition and infliction must both be situated within the larger category of deeds. One might try to accommodate this point, as do Austin Sarat and Thomas Kearns (1991), by regarding sentence and execution

as two forms of violence, but then distinguishing between the two on the grounds that one is “symbolic” and the other “physical”:

While the words of judges authorize violence, they seem not to carry it out. Yet judges do violence in both a symbolic and an instrumental sense, even as they seek to hide both. The violence of legal interpretation is disembodied. Or, rather, the violence that judges do is done to subjects who are disembodied by law’s procedures and its fictions, subjects stripped of any history and of connection to the human community. The process of (re)embodying subjects and applying physical violence is left to others. When the symbolic violence stops, such physical violence begins; when specified incantations are performed behind law’s bureaucratic façade, blood can then be spilled. (265–66)

While this formulation reminds us, as does Cover, that judges are deeply implicated in the violence they command, the distinction between its symbolic and physical manifestations does not so much overcome that between word and deed as reconfigure it in slightly altered terms. The problematic character of this reworking is compounded by the distinction drawn by Sarat and Kearns between embodiment and its absence. Austin’s representation of performative utterances as deeds suggests that judges are never the disembodied oracles they might have us take them to be. To secure silence in a courtroom, a judge may issue the command: “Order in the court.” Or that judge may simply bang a gavel. The former is as fully a bodily deed as is the latter, and the latter is as fully meaningful as is the former. By the same token, and as they will be the first to insist, those who are sentenced to die by a judicial proclamation are never in need of reembodiment. Better, I would suggest, to ask how the performative that is a death sentence, considered as an illocutionary and perlocutionary act, effects a transformation in the character of embodiment in a way that is not readily captured on the terrain defined by the opposition between word and deed or that between symbolic and physical violence.

As a first step toward preparing more promising ground, I now want to argue that, considered as a perlocutionary act, the death sentence pronounced by Harris is not merely continuous with but also partly constitutive of Dodd’s death. The sense in which this is so might

be more readily apparent if Harris were to utter a death sentence and then, in order to make evident the force of his utterance, climb down from the bench, disrobe, and employ his bare hands to do what a noose will accomplish more efficiently some two and a half years later. What this hypothetical ignores, obviously, are the various "responsibility-shifting mechanisms" that serve to disconnect the death sentence's imposition from infliction. That dissociation might appear less solid if we were to recall that the term *sentence* can be employed as a noun but also as a transitive verb. Might we suggest that, because the death sentence uttered by Harris is linked to Dodd's incarceration, and because his incarceration is linked to his execution, death sentence and execution are linked as well? Or, alternatively, and following Bourdieu, might we think of the performative uttered by Harris as a special sort of prediction, one that "contributes practically to the reality of what it announces by the fact of uttering it, of pre-dicting it and making it predicted, of making it conceivable and above all credible and thus creating the collective representation and will which contribute to its production" (1991, 128)? Or, lastly, might we contend that what Butler says of hate speech, of words that wound as a result of their intrinsic force but also because of the consequences they threaten, can be transposed to the arena of capital punishment?

The threat prefigures or, indeed, promises a bodily act, and yet is already a bodily act, thus establishing in its very gesture the contours of the act to come. The act of threat and the threatened act are, of course, distinct, but they are related as a chiasmus. Although not identical, they are both bodily acts: the first act, the threat, only makes sense in terms of the act that it prefigures. The threat begins a temporal horizon within which the organizing aim is the act that is threatened; the threat begins the action by which the fulfillment of the threatened act might be achieved. (1997, 11)

What distinguishes the threat that is hate speech from the imperative that is a death sentence is the fact that the latter is more adequately secured by the "conditions of effective domination," as well as by the authority that accompanies judicial pronouncements, and so is less prone to derailment, for example, by falling prey to perlocutionary infelicity of one sort or another. To acknowledge the unlikelihood of

such infelicity is, of course, to recall just how tightly connected are the ligatures securing the various components of the institution of capital punishment.

To indicate how my construction of these linkages differs from that of Cover, consider the game of Hangman, in which one participant identifies the number of letters in a word whose identity is not revealed, while another seeks to discover that word by guessing the letters that make it up. Those who play this game, like the attorneys and state agents who contest the fate of one sentenced to death, are engaged in a conventional practice that simultaneously enables and constrains what counts as an intelligible move. In effect, the game opens with one party in the role of the condemned, the one upon whom sentence has been passed, and the other in the role of the judge, the one who has uttered this performative; and their contest concerns whether that sentence will in time be executed. The first move takes place when the condemned guesses whether a specific letter is included in the word chosen by the judge; and each failure to guess correctly, like each unsuccessful appeal of a death sentence, moves that game one step closer to the ending mandated by the judicial imperative. Each of those moves is simultaneously an illocutionary as well as a perlocutionary act; it is the former insofar as it, through its very utterance, effects a reconfiguration of the game and so the relationship between its players, and it is the latter insofar as it, in virtue of its consequences, moves the game forward in time. Moreover, the designation of each guess as a "move" suffices to indicate that none is well understood in terms of the opposition between word and deed. Nor is any given move well situated on the terrain defined by the opposition between physical and symbolic. Like the documents that accumulate over time as a death sentence is reviewed by various state and federal courts, every move in the game of Hangman is afforded a form of permanence it would otherwise lack through its inscription on paper; but that act of recording is no more and no less embodied, no less and no more material, than is its linguistic articulation.

From the standpoint of the condemned, each successful move adds another letter to the word that must be uttered in order to escape execution. These letters are not so many discrete entities, and the relationship among them is not additive in any mechanical sense, for each of the characters entered prior to the last is an immanent ingredient, a

contributing constituent, of that word's complete intelligibility. From the standpoint of the state, each wrong guess on the part of the condemned, as with each failed appeal, builds on its predecessors in a way that more fully manifests the force of the initial performative, as first a head, and then a torso, and then one leg, and then another are drawn dangling from the scaffold. From the standpoint of neither judge nor condemned is time something that occupies the inert spaces between so many self-contained acts. Rather, time is the medium within which these moves congeal, as the term *condemned* ever more fully defines the materiality of the sentenced body. Dodd's execution is therefore joined to Harris's death sentence, not in the sense that they are identical (as Heath has it), nor in the sense that the latter is an effect mechanically triggered by the former (as Cover has it), but rather in the sense that this imperative initiates an internally related sequence of perlocutionary consequences that, insofar as they prove felicitous from the standpoint of the state, incrementally generate the corpse whose existence was prefigured in and by that utterance.

Consider, in this light, the Judgment and Sentence form that was prepared by the clerk of Clark County Superior Court and signed on July 26, 1990, by Judge Harris, by the prosecuting and defense attorneys, and, finally, just beneath his fingerprints, by Westley Allan Dodd. As I noted earlier, strictly speaking, it is not the words of Judge Harris, but rather this document, once duly certified by the county clerk, that gives his utterance its legal force. For that reason, this document is itself an illocutionary performative. But it is also a perlocutionary performative in the sense that it is followed by preparation and submission of an Order and Commitment form that commands Dodd's transportation to and confinement within the state penitentiary in Walla Walla. Strictly speaking, this is a nonnecessary consequence in the sense that issuance of this second order is not accomplished by issuance of the first, just as the second mandates a further consequence, the relocation of Dodd, that is not itself accomplished by that form's completion and certification. What work, then, is performed by these two forms? Is there a sense in which the inscription of Judge Harris's signature, an embodied deed that is a necessary condition of their citational authority, enacts a sort of violence, one that anticipates but also contains within it, as immanent implication, the collapse of the death chamber's trapdoor beneath Dodd's feet? Might we suggest that the first of these two forms,

as illocutionary act, inscribes the death sentence on the body of Dodd in the sense that, from the standpoint of the law, it is now compelled to signify that sentence as the principle of its (intel)legibility? From this moment forward, after all, Dodd's legal persona is that of one, to quote from the Judgment and Sentence form, whose body "shall be imprisoned in the state penitentiary prior to and subsequent to the issuance of the death warrant as provided in RCW 10.95.160 and shall therein be held until executed." Might we then suggest that the second form, a perlocutionary consequence of the first but also an illocutionary as well as a perlocutionary act in its own right, serves to ratify but also to etch that sentence more deeply into Dodd's flesh by commanding the officers of the Department of Corrections "to receive the defendant," who henceforth shall be known as an "Inmate Sentenced to the Death Penalty (ISDP)," "for classification, confinement, and placement as ordered in the Judgment and Sentence"? Each step toward eventual execution is yoked to its predecessors as well as its successors, and each serves to implicate Dodd more fully within the state's machinery of death. The parts of this machinery, although fragmented across space and time in accordance with the imperatives of responsibility diffusion, are nonetheless so many components, which, working together as a mutually constitutive constellation of illocutionary and perlocutionary acts, ever more completely materialize the force of the initial judicial performative.

### *Buried Alive*

A century prior to Dodd's execution in Washington, when authorizing officials in New York to proceed with their electrocution of William Kemmler, the United States Supreme Court cautioned that "punishments are cruel when they involve torture or a lingering death" and so "something more than the mere extinguishment of life" (*In re Kemmler*, 136 U.S. 436 [1890], 447). In the argument I have presented in this chapter, however, every successful invocation of the institution of capital punishment involves a "lingering death." One might try to nail down this claim, as I suspect the attorneys for Clarence Lackey did, by quoting Justice Brennan's statement, in *Furman v. Georgia* (408 U.S. 238 [1972]), to the effect that "mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending exe-

cution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death" (288).<sup>23</sup> But this contention turns on a distinction between psychological and physical suffering that is dependent on that between mind and body; and that latter distinction, in addition to being as problematic as that between word and deed, simply abets liberal law's effort to restrict the problem of pain to the fragment of time after the switch is thrown, the trapdoor released, the pellets dropped into the acid, and so on.

Better, adapting an argument advanced by Elaine Scarry in *The Body in Pain* (1985), to suggest that the incremental elaboration of a death sentence's force, its unfolding as an concatenated performative act, is correlative with and, indeed, achieved through the piecemeal destruction of the world of the condemned.<sup>24</sup> To indicate what I mean by this, by way of analogy, consider what it is to age and, more specifically, what it is to slip toward death as a result of a debilitating terminal illness. Such an illness removes one from the land of the living long before it culminates in the moment of death, narrowly construed (leaving aside, once again, the complications inherent in determining that moment). To become confined to a home, whether institutional or domestic, and then to a room, and, finally, to a bed, is to become a body whose status as human becomes questionable, precisely because its existence is now exclusively confined to engagement with those things that are directly related to the cause of bare biological persistence. "As the body breaks down," Scarry writes, "it becomes increasingly the object of attention, usurping the place of all other objects, so that finally, in very very old and sick people, the world may exist only in a circle two feet out from themselves; the exclusive content of perception and speech may become what was eaten, the problems of excreting, the progress of pains, the comfort or discomfort of a particular bed or chair" (1985, 32–33). Prior to the onset of disease, the world of fabricated things, of ordinary objects, enabled this body to be other and more than a mere body. By liberating it from the pressing imperatives that otherwise afflict warm-blooded creatures, for example, basic items of clothing enabled that being to engage in matters beyond those immediately related to maintenance of a constant internal temperature. An analogous sort of second skin was furnished by the walls and ceilings of the manufactured structures that being unreflectively inhabited; the work they did in providing shelter from the elements made it possible

for that body to project itself into a world where it could attend to specifically human activities, whether that be the writing of a poem or, should this be the body of a judge, the uttering of a death sentence. But now, caught up in the unrelenting grip of disease, this body turns in upon itself and so is ever more claustrophobically consigned to the realm of the living dead.

To endure a death sentence is to endure something akin to the living death that is a terminal illness, but, of course, with the proviso that at some point a specific date of death will be assigned and, when that date arrives, barring some interruption of this performative, the event of dying will be caused by a deliberate act of killing.<sup>25</sup> Be that as it may, for the judicially condemned, in moving from imposition to infliction, incremental contraction of the world secures the transformation of what was once an embodied human being into a creature that is ever more completely defined by the bare fact of embodiment and, as such, is no longer so clearly human (and so, of course, easier to dispatch). In making this claim, I have no truck with the sort of humanist essentialism that informs Justice Brennan's oft-cited claim in *Furman v. Georgia* (408 U.S. 238 [1972]): As with the rack and thumbscrew, Brennan insisted, the contemporary imposition of capital punishment treats "members of the human race as non-humans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the Clause [the Eighth Amendment's prohibition of cruel and unusual punishments] that even the vilest criminal remains a human being possessed of common human dignity" (273). Rather, and much more prosaically, my argument is concerned with alterations in the lived contexts within which the death-sentenced body is concretely situated and with how such alterations remove the condemned from the world by removing the world from the condemned (and vice versa). Their net effect is given apt expression by a convict on death row in Alabama: "The living dead is what it adds up to. I mean, what does a maggot do? A maggot eats and defecates. That's all we do: eat and defecate. Nothing else" (quoted in Johnson 1979, 185).<sup>26</sup>

Incarceration, obviously, is one means of securing the world's contraction, thereby prefiguring the full force of the judicial performative; and that is all the more so when, as is the case in the state of Washington, solitary confinement is statutorily prescribed for those on death row, and the administrative rule prohibiting communication among

those so confined is strictly enforced.<sup>27</sup> That said, the imprisonment of Westley Allan Dodd does not altogether remove him from what I am here calling "the world." No doubt, the walls and ceiling of his cell in the Intensive Management Unit, where he was held from the time of his conviction until just before his execution, are the means of his constraint; and yet they are also the conditions of his humanization. Sheltering his body, but also his writing platform, his pen, his bunk, and the Bible he began to read shortly before his death, the work done by these cinder blocks enabled Dodd to be something other than a creature whose being was exhausted by the incessant imperatives of embodiment. In addition, because he was still permitted telephone, mail, and visitation privileges, he was able to engage in various forms of self-extension. Just as his cell's small rectangular window enabled him to project his body, if only visually, beyond its cramped confines, so too did a radio allow him to draw the world within.

Approximately twenty-four hours prior to his date with a rope, Dodd was moved to the holding cell that is immediately adjacent to the death chamber. There, he was denied all visitors other than his attorney and what the Department of Correction's field instructions designate as "approved clergy." All telephone and mail privileges, with the exception of calls to and from that attorney, were also revoked, and no other means of communication with the world beyond this unit's confines (e.g., his radio) were permitted. The administratively prescribed equipment of this windowless cell includes a toilet whose tank is topped by a small sink, a bed consisting of a metal frame and a mattress, two sheets, two blankets, a pillow and pillowcase, a towel, a washcloth, a bar of soap, basic clothing and, finally, approved "legal materials" and "religious items." Leaving aside these last two items, which testify to what remains of Dodd's standing as something other than a body, pure and simple, his shift of venue from the Intensive Management Unit to this holding cell constricts his world still more by limiting his artificial company to those things that minister to his barest biological needs: to sleep, to stay warm, and to keep clean. For one dying of a terminal disease, confinement of the world to such artifacts is occasioned by the body's collapse in upon itself. For one sentenced to death, the body's collapse in upon itself is occasioned by the deliberate withdrawal of all artifacts that might otherwise enable it to reach beyond its own perimeter. As such, in a way that is not metaphorical, in a way that

cannot readily be assigned to the category of either symbolic or physical, these acts of dispossession must be understood as cumulative acts of violence against what was once a human being but is now ever more a body awaiting final disposition.

Removed from this holding cell, stripped of the artifacts that till now affirmed his residual status as a human being (e.g., his Bible), denied those that till now testified to his status as a creature of embodied vulnerability (e.g., the holding cell's metal bed frame and mattress), Dodd enters the death chamber where a rope, a trapdoor, and an oversized eye hook conspire to accomplish a consummatory unification of the illocutionary and perlocutionary effects of Judge Harris's original utterance. Only a microphone, jutting out from the wall just above the plate glass window in front of which his body is now positioned, recalls that this being retains a single instrument, its voice, with which to reach beyond its pinched confines, and so to remind those seated before the plate glass window below that he is not yet, to quote from the field instructions, the "remains" he is about to become. That we are inclined to think that the execution has yet to take place simply testifies to the law's success in separating into so many discrete instants the interlocking moments of the state's lethal clockwork.

### *Infelicitous Death Sentences*

Although my argument may appear to suggest otherwise, in the last analysis, my appropriation of Austin's conceptual equipment is intended to suggest that the law in general and capital punishment jurisprudence in particular are, at least in principle, less secure than they typically seem to be. In Austin's hands, what begins as an attempt to specify the defining features of performative utterances, the unique grammatical form that renders them authoritative and so capable of doing what they say, concludes as something more akin to a comedy of errors, as he catalogs the varieties of infelicity to which they are prone. The convention necessary to give a performative utterance its force may not exist, or the authority it requires in order to generate such force may be in disrepair. The person who invokes this convention when uttering a performative may not be authorized to do so, or that person, whether authorized or not, may utter it in inappropriate circumstances. The procedure initiated by any given performative may not be executed cor-

rectly or completely, perhaps because those required for its “uptake” do not understand what is required of them, or because they are unwilling to abide by its terms, or because they mean well but nonetheless botch one or more of its imperatives. And so forth and so on.

In the hands of Judith Butler, the insecurity of performative utterances becomes still more pronounced. The authority of performatives, as we saw above, is citational in the sense that it is rooted in the congealed constellation of past utterances that are simultaneously invoked and occluded when a speaker initiates a speech-act with the pronoun “I.” If that is so, then the signification of these past utterances must exceed the intentions of their speakers as well as the contexts within which they were spoken. Were that not the case, were intelligibility limited to instances of literal repetition (as opposed to re-citation), then performatives could not prove meaningful when uttered in future contexts and by different speakers. But if that is the case, then the signification of the present invocation must also exceed that intended by its speaker as well as the context in which it is now uttered. Were that not the case, this convention would soon perish, trapped within the immediacy of its moment. Accordingly, Butler concludes, “[S]peech is always in some ways out of our control” (1997, 15), and hence the success of any given performative is always provisional.

If a death sentence, at least in principle, is subject to all of the infelicities cited above, as Austin’s argument implies, and if its signification is never entirely self-contained, as Butler’s argument implies, then its power to do what it says is more contingent, less unilateral, than we usually assume. That we do not often acknowledge this contingency, that neither the illocutionary nor the perlocutionary force of this utterance is typically in doubt, testifies to the capacity of the institution of capital punishment, as presently organized in the United States, to guarantee against outbreaks of linguistic ambiguity or slippage among its well-coordinated parts. But the fact that this machine is now relatively well oiled (ignoring the wrenches recently thrown into its gears by the release of numerous persons wrongly sentenced to die as well as the renewed attention given to the death sentence’s discriminatory application) should not lead us to endorse a conception of performativity that denies its susceptibility to infelicity or ambiguity and thereby encourages the contemporary state’s sovereign pretensions.<sup>28</sup> To put this otherwise, I would suggest that, in addition to making political use

of botched executions, opponents of capital punishment follow the lead of Clarence Lackey by asking how botched death sentences might be provoked. How might the death sentence's susceptibility to infelicity be exploited? How might the death sentence, in time, be relegated to the category of failed performative, of words that no longer bear the power to call their referent into being through utterance alone or, alternatively, of words that no longer initiate the condensed sequence of events their utterance pre-dicts?

In this chapter, at best, I have hinted at one possible way of exploiting the death sentence's potential for infelicity. The doctrine of separation of powers, which is essential to the authority of the liberal state, demands the establishment of a categorical distinction between judicial and executive officials, and that distinction is manifest in the disjunction we conventionally draw between the imposition and infliction of a death sentence. That disjunction in turn is parasitic on a cluster of deeply sedimented discursive presuppositions, including that which locates word and deed in discrete ontological domains. Here, I have tried to suggest the profoundly political character of those presuppositions, and I have argued that, when we recognize that words are as fully performative as are deeds, it becomes difficult to sustain the conviction that judges are somehow less deeply implicated in the violence of capital punishment than are executioners. That conviction is misguided, first, because a judicially pronounced death sentence bears illocutionary force only in virtue of its effective incorporation of the more comprehensive structure of violence that is our institution of capital punishment; and, second, because that utterance's perlocutionary force initiates a sequence of interlacing consequences, which, barring some interruption, slowly suffocates the condemned within a tomb of the living dead. To think of the death sentence in such terms is perhaps to render the constitutional complaint of Clarence Lackey less incredible than it now appears to Clarence Thomas.