

CRIMINALS GET ALL THE RIGHTS: THE SOCIOLEGAL CONSTRUCTION OF DIFFERENT RIGHTS TO DIE

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In the United States, different people have different rights to die. This Article traces the origins of death-sentenced prisoners' ability to enlist assistance in dying and compares it to the considerably more circumscribed right held by people with serious illness. It uses empirical research on "volunteers," death-sentenced prisoners who sought execution, to argue that the legal standard for adjudicating their requests to hasten execution should be changed. Empirical evidence suggests many of the concerns governing the regulation of assisted dying in the medical context are present in the death row case. This Article therefore urges courts to use a balancing test comparable to that developed in cases involving assisted dying in the medical context. Further, counsel should be appointed to articulate the state's interests in subjecting the conviction and sentence to appellate review.

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INTRODUCTION

With the ink scarcely dry on the Supreme Court’s decision reviving capital punishment in the United States,¹ Gary Gilmore burst onto the legal scene. Gilmore demanded his execution, all but daring the State of Utah to kill him. In response to opponents of his execution, Gary Gilmore complained:

You know, the U.S. Supreme Court has ruled that you have a right to die. I’m talking about the Karen Ann Quinlan case. I don’t even really think that enters, if I want to press for my civil rights. I could raise issues like that, but I’m not.²

Since Gary Gilmore’s 1976 execution, over 10% of death-sentenced prisoners executed in the United States hastened their own executions.³ This Article examines Gilmore’s (and others’) contention that these prisoners have a “right” to die, as well as the sociolegal context in which rights to hasten death are embedded. Comparing the rights to die of the terminally ill and the death-sentenced reveals how historical contingencies, normative

¹ *Gregg v. Georgia*, 428 U.S. 153 (1976).

² The New Jersey Supreme Court, not the United States Supreme Court, decided the *Quinlan* case in March 1976. *In re Quinlan*, 355 A.2d 647 (N.J. 1976). Gilmore’s reference to this case in November 1976, however, reflects its cultural currency at the time he sought to be executed. Transcript of November 30, 1976 Utah Board of Pardons Hearing at 12, *In re Gilmore*, 429 U.S. 1012 (1976) (on file with author).

³ The Death Penalty Information Center (DPIC) reports 1,389 executions in the modern era and identifies 142 “volunteers,” defined as those prisoners who waive available legal appeals. *Searchable Execution Database*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/views-executions> (last visited Sept. 19, 2014), *archived at* <http://perma.cc/CC4P-5TG8>; <http://perma.cc/5BG6-ACG7>. It excludes, therefore, prisoners who pursue legal remedies, but do not seek clemency. It also excludes those prisoners who abandoned their appeals at one point, but then changed their minds, regardless of whether the courts permitted them to resume their appeals. Margaret Vandiver et al., “*Let’s Do It!*”: *An Analysis of Consensual Executions*, in *THE DEATH PENALTY TODAY* 190 (Robert M. Bohm ed., 2008). The Winter 2014 edition of *Death Row U.S.A.*, compiled by the NAACP Legal Defense and Educational Fund, Inc. reported that of the 1,359 individuals executed in the modern era, 143 were volunteers, or 10.5%. NAACP LEGAL DEF. AND EDUC. FUND, INC., *DEATH ROW U.S.A. WINTER 2014*, at 10 (2014), *available at* http://www.naacpldf.org/files/publications/DRUSA_Winter_2014.pdf, *archived at* <http://perma.cc/UEN5-JZBB>. For a discussion of the word “volunteer,” *see infra* subpart III(B)(3).

beliefs, and different legal logics can shape legal responses to demands for rights. In this case, the death row prisoner is legally privileged as compared to the terminally ill patient. Paradoxically, however, the more expansive right held by the death row prisoner reflects and furthers his social marginalization.

Prior scholarship on so-called volunteers has generally taken one of two approaches.⁴ One strand focuses on reforming the legal standards governing volunteers. Anthony Casey, as discussed below, argued for different standards for waiving appeals depending on the appeal sought to be waived.⁵ John Blume proposed a framework for adjudication that would assess possible suicidal motivation and prohibit “unjust” punishments, such as the execution of the innocent or those who are categorically excluded from the death penalty.⁶ This scholarship retains the essential conceptual model of the criminal law of waiver and the Eighth Amendment death penalty framework of heightened reliability. Another thread of scholarship has argued for a right to execution, analogizing the death row prisoner seeking execution to the terminally ill.⁷ As explored in greater detail below, this latter work has relied on assumptions about the volunteer population and how capital law works to argue for a categorical right to execution,

⁴ G. Richard Strafer’s article, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860 (1983), represents an exception. His qualified Fourteenth Amendment analysis, however, is not informed by more recent legal and empirical developments.

⁵ Anthony J. Casey, *Maintaining the Integrity of Death: An Argument for Restricting a Defendant’s Right to Volunteer for Execution at Certain Stages in Capital Proceedings*, 30 AM. J. CRIM. L. 75, 101–05 (2002).

⁶ John H. Blume, *Killing the Willing: “Volunteers,” Suicide and Competency*, 103 MICH. L. REV. 939, 967–72 (2005).

⁷ See, e.g., Kristen M. Dama, Comment, *Redefining a Final Act: The Fourteenth Amendment and States’ Obligation to Prevent Death Row Inmates from Volunteering to Be Put to Death*, 9 U. PA. J. CONST. L. 1083, 1101 (2007) (arguing states have no constitutional obligation to prevent volunteering for execution); Kathleen L. Johnson, Note, *The Death Row Right to Die: Suicide or Intimate Decision?*, 54 S. CAL. L. REV. 575, 614–21, 623 (1981) (asserting that the state’s interests in preserving life, protecting innocent third parties, prevention of suicide, and maintaining professional ethics were categorically outweighed by prisoner’s fundamental “right to freedom of choice”; therefore “the state’s interest in preserving respect for life through careful appellate review of all death sentences should give way to the competent prisoner’s right to refuse appeal” so long as the waiver is competently made); Julie Levinsohn Milner, Note, *Dignity or Death Row: Are Death Row Rights to Die Diminished? A Comparison of the Right to Die for the Terminally Ill and the Terminally Sentenced*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 279, 336 (1998) (“[T]he death row right to die should exist for those inmates for whom a right to die via refusal of life-sustaining medical treatment would exist if they were terminally ill rather than terminally sentenced” so long as prisoner is competent and waives his rights).

rather than one that should be subjected to careful, individualized weighing of interests.

This Article supplies a much-needed empirical basis for a critique of the waiver model as inadequate and the unqualified Fourteenth Amendment right to die as inappropriate. The legal standard for waivers is low and problematic, as discussed below. Further, the Fourteenth Amendment right to die framework, which balances the state's interests in the preservation of life, prevention of suicide, protection of third parties, and protection of the integrity of the medical profession against the individual's interest in autonomy in dying, is relevant to the death row prisoner. Based on recent research on the death row population generally and volunteers specifically, I propose a standard for death row volunteers that borrows from the medical context by requiring the volunteer to persuade the court that his right to die outweighs the state's interests.

The death row data support the analytic "fit" of the Fourteenth Amendment model. Mental health researchers have found a greater prevalence of psychological and psychiatric disorders on death row generally, and my research suggests that volunteers may be at greater risk for suicide. Many, if not most, death row prisoners (including volunteers) have ties to third parties. My research also highlights the inability of the waiver model to protect the integrity of the legal profession and the legal system broadly conceived. Bypassing appeals raises concerns about the reliability of the capital punishment system. In addition, observations of attorney performance reveal the professional and ethical tensions attorneys confront as they represent volunteering clients.

This Article also goes beyond previous work by tracing the sociolegal context in which different rights to die emerged. By contrasting Gary Gilmore and Karen Ann Quinlan, historical contemporaries and landmark figures in defining modern American rights to die, this Article illuminates not only the contradictory ways the law treats the asserted right, but also the profoundly different historical and social settings in which these rights claims emerged. This Article then urges courts to refocus on the fundamental question: when can an individual legally obtain assistance in dying? In answering that question for death-sentenced prisoners, courts should consider the broader social values that they have traditionally weighed in adjudicating requests to hasten death in the medical context.

Part I of this Article sets out the different legal frameworks for adjudicating requests to hasten death among the death-sentenced and the sick. Part II describes empirical findings that should inform the central legal questions. Part III discusses the historical and cultural context in which the law took shape. Part IV proposes an improved legal process that incorporates the state's interests in decisions to hasten death in the medical

context into adjudications of death row prisoners' requests to hasten execution. It would also mandate that counsel be appointed to advance the state's interests in opposing the prisoner's waiver of further appeals. In its Conclusion, this Article reflects on some of the larger questions raised by this project, including the apparent paradox that the socially powerless death row prisoner has a right to assistance in dying where the innocent and ill do not. In addition, the death row research reveals the precarity and ambiguity of certain legal constructs, such as "voluntary" and "rational," which are central to defining a right to die.

I. DIFFERENT RIGHTS TO DIE⁸

Death-sentenced prisoners vindicate a right to die through a technical legal process that, when contrasted with the process used by those with serious physical illness, reflects how differently these groups are treated. Courts understand that seriously ill people are embedded in a larger social world and recognize that their cases present profound questions about death and dying. By contrast, for the volunteer, even the most salient concern about the legitimacy of a state execution recedes as the court focuses on the narrower issues of whether the prisoner is competent to waive his rights to appeal and does so knowingly, intelligently, and competently.

After outlining the death row volunteer's legal process, this Part describes the evolution of rights to die in the medical context. As discussed in greater detail below, patients achieved the right to refuse life-sustaining medical intervention in most instances, but a right to assistance in dying was rejected by the Supreme Court. Certain states responded by authorizing assistance in dying under certain very limited circumstances. The Part concludes by analogizing the death row volunteer to patients who seek assistance in dying.

A. DEATH-SENTENCED PRISONERS

1. Process for Hastening Execution

A death-sentenced prisoner can hasten execution by abandoning his⁹ appeals, usually by discharging counsel and electing not to file any

⁸ Versions of the description of the legal regime governing death row waivers have previously appeared in Meredith Martin Rountree, *"I'll Make Them Shoot Me": Accounts of Death-Sentenced Prisoners Advocating for Execution*, 46 LAW & SOC'Y REV. 589 (2012) [hereinafter "*Accounts*"] and Meredith Martin Rountree, *Volunteers for Execution: Directions for Further Research into Grief, Culpability, and Legal Structures*, 82 UMKC L. REV. 295 (2014) [hereinafter "*Directions for Research*"].

⁹ While women have been subjected to the death penalty, they constitute only a fraction of death row inmates. As of January 1, 2014, sixty women are on death row in the United

pleadings on his own behalf. Prisoners typically have three essentially sequential avenues of appeals.

The first appeal is called a “direct appeal,” in which the prisoner generally argues to the state’s highest criminal court that the trial judge made erroneous legal rulings in the course of the trial. The degree to which capital cases are routinely subjected to appellate review may be overstated because of the prevalence of statutory provisions characterizing the direct appeal as “automatic.”¹⁰ The availability of the appellate mechanism does not necessarily mean that the direct review cannot be waived. A few states prohibit waiver of direct review in capital cases,¹¹ but others permit death-sentenced prisoners to forgo direct appeal at least in part. These states may permit the death-sentenced prisoner to waive his “personal” right to appeal¹² but still require, e.g., a review dictated by statute. Therefore, Washington State requires its Supreme Court to consider whether “there are not sufficient mitigating circumstances to merit leniency”; whether “the sentence . . . is excessive or disproportionate to the penalty imposed in similar cases”; and whether “the sentence . . . was brought about through passion or prejudice.”¹³ Texas ostensibly requires a direct appeal, but since

States. Thirteen have been executed. By contrast, at last count, 3,010 men are currently on death row, and 1,346 have been executed. NAACP LEGAL DEF. AND EDUC. FUND, INC., *supra* note 3, at 1, 8. The Death Penalty Information Center reports that 139 death-sentenced men and 3 women successfully sought execution. DEATH PENALTY INFO. CTR., *supra* note 3. For simplicity, I use the masculine pronoun throughout this Article.

¹⁰ See Johnson, *supra* note 7, at 578; Milner, *supra* note 7, at 284–85.

¹¹ See, e.g., State v. Ovante, 291 P.3d 974, 978 (Ariz. 2013) (en banc); State v. Brewer, 826 P.2d 783, 790–91 (Ariz. 1992); People v. Massie, 967 P.2d 29, 39–41 (Cal. 1998); Robertson v. State, 143 So. 3d 907, 908–09 (Fla. 2014); Commonwealth v. McKenna, 383 A.2d 174, 180–81 (Pa. 1978).

¹² Newman v. State, 84 S.W.3d 443, 444 (Ark. 2002).

¹³ State v. Dodd, 838 P.2d 86, 97–98 (Wash. 1992); see also Pennell v. State, 604 A.2d 1368, 1375 (Del. 1992) (finding complete waiver precluded by state statutory mandate); Geary v. State, 977 P.2d 344, 346–47 (Nev. 1999) (“Despite Geary’s valid waiver of his appeal, this court must conduct a mandatory review pursuant to . . . [a statute requiring] this court to review whether the evidence supports the aggravating circumstances, whether the death sentence was imposed under the influence of passion, prejudice, or any arbitrary factor, and whether the death sentence is excessive, considering the crime and the defendant.”); Grasso v. State, 857 P.2d 802, 808 (Okla. Crim. App. 1993) (“The sentence review, which we have found to be mandatory and not subject to waiver, requires this Court to determine whether the evidence supports the aggravating circumstances found by the trial judge.”); State v. Motts, 707 S.E.2d 804, 811 (S.C. 2011) (“Although Motts is entitled to waive his personal right to a direct appeal, we hold that he cannot waive this Court’s statutorily-imposed duty to review his capital sentence.”); Patterson v. Commonwealth, 551 S.E.2d 332, 333 (Va. 2001) (“Although Patterson has waived his right of appeal, Code § 17.1-313 mandates that we review the imposition of the death sentence. We must consider and determine whether the sentence of death was imposed ‘under the influence of passion, prejudice or any other arbitrary factor,’ and whether the sentence is ‘excessive or

1994, in cases where the volunteer waives direct appeal and discharges counsel, the appellate court has proceeded without the benefit of briefing in determining whether “fundamental error” marred the trial.¹⁴

The second appeal—variously called a “collateral attack,” “postconviction appeal,” or “state habeas proceeding”—provides the prisoner an opportunity to argue to the state court that he was deprived of a fair trial, not because the trial judge made a legal error, but because of events outside the courtroom. These claims typically include evidence of ineffective assistance of counsel or prosecutorial suppression of material exculpatory evidence. When it had the death penalty, only New Jersey prevented prisoners from waiving postconviction appeals in capital cases.¹⁵ The New Jersey Supreme Court explained that the public’s “interest in the reliability and integrity of a death sentencing decision . . . transcend[ed] the preferences of individual defendants.”¹⁶

The final avenue of appeal essentially combines all federal constitutional claims raised on direct appeal and in state habeas proceedings. These claims are presented to the federal district court in a petition for writ of habeas corpus.¹⁷ An adverse adjudication by the federal district court may, under certain circumstances, be appealed to the federal

disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.”). Louisiana requires the appellate court to consider whether the death sentence is “excessive” because of a state constitutional provision. *State v. Bordelon*, 2007-KA-0525, p.4 (La. 10/16/09); 33 So. 3d 842, 847. “Excessiveness” is decided based on the influence of “arbitrary factors,” and “whether the evidence supports the jury’s finding of at least one aggravating circumstance.” *Id.* at p.11, 33 So. 3d at 850–51. This “safeguard[s] a defendant’s right not to suffer cruel and unusual punishment, and . . . protect[s] society’s fundamental interest in ensuring that the coercive power of the State is not employed in a manner that shocks the community’s conscience or undermines the integrity of our criminal justice system.” *Id.* at p.11, 33 So. 3d at 851 (internal punctuation and citation omitted). Georgia has what appears to be an unusual system in which the Court not only must review the sentence as set out in the relevant statute, but also has the ability to require issues to be briefed. *Colwell v. State*, 543 S.E.2d 682, 682 (Ga. 2001) (“[I]n a death penalty case . . . the statutory basis for appellate review requires mandatory review. In addition, the Unified Appeal Procedure requires this Court to review a death penalty case, whether or not the defendant files a notice of appeal, and authorizes this Court to direct the defendant’s appellate counsel and the State’s attorney to brief and argue grounds not raised on appeal.” (internal citations omitted)).

¹⁴ Discussed *infra* subpart II(E).

¹⁵ See *Pike v. State*, 164 S.W.3d 257, 265 (Tenn. 2005) (listing opinions permitting waiver of postconviction review in capital cases). New Jersey abolished the death penalty in 2007. Jeremy W. Peters, *Death Penalty Repealed in New Jersey*, N.Y. TIMES, Dec. 17, 2007, <http://www.nytimes.com/2007/12/17/nyregion/17cnd-jersey.html>, archived at <http://perma.cc/8WFW-U4QN>.

¹⁶ *State v. Martini*, 677 A.2d 1106, 1107 (N.J. 1996).

¹⁷ 28 U.S.C. § 2254 (2012).

appellate court.¹⁸ The Ninth Circuit suggested at one point that its interest in ensuring the just administration of the death penalty could permit a federal court to reject a prisoner's effort to waive appeals,¹⁹ but it subsequently stepped away from that position.²⁰ Generally, the federal courts simply focus on whether a prisoner has met the legal criteria for waiver, as outlined below.²¹

2. Legal Criteria for Hastening Execution

Courts evaluate decisions to abandon appeals according to four criteria: the prisoner must make a knowing, voluntary, and intelligent waiver of his rights to appeal, and he must be mentally competent.²² These criteria are commonly applied in other parts of the criminal justice system. In accepting a guilty plea, for example, the court engages in a (usually stock) colloquy with the defendant designed to elicit his agreement that he, having been advised by counsel, understands the consequences of his plea, including that he abandons certain constitutional rights when he pleads guilty (the "knowing and intelligent" waiver), and that he has not been coerced into giving up these rights (the "voluntariness" requirement).²³

Because the requirements for waiver are so low, the competency determination is the crux of the legal life of the volunteer.²⁴ Generally, if the

¹⁸ *Id.* § 2253 (2012).

¹⁹ *Comer v. Schriro*, 463 F.3d 934, 950 (9th Cir. 2006), *reh'g en banc granted sub nom*, *Comer v. Stewart*, 471 F.3d 1359 (9th Cir. 2006), *aff. sub nom*, *Comer v. Schriro*, 480 F.3d 960 (9th Cir. 2007) (en banc) ("To allow a defendant to choose his own sentence introduces unconscionable arbitrariness into the capital punishment system.").

²⁰ *Comer*, 480 F.3d at 964 ("If *Comer* is competent to waive further proceedings, then we need not, and indeed cannot, decide whether any of *Comer's* claims have merit or are procedurally barred because there is no dispute remaining between the parties.").

²¹ *See, e.g.*, *Simpson v. Quarterman*, 341 F. App'x 68, 69 (5th Cir. 2009); *Dennis ex rel. Butko v. Budge*, 378 F.3d 880 (9th Cir. 2004); *Ford v. Haley*, 195 F.3d 603, 617–24 (11th Cir. 1999); *Harper v. Parker*, 177 F.3d 567, 573 (6th Cir. 1999); *In re Zettlemoyer*, 53 F.3d 24, 29 (3d Cir. 1995); *Smith ex rel. Mo. Public Defender Comm'n v. Armontrout*, 812 F.2d 1050, 1056–59 (8th Cir. 1987); *Lopez v. Stephens*, No. 2:12-CV-160, 2014 WL 2981056, at *7–11 (S.D. Tex. July 1, 2014); *White v. Horn*, 54 F. Supp. 2d 457, 467–70 (E.D. Pa. 1999).

²² *Godinez v. Moran*, 509 U.S. 389, 400–01 (1993) (knowing, voluntary, intelligent, and competent); *Rees v. Peyton*, 384 U.S. 312, 314 (1966) (defining competency).

²³ *Brady v. United States*, 397 U.S. 742, 748–49, 756 (1970); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

²⁴ A few courts have suggested that conditions of incarceration could make a waiver involuntary. *See, e.g.*, *Comer v. Stewart*, 215 F.3d 910, 918 (9th Cir. 2000); *Smith*, 812 F.2d at 1050. In *Groseclose ex rel. Harries v. Dutton*, 594 F. Supp. 949, 961 (M.D. Tenn. 1984), the court granted next friend standing based on prison conditions' effect on voluntariness, and, in *Tabler v. Stephens*, the district court

deemed [*Tabler*] mentally competent . . . , [but it] ruled that his waiver was not voluntary. In October of 2008—more than one month after his original state court

prisoner is found competent, he will be able to waive his rights and his appeals. Only if the prisoner is found incompetent can others—such as parents—move to intervene as a “next friend” to continue the appeals.²⁵ In the context of death-sentenced prisoners waiving appeals, courts generally cite the Supreme Court’s 1966 decision *Rees v. Peyton*, which asked whether the prisoner had the “capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.”²⁶

In *Rumbaugh v. Procnier*,²⁷ the Fifth Circuit confronted a tension inherent in this standard. Rumbaugh had a history of self-injury and suicide attempts, including when he charged a court officer in the middle of his competency hearing to provoke the officer shoot him.²⁸ Mental health professionals testified that Rumbaugh grasped the logical consequences of his decision, but his decision to hasten his execution was substantially affected by a mental disease, namely severe depression.²⁹ The Fifth Circuit then refined its interpretation of *Rees* by restricting the judicial determination of competence to whether the prisoner’s decision was “the product of a reasonable assessment of the legal and medical facts and a

competency hearing—Tabler made a threatening phone call to a state senator while on death row. An inquiry into the call ultimately led to an investigation into cell phone smuggling in the prison, which purportedly resulted in threats and harassment from prison staff and fellow inmates. Whether or not Tabler’s perception matched reality, the district court found that Tabler genuinely believed his family would be harmed if he did not volunteer for execution and therefore found his attempt to waive his federal habeas relief involuntary.

588 Fed. App’x. 297, 300 (5th Cir. 2014), *vacated on other grounds*, No. 12-70013, 2015 WL 327646, at *1 (5th Cir. Jan. 27, 2015).

²⁵ *Demosthenes v. Baal*, 495 U.S. 731 (1990); *Whitmore v. Arkansas*, 495 U.S. 149 (1990); *Gilmore v. Utah*, 429 U.S. 1012 (1976). The issues of surrogate decisionmaking in death penalty cases and in cases involving the incompetent, severely ill person are quite different. For the volunteer, the surrogate simply opts to continue the litigation. *See, e.g., In re Cockrum*, 867 F. Supp. 494, 496 (E.D. Tex. 1994) (“Accordingly, it is ORDERED that [named attorney] be appointed ‘Next Friend’ of applicant, John Cockrum for the purposes of pursuing the writ of habeas corpus before this court. As such, he shall act in the best interest of the applicant in directing the habeas corpus proceedings before this court” and setting briefing schedule for habeas litigation). In the context of medical intervention, courts try to discern whether the surrogate is asking for what the patient would have wanted. ALAN MEISEL & KATHY L. CERMINARA, *THE RIGHT TO DIE: THE LAW OF END-OF-LIFE DECISIONMAKING* (3rd ed. 2008) at 4-5-4-99. Because these issues are fundamentally so different (unlike, I contend, the issues associated with putatively competent requests to hasten one’s own death), I do not discuss them here.

²⁶ *Rees*, 384 U.S. at 314.

²⁷ 753 F.2d 395 (5th Cir. 1985).

²⁸ *Id.* at 397, 406.

²⁹ *Id.* at 400–01, 406, 408–09.

reasoned thought process.”³⁰ That the “rational decision-making process” took place within a severe depression was legally irrelevant. The depression may well have “contribute[d] to his invitation of death,” but the law required only that Rumbaugh be aware of his situation and his options in deciding to waive further appeals.³¹ In other words, the court need only “inquire about the discrete capacity to understand and make rational decisions concerning the proceedings at issue, and the presence or absence of mental illness or brain disorder is not dispositive.”³²

After the Fifth Circuit’s decision in *Rumbaugh*, the Supreme Court considered the case of *Godinez v. Moran*,³³ in which it had to decide whether certain types of waivers required different types of mental competencies. Similar to Rumbaugh, Moran had previously attempted suicide, was experiencing “deep depression,” and took psychiatric medication.³⁴ Harmonious with *Rumbaugh*’s holding, the Supreme Court ruled that the Constitution required only a single type of mental competency, namely that the prisoner have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and “a rational as well as factual understanding of the proceedings against him.”³⁵ The *Moran* dissenters protested: “[T]he majority upholds the death sentence for a person whose decision to discharge counsel, plead guilty, and present no defense well may have been the product of medication or mental illness.”³⁶ The majority opinion noted that “[r]equiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel.”³⁷

As *Moran* and *Rumbaugh* make clear, mental competence is not a high bar to cross.³⁸ The Supreme Court in *Indiana v. Edwards*³⁹ recognized that this standard permits even severely mentally ill defendants to be found competent.

³⁰ *Id.* at 402.

³¹ *Id.* The test articulated in *Rumbaugh* has been cited in other jurisdictions. *See, e.g.*, *Comer v. Schriro*, 480 F.3d 960, 970 (9th Cir. 2007); *Lonchar v. Zant*, 978 F.2d 637, 640–42 (11th Cir. 1993).

³² *Mata v. Johnson*, 210 F.3d 324, 329 n.2 (2000).

³³ 509 U.S. 389 (1993).

³⁴ *Id.* at 409–411, 417 (Blackmun, J., dissenting).

³⁵ *Id.* at 396–97 (majority opinion).

³⁶ *Id.* at 409 (Blackmun, J., dissenting).

³⁷ *Id.* at 402 (majority opinion).

³⁸ *See also*, J.C. Oleson, *Swilling Hemlock: The Legal Ethics of Defending a Client Who Wishes to Volunteer for Execution*, 63 WASH. & LEE L. REV. 147, 170 (2006) (explaining that under prevailing legal standards, “it is entirely possible for a clinically depressed but non-psychotic defendant to waive his appeals and to volunteer for execution”).

³⁹ 554 U.S. 164, 178 (2008).

B. HASTENING DEATH IN THE MEDICAL CONTEXT

Beginning in the mid-1970s, state courts considered arguments that competent death-sentenced individuals could elect to discontinue medical treatment even though it would hasten their deaths.⁴⁰ These arguments were based on a range of legal theories, including informed consent, right to privacy, and proscriptions against battery.⁴¹ Courts generally recognized an individual interest in refusing treatment, but balanced that right against the state's interests, which were most commonly identified as the preservation of life, the prevention of suicide, the protection of third parties, and the protection of the integrity of health care professionals.⁴² In *Cruzan v. Director, Missouri Department of Health*, the Supreme Court assumed without deciding that a competent person has a Fourteenth Amendment liberty interest in discontinuing medical treatment, including artificial nutrition and hydration, even if that refusal would cause or hasten her death.⁴³ The Court noted, however, that that individual right is not absolute. Instead, it must be balanced against state interests.⁴⁴

Currently, when competent individuals ask to discontinue life-sustaining medical intervention, hospitals and courts will generally permit them to do so.⁴⁵ This is not true, however, where the patient asks for a third party to take an affirmative action that will hasten death. In *Vacco v. Quill*⁴⁶ and *Washington v. Glucksberg*,⁴⁷ the Supreme Court considered challenges

⁴⁰ Thomas A. Eaton & Edward J. Larson, *Experimenting with the "Right to Die" in the Laboratory of the States*, 25 GA. L. REV. 1253, 1257–71 (1991).

⁴¹ *Id.*

⁴² MEISEL & CERMINARA, *supra* note 25, § 5.04. *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417 (Mass. 1977), provides a much-cited elaboration on these state interests. Protecting third parties includes protecting "particularly minor children, from the emotional and financial damage which may occur as a result of the decision of a competent adult to refuse life-saving or life-prolonging treatment." *Id.* at 426. The concerns regarding the "ethical integrity of the medical profession" refer to tension between some medical providers' belief that their personal or medical ethics require them to sustain life at all costs and their need to recognize their patients' preferences. *Id.* at 426–27.

⁴³ 497 U.S. 261, 269–70 (1990). *Cruzan*, like the *Quinlan* case cited by Gary Gilmore, involved the issue of surrogate decisionmaking, where family members asserted a right to die on behalf of the patient because she was incompetent to do so.

⁴⁴ *Id.* See also ELIZABETH PRICE FOLEY, *THE LAW OF LIFE AND DEATH* 161–62 (2011).

⁴⁵ The *Saikewicz* court found the state's interest in preserving human life to be strongest where the question was whether, and not for how long, the individual's life could be saved. *Saikewicz*, 370 N.E.2d at 425–26. Meisel and Cerminara describe this as a "prognostic approach" where the state's interest shrinks as the individual nears death. MEISEL & CERMINARA, *supra* note 25, at 5-42–5-45. This interest is also diminished, however, where the patient is competent. *Id.* at 5-45.

⁴⁶ 521 U.S. 793 (1997).

⁴⁷ 521 U.S. 702 (1997).

to state statutes that prohibited physicians from helping patients hasten death. Withholding treatment is considered “passive” euthanasia, while enlisting a doctor to administer a lethal drug is considered “active” euthanasia.⁴⁸ In *Vacco*, the statute’s challengers contended that no clear distinction existed between active and passive euthanasia—discontinuing treatment, after all, commonly requires an act such as turning off a ventilator.⁴⁹ They argued that the prohibition on assisted suicide violated patients’ equal protection rights by restricting the right to die to those who could die simply by discontinuing medical intervention.⁵⁰ The Supreme Court in *Vacco* rejected this argument, making clear that it saw an important distinction between acts that hasten death by withholding treatment or only treating disease symptoms, and those that involve the administration of a substance with the intent to hasten death.⁵¹

In *Glucksberg*, opponents of the state law restrictions argued that individuals had a fundamental right to hasten their own deaths and that, therefore, state restrictions on physicians’ ability to assist them were unconstitutional. The Supreme Court rejected the contention that the Constitution provided a fundamental liberty interest right to receive help in dying, and held that the state had legitimate interests in prohibiting such assistance.⁵² The Court identified the state interests as: “(1) preserving life; (2) preventing suicide; (3) avoiding the involvement of third parties and use of arbitrary, unfair, or undue influence; (4) protecting family members and loved ones; (5) protecting the integrity of the medical profession; and (6) avoiding future movement toward euthanasia and other abuses.”⁵³

The Supreme Court, however, saw no constitutional impediment to states developing statutes permitting physician-assisted suicide. While there was no federal constitutional right to assistance in dying, state legislatures were free to experiment with permitting such assistance.⁵⁴ Since *Glucksberg*, Montana and New Mexico courts have struck down assisted suicide bans and California,⁵⁵ Oregon, Vermont, and Washington have passed laws allowing physicians to help people die.⁵⁶ As discussed below,

⁴⁸ James Rachels, *Active and Passive Euthanasia*, 292 N. ENGL. J. MED. 78, 78 (1975).

⁴⁹ *Vacco*, 521 U.S. at 800–01.

⁵⁰ *Id.*

⁵¹ *Id.* at 800–08.

⁵² *Glucksberg*, 521 U.S. at 728–735.

⁵³ *Id.* at 728 n.20.

⁵⁴ *Id.* at 737 (O’Connor, J., concurring); *id.* at 789 (Souter, J., concurring).

⁵⁵ California adopted its assisted-dying statute as this issue went to print.

⁵⁶ OR. REV. STAT. 127.815 § 3.01(k)-(L) (2013); 18 VT. STAT. ANN. tit. 113 §§ 5283(a) (2012); WASH. REV. CODE § 70.245.040 (k)-(l) (West 2011); *Baxter v. Montana*, 224 P.3d 1211, 1217 (Mont. 2009) (“[Nothing in Montana law] indicat[es] that physician aid in dying

the regulatory framework established by these laws reveals limits that are not imposed on the death-sentenced prisoner.

The assisted-dying statutes passed in California, Oregon, Vermont, and Washington permit physicians to prescribe a lethal dose of medication, but patients must administer the medication themselves.⁵⁷ The statutes restrict the availability of physician-assisted suicide solely to an individual whom two doctors attest has “an incurable and irreversible disease that has been medically confirmed and will, within reasonable medical judgment, produce death within six months.”⁵⁸ In addition, Oregon and Washington prohibit providing assistance to any terminally ill individual who suffers from “a psychiatric or psychological disorder or depression causing impaired judgment.”⁵⁹ Vermont imposes an arguably lower standard: “‘Impaired judgment’ means that a person does not sufficiently understand or appreciate the relevant facts necessary to make an informed decision.”⁶⁰ A physician must “either verif[y] that the patient did not have impaired judgment or refer[] the patient for an evaluation by a psychiatrist, psychologist, or clinical social worker licensed in Vermont for confirmation that the patient was capable and did not have impaired judgment.”⁶¹

C. ANALOGIZING THE VOLUNTEER TO THE SEVERELY ILL WHO SEEK TO DIE

As outlined above and developed in greater detail below, the death row volunteer may hasten execution by competently waiving his appeals. In the medical context, the Supreme Court has rejected finding any constitutional right to obtain assistance in dying (active euthanasia), as opposed to discontinuing treatment (passive euthanasia). This raises the question of whether a death row volunteer’s waiver represents an active or passive effort to die. While a request to discontinue appeals—an act of omission—appears analogous to a request to discontinue medical treatment, the

is against public policy”); Phil Milford, *Right to Die with Doctor’s Help Affirmed in New Mexico*, BLOOMBERG (Jan. 14, 2014), <http://www.bloomberg.com/news/2014-01-14/right-to-die-with-doctor-s-help-affirmed-in-new-mexico.html>, archived at <http://perma.cc/FVA3-5VNR>.

⁵⁷ OR. REV. STAT. 127.805 § 2.01(1); 127.815 § 3.01(L); 127.880 § 3.14 (doctors may prescribe and dispense, but may not administer, lethal drugs); 18 VT. STAT. ANN. tit. 113 § 5283(a) (2012); § 5283(a)(13); § 5292 (same); WASH. REV. CODE § 70.245.020(1) (2011); § 70.245.040(1)(i); § 70.245.180(1) (same).

⁵⁸ OR. REV. STAT. 127.800 § 1.01(12) (2013); 127.815 § 3.01(1)(a); 127.820 § 3.02; 18 VT. STAT. ANN. ch. 113 § 5283(a), (a)(7) (2012); § 5281(10); WASH. REV. CODE § 70.245.040(1)(a); § 70.245.050; § 70.245.010(13) (2011).

⁵⁹ OR. REV. STAT. 127.825 § 3.03 (2013); WASH. REV. CODE § 70.245.060 (2011).

⁶⁰ 18 VT. STAT. ANN. ch. 113 § 5281(5) (2012).

⁶¹ *Id.* at § 5283(a)(8).

comparison to active assistance by a third party is more apt. As Blume notes:

[T]he right to refuse life-saving medical treatment, assuming there is such a right, is grounded in the individual's right to bodily integrity, which is not at issue in the volunteer context. Furthermore, in the refusal-of-treatment situation, a third party does not have to take action to bring about the person's death, which again is not true in the volunteer context.⁶²

Multiple third parties must act to hasten the volunteer's death. Not only must individuals working on behalf of the prison do something to the prisoner's body—in lethal injection, for example, someone must insert a needle in the prisoner's vein and start the flow of poisonous chemicals—but the state must also impose an execution date. In these cases, we see prisoners actively seek an execution date as the state generally will not set one until appeals are concluded. While rare, some prisoners remain on death row even after their appeals are exhausted. More commonly, a case will simply pend on appeal while a court decides the case, unless the prisoner campaigns to dismiss his appeal and have the court set his execution date.⁶³ Recognizing active euthanasia as the proper analogy reveals the very different ways desires to die are regulated. Data on how the law treats death-sentenced prisoners' efforts to be killed are troubling when considered in light of this comparison.

II. EMPIRICAL FINDINGS REGARDING DEATH ROW PRISONERS, INCLUDING “VOLUNTEERS”

While empirical research on volunteers lags far behind that on those with severe and terminal illness, new research, including a study I recently conducted on Texas volunteers, contradicts several assumptions made in much of the prior scholarship on volunteers. It suggests that it is time to revisit the legal standard.

For my study of the thirty-one Texas prisoners death-sentenced after *Gregg* who succeeded in hastening their execution by dropping their appeals,⁶⁴ I reviewed court documents, prison records, and media reports,

⁶² Blume, *supra* note 6, at 947–48 n.45.

⁶³ In *Reed v. State*, AP-69,292 (Tex. Crim. App. March 29, 1995), *cert. denied*, 516 U.S. 1050 (1996), for example, the Texas Court of Criminal Appeals took twelve years to decide Jonathan Reed's case. The case pended for eight years before the court remanded the case for a hearing.

⁶⁴ Texas has by far the greatest number of volunteers. According to the Death Penalty Information Center, twenty-six states had fewer than five volunteers; seven had five or more, but fewer than ten. One had eleven. While my research found that the DPIC data were not entirely accurate, even within the DPIC database, Texas stands out with twenty-eight reported volunteers, more than double than that of the next highest state, Nevada. DEATH

and conducted interviews with individuals who knew the prisoners. Unlike previous empirical studies of volunteers, I compared this population to a matched sample of non-volunteers, here, seventy-three Texas male death row prisoners of the same race or ethnicity (according to prison records) and approximate age who arrived on death row within six months of a particular volunteer and who went through at least one round of appeals and postconviction litigation.⁶⁵ This comparison brings into focus what may—and may not—distinguish volunteers from non-volunteers. These data also underscore the relevance of the "right to die" legal categories to death row prisoners.

A. DEATH ROW VOLUNTEERS GENERALLY DO NOT HAVE A
“TERMINAL” CONDITION COMPARABLE TO THAT WHICH LIMITS
APPLICABILITY OF “DEATH WITH DIGNITY” STATUTES

Terminal illness is conventionally understood by courts as an illness that will kill the patient within six months.⁶⁶ In my study of Texas volunteers, none met this definition. Instead, over 80% had waived appeals by the time their cases reached state postconviction proceedings. In other words, they bypassed state postconviction proceedings, federal habeas

PENALTY INFO. CTR. EXECUTION DATABASE, *supra* note 3. In conducting my dissertation research, I identified thirty-one death-sentenced Texas prisoners. Rountree, *Directions for Research*, *supra* note 8, at 301–04.

⁶⁵ Rountree, *Directions for Research*, *supra* note 8, at 301–04. John Blume’s 2005 study compared volunteers to non-incarcerated suicides. Blume, *supra* note 6. Vandiver, Giacomassi, and Turner compared volunteers and non-volunteers nationally, which may have obscured important state-by-state variations, among other things. Vandiver et al., *supra* note 3. According to the Death Penalty Information Center execution database, some counties—like Harris County, Texas, for example—are responsible for more executions than several states combined. Some states such as Nevada (eleven out of twelve), Oregon (two out of two), and Washington (three out of five) have executed almost exclusively volunteers. Some states execute so few that a prisoner might expect to live decades on death row before facing execution. Death row conditions also vary across states. If any of these factors matter, it is reasonable to believe that the dynamics in hastening execution could be very different in different places. Comparing all volunteers with all those executed in the modern era erases these differences. The likelihood of state-by-state variation obviously suggests caution in generalizing from the Texas data (though Texas volunteers are the most numerous), as well as the need for additional empirical research.

⁶⁶ OR. REV. STAT. 127.800 §1.01(12) (2013); WASH. REV. CODE §70.245 (West 2011); McKay v. Bergstedt, 801 P.2d 617, 630 (Nev. 1990). Scholarship advocating for volunteers’ right to hasten death commonly overstates the inevitability of execution and omits the legal understanding of “terminal.” See, e.g., Dama, *supra* note 7, at 1097 (prisoners “seek[ing] to greet imminent and unavoidable death on their own terms”); Milner, *supra* note 7, at 298, 301 (“inevitable death”; death-sentenced prisoner has a condition that will “inevitably” take his life).

proceedings in district court, and federal appellate litigation. This litigation would ordinarily take more than six months to conclude.

Further, not all death-sentenced prisoners will be executed. A study of state and federal court reversal rates in capital cases between 1973 and 1995 found that courts found “serious, reversible error” in 68% of capital cases.⁶⁷ During this period, state courts reversed 47% of capital cases, and federal courts reversed 40% of those cases that were affirmed by the state courts.⁶⁸ Of those prisoners granted a new trial because of prosecutorial or defense counsel misconduct, 82% were resentenced to punishments less than death.⁶⁹ Not even Texas, which uses the death penalty vigorously, can claim that any individual death-sentenced prisoner will be executed within six months. Since the return of the death penalty in 1977, only 46% of those sentenced to death in Texas have been executed, with almost 22.5% winning reversal or commutation.⁷⁰

B. DEATH ROW VOLUNTEERS’ INCREASED RISK FOR SUICIDE

While many might find it completely rational that those on death row might want to end it all, in fact such prisoners are a minority.⁷¹ Proponents of an unqualified Fourteenth Amendment right to execution contend that the prisoners are essentially making a rational decision to end the suffering they experience on death row. One commentator has suggested that “[t]he simple reason most condemned prisoners want to terminate their appeals is that they find conditions on death row intolerable.”⁷²

The Texas data, however, indicate that most volunteers expressed a desire for or sought execution very early, sometimes before they even got to death row. Volunteers often had a constellation of reasons for giving up their appeals. However, the most common sentiment expressed (by 61.3% of volunteers) was that they sought execution because they believed it was an appropriate punishment. Only a few prisoners (16.1%) complained about

⁶⁷ JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995*, at *i* (2000).

⁶⁸ *Id.*

⁶⁹ *Id.* at *ii*.

⁷⁰ TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, *CAPITAL PUNISHMENT, 2012 – STATISTICAL TABLES* at 20 (2014)

⁷¹ For an expanded discussion of suicidality among volunteers, see Rountree, *Directions for Research*, *supra* note 8, at 304–25.

⁷² Melvin I. Urofsky, *A Right to Die: Termination of Appeal for Condemned Prisoners*, 75 J. CRIM. L. & CRIMINOLOGY 553, 568–69 (1984); see also, e.g., Milner, *supra* note 7. Only Strafer factored this into an analysis of the voluntariness of the prisoner’s decision. Strafer, *supra* note 4, at 885–94. It bears repeating that people with a painful but not terminal illness may not legally obtain assistance in hastening death anywhere in the United States.

the conditions of incarceration, as distinct from the fact of incarceration (51.6%).⁷³

Also concerning is the earliness of the prisoners' decisions to hasten death. For one, suicide in custody is strongly associated with the earliest stages of custody.⁷⁴ For another, psychological research on affective forecasting "consistently shows that people are poor predictors of their future well-being. Specifically, people overestimate the impact and duration of negative emotions in response to loss."⁷⁵ This phenomenon may explain why, at least in Texas, individuals facing the death penalty generally sought execution at trial or soon after conviction. This pattern became particularly apparent after a 1994 decision from the Texas Court of Criminal Appeals held that prisoners were able to waive an adversarial direct appeal.⁷⁶ Prior to this decision, 75% of volunteers spent more than forty-eight months on death row; after, only 27% did.⁷⁷

In addition, significant psychological research of the severely ill, while contested, suggests that those who seek to hasten death have unmet psychiatric or palliative needs.⁷⁸ Certainly, death row prisoners are

⁷³ Meredith Martin Rountree, "The Things That Death Will Buy": A Sociolegal Examination of Texas Death-Sentenced Prisoners Who Sought Execution 90–92 (2012) (unpublished Ph.D. dissertation) (on file with the *Journal*).

⁷⁴ DAVID A. CRIGHTON & GRAHAM J. TOWL, *PSYCHOLOGY IN PRISONS* 188 (2nd ed. 2008); see also Jo Borrill, *Self-Inflicted Deaths of Prisoners Serving Life Sentences 1988–2001*, 40 *BRIT. J. FORENSIC PRAC.* 30–38 (2002) (about half of lifers were likely to kill themselves within a year of conviction).

⁷⁵ Jodi Halpern & Robert M. Arnold, *Affective Forecasting: An Unrecognized Challenge in Making Serious Health Decisions*, 23 *J. GEN. INTERNAL MED.* 1708, 1708 (2008); see also Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 *IND. L.J.* 155, 192–201 (2005) (citing evidence of death-sentenced prisoners' adaptation to death row); William E. Haley et al., *Family Issues in End-of-Life Decision Making and End-of-Life Care*, 46 *AM. BEHAV. SCIENTIST* 284 (2002).

⁷⁶ *Lott v. State*, 874 S.W.2d 687, 688 (Tex. Crim. App. 1994). In *Lott*, the Texas Court of Criminal Appeals decided that where the prisoner waived direct appeal, it would review the record—unassisted by any briefing—for "fundamental error," a category of error that is neither defined nor used in any other type of case. Not only does this decision raise more questions than it answers with respect to the scope of the court's review, it also created a process for nonadversarial legal review where one already existed. Subsequent to *Anders v. California*, 386 U.S. 738, 744 (1967), counsel may file a brief that identifies possible legal errors, and argues why the law is clear that those errors do not undermine the reliability of the verdict. The appellate court considers this briefing in deciding whether to affirm the conviction and sentence. In *Lott's* case, the TCCA did not even have the benefit of this minimal briefing.

⁷⁷ Rountree, *Directions for Research*, *supra* note 8, at 319.

⁷⁸ N.Y. STATE TASK FORCE ON LIFE AND THE LAW, *WHEN DEATH IS SOUGHT: ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT* 23–47, 153–81 (1994); BARRY ROSENFELD, *ASSISTED SUICIDE AND THE RIGHT TO DIE* 77–109 (2004) (discussing research on the role of depression, hopelessness, and pain in desires to hasten death, and requests for

substantially burdened by mental disorders.⁷⁹ Cunningham and Vigen's 2002 meta-analysis of the psychological literature found that the death row population as a whole has a high prevalence of mental illness and substance abuse and addiction. In their review of the literature on death row prisoners, they noted that eleven out of thirteen clinical studies of death row prisoners found "a high incidence of psychological symptoms and disorders, ranging from maladaptive defenses to pervasive depression, mood lability, and diminished mental acuity to episodic and chronic psychosis."⁸⁰ Death row prisoners also "appear to have a disproportionate rate of serious psychological disorders relative to a general prison population."⁸¹ These mental impairments may also impair their ability to imagine any improvement in their situation.

In addition, prisoners generally have higher suicide rates than non-prisoners, and death row prisoners have higher rates of suicide as compared to non-death-row prisoners.⁸² The two empirical studies looking specifically at volunteers and suicide—Blume's and my own—found a concerning resemblance between those who commit suicide and those who volunteer. After collecting questionnaire responses from legal team members in cases involving volunteers and attempted volunteers from across the country, Blume found similarities between those in the free world who have taken their own lives and death row volunteers. In addition to being comprised largely of white males, both groups had significant histories of mental illness and substance abuse.⁸³

In the Texas study I conducted, I identified traits associated with suicide in prison and used those to compare Texas volunteers with a matched sample of Texas death row prisoners who did not hasten their executions. Several indicators present in the volunteer population were consistent with the suicide literature. For example, as with other prisoners who commit suicide, volunteers are more likely to have prior criminal

physician-assisted suicide).

⁷⁹ Blume, *supra* note 6, at 962–63; Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 BEHAV. SCI. & L. 191 (2002). While mental dysfunction is prevalent in both the volunteer and non-volunteer Texas groups, it is important to note that those seeking execution have an incentive to minimize any mental problems. See Rountree, *Accounts*, *supra* note 8, at 606; Rountree, *Directions for Research*, *supra* note 8, at 306–08.

⁸⁰ Cunningham & Vigen, *supra* note 79, at 200.

⁸¹ *Id.*

⁸² LINDSAY M. HAYES, NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, NIC ACCESSION NO. 024308, NATIONAL STUDY OF JAIL SUICIDE: 20 YEARS LATER 1–2 (2010) (jail and prison suicide rates); CHRISTINE TARTARO & DAVID LESTER, SUICIDE AND SELF-HARM IN PRISONS AND JAILS 31 (2008) (death row suicide rate).

⁸³ Blume, *supra* note 6, at 942.

convictions, prior convictions for crimes against persons, and prior experiences with incarceration than non-volunteers.⁸⁴ The exception to this was among those sentenced to death for offenses involving a domestic crisis. This group's criminal experience was lower than the other volunteers, whether measured by their prior convictions, crimes against persons, or time in prison. This too is consistent with the prison suicide literature, which recognizes differences in suicide populations.⁸⁵

Differences in capital crimes also yielded some suggestive results. Compared to other similarly situated death row prisoners, the Texas volunteers were less likely to have committed the crime with another person and more likely to have used a gun in the murder.⁸⁶ Acting in groups may encourage offending by diffusing responsibility.⁸⁷ Conversely, solo offending may concentrate a sense of greater responsibility in the individual actor, both in the eyes of actor and those around him. This feeling of greater responsibility may be linked to a conclusion that the individual offended for dispositional rather than situational reasons; they broke the law because of something about them, not because of something about the situation.⁸⁸ Shame and guilt have been linked to an increased risk of suicide.⁸⁹

These prisoners may feel that they are more culpable for their crimes than those who are able to diffuse responsibility onto others. As a result, they may feel that they deserve their punishment, and so ask for execution. They may also translate this sense of increased culpability into a statement

⁸⁴ Rountree, *Directions for Research*, *supra* note 8, at 308–11. With respect to characteristics of prisoner suicide, see, e.g., CRIGHTON & TOWL, *supra* note 74; CHRISTOPHER J. MUMOLA, SUICIDE AND HOMICIDE IN STATE PRISONS AND LOCAL JAILS 7–8 (2005); Borrill, *supra* note 74, at 32, 35; Alison Liebling, *Prison Suicide and Prisoner Coping*, 26 PRISONS 283 (1999) (though also noting contradictory findings).

⁸⁵ See, e.g., Scott Eliason, *Murder–Suicide: A Review of the Recent Literature*, 37 J. ACAD. PSYCHIATRY & L. 371 (2009).

⁸⁶ In the Texas Study, 61.3% of the volunteers used a gun, where 49.3% of the non-volunteer sample used a gun. Where 49.3% of the non-volunteer sample committed the capital crime with at least one other person, 29% of the volunteers had a co-participant. Rountree, *Directions for Research*, *supra* note 8, at 312.

⁸⁷ Leanne F. Alarid et al., *Group and Solo Robberies: Do Accomplices Shape Criminal Form?*, 37 J. CRIM. JUST. 1, 1 (2009).

⁸⁸ Robert S. Feldman & Fred P. Rosen, *Diffusion of Responsibility in Crime, Punishment, and Other Adversity*, 2 LAW & HUM. BEHAV. 313, 318 (1978).

⁸⁹ Craig J. Bryan et al., *Guilt Is More Strongly Associated with Suicidal Ideation Among Military Personnel with Direct Combat Exposure*, 148 J. AFFECTIVE DISORDERS 37, 40 (2013); Herbert Hendin & Ann P. Haas, *Suicide and Guilt as Manifestations of PTSD in Vietnam Combat Veterans*, 148 AM. J. PSYCHIATRY 586, 589 (1991) (“The most significant finding . . . was clear and consistent relationship between veterans’ combat-related guilt and postservice suicidal behavior.”); David Lester, *The Role of Shame in Suicide*, 27 SUICIDE & LIFE-THREATENING BEHAV. 352 (1997) (noting associations of shame with suicide and encouraging further research).

about their disposition or character. They may decide that they are worthless and that they lack the possibility of redemption in this life. This feeling could combine with other stressors or vulnerabilities to motivate a decision to hasten death.

The finding about gun use is also provocative, because it suggests the possibility of more impulsive or intoxicated lethal acts. Death row inmate Steven Morin reportedly told a friend said that he did not intend to kill his victim—he had been in the middle of stealing her car when she confronted him—but “something came over him and the gun went off.”⁹⁰ Richard Foster described his gun homicide as an “accident” and “not intentional.”⁹¹ Whether Foster’s story is true or not, a prisoner’s impulsive use of the gun could become part of his personal narrative of greater shame and guilt and desire for self-destruction.

In addition to possibly having greater overall risk of suicide, some individual volunteers were plainly suicidal. Charles Rumbaugh’s case is the most dramatic. In the course of his testimony in support of his request to waive his appeals, he announced:

All I really wanted to say is that it doesn’t matter to me; that I’ve already picked my own executioner and I’ll just make them kill me. If they don’t want to do it . . . if they don’t want to take me down there and execute me, I’ll make them shoot me.

I think I’ll make them shoot me right now.

He then pulled a prison-made knife from his pocket and was shot after he charged the deputy U.S. Marshal, shouting “Shoot!”⁹²

Steven Renfro, another Texas death row prisoner, was described at trial as having attempted “suicide by cop” at the time he was arrested. The State’s psychiatrist interviewed Renfro for four hours prior to trial, and testified: “He made it clear that he wanted it to end it that day [of his arrest], to have been shot and killed. Renfro wanted to be and intended to be killed that night by the police officers [and] wants to die now.”⁹³ The defense psychiatrist at trial believed that Renfro wanted help in hastening death because of his religious beliefs, but that his suicidal depression could be treated:

⁹⁰ *Stephen Peter Morin*, MURDERPEDIA, <http://murderpedia.org/male.M/m1/morin-stephen-peter.htm> (last visited Sept. 21, 2014), *archived at* <http://perma.cc/9MJZ-4BLD>.

⁹¹ *Foster v. Johnson*, No. 4:92-cv-00615-Y (N.D. Tex. Mar. 14, 2000) (findings of fact on remanded issue); David Carson, *Richard Foster*, TEX. EXECUTIONS INFO. CTR. (Aug. 27, 2012), <http://www.txexecutions.org/reports/216.asp>, *archived at* <http://perma.cc/T27R-KH7U>.

⁹² *Rumbaugh v. Procnunier*, 753 F.2d 395, 397 (5th Cir. 1985).

⁹³ Reporter’s Record (RR) at 27:3438, 3450, 3481, *Renfro v. State*, AP-72,794 (Tex. Crim. App).

Mr. Renfro . . . [is] profoundly depressed. . . . [H]e was suicidal before the murders and he is still suicidal, but he doesn't want to go to hell, so he wants someone else to kill him. He's in a lot of pain. He's in a lot of emotional pain. His depression hasn't been treated. I expect he will always carry with him the guilt. He may not—if appropriately treated, he may not always be suicidal.⁹⁴

In all, these data demonstrate the salience of mental distress, mental illness, and suicidality within this population.

C. DEATH ROW PRISONERS CAN HAVE MEANINGFUL RELATIONSHIPS WITH THIRD PARTIES

One scholar captured the way courts have isolated death row volunteers from their social world by comparing the Supreme Court's opinion in *Gilmore* to the portrait painted by Norman Mailer in *The Executioner's Song*, his book about Gary Gilmore.⁹⁵ She observes:

The Executioner's Song portrays the grand, interconnected mass of humanity that formed around even the least worthy person and illustrates how his fate included it all [I]n contrast to the book's dramatization of the connection among all of the persons it names, the Court portrayed Gary Gilmore as an autonomous human being and his mother as a separate person. It made no reference to anyone else.⁹⁶

Those advocating for an unfettered death row “right to die” further this social atomization by marginalizing the death row prisoner's connection to family. The children of death-sentenced prisoners have diminished interests in their parent's decision to die because their parent cannot contribute financially nor “participate in day-to-day family life as a normal parent.”⁹⁷ This argument reduces familial contribution to financial support and “normal” parenting in a way that excludes not only incarcerated parents but also, e.g., some parents with disabilities or debilitating illness. Further, it is contradicted by even the brief glimpses of death row prisoners' family life that appear in court documents, media accounts, and the empirical literature.

One study of children of death row prisoners found “[t]he most prevalent theme was the children's discussion of the importance of having their parent in their lives even if the relationship could only occur from death row.”⁹⁸ While many chafed at the obstacles prison imposed on developing a meaningful relationship with their fathers, at least some of the

⁹⁴ *Id.* at RR 29:3744–45.

⁹⁵ NORMAN MAILER, *THE EXECUTIONER'S SONG* (1979).

⁹⁶ Ann Althouse, *Standing*, in *Fluffy Slippers*, 77 VA. L. REV. 1177, 1183 (1991).

⁹⁷ Johnson, *supra* note 7, at 616.

⁹⁸ Elizabeth Beck & Sandra J. Jones, *Children of the Condemned: Grieving the Loss of a Father to Death Row*, 56 OMEGA 191, 197 (2007–2008).

children discussed their father's role in raising them, even from death row.⁹⁹ For these children, their fathers provided advice, emphasized the importance of going to school and staying away from crime, and acted as agents of informal social control.¹⁰⁰ The impact of their father's execution was generally "profound" and negative.¹⁰¹

While imperfect proxies of the condemned's connectedness to others, data from the Texas prison system regarding witnesses to executions indicate that most volunteers had some social ties to the outside world. Of the volunteers on whom I obtained information, 89.6% (27) invited witnesses to their execution, and of those, 93.1% (25) had witnesses other than clergy or attorneys. In addition, only 17.2% (5) of volunteers are buried in the prison cemetery, where they are buried under their prison number and not their name. So many volunteers being buried elsewhere suggests that the vast majority had relationships with people outside of prison that were strong enough that those individuals collected their bodies and made arrangements to bury them privately.

Further, these data may understate relationships, as prisoners may have had important social relationships not reflected in the prison records. Anthony Cook, for instance, had only his spiritual advisor (who had previously witnessed several executions) present at his execution, but his mother, stepfather, brother, sister, in-laws, and cousins joined the spiritual advisor at the funeral home after the execution.¹⁰² Cook's burial in the prison cemetery¹⁰³ may simply reflect that his family did not have the means to bury him. Another prisoner had no one from his nuclear family witness his execution, but in his final days, he visited with his mother, brothers, first wife, and his four children.¹⁰⁴

In Texas competency hearings, while families are not always invisible, no one represents their interests. In two cases,¹⁰⁵ which were unusual for involving family in the first place, family members positioned themselves

⁹⁹ *Id.* at 197, 200, 201–04.

¹⁰⁰ *See, e.g., id.* at 200 (after his father was executed, one child became aggressive toward others, but once he turned eighteen, "he realized that he would have to find a way to deal with his anger, lest he break a promise he had made to stay out of jail in order to care for his father's mother, whom has served as [the child's] caretaker from the time that his father was incarcerated.")

¹⁰¹ *Id.* at 208.

¹⁰² Susan Blaustein, *Witness to Another Execution: In Texas, Death Walks an Assembly Line*, HARPERS, May 1994, at 53.

¹⁰³ *Id.* at 62.

¹⁰⁴ Roy Bragg, *Remorseful Killer Wants to Die for Crime/Families of Victims Can't Forgive, Forget*, HOUS. CHRON., Mar. 2, 1987, § 1, at 1.

¹⁰⁵ Joe Fedelfido Gonzales, Jr., AP-71.253 (Tex. Crim. App.); James Scott Porter, No. 1:03-cv-448 (E.D. Tex.).

as agents to dissuade the prisoner from ending his life or attest to his fixity of purpose. The family members' testimony about what the prisoner meant to them, whether he had children who would suffer from his death, and whether they thought his incarceration was a terrible burden on them was not included in the court's calculus in permitting the prisoner to hasten execution.

D. VOLUNTEERS' LEGAL PROCEEDINGS MAY NOT BE VIGOROUSLY LITIGATED

The Fourteenth Amendment medical intervention cases inquire into the effect of hastening death on the integrity of the medical profession. Similar to doctors who are treating a patient who is terminally ill and desires to hasten his death, attorneys representing a client who seeks to hasten his execution are beset by conflicting professional and ethical directives.

The legal academy has devoted substantial attention to lawyers' ethical responsibilities to the client who wants to die, reaching contradictory conclusions.¹⁰⁶ Further, while an agency role is the putative norm for the attorney–client relationship, it is not the standard of practice in death penalty cases. The American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* state forcefully:

Some clients will initially insist that they want to be executed—as punishment or because they believe they would rather die than spend the rest of their lives in prison; some clients will want to contest their guilt by not present mitigation. *It is ineffective assistance for counsel to simply acquiesce to such wishes*, which usually reflect the distorting effects of overwhelming feelings of guilt and despair rather than a rational decision in favor of state-assisted suicide.¹⁰⁷

¹⁰⁶ See, e.g., MICHAEL MELLO, *THE UNITED STATES V. THEODORE JOHN KACZINSKI: ETHICS, POWER, AND THE INVENTION OF THE UNABOMBER* 25–26, 189–213 (1999) (criticizing counsel for working against client's wishes); Richard W. Garnett, *Sectarian Reflections on Lawyers' Ethics and Death Row Volunteers*, 77 NOTRE DAME L. REV. 795, 808–09, 819 (2002) (reflecting on complexity of attorney's task in representing volunteer and the limits of professional rules); C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849, 860–76 (2000) (describing range of attitudes of death penalty cause lawyers regarding volunteers); Oleson, *supra* note 38, at 228–29 (arguing ethical rules not useful for lawyers representing volunteers and that “ethical lawyer should refuse to acquiesce to the volunteering client's wishes” because of “death row syndrome”).

¹⁰⁷ American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 1009–10 (2003) (emphasis added).

Further, “[t]he duty to investigate [mitigating evidence] exists regardless of the expressed desires of a client.”¹⁰⁸

In the Texas study, none of the successful Texas volunteers appears to have had an adversarial hearing in which counsel marshaled lay and expert witnesses to attack the assertions that the prisoner was competent and waiving his rights knowingly, voluntarily, and intelligently.¹⁰⁹ Many attorneys were, nonetheless, plainly pained by reducing their role to simply effectuating their client’s wish to die. Like doctors, the attorneys are torn between what they see as the object of their professional skills—winning a reversal of the conviction or sentence—and their duty to the individuals whose lives they are entrusted with. When asked by the court whether he thought his client was capable of waiving his appeals, one attorney finally said, “Your Honor, these are the hardest questions that I’ve had to answer in my life. It appears to me that he does.”¹¹⁰ Another stated in response to similar questions, “I wish that I didn’t, Judge. I know that he does. He understands everything.”¹¹¹

E. LITIGATION WITHOUT COUNSEL THREATENS THE INTEGRITY OF THE LEGAL PROCESS

Nonadversarial waiver proceedings can leave critical factual questions unanswered,¹¹² and in Texas at least, important legal questions may also remain unaddressed. While statutes suggest almost every state requires “automatic” judicial review of death sentences, Texas offers a cautionary

¹⁰⁸ *Id.* at 1021.

¹⁰⁹ In Christopher Swift’s and Michael Rodriguez’s cases, counsel actively advocated against their clients’ wishes in the course of the hearing on the waiver, but in both cases, counsel relied primarily on legal argument. Through cross-examination they challenged some of the evidence, but they presented no separate evidence or experts. Hearing, Rodriguez v. Quarterman, 3:06-cv-00965-G (N.D. Tex. Aug. 22, 2007) Hearing, State v. Swift, F-2003-1720-C (Denton Cty, Tex. Feb. 2, 2006). Based on a press report, Stephen Morin’s counsel sought a stay of execution to raise the issue of mental competency, but the trial judge, based on his observations of Morin, concluded Morin was mentally competent and refused a hearing. Jacque Crouse & Terry Donahue, *Lawyer: ‘Blood’ on Mattox’ Hands*, SAN ANTONIO EXPRESS-NEWS, March 13, 1985, at A5. Ramon Hernandez’s trial counsel unsuccessfully sought a stay of execution as a “next friend.” Hernandez’s former counsel argued that Hernandez’s waiver was based on a mistake of law, not mental incompetence. Lovelace v. Lynaugh, 809 F.2d 1136, 1137 (5th Cir. 1987).

¹¹⁰ Dec. 19, 1997 11.071 Hearing at 54, *Ex parte Tuttle*, AP-72,387 (Tex. Crim. App. 1997).

¹¹¹ July 16, 1998 Hearing on Defendant’s Motion to Withdraw Appeal, State v. Foust, AP-73,130 (Tex. Crim. App. 1998).

¹¹² See Rountree, *Accounts*, *supra* note 8, at 605–14 (describing questionable mental health assessments and court proceedings normalizing desire to die).

example of possible gaps being left between the law on the books and the law in action.

During the sentencing phase of Christopher Jay Swift's trial, Swift refused to permit his lawyers to present mitigating evidence to persuade the jury to sentence him to life rather than death.¹¹³ One court-appointed psychiatrist determined that Swift was insane at the time of the crime. Swift explained to the court that he wanted the death penalty because voices in his head "haunt me daily, and I feel that, you know, death is going to be the only thing that takes them away."¹¹⁴ Swift's direct appeal lawyer filed a substantial brief in the Texas Court of Criminal Appeals (TCCA) arguing that imposing the death penalty under these circumstances violated the Constitution. After Swift was granted the right to proceed pro se, the TCCA "unfiled," or removed from the record of the case, the brief filed by counsel and did not consider it in affirming Swift's conviction and sentence.¹¹⁵

Swift's is a particularly stark example because the court explicitly disregarded a legal argument regarding the unconstitutionality of his execution. In most volunteer cases, however, no brief would be filed in the first place, as counsel already would have been discharged. In these cases, no counsel alerts the appellate court to questions of innocence, mental illness, racial bias, or official misconduct—issues that fundamentally undermine the legitimacy of the death penalty.

III. SOCIAL INFLUENCES ON RIGHTS TO DIE

What accounts for these differences in judicial thinking about terminally ill and death-sentenced people? How did the despised and marginalized end up with a more expansive right than the innocent ill? Conversely, others may wonder why anyone would be surprised that those sentenced to death would have an easier time getting themselves killed. That is the point of the punishment, after all.

While this outcome may not be surprising on the surface, the reasons for it are not the obvious ones. It is not simply that judges hope for some kind of political or ideological benefit from hastening an execution—indeed, in the Texas cases, at least two judges expressed great discomfort when faced with prisoners who sought execution.¹¹⁶ Instead, these legal standards are animated by beliefs about sick people, free will, criminality,

¹¹³ Transcript of Record at 35:28–35 and 36:9, *State v. Swift*, F-2003-1720-C (Denton Cty., Tex. 2006).

¹¹⁴ *Id.* at 35:34.

¹¹⁵ *State v. Swift*, AP-75,186, 2006 WL 269266 (Tex. Crim. App. Sept. 20, 2006).

¹¹⁶ 2 Reporter's Record at 40, *State v. Gonzales*, AP-72,253 (Tex. Crim. App.); July 6, 2000 Hearing at 20–21, *State v. Hayes*, AP-73,830 (Tex. Crim. App.).

mental illness, and who is on death row. Further, they are embedded within a particular historical context.

A. AMONG THE VERY ILL

Self-killing has a long history of state proscription, though desires to die have become substantially medicalized as self-killing is now more likely to be seen as potentially pathological rather than unpatriotic.¹¹⁷ The sociolegal framework undergirding medical decisions hastening death reflects a number of questions about the appropriate roles for individuals, medicine, government, and God to play in ending life, as well as the relationships between desires for death and mental illness. These questions are situated in a particular historical moment that is shaped by the freighted history of euthanasia movements, the heart-rending realities of modern medicine's capabilities, the revolution in the doctor–patient relationship, and the emergence of the civil rights discourse. The ascendancy of the rights framework in medical decisionmaking enabled euthanasia advocates to recast their advocacy of hastening death as a type of right, where previously it had been seen as a vehicle for social improvement. In addition to being politically expedient, it also fixed the legal question within a framework that requires investigating and balancing competing interests.

While hardly the first legal case to present the question of discontinuing or foregoing medical treatment, Karen Ann Quinlan's case gripped the public imagination. It is widely cited as the beginning of the modern American discussion about the right to die.¹¹⁸ *Newsweek*, which

¹¹⁷ See, e.g., GEORGES MINOIS, HISTORY OF SUICIDE 7–9 (Lydia G. Cochrane trans., 1999); *id.* at 9 (describing suicides from the Middle Ages “condemned as murder, [leading] to savage punishment inflicted on the dead body and to confiscation of the estate of the deceased”); see also FOLEY, *supra* note 44, at 154–56; MINOIS, *supra*, at 33 (describing St. Thomas Aquinas's influential argument against suicide as an offense against nature, society and God); *id.* at 282–83 (describing decline in criminal prosecution and punishment of corpses of suicides in eighteenth century France); *id.* at 291 (noting that the French king “could not tolerate [subjects] disposing of life freely, thus weakening his kingdom and his authority”); *id.* at 324 (noting political assertion that “it was ‘medically demonstrated that candidates for suicide are pathological cases’”).

¹¹⁸ See, e.g., IAN DOWBIGGIN, A MERCIFUL END: THE EUTHANASIA MOVEMENT IN MODERN AMERICA 146–47 (2003) (quoting a comparison of Quinlan's case to *Brown v. Board of Education*); ELAINE FOX ET AL., COME LOVELY AND SOOTHING DEATH: THE RIGHT TO DIE MOVEMENT IN THE UNITED STATES 26 (1999) (noting that Quinlan “dramatically focused public attention on the passive euthanasia issue”); ELIZABETH ATWOOD GAILEY, WRITE TO DEATH: NEWS FRAMING OF THE RIGHT TO DIE CONFLICT, FROM QUINLAN'S COMA TO KEVORKIAN'S CONVICTION 18–19 (2003) (citing media coverage in the wake of the Quinlan case).

featured her case as its cover story in November 1975, economically invoked common anxieties surrounding decisions to hasten death.¹¹⁹

The article first outlined the primary legal dispute: after recognizing that his daughter would not recover from a persistent vegetative state, Karen Ann Quinlan's father sought to be appointed her guardian in order to ask the hospital to turn off the ventilator that supported her breathing. The hospital refused. The parties went to court. The story then quoted one lawyer arguing that Quinlan was not "brain dead" and that by removing the ventilator, the court would be "just extinguish[ing] life because she is an eyesore."¹²⁰ Another asked, "Where do we draw the line?"¹²¹ Nazi Germany's practice of euthanizing "cripples, mental incompetents, epileptics, the elderly and others held to be socially undesirable" was invoked,¹²² and a physician recalled an infant born with a treatable but highly disfiguring condition. The child was allowed to die, and "'Nobody said a word,' according to the . . . doctor. 'I think it's because we live in an era of the Body Beautiful, so the sight of a kid with almost nothing below the waist gave everybody pause.'"¹²³

The case was also described as making public a "private and personal plight."¹²⁴ Doctors expressed concern about legal supervision over (and possible sanctions for) medical decisionmaking, as well as the professional and ethical conflicts created by requests to hasten death. At the same time, medical advances were blamed for creating the painful situation in the first place. New technologies permitted life to continue, even as definitions of life and death shifted. Whether because of the mysteries of the human body or medical progress, terminal prognoses were also called into question.

1. Twentieth-Century Euthanasia Movements

The contemporary so-called "Right to Die" and "Death with Dignity" movements were not the first time Americans organized to promote euthanasia.¹²⁵ Prior euthanasia advocates rejected the notion of spiritual transcendence in suffering, and their enthusiasm for science and human control led advocates to embrace euthanasia as part of a larger eugenics program of social improvement. Not only could those suffering find a peaceful death, but those burdened by severe mental or physical impairment

¹¹⁹ Matt Clark, *A Right to Die?*, NEWSWEEK, Nov. 3, 1975, at 58.

¹²⁰ *Id.* at 58–59.

¹²¹ *Id.* at 59.

¹²² *Id.*

¹²³ *Id.* at 67.

¹²⁴ *Id.* at 58.

¹²⁵ DOWBIGGIN, *supra* note 118, at 7–62.

could be killed as painlessly as possible, for their own good and the good of the larger society.¹²⁶ Nazi euthanasia practices (and eugenic intent) exposed the dangers state-sanctioned euthanasia could pose for the socially vulnerable and marginalized, however, and consequently discredited the American movement's framework of euthanasia as a tool for social improvement. As Americans learned of eugenics-inspired euthanasia programs conducted by German doctors, the American euthanasia movement became quiescent.¹²⁷ The "rights" framework, however, emerged in the wake of the civil rights movements of the 1960s, and offered a powerful new discursive tool.¹²⁸

2. The Role of Organized Medicine in Contemporary Movements

The rights framework reconfigured the American euthanasia movement from one oriented toward the good of society to one promoting the autonomy and dignity of the individual at a time when patients were demanding a more active role in their medical care.¹²⁹ In addition, it created an avenue into court, an institution capable of putting pressure on the medical profession. The euthanasia movement has been credited with improving pain management specifically and palliative care more generally.¹³⁰ At the same time, the legal rights-based framework accords doctors a legitimate presence in legal proceedings. Their ethical responsibilities and professional training, as well as their prognoses, position them as important interlocutors as courts decide these claims. Relatedly, the patient's demands for autonomy—at the heart of the right to die conceptual framework—are dialogically related to the physician's demands to direct how medical technology is to be used.

3. Fear of the Slippery Slope

Concerns about a slippery slope, where euthanasia is first intended to offer a choice to the suffering individual with a terminal illness, but then becomes a decision made by others for those not similarly afflicted, have both an historical and contemporary foundation. Historically, not only did the Nazi example demonstrate how socially vulnerable people could become the targets of nonvoluntary euthanasia, but statements by advocates

¹²⁶ *Id.*

¹²⁷ *Id.* at 63–73.

¹²⁸ *Id.* at 97; GAILEY, *supra* note 118, at 127.

¹²⁹ *See, e.g.,* DOWBIGGIN, *supra* note 118, at 111–15 (surveying range and sources of public disenchantment with organized medicine beginning in the 1970s).

¹³⁰ *See, e.g.,* DANIEL HILLYARD & JOHN DOMBRINK, *DYING RIGHT: THE DEATH WITH DIGNITY MOVEMENT* 259 (2001).

for the American euthanasia movement at the beginning of the twentieth century clearly indicated they saw legislation permitting voluntary euthanasia for those facing death was simply a first step toward eventual embrace of nonvoluntary euthanasia for “monster” babies and individuals with mental and intellectual disabilities.¹³¹

The New York Task Force¹³² expressed concern about a slippery slope, in light of the tension in compassion arguments:

Policies limiting suicide to the terminally ill, for example, would be inconsistent with the notion that suicide is a compassionate choice for patients who are in pain or suffering. As long as the policies hinge on notions of pain or suffering, they are uncontainable; neither pain nor suffering can be gauged objectively, nor are they subject to the kind of judgments needed to fashion coherent public policy.¹³³

Reports from European countries where euthanasia is legal demonstrate the Task Force’s concerns were not farfetched. While disputed, some studies suggest that in the Netherlands at least some physicians have engaged in unsolicited euthanasia and complied with euthanasia requests from patients suffering from depression, but no physical ailment of any kind, much less one that would cause incurable physical deterioration.¹³⁴ A recent study notes that a group of Belgian physicians favoring euthanasia also tend to support extending euthanasia to minors “who can value their interests.”¹³⁵

The New York State Task Force also expressed concern about a disproportionate impact of legalized euthanasia on poor people or members

¹³¹ See, e.g., DOWBIGGIN, *supra* note 118, at 44 (advocate’s “support for euthanasia did not stop a voluntary mercy killing,” arguing it was “socially desirable” to kill “imbeciles and idiot infants and ‘monsters’”); *id.* at 47 (another advocate’s view that “purpose of euthanasia is to remove from society living creatures so monstrous, so deficient, so hopelessly insane that continued existence has for them no satisfactions and entails a heavy burden on society”); *id.* at 51 (“[s]upport for involuntary mercy killing [was] a fairly common attitude among early proponents of euthanasia”); *id.* at 57 (voluntary euthanasia bills seen as an “entering wedge”).

¹³² The New York Task Force was convened in 1984 by then-Governor Mario M. Cuomo. Initially charged with exploring the public policy issues raised by advances in medical technology and life-sustaining treatment, it subsequently expanded its focus to include assisted suicide and euthanasia. N.Y. STATE TASK FORCE ON LIFE AND THE LAW, *supra* note 78, at ix–5.

¹³³ *Id.* at xv.

¹³⁴ See Washington v. Glucksberg, 521 U.S. 702, 734 (1997). *But see* Bregje D. Onwuteaka-Philipsen et al., *Trends in End-Of-Life Practices Before and After the Enactment of the Euthanasia Law in the Netherlands from 1990 to 2010: A Repeated Cross-sectional Survey*, 380 LANCET 908, 908 (2012) (reporting slight decrease in euthanasia without explicit request).

¹³⁵ Joachim Cohen et al., *Cultural Differences Affect Euthanasia Practice in Belgium: One Law but Different Attitudes and Practices in Flanders and Wallonia*, 75 SOC. SCI. & MED. 845, 849 (2012).

of minority communities. In addition to disparities in access to medical and mental health care, the Task Force noted that care “will be practiced through the prism of social inequality and prejudice that characterizes the delivery of services in all segments of society, including health care. . . . [Physicians] are not exempt from the prejudices manifest in other areas.”¹³⁶ This raises the prospect that institutional structures and professionals may encourage disadvantaged individuals to seek euthanasia.

4. Contemporary Legal Safeguards

Vermont’s, Washington’s, and Oregon’s “Death with Dignity” statutes seek to meet at least some of physicians’ professional concerns by permitting physician-assisted suicide (where the physician only prescribes a lethal dose of medication), but not euthanasia (where the physician administers the lethal dose), and by requiring that the patient have “an incurable and irreversible disease that has been medically confirmed and will, within reasonable medical judgment, produce death within six months,” as attested to by two physicians.¹³⁷ In addition, the Oregon and Washington statutes explicitly recognize depression can play a role in desires to hasten death, and Vermont, Oregon, and Washington limit physician-assisted suicide to those whose judgment is not impaired by mental illness.¹³⁸

¹³⁶ N.Y. STATE TASK FORCE ON LIFE AND THE LAW, *supra* note 78, at 125.

¹³⁷ OR. REV. STAT. 127.800 §§ 1.01(12), 2.01 (2013); 18 VT. STAT. ANN. tit. 113 §§ 5281(a)(10), 5283(a), 5283(a)(7) (2012); WASH. REV. CODE §§ 70.245.010(13), 70.245.020 (2011). In addition to limiting physician-assisted suicide to those with terminal illnesses, the statutes may also reflect criticisms of Dr. Kevorkian for helping individuals die without confirming that they were in fact ill. DOWBIGGIN, *supra* note 118, at 166.

¹³⁸ OR. REV. STAT. 127.825 § 3.03 (2013); WASH. REV. CODE §70.245.060 (2011) (prohibiting assistance to any terminally ill individual who suffers from “a psychiatric or psychological disorder or depression causing impaired judgment”). While the evidence remains scant, a recent review article reported that a study conducted in Oregon found that 20% of those requesting physician-assisted suicide exhibited symptoms of depression, and another found that 26% had such symptoms. In the first study, none was prescribed lethal medication; in the second, 17% (three people) were prescribed medication. Penney Lewis & Isra Black, *Adherence to the Request Criterion in Jurisdictions Where Assisted Dying Is Lawful? A Review of the Criteria and Evidence in the Netherlands, Belgium, Oregon, and Switzerland*, 41 J. L. MED. & ETHICS 885, 889 (2013). “[T]he prevalence of depression in granted requests for [physician-assisted suicide] in Oregon appears to be lower than the rate in ungranted requests.” *Id.* at 894.

Foley emphasizes that the depression standing alone is insufficient; it must impair the patient’s judgment. While the severity of the depression clearly matters, substantial evidence indicates that depression can affect judgment. *See, e.g.*, Terry A. Maroney, *Emotional Competence, ‘Rational Understanding,’ and the Criminal Defendant*, 43 AM. CRIM. L. REV. 1375, 1408–16 (2006).

B. AMONG THE DEATH-SENTENCED

1. Historical Context

Conventional legal inquiry into appeal waivers usually begins with *Rees v. Peyton*: does the prisoner have the “capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.”¹³⁹ Melvin Rees himself sought to withdraw his Supreme Court appeal in 1965, as support for the death penalty waned.¹⁴⁰ Having failed to coax the parties into a negotiated resolution of the case, the Court ordered the lower court to adjudicate Rees’s competence.¹⁴¹ After multiple evaluations, the lower court found Rees incompetent, and the Supreme Court took no further formal action on the case.¹⁴² Only after Rees’s natural death in 1995 did the Court dismiss his case.¹⁴³

While this legal standard is widely cited, the contentious and insistent Gary Gilmore we saw at the beginning of this Article was ultimately more important in defining the modern volunteer. Much of Gilmore’s case seems peculiar to Gilmore—certainly no other volunteer inspired a Pulitzer Prize-winning book, two television movies, the cover of a national newsweekly, a *Saturday Night Live* skit, and a pop song¹⁴⁴—but in his case we see not only the seeds of future death penalty cases, but also legal logics that help explain how the Supreme Court came to take such a different view of death-seeking prisoners and death-seeking patients.

Gilmore, sentenced to death only months after the death penalty was reinstated in the United States,¹⁴⁵ was not as easily put off as Rees. At a trial

¹³⁹ *Rees v. Peyton*, 384 U.S. 312, 314 (1966).

¹⁴⁰ STUART BANNER, *THE DEATH PENALTY* 244–47 (2002); Phyllis L. Crocker, *Not to Decide Is to Decide: The U.S. Supreme Court’s Thirty-Year Struggle with One Case About Competency to Waive Death Penalty Appeals*, 49 WAYNE L. REV. 885, 919–20 (2004).

¹⁴¹ Crocker, *supra* note 140, at 900–01, 904–09, 921–22.

¹⁴² *Id.* at 909–914, 918–19. As Crocker notes, during the pendency of *Rees*, the climate surrounding the death penalty changed. When the Supreme Court informally revisited the status of *Rees* in 1971, the Court was considering cases that could effectively have ended the unofficial moratorium on executions that spanned from 1967 to 1976. *Id.* at 922–23.

¹⁴³ *Id.* at 935.

¹⁴⁴ John H. Blume, *Gilmore v. Utah: The Persistent Problem of ‘Volunteers’*, in *DEATH PENALTY STORIES* 227 (John H. Blume and Jordan M. Steiker eds. 2009); *Saturday Night Live* (NBC television broadcast Dec. 11, 1976) (containing skit “Let’s Kill Gary Gilmore for Christmas”); *THE ADVERTS, GARY GILMORE’S EYES* (Anchor Records 1977).

¹⁴⁵ The Supreme Court in 1972 struck down multiple state death penalty statutes as violating the Eighth Amendment. *Furman v. Georgia*, 408 U.S. 238 (1972). In July 1976, the Supreme Court approved a number of revised statutes, permitting the death penalty to

court hearing after sentencing, Gilmore told the court, “You sentenced me to die. Unless it’s a joke or something, I want to go ahead and do it.”¹⁴⁶ In a perfunctory hearing before the Utah Supreme Court, Gilmore, represented by counsel who assisted rather than opposed his efforts, testified that he knew he had a right to appeal; that he had told his attorneys that he did not want to appeal; that he had told him during the trial that if found guilty, he would prefer death to imprisonment; and that he preferred to keep the originally scheduled execution date.¹⁴⁷ Despite protests from Gilmore’s prior lawyer, no formal mental competency or waiver hearing was conducted.¹⁴⁸

Less than five months after his crime and two months after his sentencing, Gilmore’s case went before the Supreme Court.¹⁴⁹ Gilmore’s mother, Bessie Gilmore, proceeded in the Court as a “next friend” to stay his execution, arguing that he was not competent to knowingly and intelligently waive his rights. Bessie Gilmore’s stay application informed the Court of “petitioner’s history of suicidal tendencies, his November 16, 1976, suicide attempt, and his repeated request to be executed [to] indicate that petitioner’s original waiver of appeal is an attempt to commit suicide.”¹⁵⁰ It cited psychiatric sources discussing the “impulse to suicide as a form of mental illness.”¹⁵¹

The Attorney General responded that Gilmore’s post-trial suicide attempt was not pathological, but simply an “attempt [] to effectuate the sentence himself.”¹⁵² His desire to die was rational: “Mr. Gilmore had sufficient experience of prison life that he was able to form an accurate estimation of what it would be like for him to languish in prison.”¹⁵³ Gilmore should be accorded the “right to make a rational choice within the framework of his circumstances and personal philosophical constructs.”¹⁵⁴

In addition to having a markedly swifter adjudication than Rees, Gilmore set up a very different mental health contest. Where Rees was

proceed. *Jurek v. Texas*, 428 U.S. 262 (1976); *Profitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976). Gilmore committed his capital crime on July 19 and 20, 1976, and he was sentenced to death on October 7, 1976. Blume, *supra* note 144, at 204.

¹⁴⁶ MAILER, *supra* note 95, at 467.

¹⁴⁷ Blume, *supra* note 144, at 213.

¹⁴⁸ *Id.*

¹⁴⁹ *Gilmore v. Utah*, 429 U.S. 1012 (1976).

¹⁵⁰ Application for a Stay of Execution at 31, *In re Gilmore*, No. A-453 (U.S. Dec. 2, 1976) [hereinafter “Stay App”].

¹⁵¹ *Id.* at 31–32.

¹⁵² Response to Application for Stay of Execution at 57, *In re Gilmore*, No. A-453 (U.S. Dec. 7, 1976) [hereinafter “Stay Resp.”].

¹⁵³ *Id.*

¹⁵⁴ *Id.*

delusional and psychotic,¹⁵⁵ the Gilmore litigation instead focused on rival interpretations of his suicidality and its implications for his competence to waive his appeals.¹⁵⁶

The Supreme Court stayed Gilmore's execution on December 3, 1976, to give it time to review certain documents. Ten days later, it lifted the stay, summarily finding that Gilmore was mentally competent and had made a knowing and intelligent waiver.¹⁵⁷ Justices White, Brennan, and Marshall dissented, complaining that without appellate review, no one could know whether the Utah death penalty statute was constitutional.¹⁵⁸ According to the dissents, this question needed to be resolved since Gilmore could not, under the Eighth Amendment, consent to an unconstitutional punishment.¹⁵⁹

Justice Marshall's dissent paints a picture of informal, rushed, and (in his view) unreliable proceedings. The experts—all of whom worked for the State—had never been subjected to adversarial examination, and portions of the transcript regarding defense counsel's opinion of Gilmore's competence and legal claims were not transcribed.¹⁶⁰ In Gilmore's case, we see problems plaguing the adjudication of volunteers, at least in Texas.¹⁶¹ Questionable mental health assessments and nonadversarial proceedings are accepted. Desires to hasten execution can stand alongside suicide attempts without defeating competence. The mother's interest in preventing execution is entirely contingent on the competency finding. The state interest in the legality of the conviction and sentence was a concern to no one but the dissenters.

Executing Gilmore also provided death penalty proponents with the opportunity to demonstrate the necessity of the death penalty. As Blume points out, Gilmore presented none of the familiar concerns about the death penalty. He was white, unrehabilitated after repeated stints in prison, and not plainly mentally ill. He appeared intelligent, remorseless, and obnoxious, and he admitted guilt consistent with other compelling evidence. Add to that the fact that Utah did not have the cultural baggage of the

¹⁵⁵ See, e.g., Crocker, *supra* note 140, at 914 (footnotes omitted) ("At the evidentiary hearing, Rees 'was unkempt and required constant attention lest he take his clothes off in the courtroom.' He repeatedly interrupted the proceedings with 'unrelated and incoherent statements.'").

¹⁵⁶ Stay App., *supra* note 150, at 31–32.

¹⁵⁷ *Gilmore v. Utah*, 429 U.S. 1012, 1013 (1976).

¹⁵⁸ *Id.* at 1017–18 (White, J., dissenting).

¹⁵⁹ *Id.*; *id.* at 1019 (Marshall, J., dissenting).

¹⁶⁰ *Id.* at 1019–20 (Marshall, J., dissenting).

¹⁶¹ Rountree, *Accounts*, *supra* note 8, at 605–07, 609–14.

former Confederacy, Gilmore became, “in many respects, the perfect person to usher in the new era of executions.”¹⁶²

Blume argues that “the path was set” when the Supreme Court permitted Gilmore to waive his appeals.¹⁶³ Without disputing Blume’s view of the contingent importance of Gilmore, the larger sociopolitical context helped cement and extend the Court’s decision. The 1970s witnessed important shifts in the American criminal justice system. The mobilization of pro-death-penalty activists after *Furman v. Georgia*¹⁶⁴ struck down several states’ death penalty statutes, and the rise of “law and order” politics alongside more retributive penal policies have been chronicled elsewhere.¹⁶⁵ Certainly Gilmore, with his extensive juvenile and adult history of crime and imprisonment, fit nicely within the then-contemporary disenchantment with the rehabilitation model.¹⁶⁶

Simultaneously, the Supreme Court was in the middle of the contentious debate regarding rights held by those accused of crimes. Most relevant here is the Court’s landmark decision in *Faretta v. California*.¹⁶⁷ In *Faretta*, the Supreme Court decided that individuals have a constitutional right to represent themselves in criminal proceedings. They must not be required to have a lawyer “force[d]” upon them, even at a cost of a less reliable proceeding: “[A]lthough he may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law.”¹⁶⁸

The dissenters inveighed against this individualistic stance that it believed would undermine the criminal justice system as a whole:

That goal [of justice] is ill-served, and the integrity of and public confidence in the system are undermined, when an easy conviction is obtained due to the defendant’s ill-advised decision to waive counsel. The damage thus inflicted is not mitigated by the lame explanation that the defendant simply availed himself of the ‘freedom’ ‘to go

¹⁶² Blume, *supra* note 144, at 226.

¹⁶³ *Id.* at 228.

¹⁶⁴ 408 U.S. 238 (1972).

¹⁶⁵ See, e.g., BANNER, *supra* note 140, at 267–84; DAVID GARLAND, PECULIAR INSTITUTION 231–55 (2010); JONATHAN SIMON, GOVERNING THROUGH CRIME 116–30 (2007).

¹⁶⁶ See, e.g., Todd R. Clear and Aaron Ho, *An Essay: The First 50 Years of the Journal of Research in Crime and Delinquency*, 51 J. RES. CRIME & DELINQ. 402, 406–07 (2014) (discussing the influence of Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INT. 22 (1974)). One television writer reportedly said at the time that Gilmore’s case was “an open commentary on the utter failure of our prison system to rehabilitate anybody.” MAILER, *supra* note 95, at 572.

¹⁶⁷ 422 U.S. 806 (1975).

¹⁶⁸ *Id.* at 834 (internal citations and punctuation omitted).

to jail under his own banner.' The system of criminal justice should not be available as an instrument of self-destruction.¹⁶⁹

These multiple historical, social, and legal strands combined to give Gilmore a symbolic importance extending beyond a message that the death penalty was once again a punishment available to states. When the Supreme Court refused to stay Gilmore's execution, it may also have been signaling that it would limit the reach of cause lawyers¹⁷⁰ by strengthening the agency of the condemned individual, to the exclusion of broader systemic considerations.

In addition, as Gilmore himself noted in his reference to Karen Ann Quinlan quoted at the beginning of this Article, his desire to hasten death was situated within a cultural moment when a discourse of rational death and a right to die gained national prominence against a backdrop of the civil rights movements of the 1960s and 1970s.¹⁷¹

2. Logic of Death Penalty Law

The different legal logics of death penalty and terminal illness also contribute to different outcomes. Where decisions to hasten death in the context of medical interventions require weighing state interests against the individual's desire, volunteers require no such balancing. Because a death-sentenced prisoner's desire to hasten death is conceptualized solely within the framework of rules and waiver, the concerns that we see in the context of the right to die of the terminally ill cannot penetrate.

Significantly, the fact that this waiver occurs in the context of the death penalty may strengthen the logic of rules, rather than diminish it. While the idea that "death is different" is fundamental to Eighth Amendment death penalty jurisprudence, it is usually operationalized through procedural safeguards, like rules. David Garland argues that American death penalty law evolved to distance the death penalty from lynching.¹⁷² One strategy included "rationalizing and juridifying"¹⁷³ the

¹⁶⁹ *Id.* at 839–40 (Burger, C.J., dissenting) (internal citations and punctuation omitted).

¹⁷⁰ Gilmore's mother was represented by Anthony Amsterdam. He exemplified the anti-death-penalty cause lawyer, having argued *Furman v. Georgia*, 408 U.S. 238 (1972). By the time of Gilmore's case, he had appeared before the Supreme Court in at least five other death penalty cases. See *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Aikens v. California*, 406 U.S. 813 (1972); *McGautha v. California*, 402 U.S. 183 (1971); *Maxwell v. Bishop*, 398 U.S. 262 (1970).

¹⁷¹ HILLYARD & DOMBRINK, *supra* note 130, at 8–9.

¹⁷² GARLAND, *supra* note 165, at 34–35 ("the contemporary American death penalty has, in important respects been *designed* to be an antilynching For all the inversions of form, the social forces and political processes that enabled lynchings, mobilized lynch mobs, and made lynchings useful for political actors have somehow persisted and continue to structure the modern death penalty's deployment and utility.").

application of the death penalty.¹⁷⁴ The Supreme Court, Garland explains, developed a “discipline of legal rules and procedural propriety” to “us[e] the values of liberalism (rule-based restraints on state power, respect for the individual, due process, legality) to reshape America’s capital punishment practice.”¹⁷⁵ The existence of rules and procedures, in other words, contribute to constituting a legitimate death penalty. Hand in hand with a logic of rules is the idea that rules can be waived, provided, of course, that the waiver follows certain rules. The waiver model works well—indeed, it can only exist—within a discourse of rules. It acknowledges the existence of rules, even as the individual invokes a desire not to take advantage of them.

This conceptualization shapes the function of mental illness, as is plain in the *Gilmore* Supreme Court litigation. Both the application for a stay of execution filed by Gilmore’s mother and the response from the Attorney General of Utah spoke directly to Gilmore’s efforts to kill himself.¹⁷⁶ The desire to hasten death, however, was legally relevant only to the extent that it signified mental illness that undercut the validity of the waiver. Bessie Gilmore’s stay application argued that “[t]o permit a man to kill himself through legal process by his lack of rational choice affronts a most basic sense of justice,” and specified that a proper waiver is the mechanism for protecting justice.¹⁷⁷ It did not draw on, for example, the historical proscriptions on suicide elaborately described by the Supreme Court in *Glucksberg*.¹⁷⁸ The waiver model reconfigures the relevance of mental illness such that it relates only to the ability to waive, not to the desire to die.

3. Cultural Frames of Mental Illness and Criminality

The legal marginalization of mental distress among condemned prisoners may reflect a larger cultural ambivalence regarding depression as a form of mental illness.¹⁷⁹ At least in the criminal context, the law also

¹⁷³ Garland defines juridification as “the regulation of state power by reference to legal rules and procedures.” *Id.* at 264. Other strategies included “civilizing and humanizing” the punishment by, e.g., excluding juveniles or those mentally ill at execution, and “democratizing and localizing” by shifting death penalty decisions to local participants. *Id.* at 268–80.

¹⁷⁴ *Id.* at 262.

¹⁷⁵ *Id.* at 263–65.

¹⁷⁶ Stay App., *supra* note 150, at 31–32; Stay Resp., *supra* note 152, at 56–57.

¹⁷⁷ Stay App., *supra* note 150, at 32 (internal punctuation omitted).

¹⁷⁸ *Washington v. Glucksberg*, 521 U.S. 702, 710–15 (1997).

¹⁷⁹ David Pilgrim, *The Survival of Psychiatric Diagnosis*, 65 SOC. SCI. & MED. 536, 542 (2007).

generally fails to acknowledge the impact of impaired affective (as opposed to cognitive) states on decisionmaking.¹⁸⁰ Certainly Melvin Rees, with his delusional thinking and psychotic preoccupations, conformed more closely to widespread ideas of what mental illness looks like than did Gary Gilmore.¹⁸¹ Notably, the Supreme Court has expressed greater concern over the reliability of the procedures to evaluate mental competency in both *Ford v. Wainwright*¹⁸² and *Panetti v. Quarterman*,¹⁸³ both of which involved prisoners with serious delusions, than it has in volunteer cases.¹⁸⁴

This difference in interpreting depression may also reflect a bias against recognizing mental dysfunction in criminals as it contradicts prevalent ideas about criminal intentionality and autonomy.¹⁸⁵ A *Newsweek* magazine cover featuring Gary Gilmore trades in romantic notions of death seeking.¹⁸⁶ Gilmore looks directly at the camera, with what could be construed as a perhaps rakish, perhaps slightly menacing, grin on his face. He wears a short-sleeved prison jumpsuit that reveals handcuffs and his tattooed forearms. “Death Wish” is stamped in red on Gilmore’s torso. It is easy to read into the image that Gilmore has a “death wish” because he is a thrill-seeking outlaw, not because he is depressed and sees no point to living.

Perhaps tapping into these assumptions about free will is the persistence of the metaphor of “volunteer” to describe execution-hastening death-sentenced prisoners. The word “volunteer” amplifies connotations of

¹⁸⁰ Maroney, *supra* note 138, at 1400 (“[T]o the extent that examiners and courts sometimes reveal their conception of the distinction between a ‘rational’ and ‘factual’ understanding, it appears clear that the generally operative concept of *Dusky* rationality is focused almost entirely on disordered cognitive processes, such as those seen in thought disorder. The role of emotional disorder, though sometimes mentioned, remains almost entirely unexplored. Indeed, it is sometimes deliberately disregarded.” (footnote omitted)).

¹⁸¹ Bruce G. Link et al., *Public Conceptions of Mental Illness: Labels, Causes, Dangerousness, and Social Distance*, 89 AM. J. PUB. HEALTH 1328, 1331 (1999) (finding study respondents significantly more likely to identify schizophrenia as “mental illness” than depression).

¹⁸² 477 U.S. 399 (1986).

¹⁸³ 551 U.S. 930 (2007).

¹⁸⁴ These cases also involved a different legal question: competency to be executed. Among other things, and generally unlike the Texas volunteer cases, this meant that the prisoners’ lawyers sought genuinely adversarial proceedings to test the mental health evidence.

¹⁸⁵ DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 184 (2001); Daniel LaChance, *Last Words, Last Meals, and Last Stands: Agency and Individuality in the Modern Execution Process*, 32 LAW & SOC. INQUIRY 701, 703–04 (2007).

¹⁸⁶ This image can be viewed at <https://www.etsy.com/listing/62736758/gary-gilmore-cover-newsweek-november-29>, archived at <https://perma.cc/ZRC5-JQTG>.

free will and suggests a kind of civic-mindedness. Conversely, the notions of helplessness and passivity embedded in the “sick role,”¹⁸⁷ as well as the historical ghosts of euthanasia, may inhibit our calling those using the Vermont, Oregon, and Washington statutes “volunteers.” As Thibodeau, McClelland, and Boroditsky’s experimental work found, metaphors shape our understanding of the underlying social problem, as well as its solution.¹⁸⁸

IV. PROPOSED ANALYSIS FOR ADJUDICATING REQUESTS TO EXPEDITE EXECUTION

Explaining why the law treats these desires to die so differently does not justify the different legal approaches. I propose a legal standard that acknowledges that many of the issues surrounding desires to die are similar, whether one is imprisoned or not—with one important exception. Where assisted-death is illegal in most states, I do not propose an equivalent ban on the execution of volunteers. While this may be the more consistent approach, I recognize that it is an impractical position at this time. Instead, I offer a way to ameliorate, if not eliminate, the disparity in how the law treats desires to die.

Using the right to die in the medical context as a template, the standard for volunteers should consider state interests regarding the preservation of life, prevention of suicide, interests of innocent third parties, and implications for a profession (here reconceptualized to include the individual lawyer and the legitimacy of the legal system as a whole). In addition, prison institutional considerations should be integrated into the

¹⁸⁷ In the 1950s, sociologist Talcott Parsons theorized the “sick role” which, among other things, situated the patient as passive, helpless, and subordinate to the expert physician. “The sick patient is in a situation of ‘helplessness’ and ‘technical incompetence’, being ‘liable to a whole series of ir- and non-rational beliefs and practices.’” Chris Shilling, *Culture, the ‘Sick Role’ and the Consumption of Health*, 53 BRIT. J. SOC. 621, 628 (2002). Parsons’ characterization of the sick as passive has been countered by empirical work on more agentic and empowered patients, particularly with the growth of other areas of purported expertise, such as the Internet. Michele Crossley, *‘Sick Role’ or ‘Empowerment’? The Ambiguities of Life with an HIV Positive Diagnosis*, 20 SOC. HEALTH & ILLNESS 507, 509–10 (1998); Shilling, *supra*, at 628, 631; Matthias Zick Varul, *Talcott Parsons, the Sick Role and Chronic Illness*, 16 BODY & SOC’Y 72, 72–73 (2010). In the context of this Article, where the focus is less on the patient’s sense of empowerment and agency, and more on the state’s view of the patient, the sick role may continue to animate the state’s response since the state is posited as the individual’s protector, with the burden being on the patient (or his or her surrogates) to overcome the notion that the patient wants this particular kind of “protection.” Shilling, *supra*, at 628.

¹⁸⁸ Paul Thibodeau et al., *When a Bad Metaphor May Not Be a Victimless Crime: The Role of Metaphor in Social Policy*, in PROCEEDINGS OF THE 31ST ANNUAL CONFERENCE OF THE COGNITIVE SCIENCE SOCIETY 809–14 (N. A. Taatgen & H. van Rijn eds., 2009).

analysis, as they are in the prisoner medical care cases. Finally, to ensure a genuinely adversarial proceeding in which the full range of the state's interests is presented to the court, independent counsel should be appointed.

A. STATE'S INTEREST IN PREVENTING SUICIDE AND PRESERVING LIFE

As the data described above make clear, the risk of suicidality in the volunteer population is real and should be integrated into the legal analysis. Mental health information should not simply affect the validity of the waiver, but should also be taken into account in assessments of impaired judgment and the will to live more generally.

Further, while Timothy Kaufman-Osborne argues that the prisoner dies at the pronouncement of sentence,¹⁸⁹ this is true in only the most symbolic sense. The state has an interest in even the life of the death-sentenced prisoner. The Eighth Amendment guarantees of food, essentially safe and clean shelter, clothing, and medical care extend to the death-sentenced as much as they do to other prisoners.¹⁹⁰ Some prisons have rules prohibiting a mentally competent prisoner from hurting himself or from permitting another to hurt him.¹⁹¹

California death row prisoner Clarence Allen's attempt to refuse medical treatment lays bare the contradictions in how and when prisoners have rights to die. Allen, an elderly prisoner with significant health problems and physical disabilities, suffered a heart attack about three

¹⁸⁹ TIMOTHY V. KAUFMAN-OSBORN, *FROM NOOSE TO NEEDLE: CAPITAL PUNISHMENT AND THE LATE LIBERAL STATE* 13–45 (Univ. of Michigan Press 2002).

¹⁹⁰ *See, e.g.*, *Snow v. McDaniel*, 681 F.3d 978, 987 (9th Cir. 2012) (holding that the fact that prisoner-patient was on death row was an improper motive for denying medical care); *Gates v. Cook*, 376 F.3d 323, 332 (5th Cir. 2004) (holding that clean and safe shelter, food, clothing, and medical care are required by Eighth Amendment).

¹⁹¹ *See, e.g.*, TEX. DEP'T OF CRIM. JUSTICE, *Self-Inflicted Bodily Injury for Secondary Gain or Threatening to Self-Inflict Bodily Injury*, in *DISCIPLINARY RULES AND PROCEDURES FOR OFFENDERS C-2* (2012), available at http://www.tdcj.state.tx.us/documents/cid/Disciplinary_Rules_and_Procedures_for_Offenders_English.pdf, archived at <http://perma.cc/YM28-YWQ2>.

Physical injury to an offender's body that is self-inflicted or inflicted by others with the offender's permission, or assisting another offender in mutilating the offender's body, absent a determination by a mental health professional that the offender's behavior is the result of a mental condition, or threatening to self-inflict bodily injury.

Some systems are abandoning punishment for self-harm. *See* Austin Jenkins, *Washington Prisons Will No Longer Punish Inmates for 'Self-Harm'*, NW NEWS NETWORK (July 3, 2014), <http://nwnewsnetwork.org/post/washington-prisons-will-no-longer-punish-inmates-self-harm>, archived at <http://perma.cc/T5FS-8Y8J> (citing Washington and Vermont prison systems).

months before his scheduled execution.¹⁹² The Associated Press reported that:

Having suffered a heart attack in September, Allen had asked prison authorities to let him die if he went into cardiac arrest before his execution, a request prison officials said they would not honor.

“We would resuscitate him,” said prison spokesman Vernell Crittendon, then execute him.¹⁹³

This is consistent with case law. A few courts have permitted prisoners to refuse treatment,¹⁹⁴ but generally courts have allowed prisoners to intervene forcefully when prisoners try to die, citing the state’s interest in preserving life and preventing suicide.¹⁹⁵ In *In re Caulk*,¹⁹⁶ the prison sought to force-feed a prisoner facing life without parole in prison.

The prisoner had decided to stop eating because he:

[N]ever expects to be released from prison again. He says he is tired, unhappy, disappointed with the promise that life holds, that he does not ‘belong on the streets.’ He maintains that if he cannot live freely, he does not want to live at all He testified that he has hurt a lot of people, and whenever he feels pain on his starvation diet, he believes he is paying another debt for his past misdeeds.¹⁹⁷

Caulk offered to release the prison from any liability for his death, and did not appear to the court to be starving himself for any secondary gain, such as a transfer to another prison.¹⁹⁸ The court acknowledged that Caulk

¹⁹² Dan Glaister, *California Executes Clarence Ray Allen*, 76, *GUARDIAN* (Jan. 17, 2006 7:09 PM EST), <http://www.theguardian.com/world/2006/jan/18/usa.danglaister>, archived at <http://perma.cc/AP8Z-MVWY>; Henry Weinstein and Hector Becerra, *California Executes Death Row Inmate*, 76, *L.A. TIMES* (Jan. 17, 2006), <http://articles.latimes.com/2006/jan/17/local/me-allen17>, archived at <http://perma.cc/6RF3-DUGH>

¹⁹³ Associated Press, *Senior Prisoner on California’s Death Row Is Executed at Age 76*, *WASH. POST* (Jan. 18, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/17/AR2006011701327.html>, archived at <http://perma.cc/4CT5-SEDE>.

¹⁹⁴ See, e.g., *Thor v. Superior Court*, 855 P.2d 375, 380–83, (Cal. 1993); *Comm’r. of Corr. v. Turner*, 2006 WL 453465 at *3 (Mass. 2006).

¹⁹⁵ See, e.g., *Polk Cty. Sheriff v. Iowa Dist. Ct. for Polk Cty.*, 594 N.W.2d 421 (Iowa 1999) (permitting involuntary dialysis); *Comm’r. of Corr. v. Myers*, 399 N.E.2d 452 (Mass. 1979) (same). See generally Arlene McCarthy, *Prisoner’s Right to Die or Refuse Medical Treatment*, 66 *A.L.R.5th* 111 (1999); Daniel R.H. Mendelsohn, *The Right to Refuse: Should Prison Inmates Be Allowed to Discontinue Treatment for Incurable, Noncommunicable Medical Conditions?*, 71 *MD. L. REV.* 295 (2011); Peter Wood, *The Right to Refuse Medical Treatment: Courts’ Disparate Treatment of Incarcerated Patients*, 112 *PENN. L. REV.* 1167 (2008).

¹⁹⁶ 480 A.2d 93 (N.H. 1984).

¹⁹⁷ *Id.* at 95.

¹⁹⁸ *Id.* *Caulk* and the other cases discussed in this section differ from most hunger strike cases insofar as the prisoners in this section were not trying to make a statement or extract a concession from the prison administration. In those cases, courts generally side with the

had a state constitutional right to privacy protecting him from “unwanted infringements of bodily integrity,” but, since “no constitutional right is absolute,” it weighed Caulk’s constitutional right against the state’s interests.¹⁹⁹ The court concluded:

Although the defendant contends that he is allowing himself to die, rather than committing suicide, it is important to note what this case does not involve. This is not a situation where an individual, facing death from a terminal illness, chooses to avoid extraordinary and heroic measures to prolong his life, albeit for a short duration. Rather, the defendant has set the death-producing agent in motion with the specific intent of causing his own death, and any comparison of the two situations is superficial. Thus, in these circumstances, the State’s interest in preserving life and preventing suicide dominates.²⁰⁰

In *Laurie v. Senecal*,²⁰¹ the Rhode Island Supreme Court considered

whether a healthy adult male prisoner . . . has a constitutional right to end his life by starvation as long as he has no dependents who might suffer as a result of his demise and as long as he is not suffering from any psychotic or delusional condition and is not using his self-impelled starvation as a means of extracting concessions from the director.²⁰²

The prisoner had no physical ailment. He simply “no longer desired to live because of the stigma of his conviction” and felt “continuous psychological pain” because of his crime.²⁰³ Despite finding the prisoner was competent, “had made a knowing and voluntary decision to stop taking food and water for the purpose of ending his life,” and had no dependents who would suffer from his death, the court found the prison had a “right and duty to intervene”²⁰⁴ because of the state’s interest in preserving life and preventing suicide. “In respect to an incarcerated prisoner, we believe that

prison. See, e.g., *Weinschenker v. Avolio*, No. 06-CV-0405, 2006 U.S. Dist. WL 897740 (W.D. Pa. 2006); *In re Soliman*, 134 F. Supp. 2d 1238 (N.D. Ala. 2001); *Lantz v. Coleman*, No. HHDCV084034912, 2010 WL 1494985 (Conn. Super. Mar. 9, 2010); *Ill. Dep’t of Corr. v. Millard*, 782 N.E.2d 966 (Ill. App. 2003); *State ex rel. White v. Narick*, 292 S.E.2d 54 (W. Va. 1982); see also *Comm’r. of Corr. v. Myers*, 399 N.E.2d 452 (Mass. 1979) (construing dialysis refusal as effort to obtain transfer to lower security prison). But see *Singletary v. Costello*, 665 So.2d 1099 (Fla. App. Dist. 1996) (denying prison permission to forcefeed); *Hill v. Dep’t of Corr.*, 992 A.2d 933 (Pa. 2010) (authorizing invasive medical tests, but holding that prison failed to meet evidentiary burden to forcefeed). For a discussion of the relevance of *Cruzan* and *Glucksberg* to prison hunger strikes, see Mara Silver, *Testing Cruzan: Prisoners and the Constitutional Question of Self-Starvation*, 58 STAN. L. REV. 631 (2005).

¹⁹⁹ *In re Caulk*, 480 A.2d at 95 (internal citations omitted).

²⁰⁰ *Id.* at 97 (internal citations omitted).

²⁰¹ 666 A.2d 806 (R.I. 1995).

²⁰² *Id.* at 808.

²⁰³ *Id.* at 807.

²⁰⁴ *Id.* at 807–08.

there is no right under either the State or the Federal Constitution to override the compelling interest of the state in the preservation of his or her life and the prevention of suicide.”²⁰⁵

In Maine, a court permitted a jail to force-feed a prisoner who “refus[ed] to take life-sustaining sustenance as a result of a sense of hopelessness.”²⁰⁶ The court reasoned that the sheriff of the jail had “the obligation to take reasonable measures to maintain the wellbeing of individuals in his custody.”²⁰⁷ The Seventh Circuit limited prisoners’ right to refuse medical treatment by referring to the psychological impact of incarceration (and the state’s duty to mitigate that impact).²⁰⁸

Free people who are sane have a liberty interest in refusing life-saving medical treatment, and likewise in refusing to eat, a method by which some elderly people commit suicide. But either prisoners don’t have such an interest, or it is easily overridden.

The reasons are practical. (No longer does one hear that prisoners must not be allowed to evade punishment by killing themselves and thus “cheating the gallows.”) . . . Prison officials who let prisoners starve themselves to death would also expose themselves to lawsuits by the prisoners’ estates. Reckless indifference to the risk of a prisoner’s committing suicide is a standard basis for a federal civil rights suit. The idea behind liability in such cases is that incarceration can place a person under unusual psychological strain and the jail or prison under a commensurate duty to prevent the prisoner from giving way to the strain. The analysis is applicable when suicide takes the form of starving oneself to death.²⁰⁹

The remorse, hopelessness, and stress of incarceration articulated in these cases are strikingly similar to the reasons many death row volunteers give for wanting to die.²¹⁰ In the death row context, of course, these reasons are accepted.

Finally, in the context of the death penalty, accepting the prisoner’s reason for wanting to hasten execution is also legally questionable. Not only should this be irrelevant, as Anthony Casey states bluntly,²¹¹ but this

²⁰⁵ *Id.* at 809.

²⁰⁶ *Ross v. Emerson*, No. CV-05-262, 2005 WL 3340087, at *1 (Me. Super. Nov. 3, 2005) (order denying motion to dissolve temporary restraining order).

²⁰⁷ *Id.* at *2.

²⁰⁸ *Freeman v. Berge*, 441 F.3d 543 (7th Cir. 2006).

²⁰⁹ *Id.* at 546–47 (internal citations omitted). The California Supreme Court notably rejected the idea that liability could attach in the face of the prisoner’s waiver of nutrition and hydration. *Thor v. Superior Court*, 855 P.2d 375, 386–87 (Cal. 1993).

²¹⁰ *Rountree, Accounts*, *supra* note 8, at 601–03.

²¹¹ *Casey, supra* note 5, at 99 (“This is irrelevant. There is no right to choose death over imprisonment. And there is especially no right to choose a punishment otherwise prohibited by the Constitution.”).

argument contains no principle limiting lethal injection to death-sentenced prisoners.

For non-death-sentenced prisoners, courts reject the notion that hopelessness or a desire to atone for one's crimes entitled a prisoner to hasten death. Instead, courts impose a duty on the state to maintain life. Further, echoing Casey's argument, courts find that whether and when to die is simply not for the prisoner to decide. In confronting a prisoner's request for expedited execution, courts should weigh the state's strong interest in keeping volunteers alive, as it does with other prisoners.

B. INSTITUTIONAL SECURITY CONCERNS

The prisoner cases frequently invoke concerns regarding the orderly administration of the prison.²¹² In *McNabb v. Department of Corrections*, the Washington Supreme Court considered the case of Charles McNabb who sought to refuse force-feeding by the prison.²¹³ The prison began force-feeding him after he "had not eaten voluntarily for over five months."²¹⁴ The plurality opinion noted that the prisoner was neither "terminally ill" nor "debilitated by disease"; McNabb wanted only to have his fast "take its course" to his death.²¹⁵ While recognizing McNabb had a "limited right to refuse artificial means of nutrition and hydration," the court noted that it was "subject to the goals and policies of the prison system."²¹⁶ The prison's interest was "an additional state interest that should be considered."²¹⁷ Further, courts should defer to prison administrators' assessments of the risks to institutional security and order.²¹⁸ The plurality concluded:

Therefore, the court will weigh McNabb's right to refuse artificial means of nutrition and hydration against the existence of *five* compelling state interests: (1) the maintenance of security and orderly administration within the prison system, (2) the preservation of life, (3) the protection of innocent third parties, (4) the prevention of suicide, and (5) the maintenance of the ethical integrity of the medical profession.²¹⁹

²¹² See, e.g., *Stouffer v. Reid*, 993 A.2d 104 (Md. 2010); *Comm'r. of Corr. v. Myers*, 399 N.E.2d 452, 458–59 (Mass. 1979); *In re Caulk*, 480 A.2d 93, 96 (N.H. 1984).

²¹³ *McNabb v. Dep't of Corr.*, 180 P.3d 1257 (Wash. 2008).

²¹⁴ *Id.* at 1259.

²¹⁵ *Id.* at 1260.

²¹⁶ *Id.* at 1264.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 1264–65. Even the justices who concurred only in the judgment found the prisoner's right to refuse medical treatment was constrained:

Prisoners who are otherwise healthy have no right to refuse artificial means of nutrition and hydration in an effort to end their lives. Contrary to the inference of the dissent, Charles McNabb is not conducting a hunger strike—he is attempting to commit suicide. The extraordinary intervention in this case was initiated only when medical staff issued a written determination that

This interest should be weighed in the case of volunteers, as well. While the data are not clear whether or how prison security may be disrupted by volunteers, researchers have observed that suicides can occur in clusters, and can be “contagious” insofar as one suicide may “facilitate the occurrence of a subsequent suicide.”²²⁰ This raises the question whether one individual’s decision to hasten execution could affect others. Blume reports that many attorneys believe execution hastening is contagious, and Blume’s data tentatively suggest that contagion could be a dynamic affecting decisions to hasten execution.²²¹ If such a dynamic is at work, it portends a systematic degradation of the legal process, as well as the possibility of increased depression and hopelessness. This could increase the burden on prison mental health staff. Courts should therefore inquire into the impact of a particular volunteer’s execution on the larger death row population.

C. STATE’S INTEREST IN PROTECTING INNOCENT THIRD PARTIES

The Death with Dignity statutes do not provide a voice for third parties, and this may well reflect the fact that the weight of this factor has receded in importance in the passive euthanasia cases.²²² It may also reflect the fact that the Death with Dignity statutes narrow the group of people who may avail themselves of the law. Individuals must be within six months of death.

For otherwise healthy people, such as the prisoner in *Laurie v. Senecal*, this concern may be more prominent. In the context of the social ties of death row prisoners, empirical research suggests that volunteers as a group are not dramatically more socially isolated than those who pursue their appeals. The existence of “execution impact” evidence, i.e., testimony from the capital defendant’s loved ones about the negative effect his execution would have on them at trial also suggests the existence of

McNabb’s health was threatened. McNabb has no right to starve himself to death by refusing sustenance while in the custody of the State—this is not a privacy right that citizens of the state hold or expect to hold.

Id. at 1267 (Madsen, J., concurring).

²²⁰ Madelyn S. Gould et al., *Suicide Clusters: A Critical Review*, 19 SUICIDE & LIFE-THREATENING BEHAV. 17, 18 (1989); Matthew K. Nock et al., *Suicide and Suicidal Behavior*, 30 EPIDEMIOLOGIC REVS. 133, 145 (2008) (identifying suicidal behavior among peers as a risk factor for suicide).

²²¹ Blume, *supra* note 6, at 964. The Texas data suggest that it is difficult to disentangle contagion from other influences on decisions to be executed. Rountree, *supra* note 73, at 67–71.

²²² The New Mexico opinion striking down the physician-assisted death ban, by contrast, repeatedly noted the impact of the death on family members and loved ones. *Morris v. Brandenburg*, No. D-202-CV 2012-02909, at 6, 12 (2d Jud. Dist. N.M. Jan. 13, 2014).

comparable evidence when execution is a more proximate reality.²²³ Nevertheless, these family ties are disregarded in waiver adjudications. The voices of mothers, fathers, children, and spouses should be included and weighed in the court's adjudication.

D. STATE'S INTEREST IN THE INTEGRITY OF THE LEGAL SYSTEM AND LEGAL PROFESSION

The state has multiple interests specific to the operation of the legal system in capital cases. First, it must ensure the legitimacy of the death-sentencing process. Second, it must create legal structures enable individual lawyers to act ethically.

1. The Legitimacy of the Death Penalty System

As the New Jersey Supreme Court observed, the state has "an interest in the reliability and integrity of a death sentencing decision."²²⁴ This concern has led scholars to propose legal standards that protect this interest. Anthony Casey advocates a standard whereby the state's interest diminishes as appeals are pursued and (from the prisoner's perspective) lost. Casey bases his argument in part on his contention that the chance of error diminishes as the case proceeds.²²⁵ This in turn increases the state's confidence in the reliability and integrity of the death sentence. Evolutions in the law governing capital appeals undermine the assumption that the chance of error decreases as appeals progress. Certainly federal judges with

²²³ See Wayne A. Logan, *When Balance and Fairness Collide: An Argument for Execution Impact Evidence in Capital Trials*, 33 U. MICH. J. L. REFORM 1 (1999). As Logan notes, execution impact evidence "permits jurors to recognize in a visceral way that their capital decision does not occur in a vacuum—that the life they may decide to take perhaps has had, and perhaps will continue to have, some positive effect on others." *Id.* at 52.

²²⁴ *State v. Martini*, 677 A.2d 1106, 1107 (N.J. 1996). In dissenting from the Supreme Court's decision in *Gilmore v. Utah*, Justice Marshall expressed this interest more pungently: "[T]he Eighth Amendment not only protects the right of individuals not to be victims of cruel and unusual punishment, but that it also expresses a fundamental interest of society in ensuring that state authority is not used to administer barbaric punishments." 429 U.S. at 1019 (Marshall, J., dissenting).

²²⁵ Casey, *supra* note 5, at 101, 103.

The interest in restricting defendants from volunteering for execution is derived from the state's responsibility to prevent the inconsistent or inappropriate application of the death sentence. . . . Each stage of the proceedings serves as a safeguard against an inappropriate death sentence and the danger of such a sentence diminishes as the case proceeds through each stage. . . .

. . . .

Every stage serves as a checkpoint, an additional safeguard filtering out the impurities.

Id. For a contrary view, see, e.g., DAVID R. DOW, EXECUTED ON A TECHNICALITY: LETHAL INJUSTICE ON AMERICA'S DEATH ROW 52–86 (2005).

life tenure may have a different perspective from elected state judges,²²⁶ the quality of counsel can improve, and new evidence may come to light as the case proceeds. Given the current direction of federal habeas law, however, the more defensible justification for the changing balance is the state's diminishing interest in ensuring the accuracy of the process. The Anti-terrorism and Effective Death Penalty Act²²⁷ and the body of habeas corpus law that has evolved in its wake have narrowed the scope of federal judicial review, raised the prisoner's evidentiary burden, and limited the federal courts' ability to grant the prisoner relief as compared to state courts and to pre-AEDPA federal powers.²²⁸ These restrictions reflect the current view that the state's interest in correcting error decreases as its interest in finality increases.²²⁹

Conversely, the state's interest is highest in the early stages of the process, namely at trial.²³⁰ Arguments that death-sentenced individuals simply choose the timing of their punishment, not the punishment itself,²³¹ are undermined by cases in which people facing the death penalty prevented a full and fair hearing at the guilt/innocence and punishment phases of trial. In the Texas study, some volunteers asked the jury for the death penalty, barred presentation of mitigating evidence, halted cross-examination of hostile witnesses, or required counsel to pick a pro-death-penalty jury.²³² In

²²⁶ Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1826–32 (2000).

²²⁷ 28 U.S.C. § 2254 (2012).

²²⁸ See generally Larry Yackle, *AEDPA Mea Culpa*, 24 FED. SENT. RPTR. 328, 331–33 (2012) (describing ways in which AEDPA changed federal habeas law).

²²⁹ See, e.g., *Cullen v. Pinholster*, 131 S.Ct. 1388 (2011) (finding interest in finality weighs against introduction of new evidence in federal habeas proceedings); Samuel R. Wiseman, *Habeas After Pinholster*, 53 B.C. L. REV. 953, 1006 (2012) (observing that “federalism, comity, and finality rival, if not eclipse, the vindication of constitutional rights as the primary concern of federal habeas”).

²³⁰ Casey, *supra* note 5, at 104–05.

²³¹ See, e.g., Milner, *supra* note 7, at 296.

²³² These techniques were variously used by Texas volunteers Joe Fedelfido Gonzales, Steven Renfro, Christopher Jay Swift, Richard Beavers, and James Scott Porter. Joe Fedelfido Gonzales *pro se* Appellant's Brief in CCA No. 72,253, filed in the TCCA on June 27, 1996 (at 2 (“During the individual voir dire, I, Joe F. Gonzales, Jr. made statements which were true and correct so that I would systematically stack the deck against myself, so I would more or less be convicted of the charge, (capital murder), and by not cross examining the state's witnesses nor objecting to direct examination or to the admittance of evidence, (by my own judgment and free will), I believe was an asset to the state and an aid to the jurors in their answering the special issue questions number one (1) and number two (2) so that the death penalty would ultimately be imposed.”); opening argument at 23 (reassuring jury that request for death penalty not suicidal); Steven Renfro: District Court No. 96-0102X1, Reporter's Record (RR) 25:3152–54 (Renfro instructed counsel not to cross-

addition, these arguments ignore the possibility of error by the trial court. Prisoners should not be allowed to waive direct appeal, the stage at which the trial court's decisions are reviewed.

Nor should courts permit prisoners to waive review of possibly unconstitutional sentences. "[T]he consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment."²³³ Claims that the would-be volunteer should be excluded from the death penalty by virtue of, e.g., his intellectual disability or youth at the time of the crime, should be decided before the validity of the waiver is adjudicated.²³⁴ Finally, in light of evidence regarding botched executions,²³⁵ litigation regarding the procedure used to kill should also not be waivable. There is a "strong societal interest in the ban on cruel and unusual punishments that should not be waived by one individual," as such a waiver would essentially "deprive the Eighth Amendment of meaning."²³⁶ Therefore, under the regime this Article proposes, prisoners' burden to demonstrate an entitlement to expedited execution would decrease as appeals progressed. However, regardless of the stage of appeals, the prisoner could not waive appeals regarding the method of execution or whether the prisoner falls within a category of offenders excluded from execution.

2. *The Integrity of the Legal Profession*

Physicians' conflicts with hastening death have sometimes been reconciled by reference to the importance of recognizing the importance of autonomy in a therapeutic relationship.²³⁷ The more profound question

examine witness); RR 28:3664 (Renfro tells jury his crime deserved the death penalty); Christopher Swift, District Court No. F-2003-1720-C, RR 35:33-34 (confirming on the record he does not want any mitigating evidence presented at punishment phase); Richard Beavers, District Ct No. 465138, RR 21: 269-71 (Beavers waives right to cross-examine surviving victim); James Scott Porter, District Court No. 00-F-0441-202, RR 5:29-30 (Porter limited defense counsel's ability to present certain defenses, to contact mitigation witnesses, and to present any witnesses on his behalf).

²³³ *Gilmore v. Utah*, 429 U.S. 1012, 1018 (1976) (White, J., dissenting).

²³⁴ See also Blume, *supra* note 6, at 977-78.

²³⁵ See, e.g., Katie Fretland, *Clayton Lockett Writhed and Groaned. After 43 Minutes, He Was Declared Dead*, GUARDIAN (April 30, 2014), <http://www.theguardian.com/world/2014/apr/30/clayton-lockett-oklahoma-execution-witness>, archived at <http://perma.cc/LGF7-F2KT>; Michael Kiefer, *Arizona Officials Deny Execution Was Botched*, ARIZ. REPUBLIC (July 25, 2014), <http://www.azcentral.com/story/news/arizona/politics/2014/07/25/arizona-officials-deny-execution-botched/13145329/>, archived at <http://perma.cc/W577-FPA9>.

²³⁶ Jeffrey L. Kirchmeier, *Let's Make a Deal: Waiving the Eighth Amendment by Selecting a Cruel and Unusual Punishment*, 32 CONN. L. REV. 615, 642 (2000).

²³⁷ See, e.g., *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417, 426-27 (1977).

physicians have raised is whether their role in hastening death transforms the image of the profession or even changes the profession itself.²³⁸ Critics of assisted death voice concern that doctors may become more engaged with helping patients die than with alleviating their pain or addressing their depression.²³⁹

Similar questions are worth asking in the context of legal representation. What aspects of the attorney's role or the attorney–client relationship may be enhanced or degraded by enabling a client's death? Some may fear that an attorney's refusal to follow his client's order to hasten his execution undermines a core professional value. Others may believe that by asserting the importance of pursuing appeals, they uphold a system that metes out punishment in a lawful, orderly way. They also fulfill another mission—to show their clients that their lives have value and that they are entitled to the protections of due process.

A larger concern is that a lawyer's experience of helping a client die could change future approaches to representation by that individual attorney or within that legal community. The experience could, e.g., erode the attorney's or the profession's commitment to enhancing the reliability and integrity of the capital conviction and death sentence through a thorough investigation.

When confronted with a volunteer, the court should examine whether counsel has performed the investigation outlined by the American Bar Association's *Guidelines*.²⁴⁰ While not limited to these questions, the investigation is particularly important as it pertains to issues directly related to the appropriateness of the death sentence, i.e., whether the prisoner is excluded from the death penalty because of his juvenile status at the time of the crime or his intellectual disability, and whether he is “innocent of the death penalty,” i.e., his crime did not constitute capital murder. Where the proportionality of the sentence is legally relevant, the investigation must

²³⁸ See, e.g., HILLYARD & DOMBRINK, *supra* note 130, at 37, 45, 90–91, 129–30, 139.

²³⁹ *Id.* at 181–82 (American Medical Association President expressing concern that physician-assisted death “would . . . discourage the kind of appropriate aggressive palliative care that can dissuade patients in pain from seeking just such an early death. Recent promising developments . . . could be set back dramatically”). Author and physician Atul Gawande recently described the planned assisted death of a woman with terminal brain cancer as “a sign that our health care system has failed her, because she cannot trust that medical personnel are going to recognize her priority of not suffering and be willing to offer sufficient care and therapy.” FRONTLINE, *Brittany Maynard: Symbol of a Broken Health Care System?* | FRONTLINE, YOUTUBE (Oct. 17, 2014), <http://youtu.be/nIvZtd1nEzE?t=1m41s>, archived at <http://perma.cc/A7GW-2ZZ7>. These physicians fear that not only have individual doctors possibly failed their patients by not meeting their needs, but that the profession as a whole may fail to commit to making good palliative care a priority.

²⁴⁰ American Bar Association, *supra* note 107, at 1015–27.

also be adequate to provide courts with the evidence required to perform their statutory duty.²⁴¹ This inquiry would be analogous to asking a physician whether she had performed the tests necessary to reach an accurate diagnosis of the patient's condition.

3. *Counsel Must Be Appointed to Represent the Range of State Interests*

Judicial inquiry into counsel's investigation is essential, but the professional tension volunteers' lawyers experience would be substantially resolved by appointing counsel to represent the prisoner and different counsel to argue for the state's interests in rejecting the prisoner's waiver. Certainly the lackluster litigation in the Texas volunteer cases suggests such appointment of counsel is essential.²⁴² In a few volunteer cases, courts have appointed counsel (or asserted counsel should have been appointed) to present the case for the incompetence or involuntariness of the waiver.²⁴³ When capital defendants have refused to permit the presentation of mitigating evidence, some courts have allowed or required other participants to provide mitigating evidence.²⁴⁴ A similar mechanism should be used in presenting the case for the state's interests in the broader inquiry

²⁴¹ See cases cited *supra* note 13 (outlining scope of mandatory review).

²⁴² Rountree, *Accounts*, *supra* note 8, at 609–12.

²⁴³ *Mason ex rel. Marson v. Vasquez*, 5 F.3d 1220, 1222 (9th Cir. 1993) (noting that the district court had ordered counsel to remain prisoner's court-appointed attorney until his mental competence was determined); *Comer v. Stewart*, 230 F. Supp. 2d 1016, 1019–20 (D. Ariz. 2002) (noting that the court had ordered habeas counsel to present evidence that prisoner's waiver was incompetent and involuntary, and that it had appointed separate counsel to represent prisoner in his effort to waive his appeals); *State v. Ross*, 873 A.2d 131, 141–42 (Conn. 2005) (appointing counsel to present case against prisoner's waiver, but emphasizing unique aspects of case); *accord. Tabler v. Stephens*, 588 Fed. App'x 297, 311 (5th Cir. 2014) (Dennis, J., dissenting) (“[I]t was ineffective assistance of counsel for them to allow Tabler to waive his habeas rights without taking action to test his competency.”), *vacated*, No. 12-70013, 2015 WL 327646, at *1 (5th Cir. Jan. 27, 2015); *Appel v. Horn*, 250 F.3d 203, 217 (3d Cir. 2001) (“Appel’s counsel should have investigated, advocated, or otherwise acted to ensure that there was ‘meaningful adversarial testing [of Appel’s competency].’”) (internal citations omitted); *O’Rourke v. Endell*, 153 F.3d 560, 569 (8th Cir. 1998) (“We believe O’Rourke should have been represented by an attorney, either a counsel of record or a ‘next friend,’ to argue that he lacked the capacity to waive his appeal.”); *Newman v. Norris*, No. 05-2107, 2008 WL 222689 at *8 (W.D. Ark. Jan. 24, 2008) (“The position that Petitioner was not competent to waive his rights to counsel and to seek post-conviction relief should have been advanced by an attorney, either a counsel of record or a ‘next friend.’”).

²⁴⁴ See *Barnes v. State*, 29 So.3d 1010, 1022–26 (Fla. 2010) (upholding appointment of “mitigation counsel” to assist court where defendant refused to present mitigation evidence); *Fitzpatrick v. State*, 900 So.2d 495, 523–24 (Fla. 2005) (court required State to present parole officer).

proposed here.²⁴⁵ By ensuring that the state's interests are adequately litigated, appointed counsel would also alleviate the conflict counsel must struggle with in representing a client who seeks execution.

E. STANDARD OF PROOF

Once the court has considered the evidence and argument regarding the state's interest in preventing suicide, protecting the interests of innocent third parties, the reliability and constitutionality of the death sentence and execution, and the impact of the execution on other prisoners and prison staff, it must determine whether the prisoner has demonstrated by clear and convincing evidence that his right to die outweighs the state's interests. As the Supreme Court noted:

[T]his Court has mandated an intermediate standard of proof—clear and convincing evidence—when the individual interests at stake in a state proceeding are both particularly important and more substantial than mere loss of money

We think it self-evident that the interests at stake in the instant proceedings are more substantial, both on an individual and societal level, than those involved in a run-of-the-mill civil dispute. But not only does the standard of proof reflect the importance of a particular adjudication, it also serves as a societal judgment about how the risk of error should be distributed between the litigants. The more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision. . . . An erroneous decision not to terminate results in a maintenance of the status quo; the possibility of subsequent developments . . . at least create the potential that a wrong decision will eventually be corrected or its impact mitigated. An erroneous decision to withdraw life-sustaining treatment, however, is not susceptible of correction.²⁴⁶

Here too, of course, a life is at stake, and not simply pecuniary interests. In addition, the legitimacy of the death penalty system as a whole—our interest “in making sure that the government does not act brutally and lawlessly”²⁴⁷—rests on this determination as well. If the court finds the prisoner has met his burden to claim a right to assisted death, it must then determine—again with the aid of appointed counsel and an adversarial process—whether the prisoner has established his waiver of appeals is both competent and voluntary.²⁴⁸

²⁴⁵ Strafer, *supra* note 4, at 908–11, suggests some of the interests I outline here could be safeguarded by permitting greater involvement of third parties. Recognizing the difficulties many family members experience in understanding the legal system and gaining access to counsel, as well as the State's role in protecting their interests, I would shift the burden to the State to ensure its interests are presented to the court.

²⁴⁶ *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 282 (1990) (internal punctuation and citations omitted). *Id.* at 283 (internal punctuation and citations omitted).

²⁴⁷ Althouse, *supra* note 96, at 1191.

²⁴⁸ State and federal jurisdictions vary with respect to the burden of proof courts should

CONCLUSION

Justice Scalia, rarely a friend to the death row prisoner, quoted from a nineteenth century court opinion in objecting to arguments for a fundamental right to die:

The life of those to whom life has become a burden—of those who are hopelessly diseased or fatally wounded—nay, even the lives of criminals condemned to death, are under the protection of the law, equally as the lives of those who are in the full tide of life's enjoyment, and anxious to continue to live.²⁴⁹

In fact, the law does distinguish the “hopelessly diseased” from the condemned. Some non-terminal individuals with a higher risk for suicide are allowed to obtain the state's assistance in dying, regardless of the interests of third parties, systemic questions about the legitimacy of the legal system and legal profession, and the broader state interest in protecting life and preventing suicide, even of death row prisoners. The invisibility of this disparity in the Supreme Court's jurisprudence is striking. In *Glucksberg*, for example, Justice Souter and Justice O'Connor asked almost existential questions about how we can know whether a decision to die is truly competent, knowing, and voluntary.²⁵⁰ In the criminal justice system, these assessments regarding voluntariness and competence, far from being too uncertain to hazard, are made routinely. Courts assess voluntariness in every plea agreement, and adjudicate the competency of tens of thousands of men and women every year.²⁵¹ In the context of the criminal justice system, the fact that the proceedings involve desires to hasten death does not alter the calculability of competence.

The Court is concerned about suicidality and desires to die in one setting, but indifferent in another. The Court in *Glucksberg* was particularly concerned by the problem of accurately diagnosing and treating depression, and cited empirical data linking depression, mental disorders and desires to hasten death.²⁵² The Supreme Court's sensitivity to suicide in this context

apply in waiver adjudications. *See, e.g.,* *Mason ex rel. Marson v. Vasquez*, 5 F.3d 1220, 1225 (9th Cir. 1993) (requiring federal court to find competence by the preponderance of the evidence); *State v. Ross*, 873 A.2d 131, 146 (Conn. 2005) (because trial court's determination based on a preponderance of the evidence standard not clearly erroneous, court declined to decide who bore the burden of proof); *Reid ex rel. Martiniano v. State*, 396 S.W.3d 478, 516 (Tenn. 2013) (requiring prisoner to demonstrate incompetence by clear and convincing evidence).

²⁴⁹ *Cruzan*, 497 U.S. at 295 (Scalia, J., concurring) (citation omitted).

²⁵⁰ *Washington v. Glucksberg*, 521 U.S. 702, 738 (1997) (O'Connor, J., concurring); *id.* at 783–84 (Souter, J., concurring).

²⁵¹ *Maroney*, *supra* note 138, at 1378.

²⁵² *Glucksberg*, 521 U.S. at 730–31.

contrasts sharply with its death row cases where suicidality and depression featured plainly.²⁵³

The Court in *Glucksberg* was also aware of the problems of social marginalization and desires to hasten death. It expressed concern that legalizing assisted suicide would expose “vulnerable groups—including the poor, the elderly, and disabled persons” to “abuse, neglect, and mistakes.”²⁵⁴ It is difficult to imagine, however, a more profoundly stigmatized social group than death-sentenced prisoners.²⁵⁵ The concerns the Court identifies regarding compromised autonomy and lack of access to good medical care apply with full force to prisoners. Underscoring the different treatment of prisoners, however, the circuit court in *Rumbaugh* cited the poor mental health care in prison as a reason to *permit* Rumbaugh to waive his appeals: “[Rumbaugh’s] ability to make the life/death choice is apparent from his comments . . . that if he thought that meaningful treatment were available and if it were offered, he would probably change his decision not to appeal.”²⁵⁶

Gary Gilmore left an unmistakable imprint on the right to hasten death accorded death row prisoners, but the continuing power of his example reflects that the law of volunteers is dominated by the capital punishment

²⁵³ Only Justice Marshall made any reference to Gilmore’s suicide attempt. *Gilmore v. Utah*, 429 U.S. 1012, 1019 (1976) (Marshall, J., dissenting). In *Godinez v. Moran*, the majority recited a series of violent acts Moran committed, some against others, and then against himself. 509 U.S. 389, 394 n. 3 (1993). The majority made no reference to depression and literally marginalized Moran’s suicidality by relegating it to a footnote that recites the lower court’s reasons for rejecting Moran’s waiver. *Id.* The dissent discusses Moran’s depression and suicidality, and complains that in the majority opinion, “the most significant facts are omitted or relegated to footnotes.” *Id.* at 409, 410, 416–17 (Blackmun, J., dissenting). In *Demosthenes v. Baal*, the Court mentions the prisoner’s suicide attempts only in the context of explaining the evidence before the lower court. 495 U.S. 731, 735–37 (1990). The dissenting opinion once again offers a larger context for understanding the prisoner’s actions. Here the dissenting Justices reveal that Baal

has been hospitalized for behavioral and mental problems on numerous occasions since he was fourteen years old, has attempted suicide on at least four occasions since 1987 [including twice in April 1990], and has been diagnosed in the past as a latent schizophrenic, a borderline personality, depressed, and as suffering from organic brain syndrome.

Id. at 740 (Brennan, J., dissenting).

²⁵⁴ *Glucksberg*, 521 U.S. at 731.

²⁵⁵ While the stigma associated with their crime and punishment may be a useful form of social control and expression of social norms, it is also relevant that death-sentenced prisoners tend to be drawn from marginalized groups. Justice Douglas noted in *Furman v. Georgia*: “Former Attorney General Ramsey Clark has said, ‘It is the poor, the sick, the ignorant, the powerless and the hated who are executed.’ One searches our chronicles in vain for the execution of any member of the affluent strata of this society.” 408 U.S. 238, 251–52 (1972).

²⁵⁶ *Rumbaugh v. Procunier*, 753 F.2d 395, 402 (1985).

frame. By not only involving criminal cases, which implicate normative ideas of who commits crimes and why, but also the death penalty, with its own logics and history, volunteers have developed a right to die substantially removed from the wider social and legal debates over hastening death. Where this wider discussion has defined the problem as the hypermedicalized, debilitating, and painful “bad” death, it has also had to contend with powerful social anxieties. The negative history of euthanasia, our concern for marginalized, suicidal, and/or vulnerable individuals, and fears of a slippery slope that may transform a right to die into a duty to die also inform the legal questions courts ask.

By making legally irrelevant the prisoner’s depression, his relationships with loved ones, and the experience of advocating for the death of one’s client, the volunteer jurisprudence further marginalizes the condemned prisoner. This marginalization, paradoxically through a more expansive right, undermines the legitimacy of the legal system generally. In addition, as the empirical evidence also makes clear, it also specifically threatens the legitimacy of the death penalty by permitting prisoners to hasten execution by bypassing adversarial proceedings. To right this balance—indeed, to inject a balance—into the legal treatment of volunteers, the legal standard for adjudicating death row prisoners’ requests to hasten execution should recognize and weigh the full panoply of the state’s interests.

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