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# VOLUNTEERING FOR EXECUTION: COMPETENCY, VOLUNTARINESS AND THE PROPRIETY OF THIRD PARTY INTERVENTION

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## I. INTRODUCTION

Eight men have been executed since 1976 when the Supreme Court ruled, in a series of cases,<sup>1</sup> that the death penalty is constitutional so long as its imposition is accompanied by certain safeguards.<sup>2</sup> At one point or another, all but three of these men not only "chose" to forgo further

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<sup>1</sup> *Robert v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

<sup>2</sup> The eight men executed were Gary Gilmore, Jesse Bishop, John Spinklink, Steven Judy, Frank Coppola, Charlie Brooks, Jr., John Lewis Evans, and Jimmy Lee Gray. Gary Gilmore was shot by a firing squad on January 17, 1977, after attempts to intervene on his behalf were exhausted. *See Gilmore v. Utah*, 429 U.S. 989 (1976) (granting stay of execution); *Gilmore v. Utah*, 429 U.S. 1012 (1976) (lifting stay).

Jesse Bishop was gassed to death on October 22, 1979, after efforts to halt his execution were exhausted. *See Bishop v. State*, 95 Nev. 511, 597 P.2d 273 (1979) (affirming conviction); *Lenhard v. Wolff*, 603 F.2d 91 (9th Cir.) (affirming denial of writ of habeas corpus and of stay of execution), *granting temporary stay*, 443 U.S. 1306 (Rehnquist, Circuit Justice), *denying stay* 444 U.S. 807, 444 U.S. 1301 (1979) (Rehnquist, Circuit Justice).

John Spinklink was electrocuted on May 25, 1979, after exhausting his remedies. *See Spinklink v. State*, 313 So. 2d 666 (Fla. 1975) (affirming conviction and sentence), *cert. denied*, 428 U.S. 911, *reh'g denied*, 429 U.S. 874 (1976), *aff'g denial of state collateral attack*, 350 So. 2d 85 (Fla.), *cert. denied*, 434 U.S. 960 (1977), *aff'g denial of habeas corpus sub nom. Spinklink v. Wainwright*, 578 F.2d 583 (5th Cir. 1978), *cert. denied*, 440 U.S. 976, *reh'g denied*, 441 U.S. 937,

efforts to contest their executions, but vigorously, and in the end successfully, opposed efforts by third parties to continue the battles in their stead.<sup>3</sup>

Such instances of citizens "volunteering" to be executed are by no means uncommon and certainly not "unique in the annals of the Court."<sup>4</sup> Prior to *Gilmore v. Utah*,<sup>5</sup> the Supreme Court twice considered appeals brought, not by the condemned men themselves, but by "next friends"<sup>6</sup> attempting to intercede on behalf of the condemned men.<sup>7</sup> Other examples of this phenomenon have been documented both before<sup>8</sup> and after<sup>9</sup> re-imposition of the death penalty in 1976.<sup>10</sup>

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*denying application for stay*, 442 U.S. 1301 (Rehnquist, Circuit Justice), *denying habeas corpus petition and application for stay*, 372 So. 2d 927 (Fla. 1979).

Steven Judy was electrocuted on March 9, 1981 after efforts to halt his execution were exhausted. *See* *State v. Judy*, No. 580-S-128 (Ind. Jan. 30, 1981).

Frank Coppola was electrocuted in August, 1982, after his and others' attempts to halt his execution were exhausted. *See* *Coppola v. Virginia*, 444 U.S. 1103 (1980) (denying certiorari from state direct appeal), *cert. denied sub nom.* *Coppola v. Warden, Virginia State Penitentiary*, 455 U.S. 927, *aff'g dismissal of habeas petition sub nom.* *Lawrence v. Mitchell*, 73 L.Ed.2d 1394 (1982).

Charlie Brooks, Jr., was executed by lethal injection on December 7, 1982, after exhausting his remedies. *See* *Brooks v. Estelle*, 103 S. Ct. 1490 (1982) (Brennan, Marshall, and Stevens, JJ., dissenting from denial of stay).

John Lewis Evans was executed on April 23, 1983 after exhausting his remedies. *See* *Evans v. Alabama*, 361 So. 2d 654 (Ala. 1977) 361 So. 2d 666 (affirming conviction and death sentence), *denying stay of execution*, 440 U.S. 987 (1979), *denying petition for habeas corpus*, 472 F. Supp. 707 (S.D. Ala.), *rev'd*, 628 F.2d 400 (5th Cir. 1980), *petition for reh'g denied*, 639 F.2d 221 (5th Cir. 1981), *rev'd sub nom.* *Hopper v. Evans*, 456 U.S. 605 (1982).

Jimmy Lee Gray was executed September 2, 1983 after exhausting his remedies. *See* *Gray v. State*, 375 So. 2d 994 (Miss. 1979) (convicted and sentenced to death), *cert. denied*, 446 U.S. 937 (1980), *aff'g denial of habeas corpus petition sub nom.* *Gray v. Lucas*, 685 F.2d 139 (5th Cir. 1982), *aff'd*, 710 F.2d 1048 (5th Cir. 1983), *denying cert. & stay of execution*, 52 U.S.L.W. 3169 (Sept. 1, 1983).

<sup>3</sup> John Spenkelink and Charlie Brooks, Jr., were the only two of the eight to contest expressly their executions to the end.

<sup>4</sup> *Gilmore v. Utah*, 429 U.S. 1012, 1013 n.1 (1976) (Burger, C.J., concurring).

<sup>5</sup> 429 U.S. 1012 (1976).

<sup>6</sup> For a definition of "next friend," see *infra* notes 210-15 and accompanying text.

<sup>7</sup> *See* *Rees v. Peyton*, 384 U.S. 312 (1966) (per curiam), *held without action on petition for cert.*, 386 U.S. 989 (1967); *Anderson v. Kentucky*, 353 S.W.2d 381 (Ky. Ct. App. 1961), *cert. denied* 369 U.S. 829, *cert. granted*, 371 U.S. 886 (1962), *denying motion to dismiss petition*, 371 U.S. 937, 376 U.S. 940 (1964) (continuing case "indefinitely"), *denying motion for hearing*, 377 U.S. 902 (1964), *denying motion to correct continuation order*, 402 U.S. 993 (1971). *See generally* Note, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 STAN. L. REV. 765, 768-69 n.23 (1980) (discussing *Anderson*).

<sup>8</sup> *See, e.g., Ex parte Wood*, 129 Tex. Crim. 422, 87 S.W.2d 487 (1935) (defendant convicted of murder permitted to withdraw his notice of appeal over his attorney's objection); *Ex parte Maple*, 116 Tex. Crim. 383, 33 S.W.2d 734 (1930).

Bernard L. Diamond reports examples of this phenomenon as early as the *Hadfield* case in England in 1890. Diamond, *Murder and the Death Penalty: A Case Report*, in CAPITAL PUNISHMENT IN THE UNITED STATES 446-47 (H. Bedau & C. Pierce eds. 1976); *see also* F. WHARTON & M. STILLE, 1 MEDICAL JURISPRUDENCE § 802 (4th ed. Philadelphia 1882) ("I fling myself, not into the river, nor into the abyss, but upon the scaffold") (quoting Lord Clarendon)

This Article examines this phenomenon and suggests that the Court's response to it has been woefully inadequate. The Article begins by examining documented cases by defendants or prisoners facing possible execution who express the desire to "waive" legal challenges to this fate, or who affirmatively seek to force the State to fulfill its pledge to execute them. Section II argues that such individuals fall into two usually inter-related categories: (1) those suffering from psychological illnesses characterized by suicidal impulses who, for whatever reasons, are unable to commit the act themselves and seek the State's assistance through the death penalty; and (2) those suffering, both physically and psychologically, from the combined stress of being condemned to die at some indefinite point in the future while being confined for prolonged periods in brutalizing and dehumanizing conditions on "death rows" across the country.

Section III analyzes these findings under currently accepted legal doctrines. First, the Article addresses the issue of competency and argues that competency standards must be flexible to reflect the importance of the decision sought to be waived or exercised. Because existing

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(cited in Note, *supra* note 7, at 765); see also T. SELLIN, *THE DEATH PENALTY* 59 (1959) (describing examples from past centuries).

<sup>9</sup> See *infra* Part II.

<sup>10</sup> Because of the extraordinary care now required for imposition of the death penalty, see generally Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97 (1979); Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1 (1980); Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980), it is somewhat surprising that this bizarre phenomenon has not attracted more attention from criminologists and legal scholars. The only legal commentary concerning the subject is a student note. Note, *The Death Row Right to Die: Suicide or Intimate Decision?*, 54 S. CAL. L. REV. 575 (1981) [hereinafter Note, *The Death Row Right to Die*]. A few other authors have discussed the related subjects of the constitutionality of executing a presently incompetent inmate of and death row stress, but they have not focussed in detail on how these or other factors might affect an inmate's decision to "give up" and acquiesce in his own execution. See Hazard & Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 UCLA L. REV. 381 (1962); Peltham, *The Common Law and the Execution of Insane Criminals*, 4 MELB. U.L. REV. 434 (1964); Weihofen, *A Question of Justice: Trial or Execution of an Insane Defendant*, 37 A.B.A. J. 651 (1951); Note, *supra* note 7; Note, *Insanity of the Condemned*, 88 YALE L.J. 533 (1979); Note, *Mental Suffering Under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814 (1972) [hereinafter Note, *Mental Suffering Under Sentence of Death*]; Comment, *Execution of Insane Persons*, 23 CALIF. L. REV. 246 (1950). Similarly, criminologists, to the extent that they have given any attention to the subject at all, have focussed on the stress attendant to either being condemned to die or to life on death row. See C. DAVIS, *WAITING FOR IT* (1980); S. GETTINGER, *SENTENCED TO DIE* (1979); B. JACKSON & D. CHRISTIAN, *DEATH ROW* (1980) (conditions on death row in Texas); R. JOHNSON, *CONDEMNED TO DIE: UNDER SENTENCE OF DEATH* (1981); Gallemore & Pantone, *Inmate Responses to Lengthy Death Row Confinement*, reprinted in *CAPITAL PUNISHMENT IN THE UNITED STATES* 527-34 (H. Bedau & C. Pierce eds. 1976); Bluestone & McGahee, *Reaction to Extreme Stress: Impending Death by Execution*, 119 AM. J. PSYCHIATRY 393 (1962); Lewis, *Killing the Killers: A Post Furman Profile of Florida's Condemned*, 25 CRIME & DELINQ. 200 (1979); Else, Kudsk & Meyer, *Living Conditions of Death Sentence Inmates in the United States* (Feb. 1981) (unpublished dissertation, School of Social Work, University of Iowa).

case law does not recognize this, courts fail to apply to competency the extraordinary care employed in other death penalty contexts. More importantly, competency tests in death penalty cases fail to take into account the "suicide"<sup>11</sup> or "murder/suicide"<sup>12</sup> phenomena that is often present. Second, and totally apart from traditional notions of competency, this Article argues that decisions to "waive" further legal challenges can almost invariably be traced to the unconscionable conditions to which condemned are subjected. Inmates are put to the Hobson's choice of prolonged torture by incarceration or swift torture by execution. An inmate's "choice" of the latter alternative over the former is no more voluntary than a confession beaten out of a police suspect during a custodial interrogation; only the method utilized to exact that "choice" is unique.

Section IV argues that even if an inmate's decision to forgo further legal proceedings can be deemed both competent and voluntary, recognizing such a "right" cannot be reconciled with either the State's interest in ensuring that the death penalty is imposed in a constitutional manner or the federal interest in ensuring that the states themselves impose the penalty in that manner. In contrast to the qualified "right to die" increasingly recognized in the medical field, a convicted felon has no "right" to determine his method of punishment. Moreover, the probability of overturning a conviction or death sentence is considerably greater than the probability of recovering from a comatose physical condition. Hence, continued legal proceedings to determine the constitutionality of a death sentence are neither legally nor morally the equivalent of extraordinary life-saving measures imposed on a brain-dead patient. On the contrary, they are *required* if the death penalty is to remain a part of our constitutional fabric.

Finally, Section V explores the rights of third parties, such as relatives and attorneys, to intervene both as "next friends" in the situations described in the previous sections and independently to protect their *own* interests—the preservation of family ties and the attorney/client relationship from unlawful interference by the State.

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<sup>11</sup> See *infra* notes 13-24.

<sup>12</sup> *Id.* The "murder/suicide" phenomenon refers to the clinically recognized syndrome in which an individual intentionally commits murder in a state with a death penalty hoping that, once caught, the State will execute him and thereby accomplish what he himself cannot bring about by his own hand. This is distinguished from the related syndrome prevalent in death row inmates who actively challenge their convictions and sentences until the stress of their status and the conditions of their incarceration make state-imposed "suicide" preferable.

## II. THE PSYCHOLOGY OF THE DEATH WISH: THE FRUSTRATED SUICIDE AND THE MESSAGE OF DEATH ROW

### A. "MURDER" AND "SUICIDE" OR "MURDER AND SUICIDE?"

It is a distressing irony of death penalty jurisprudence that while the sanction itself is upheld, at least in part, on the assumption that it serves as a deterrent, the "right" of the condemned to demand their executions is recognized, despite growing evidence that it actually inspires others to commit murder. The psychological basis of the syndrome has been succinctly described by George F. Solomon:

The close linking of suicide and murder is seen in the mechanism of seeking to be killed, to be punished for one's own transgressions, particularly for one's murderous feelings. . . . [M]any criminals leave clues, need to confess, and seek punishment. . . . [M]urder can be committed either consciously or unconsciously in order to be killed by the state. . . .<sup>13</sup>

Perhaps the most well known example of this phenomenon is the case of James French. In 1958, French was convicted in Oklahoma of murdering a motorist who picked him up while hitch-hiking. At his trial, he testified that he committed the crime in the hope that he would be executed and begged for the death sentence. His attorney, however, worked out a guilty plea with the prosecutor and French only received life imprisonment. Three years later, French strangled his cellmate and, when tried for murder again, urged the judge and jury to sentence him to death. Although numerous appeals were taken by his attorneys, French was ultimately declared sane and executed in 1966.<sup>14</sup>

<sup>13</sup> Solomon, *Capital Punishment as Suicide and as Murder*, reprinted in CAPITAL PUNISHMENT IN THE UNITED STATES 433-35 (H. Bedau & C. Pierce eds. 1976). Louis J. West has described the syndrome in a similar fashion:

[T]he death penalty breeds murder. It becomes more than a symbol. It becomes a promise, a contract, a covenant between society and certain (by no means rare) warped mentalities who are moved to kill as part of a self-destructive urge. These murders are discovered by the psychiatric examiner to be, consciously or unconsciously, perpetrated in an attempt to commit *suicide* by committing *homicide*. It only works if the perpetrator believes he will be executed for his crime.

West, *Psychiatric Reflections on the Death Penalty*, reprinted in CAPITAL PUNISHMENT IN THE UNITED STATES 426-27 (H. Bedau & C. Pierce eds. 1976) [hereinafter West, *Psychiatric Reflections*]; see also F. ALEXANDER & H. STAUB, *THE CRIMINAL, THE JUDGE AND THE PUBLIC* (1956); S. GETTINGER, *supra* note 10, at 123; K. MENNINGER, *THE CRIME OF PUNISHMENT* (1968); T. SELLIN, *supra* note 8; F. WERTHAM, *THE SHOW OF VIOLENCE* (1949); D. WEST, *MURDER FOLLOWED BY SUICIDE* (1966) [hereinafter WEST, *MURDER*]; Diamond, *supra* note 8, at 445; Zilboorg, *Differential Diagnosis of Types of Suicides*, 35 ARCHIVES NEUROLOGICAL PSYCHIATRY 270-91 (1936).

<sup>14</sup> S. GETTINGER, *supra* note 10, at 123; West, *Psychiatric Reflections*, *supra* note 13, at 426. Dr. West interviewed French in 1965 and described his history of aborted attempts at suicide: French admitted to me that he had seriously attempted suicide several times in the past but always "chickened out" at the last minute. His basic (and obviously abnormal) motive in murdering his inoffensive cellmate was to force the State to deliver to him the electrocution to which he felt entitled and which he deeply desired.

Commentators have observed that "[t]he incidence of suicide-related murders is substantial."<sup>15</sup> According to California Department of Justice statistics, some ten percent of the known criminal homicide offenders in 1960 committed suicide after their crime.<sup>16</sup> Some courts have also acknowledged suicide as a motive in certain slayings.<sup>17</sup>

As many of these examples illustrate, the impulse to murder is often preceded by a history of failed attempts at suicide. Moreover, even where there is no explicit link between the crime and the presence of suicidal tendencies, such feelings are prevalent on death row, often taking the form of remorse. Professor Johnson discussed this behavior in his study of death row in Alabama:

The crimes of psychotics often display purpose that relates to deep-seated and volatile needs. These crimes are felt to be senseless because making sense of them is too difficult or painful. Characteristically, this man speaks of his inability to comprehend his crime. Yet he is obsessed with remorse. Suicide, an escape from the crime and from himself, is a constant preoccupation.<sup>18</sup>

Many of those who have attempted, both successfully and unsuccessfully to cut off their own appeals since the re-institution of the death penalty have exhibited such dysfunctional behavior. Gary Gilmore, the first and most prominent of those executed in this era of the death penalty, is a prime example.

Gilmore served more than half of his life behind bars, including eighteen of his last twenty-one years.<sup>19</sup> He was last serving time in Oregon, a state that did not have the death penalty, when he was paroled prior to the incident resulting in his death penalty and execution. He chose to be paroled in Utah, a state with the death penalty and "the one place in the nation where blood atonement, in the form of a firing

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West, *Psychiatric Reflections*, *supra* note 13, at 427. Such stories are by no means uncommon. Gettinger, for example, also relates the story of a man in California who tortured and killed three women, each time with the anticipation of being captured and executed. He reportedly told a psychiatrist that "[w]hen I was planning the first killing, I was planning at the same time what I was going to order for my last meal before the gas chamber." S. GETTINGER, *supra* note 10, at 123; *see also* Diamond, *supra* note 8, at 447-57; Solomon, *supra* note 13, at 437; Leavy, *Execution: Trigger For More Violence? Gilmore's 'Success' in Demanding Death Could Backfire*, Los Angeles Times, Nov. 28, 1976, §8 at 5 (discussing other examples).

<sup>15</sup> Comment, *The Death Penalty Cases*, 56 CAL. L. REV. 1268, 1286 (1968).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 1287. One example noted by this commentator is *People v. Cash*, 52 Cal. 2d 841, 842-43, 345 P.2d 462, 463 (1959).

<sup>18</sup> R. JOHNSON, *supra* note 10, at 35. Thus, Johnson quotes directly from one prisoner he diagnosed as falling within this category: "I think about killing myself every day. . . . If I'd had to, if I'd known, or had any inkling or any idea that I was going to do something like that, I'd have killed myself before I ever allowed myself to (kill them). . . . I think of suicide all the time." *Id.* at 35-36.

<sup>19</sup> H. BEDAU, *THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT* 121-23 (1977).

squad, may be used to administer the death penalty for murder."<sup>20</sup> Dr. John C. Woods, Chief of Forensic Psychiatry at Utah State Hospital and one of the psychiatrists who examined Gilmore before his trial to determine his sanity, concluded that Gilmore realized he was on a treadmill and "[k]nowing he did not want to return to prison, he took the steps necessary to turn the job of his destruction over to someone else."<sup>21</sup> Indeed, Dr. Woods theorized that Gilmore

went out of his way to get the death penalty; that's why he pulled two execution-style murders he was bound to be caught for. I think it's a legitimate question, based on this evidence and our knowledge of the individual, to ask if Gilmore would have killed if there was not a death penalty in Utah.<sup>22</sup>

Gilmore also exhibited "erratic behavior" including a suicide attempt while on death row.<sup>23</sup>

<sup>20</sup> *Id.*

<sup>21</sup> I. ISENBERG, THE DEATH PENALTY 91 (1977) (quoting Nordheimer, *Death Wish Is Discerned In Poetry and Killings of Doomed Convict*, New York Times, Nov. 15, 1976, at 15).

<sup>22</sup> *Id.*

<sup>23</sup> *Gilmore v. Utah*, 429 U.S. 1012, 1019 (1976) (Marshall, J., dissenting); H. BEDAU, *supra* note 19, at 122.

Another example of the "murder/suicide" phenomenon among recent capital defendants is Arthur F. Goode, III. Goode, an escapee from a Maryland mental hospital, was initially charged with the murder and rape of a ten-year-old child in Florida. He fled to Maryland where he kidnapped two young boys, killing one of them in Virginia. *Goode v. State*, 365 So. 2d 381 (Fla.), *cert. denied*, 441 U.S. 967 (1979).

He was tried for murder in Virginia but "only" received a sentence of life imprisonment. Thereafter, he gave a statement in which he demanded to be returned to Florida "so that he could be convicted of Jason's murder and be executed." *Id.* at 382 (emphasis added). His request was granted, and during his trial in Florida he gave a full confession in which he expressed the desire to be convicted and executed. *Id.* The court ultimately permitted him to fire his attorney and conduct his "trial" *pro se*. *Id.* at 383-84; *see also* *State v. Aumann*, 265 N.W.2d 316 (Iowa 1978).

Many others have exhibited the "remorse/suicide" symptoms described by Professor Johnson. Indeed, Arthur Goode's decision to force his own execution appears to have been the product of massive feelings of guilt:

[D]espite his insistence that he feels no remorse he does indicate that he still considers himself to be dangerous and in a very vague way, but in a very true way indicates that somewhere within himself there is the thought that he should not be allowed to continue to go on in his present course which includes mental illness, which includes murdering young children.

*Goode*, 365 So. 2d at 382.

A more recent example occurred in *People v. Chadd*, 28 Cal. 3d 739, 621 P.2d 837, 170 Cal. Rptr. 798 (en banc), *cert. denied*, 452 U.S. 930 (1981). Billy Lee Chadd, charged concurrently with capital murder in Nevada, pleaded guilty to first degree murder in California. 28 Cal. 3d at 745 n.2, 621 P.2d at 840 n.2, 170 Cal. Rptr. at 801 n.2. Prior to his preliminary hearing, Chadd tried to commit suicide while hospitalized. When he then sought to dismiss his attorney, his counsel objected, explaining: "This particular defendant's basic desire is to commit suicide, and he's asking for the cooperation of the State in that endeavor." *Id.* at 744, 621 P.2d at 839, 170 Cal. Rptr. at 89. The following colloquy then ensued:

THE COURT: "Mr. Chadd, your counsel has indicated that you want to commit this



- B. "[I]F THEY COULD FRY ME TOMORROW, THAT WOULD BE PREFERABLE TO SPENDING THE REST OF MY LIFE HERE. THIS ISN'T LIVING. IT'S JUST EXISTING."<sup>24</sup>

These comments by Charles Bryant succinctly describe the sentiments common among the condemned who have chosen to hasten their own executions. Two factors contribute to such feelings: (1) the psychological stress attendant to living under a sentence of death, and (2) the dehumanizing conditions of death row.

### 1. *Stress and a Sentence of Death*

It is difficult to imagine a source of psychological stress more exacting than being forced to live the spasmodic certainty and uncertainty of being sentenced to die.<sup>25</sup> Professor Johnson, in his comprehensive study

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suicide. You want to plead guilty and have the Court help you in doing that. What about that?"

THE DEFENDANT: "Your Honor, it's true, I did attempt suicide. I have given serious consideration to the consequences of the trial, the outcome, what it might be. I feel the death penalty would be, for all intents better for me. . . . If the State of California can't, and I don't receive the death Penalty, then I have got another shot in Nevada. They're going to try for the death penalty, too. If that doesn't work out, then I will just have to do it myself."

*Id.* at 744-45, 621 P.2d at 840, 170 Cal. Rptr. at 801.

<sup>24</sup> *Death-Row Interviews*, U.S. News and World Report, July 12, 1976, at 51-53 (quoting Charles Bryant), *quoted in* I. ISENBERG, *supra* note 21, at 46.

<sup>25</sup> Justice Stevens has observed:

In capital cases, however, the punishment is inflicted in two stages. Imprisonment follows immediately after conviction; but the execution normally does not take place until after the conclusion of post-trial proceedings in the trial court, direct and collateral review in the state judicial system, collateral review in the federal judicial system, and clemency review by the executive department of the State. However critical one may be of these protracted post-trial procedures, it seems inevitable that there must be a significant period of incarceration on death row during the interval between sentencing and execution. If the death sentence is ultimately set aside or its execution delayed for a prolonged period, the imprisonment during that period is nevertheless a significant form of punishment. Indeed, the deterrent value of incarceration during that period of uncertainty may well be comparable to the consequences of the ultimate step itself.

*Coleman v. Balkom*, 451 U.S. 949, 952 (1981) (Stevens, J., concurring in denial of certiorari).

Bluestone and McGahee made a similar observation in their landmark study of eighteen prisoners on death row in 1962. Bluestone & McGahee, *supra* note 10, at 393. Their study supports the hypothesis that stress from an impending death sentence causes inmates to resort to a number of defense mechanisms, but fails to treat these reactions in detail. A study conducted by Gallemore and Panton is generally consistent with this and is a bit more revealing. They studied the effect of stress upon eight prisoners in North Carolina who had been on death row for at least two years. Three of the eight prisoners "made relatively poor adjustments, with obvious deterioration." Gallemore & Panton, *supra* note 10, at 529. One had "an elevated self-mutilation score" in post-admission testing, and at one point "stuck a staple and a broken ice cream spoon into his arm 'just to see the blood.'" *Id.* at 530.

Like Bluestone and McGahee, Gallemore and Panton viewed such reactions as the result of psychological stress that caused increasingly severe reactions over time. The deterioration noted by Gallemore and Panton appeared to be directly connected to conditions of confinement on the death row:

Results of clinical evaluations and psychological testing were surprisingly uniform in

of death row in Alabama,<sup>26</sup> confirms and expands upon the conclusions reached in these earlier works. Apart from how the presence of the condemned in prisons itself affects the conditions of that environment, Johnson explored the affect of the sentence itself as "an independent source of stress and suffering."<sup>27</sup> Much like Camus' initial impressions, he describes the experience as

a painful oscillation between hope and despair. According to one prisoner: "It's just like you are in the middle of a vise, and one part of the vise is pulling you this way and one of them is pulling you the other way. And the vise is sharp." With the parameters of one's existence cast in terms of uncertain hope and uncertain despair, arduous and recurring battles for peace of mind ensue.<sup>28</sup>

Like Gallemore and Panton, Johnson observed a marked deterioration over time. He also found that, eventually, traditional defense mechanisms fail and prisoners consider suicide—either by their own hands or by terminating their legal battles—as a welcome option. Thus, some spoke of suicide as preferable "to the marginal lives they expect to eke out after years of confinement."<sup>29</sup>

As long ago as 1950, a Supreme Court Justice recognized that "the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon."<sup>30</sup> Johnson's study, as well as those of other commentators,<sup>31</sup> indicate that an early symptom of psychological impair-

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demonstrating a "hardening" of psychological defenses as time passed on death row. . . . The potential for constructive reeducation that might follow the breakdown of previous antisocial behavior patterns in the face of overwhelming stress is obvious. It is also evident, however, that death row confinement has not been designed for positive rehabilitative emphasis, and in practice the occupants over time become progressively less suitable for reentry into a general prison population or the general public.

*Id.* at 532-33.

<sup>26</sup> R. JOHNSON, *supra* note 10.

<sup>27</sup> *Id.* at 80.

<sup>28</sup> *Id.* at 81.

<sup>29</sup> *Id.* at 111. Johnson went on to state:

They speak of suicide as a means of escape from death row. They also consider dropping their appeals as a means to terminate their death row confinement, which would be tantamount to committing state-assisted suicide. In their words, "I probably think about suicide more than a lot of guys up there. Like I say, I want out. Where the rest of these guys, they say, 'while you live there's hope.' Well, that's true. I'm not gonna' be so stupid as to say it's not. But they're willing to wait five or ten years to get off death row. I'm not. And I've made this statement on several occasions, that if something's not done pretty soon, there's no doubt, I'll punch out. I'll punch my own ticket if I have to."

*Id.* at 111-12.

<sup>30</sup> *Sollesbee v. Balkoom*, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting); *cf. Ex parte Medley*, 134 U.S. 160, 172 (1890); *People v. Anderson*, 6 Cal. 3d 628, 649, 493 P.2d 880, 894, 100 Cal. Rptr. 152, 166 (1972) ("the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture"). *See generally Furman v. Georgia*, 408 U.S. 238, 288 (1972) (Brennan, J., concurring).

<sup>31</sup> *See* C. DAVIS, *supra* note 10, at 157; S. GETTINGER, *supra* note 10, at 94; Comment, *supra* note 15, at 1342; Note, *Mental Suffering Under Sentence of Death*, *supra* note 10, at 827-29; Waters, *Death Row: Three Who Wait*, JURIS 19 (JAN. 1977); *Under New Law, Fewer People Line Death*

ment is often attempted suicide.

The lure of suicide, either by direct action or by enlisting the assistance of the State, as a release from this intense psychological torture may be as great for the innocent as for the guilty. Isidore Zimmerman once came within a few minutes of being electrocuted. When the time finally approached he reportedly welcomed the news and was disappointed when he was reprieved. Zimmerman was later fully exonerated for the crime for which he once "willingly" sought to be executed.<sup>32</sup>

## 2. *The Message of "Death" Row*

There are well over a thousand prisoners on death rows across the country,<sup>33</sup> with an average of one person every three days being added to this total.<sup>34</sup> These growing numbers are forced to cope, often for years,<sup>35</sup> on make-shift death rows originally designed for short-term confinement.<sup>36</sup> Recent studies and law suits document both the barbaric conditions pervading death rows and the debilitating and life-negating effects of these conditions. According to available studies, death row inmates are generally not integrated into the general prison population; have no access to "rehabilitative" programs; have little opportunity to exercise; and are confined to their cells for extraordinarily long periods

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*Row*, The News and Observer, Raleigh, North Carolina, Apr. 17, 1979; Contact, Inc., The Question of Capital Punishment 97 (1980 & March 1981 update).

Similar breakdowns in behavior have been noted in other contexts where death was imminent. See E. KUBLER-ROSS, ON DEATH AND DYING (1969); Pattison, *The Experience of Dying*, 21 AM. J. PSYCHOLOGY 32, 35 (1967) (quoted in Note, *Mental Suffering Under Sentence of Death*, *supra* note 10, at 827).

<sup>32</sup> S. GETTINGER, *supra* note 10, at 95. Gettinger also relates the story of a Florida man who

fought his conviction for five years without success and then wrote to his attorney in 1965 to give up all appeals and arrange for his execution. "I have come to the conclusion that I prefer to die rather than to live," he said. The lawyer did not give up, and seven years later it was proven that the incriminating plaster molds of the man's footprints had been made not at the scene of the crime but in the backyard of a deputy sheriff. The conviction was overturned and the man went free.

*Id.*

<sup>33</sup> See Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 909 n.7 (1982) (citing NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., DEATH ROW, U.S.A. 1 (1982)).

<sup>34</sup> Gillers, *supra* note 10, at 5 & n.13.

<sup>35</sup> Even before the importance of post-conviction procedures was emphasized by the Supreme Court, it was not uncommon for the condemned to spend years languishing on death row. Chessman spent at least 11 years on death row in San Quentin. *People v. Chessman*, 52 Cal. 2d 467, 499, 341 P.2d 679, 699, cert. denied, 361 U.S. 925 (1959); see also *Chessman v. Dickson*, 275 F.2d 604, 608 (9th Cir. 1960) (11 years on death row is neither an eighth amendment violation nor denial of a due process). Charles Townsend spent almost 16 years on death row in Illinois. *Townsend v. Twomey*, 322 F. Supp. 158, 174 (N.D. Ill. 1971).

<sup>36</sup> Historically, death row confinement was limited to months, rather than years, while efforts at clemency and last minute appeals were exhausted. R. JOHNSON, *supra* note 10, at 121.

of time.<sup>37</sup>

<sup>37</sup> Two unpublished studies document nation-wide death row conditions. The first is a compilation of the results of a questionnaire circulated by the American Foundation Institute of Corrections in 1979. W. Nagel, *Death House Survey* (The American Foundation, Inc., Institute of Corrections, July 1, 1979). According to the study, 26 states segregate the condemned either in separate cell blocks or in entirely separate facilities. Moreover, privileges afforded the prisoners in these segregated conditions appear to be arbitrarily granted or withheld. While a few states permit almost unlimited and/or lengthy visitation, 9 states deny contact visitation entirely and another 2 limit the duration of visits to only 30 minutes per month. Recreation periods demonstrate a similar arbitrariness. *Id.* One state permits up to 56 hours of out-of-cell recreation per week while another 2 allow only 2 hours per week. *Id.* As expected, inmates live under such harsh conditions for years. One individual had been awaiting execution for 9 years and 3 months at the time of the survey. Six states reported holding prisoners for execution for over 5 years, and 10 other states reported holding them from 2 to 5 years. *Id.*

The second study, conducted through the School of Social Work at the University of Iowa, also compiled the results of questionnaires, but is more comprehensive in its findings. See Else, Kudsk & Meyer, *supra* note 10. This study confirms the indications of the earlier study that those under sentence of death are segregated from general prison populations. According to this study, only one state, Pennsylvania, integrates the condemned into the general prison populations. *Id.* at 3. Six states require segregation by statute. *Id.* Most significantly, half of the reporting states confessed that no contact is permitted with other inmates at all. *Id.*

The second study also reveals that "death-sentenced inmates," or DSIs, as the authors refer to them, suffer from a wide range of disabilities not imposed upon other inmates. These disabilities are imposed on DSIs "not because of their behavior within the institution, but because of the sentence they received from the court." *Id.* at 11. The authors conclude:

Comparing the daily activities of DSIs with the general prison populations, the differences are distressing. Most DSIs cannot work at prison jobs, cannot attend education classes, clubs or religious services, have much less opportunity for exercise and recreation and much less adequate facilities and equipment. DSIs have little human contact. Most are confined to their cells over 22 hours a day. Many are shackled for trips within the prison. Most eat in their cells and are separated from visitors by barriers.

"Exercise areas" are often the hallways outside the DSI cells or "dog runs" with absolutely no equipment provided. In some places no hobbies are allowed in the cells and there is a limit of four books in the cell at any one time. . . .

Perhaps more important than any single deprivation is the fact that the impact and effect of each restriction is exaggerated because of the more general deprivation of being kept in cells most of every day and isolated from almost all contact with other human beings.

*Id.* at 12.

Reports of conditions in specific states or individual prisons within a state confirm the conclusions reached in these studies. For instance, there is more information available about death row in Holman Prison in Alabama than about any other death row. In 1978, a class action suit was brought by Holman inmates culminating in a settlement agreement in 1980. *Jacobs v. Bennett*, No. 78-309-H (S.D. Ala., Nov. 3, 1978) (plaintiff's pretrial brief); *Jacobs v. Britton*, No. 78-309-H (S.D. Ala., Jan. 1980) (settlement agreement). In addition, Professor Johnson's work was conducted at Holman. See R. JOHNSON, *supra* note 10. According to the evidence collected for the class action suit and Johnson's study, prisoners in Holman prior to the settlement were under "locked-down" status in their cells 23 to 24 hours a day. Massive idleness was the norm. Prisoners were kept in virtual solitary confinement. They were not allowed to mingle with each other, and visitation privileges were minimal. *Id.* at 49, 54-55. Not even television was provided on a routine basis. *Id.* at 48. One prisoner reportedly passed the time by playing with cockroaches and another by reading a dictionary. *Id.* In

While the sentence of death itself is a source of considerable and often debilitating stress, the "social environment" in which the trauma of imminent death is experienced can itself "play a critical role in determining the nature and outcome of coping efforts."<sup>38</sup> In contrast to the dying patient whose "social environment" often is made life-affirming through the intentional enhancement of personal autonomy, conditions on death rows are designed to be life-negating. The remote physical locations of the prisons, limited visitation rights, and the indignities forced upon both inmate and visitor when those rights are invoked stand in stark contrast to the support systems available to a terminally ill patient.<sup>39</sup> Apparently abandoned by the living, the condemned are subjected to "massive deprivation[s] of personal autonomy" on death row.<sup>40</sup> The image of death row existence as itself a "living death"<sup>41</sup> is reflected in the attitudes of death row inmates whose expressions of suicidal im-

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addition, food was sparse and cold, often mixed with hair and bugs. *Id.* at 45; *see Bennett*, No. 78-309-H at 4.

As if the physical conditions were not brutalizing enough, allegations of random beatings abound. *Bennett*, No. 78-309-H at 1 (S.D. Ala., Nov. 3, 1978) (amended complaint). Even more torturous than the physical beatings, however, were the instances of psychological abuse by guards:

Unquestionably, the most potent and virulent source of death anxiety is staff efforts to remind inmates of their impending execution. Upon admission to death row, prisoners have been given tours of the deathroom during which they view the electric chair as though it were an exhibit in a museum. In uglier encounters, new prisoners may be graphically reminded of their date with the chair, and then summarily locked in their cells to consider their fate.

R. JOHNSON, *supra* note 10, at 83.

At the time of the *Bennett* lawsuit, there were 38 prisoners on Holman's death row living under these conditions. Although only four had exhausted even their state remedies on direct appeal, 20 had been there a year or more, including one who was there two and a half years and another for two years. *Bennett*, No. 78-309-H at 2.

Similar conditions have been described, although in less detail, in Georgia, *see Daniels v. Zant*, No. 79-110-MAC (M.D. Ga., July 20, 1979); C. DAVIS, *supra* note 10, at 1, 157-58; Virginia, *see Brown v. Hutto*, No. 81-0853-R (E.D. Va., Feb. 23, 1982) (proposed consent decree) (at one time, Frank Coppola was a named plaintiff in this class action); Oklahoma, *see S. GETTINGER*, *supra* note 10, at 68; R. JOHNSON, *supra* note 10, at 142 n.1; North Carolina, *see Gallemore & Pantan*, *supra* note 10, at 528; and Florida, *see S. GETTINGER*, *supra* note 10, at 23; Lewis, *supra* note 10, at 208-09.

<sup>38</sup> R. JOHNSON, *supra* note 10, at 9.

<sup>39</sup> *Id.* at 10. Johnson notes:

In spite of the confining hospital milieu, many terminally ill patients appear able to adjust to their fate. They do so with the aid of family and other community-based resources. The comparative flexibility that can be incorporated into hospital procedures, giving patients a limited sense of control over their life, may also aid adjustments.

*Id.* (footnotes omitted).

<sup>40</sup> *Id.* at 110. As a result, Johnson concludes that "a sense of helpless defeat may represent for the death row prisoner what growth and acceptance represent for the terminal patient: the culmination of a struggle to come to grips with the prospect of death in a particular institutional context." *Id.* at 98 n.10.

<sup>41</sup> *Id.* at 17. Johnson observed that many inmates themselves used the term "living death" to characterize "the essential or cumulative experience" of death row existence—"the

pulses or desires to waive their appeals are continually connected to their thoughts about "living" on death row.

One inmate in California stated: "I would rather go downstairs to that gas chamber then have to spend the rest of my life here. Being free is being alive. If a person goes down to the gas chamber he's escaped. It is going to cost him his life, but he's escaped."<sup>42</sup> Such sentiments commonly result in suicide attempts. At Mecklenburg, experts observed an unusually high incidence of self-mutilation and other psychological problems among inmates.<sup>43</sup> Similar observations have been made in Florida,<sup>44</sup> Oklahoma<sup>45</sup> and Auschwitz.<sup>46</sup>

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zombie-like, mechanical existence of an isolate physical organism—a fragile twilight creature that emerges when men are systematically denied their humanity." *Id.*

<sup>42</sup> S. GETTINGER, *supra* note 10, at 96.

<sup>43</sup> Memorandum in Support of Application for Stay of Execution, *Lawrence v. Mitchell*, No. 82-6495 at 8-9 (4th Cir., Aug. 10, 1982). Another expert added that the "enforced social isolation" present at Mecklenburg produced, first, "loneliness, giving way to depression, and culminating in some cases, in suicidal thoughts and gestures." *Id.*

<sup>44</sup> Lewis reports that approximately 42 percent of the death row inmates in Florida seriously considered suicide at one point or another, and 35 percent actually attempted suicide. Lewis, *supra* note 10, at 217 (quoting P. LEWIS & K. PEOPLES, *THE SUPREME COURT AND THE CRIMINAL PROCESS: CASES AND COMMENTS* 1164-72 (1978)).

<sup>45</sup> Gettinger noted that Richard Hager demanded to be executed after spending only three months on Oklahoma's death row. S. GETTINGER, *supra* note 10, at 67-68.

<sup>46</sup> See generally G. KREN & L. RAPPAPORT, *THE HOLOCAUST AND THE CRISIS OF HUMAN BEHAVIOR* 115 (1980) ("[s]uicide was not infrequent [in the death camps]"); B. BETTELHEIM, *Individual and Mass Behavior*, reprinted in B. BETTELHEIM, *SURVIVING AND OTHER ESSAYS* 69, 308 (1979) [hereinafter Bettelheim, *Individual and Mass Behavior*]; Citrome, *Conclusions d'une Enquete sur le Suicide dans les Camps de Concentration*, 12 *CAHIERS INTERNATIONNAUX DE SOCIOLOGIE* 147 (1952).

In the extermination camps of Nazi Germany, prisoners were repressed into "docility" to the point where they "walked to the gas chambers or . . . dug their own graves and then lined up before them so that, shot down, they would fall into the graves." B. BETTELHEIM, *THE INFORMED HEART* 250 (1960). Bettelheim describes how conditions in the camps themselves coerced suicidal actions by prisoners:

It may be assumed that most of these prisoners were by then suicidal. Walking to the gas chamber was committing suicide in a way that asked for none of the energy usually needed for deciding and planning to kill oneself. Psychologically speaking, most prisoners in the extermination camps committed suicide by submitting to death without resistance. . . . Through the use of terror the SS succeeded in forcing its opponents to do, out of their own will, what it wished them to do. Millions of people submitted to extermination because SS methods had forced them to see it not as a way out, but as the only way to put an end to conditions in which they could no longer live as human beings. . . . *Id.* at 250-51. What happened in the concentration camp suggests that under conditions of extreme deprivation, the influence of the environment over the individual can become total.

*Id.* 147.

Bettelheim also observes that the environment made fulfillment of the death wish simple since one only had to give up:

It came relatively rarely through outright suicide, because this meant to take some action, desperate as it was, and they no longer had the strength to act on their own. But there was also no need to deliberately do away with one's life. If one did not exercise great ingenuity and determination in the battle to stay alive, one was soon dead, given

In finding confinement conditions unconstitutional, courts often associate incidents of suicide and self-mutilation with the dehumanizing and life-negating environments. For example, in *Ramos v. Lamm*,<sup>47</sup> the Tenth Circuit affirmed the district court's ruling that incarceration in "Old Max," Colorado's maximum security prison, violated the eighth amendment. Evidence at trial indicated that a combination of factors, including low staffing levels, the architecture of the cellhouses, the physical layout of the buildings themselves and the depraved conditions maintained within the cellhouses contributed to high levels of violence.<sup>48</sup> In particular, self-inflicted forms of violence existed at an unusually intense level.<sup>49</sup>

In a sense, the condemned have at their disposal an "easier" way to find release from unbearable conditions: they can simply "pull the plug" by firing their attorneys and withdrawing their appeals. Robert Lee Massie, for example, attempted to dismiss his automatic appeal from a first degree murder conviction in California in 1979 primarily because he preferred execution to the extended torture of life on San Quentin's death row.<sup>50</sup> He had previously been confined for seven and a half years

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the conditions in the camps. Therefore if one gave up hope, one lost the ability to go on with the difficult and painful struggle survival required and so one died in a short time.

B. BETTELHEIM, *Individual and Mass Behavior*, *supra*, at 106.

<sup>47</sup> 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981).

<sup>48</sup> *Id.* at 573. It has long been recognized that pervasive idleness and in-cell confinement causes increased tension and violence. *See, e.g.*, *Burks v. Teasdale*, 603 F.2d 59, 63 (8th Cir. 1979); *Palmigiano v. Garrahy*, 443 F. Supp. 956, 968-69 (D.R.I. 1977); *Anderson v. Redman*, 429 F. Supp. 1105, 1113 (D. Del. 1977); *see also Laaman v. Helgemoe*, 437 F. Supp. 269, 294 (D.N.H. 1977); *Jordon v. Fitzharris*, 257 F. Supp. 674, 680 (N.D. Cal. 1966); Comment, *Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform*, 12 HARV. C.R.-C.L. L. REV. 367, 400 (1977).

<sup>49</sup> *Ramos*, 639 F.2d at 572. The District Court presented these findings in greater detail: "In 1978, the Department reported more than 70 incidents of suicide and self-mutilation attempts. Between January 1, 1979 and May 30, 1979, the Department reported more than 21 incidents." 485 F. Supp. 122, 144 (D. Colo. 1979). Indeed, the Colorado Department of Corrections' own Five Year Plan supported these findings:

Frequently, because of the low level of individual attention devoted to this type of inmate and because of the high level of sensory deprivation that results from housing in a total isolation environment, he or she will seek any path available to compensate. Self-inflicted wounds and ingestion of metal, glass, or other foreign objects are frequent examples of these attention-seeking measures. Many, if not all of these incidents could be avoided by placing these inmates in a professionally administered unit that does not entail the almost total sensory deprivation of Cellhouse 3.

Brief for Appellee at 66-67, *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981) (quoting Five Year Plan). Experts also supported these findings. *See id.* at 66 (worse than the physical violence was "the kind of violence which emerges because men are largely idle, tense, angry and deteriorating, and forced to remain that way"); *see also Anderson*, 429 F. Supp. at 1112-18 (overcrowding caused severe physical and psychological damage to inmates, including increased incidence of self-mutilation and attempted suicide).

<sup>50</sup> *Massie v. Sumner*, 624 F.2d 72 (9th Cir. 1980), *cert. denied*, 449 U.S. 1103 (1981). Massie was sentenced to die on May 25, 1979. Just a few months later, a class action law suit was filed by San Quentin's death row inmates, contesting automatic segregation, strip searches,

on death row under a prior murder conviction.<sup>51</sup> Massie stated that he did *not* want to be executed, nor did he object to spending the rest of his life incarcerated. Given, however, the "choice" of execution or life on death row, he preferred execution.<sup>52</sup> Indeed, Massie based his claim that he had a right to be executed in part on the eighth amendment, bizarrely asserting that execution was an appropriate "remedy" for this violation.<sup>53</sup>

Most inmates are not as articulate as Massie in expressing the rationale for their decision to assist the executioner. Frank Coppola simply demanded his execution, but experts reporting on conditions at Mecklenburg in support of his attorneys' efforts to stay his execution stated that his decision

may be viewed as the product of the intolerable conditions of confinement that he is subjected to and the resultant loneliness, depression, frustration, helplessness and hopelessness. I doubt that Mr. Coppola would have made the decision to forego the legal process if the conditions at MCC were less restrictive and demeaning and more dignifying and humane than they are.<sup>54</sup>

Most of the other reported instances of attempts to waive trial or post-conviction remedies have been based, at least in part, on the anticipation or experience of incarceration on death row.<sup>55</sup>

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poor ventilation, lighting and general conditions, and lack of contact visits, vocational or educational programs. *Thompson v. Enomoto*, C-79-1630-ACW (N.D. Cal., July 6, 1979).

<sup>51</sup> See *Massie*, 624 F.2d at 73 n.1.

<sup>52</sup> *Id.* at 73; see also S. GETTINGER, *supra* note 10, at 95 (quoting Capote, *Death Row, U.S.A.*, Esquire (Oct. 1968) (Massie demanded to be executed)); CONTACT, INC., *supra* note 31, at 97 (quoting Massie: "Why should the law be permitted to play with my life like a yo-yo subjecting me to continuous dates of execution?").

<sup>53</sup> *Massie*, 624 F.2d at 73. The court rejected this claim, holding that Massie had other remedies, such as a suit under 42 U.S.C. § 1982 (1976). *Id.* As this Article argues in the following section, Massie's argument turned the law on its head: the eighth amendment violation should have precluded the court from finding his "choice" a voluntary one.

<sup>54</sup> *Lawrence v. Mitchell*, No. 82-6495 (4th Cir., Aug. 10, 1982) (Memorandum in Support of Application for Stay of Execution) (quoting Milan affidavit).

On January 17, 1983, another Mecklenburg death row inmate, thirty-year-old Buddy Earl Justus (who is also sentenced to die in Georgia and Florida) wrote a petition to the local court asking that his execution be "conducted as soon as possible." *Washington Post*, Feb. 3, 1983, at B6, col. 2-3. Justus had been convicted first in 1979, had his conviction reversed on appeal, but was retried and convicted again in 1980. According to Justus' attorneys, Justus sought execution because of the deplorable conditions at Mecklenburg. *Id.* He changed his mind, however, on February 2, 1983.

<sup>55</sup> Prison conditions appear to have played a part in both Gary Gilmore's and Jesse Bishop's "decisions" to seek execution. Gilmore's famous demand to die "with grace and dignity" itself implies that the prison environment in which he had spent most of his life overcame his will to live. H. BEDAU, *supra* note 19, at 122; see also *Gilmore v. Utah*, 429 U.S. 1012, 1015 (Burger, C.J., concurring) (noting that Gilmore stated "he did not 'care to languish in prison for another day,'" but disclaiming that his decision was the product of the "the way he was treated in prison"). Bishop "complained bitterly" about conditions on Nevada's death row. *Lenhard v. Wolff*, 444 U.S. 807, 811 n.2 (1979) (Marshall, J., dissenting).



Thus, decisions to plead guilty or waive post-conviction remedies in capital cases are generally not the product of rational and autonomous choice. Rather, such decisions reflect either the intentional death wish of the condemned, as in the "murder/suicide" phenomenon, or the synergistic effect of the panic attendant to the anticipation of death by execution accompanied by continued existence in the insufferable environs of death row.<sup>56</sup> The "choice" offered by the State is not an easy one, and prisoners often attempt to retract their "waivers" once made.<sup>57</sup>

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from denial of stay); see also *Hopper v. Evans*, 456 U.S. 605, 607-08 (1982) (quoting Evans telling the jury "I would rather die by electrocution than spend the rest of my life in the penitentiary"); *Evans v. State*, 361 So. 2d 654, 655 (Ala. Crim. App. 1977); *People v. Chadd*, 28 Cal. 3d 739, 744-45, 621 P.2d 837, 840, 170 Cal. Rptr. 798, 801 (1981) (considered death penalty "for all intents better for me" after having "given serious consideration to the consequences of the trial, the outcome, what it might be"); *People v. Stanworth*, 71 Cal. 2d 820, 830 nn.12-13, 457 P.2d 889, 896 nn.12-13, 80 Cal. Rptr. 49, 56 nn.12-13 (1969) (desiring execution since "it would save me many months of useless existence here on Death Row" and because he wished to "suffer for my acts" and he "cannot continue living with [a] cloud over my head, please be merciful and give me an endless sleep as soon as you can so this pain and suffering that I have will be no more"); *Goode v. State*, 365 So. 2d 381, 382 (Fla. 1979) (one of Goode's three reasons for desiring execution was that he "wish[ed] not to spend the rest of his life in prison"); *Commonwealth v. McKenna*, 476 Pa. 428, 383 A.2d 174, 181 (1978) (McKenna "personally prefers death to spending the remainder of his life in prison"); Ritter, *Waiting to Die in Alabama*, SOUTHERN COALITION REPORT ON JAILS & PRISONS 4, 6 (1979); Andersen, *The Death Penalty*, Time, Jan. 24, 1983, at 32 (Doris Ann Foster described her attempt to fire her Maryland attorneys and, despite maintaining her innocence, actively seek her execution, because, she said, death row was "ruining my body and eventually would ruin my mind. I could see what I'd be like after ten years here. I don't want to be hostile. I don't want to lose my peace. I have no desire to continue on in such an inhumane existence.").

<sup>56</sup> A third possible reason that appears to be present in at least two known cases is best described as the "blaze of glory" syndrome. Gary Gilmore's decision to seek execution by firing squad has been criticized, for example, as simply another manifestation of his "unrepentant and callous self-centered attitude toward human life" which ultimately included his own. H. BEDAU, *supra* note 19, at 122-23. Before he changed his mind, John Louis Evans exhibited a similar bravado. See *Evans*, 361 So. 2d at 656, 661. Assuming that such exhibitionist tendencies are not themselves symptoms of an underlying psychological defect, but see *United States v. Robertson*, 507 F.2d 1148, 1153 & n.22 (D.C. Cir. 1974), it is questionable whether the rationales summoned in defense of the death penalty are furthered by the State's becoming an accomplice to the fulfillment of such motivations. See *infra* Part IV.

<sup>57</sup> See, e.g., *Hopper v. Evans*, 456 U.S. 605, 608; *Evans v. Bennett*, 440 U.S. 987 (1979) (Brennan, J., concurring in denial of stay); *Lenhard v. Wolf*, 443 U.S. 1306, 1307 n.\* (1979) (Rehnquist, Circuit Justice); *People v. Stanworth*, 11 Cal. 3d 588, 608, 522 P.2d 1058, 1072, 114 Cal. Rptr. 250, 264 (1974) (Stanworth claiming his counsel was ineffective for allowing him to plead guilty in accordance with his own wishes); see also *Potts v. Zant*, 638 F.2d 727 (5th Cir. 1981); *Evans v. Britton*, 628 F.2d 400 (5th Cir. 1980), *petition for reh'g denied*, 639 F.2d 221 (5th Cir. 1981); W. BOWERS, EXECUTIONS IN AMERICA 386-94 (1974) (complete inventory of executions in Virginia); R. JOHNSON, *supra* note 10, at 145 n.24 (discussing letter from inmate expressing desire for death, and his attorney's ability to change his mind by showing his concern). This tendency for change of heart is perhaps explained by former Pennsylvania Supreme Court Justice Musmanno:

One of the judges of the lower court indicated from the bench that a sentence of life imprisonment is not to be regarded as a lesser penalty than that of death. I challenge

### III. THE AUTONOMY OF THE DEATH DECISION: AN EXERCISE OF FREE WILL OR A COERCED RESPONSE TO STRESS?

#### A. COMPETENCY

To date, challenges to a capital defendant's "right" to demand his own execution have been almost exclusively limited to the question of competency, and have not deviated markedly from the analysis first articulated in *Rees v. Peyton*.<sup>58</sup> In *Rees*, the Court established that, as a matter of *due process*, a condemned prisoner cannot be permitted to refuse the assistance of counsel and terminate legal proceedings without an adequate hearing to determine his ability to make such a choice rationally. The Court instructed the trial court to make a finding with respect to Rees' competence to abandon further post-conviction attacks on his sentence, using the following standard:

[We] direct the District Court to determine Rees' mental competence in the present posture of things, that is, whether he has capacity to appreciate his position and make a rationale choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from mental disease, disorder or defect which may substantially affect his capacity in the premises.<sup>59</sup>

This analysis is inadequate, however, to protect either the individual's or the State's interests in administering the death penalty. It fails to address the requirement that the standard for determining competency is a varying one that depends upon the rights sought to be waived; it fails to reflect the uniqueness of the decision involved in the death penalty context; and it fails to address the "suicide" or "murder/suicide" phenomena so often present in instances of attempted waivers.

Cases concerning this standard tend to address the nature of the hearing and the sufficiency of the evidence rather than the standard

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that statement categorically. It can be stated as a universal truth stretching from nadir to zenith that regardless of circumstances, no one wants to die. Some person may, in an instant of spiritual or physical agony express a desire for death as an anodyne from intolerable pain, but that desire is never full-hearted because there is always the reserve of realization that the silken cord of life is not broken by a mere wishing. There is no person in the actual extremity of dropping from the precipice of life who does not desperately reach for a crag of time to which to cling even for a moment against the awful eternity of silence below. With all its "slings and arrows of outrageous fortune," life is yet sweet and death is always cruel.

*Commonwealth v. Elliott*, 371 Pa. 70, 79-80, 89 A.2d 782, 787 (1952) (Musmanno, J., dissenting).

<sup>58</sup> 384 U.S. 312 (1966) (per curiam). See generally Note, *The Death Row Right to Die*, *supra* note 10; Note, *supra* note 7. Examples of such challenges include: *Lenhard v. Wolff*, 443 U.S. 1306 (Rehnquist, Circuit Justice) (granting temporary stay), 444 U.S. 807 (1979) (vacating temporary stay); *Evans v. Bennett*, 440 U.S. 1301 (granting temporary stay), 440 U.S. 987 (vacating temporary stay) (1979); *Gilmore v. Utah*, 429 U.S. 1012 (1976); see also *Hays v. Murphy*, 663 F.2d 1004, 1008-09 (10th Cir. 1981); *Beavans v. Maggio*, No. 81-3668 (5th Cir., Nov. 2, 1981).

<sup>59</sup> *Rees*, 384 U.S. at 314.

itself. The most comprehensive analysis is in the Tenth Circuit's recent decision, *Hays v. Murphy*.<sup>60</sup> Thomas Lee Hays was convicted of first degree murder at a trial in which he contested his guilt. While he cooperated in his direct appeal, he thereafter opposed all further actions on his behalf.<sup>61</sup> His mother initiated the federal habeas proceedings culminating in the Tenth Circuit's decision.<sup>62</sup>

All parties agreed that the *Rees* standard was sufficient. The battleground of the case concerned the question of whether the district court had sufficient information upon which to base its finding of competency. Hays had a history of mental problems, including commitment periods, "suicidal tendencies," alcoholism, and the possibility of a concussion.<sup>63</sup> At least under these or similar circumstances, the Tenth Circuit concluded that due process required "extended, close observation in a proper setting which is generally recognized as essential for the psychiatric and psychological evaluations required."<sup>64</sup> Thus, *Hays* stands for the proposition that, while psychiatric or psychological examinations and

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<sup>60</sup> 663 F.2d 1004 (10th Cir. 1981).

<sup>61</sup> *Id.* at 1006-07.

<sup>62</sup> *Id.* The mother was proceeding as a "next friend" under settled principles. *See generally infra* notes 209-15 and accompanying text. 28 U.S.C. § 2242 (1971) specifically provides for such third party petitions under appropriate circumstances: "Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf. . . ." *Id.* (emphasis added).

<sup>63</sup> *Id.* at 1009.

<sup>64</sup> *Id.* at 1011-12 (footnotes omitted). The court emphasized that the "proper setting" did not include death row:

We are convinced that the evidence overwhelmingly establishes that there was not sufficient opportunity for proper psychiatric and psychological evaluation of Mr. Hays. There was sporadic interviewing of him through the long period that he has been in custody on death row at the Oklahoma State Penitentiary and several psychiatrists have had contacts with him at different times.

Nevertheless, the testimony convincingly demonstrates that *proper evaluation requires a setting and a relationship between the subject and the experts which were not permitted by the circumstances of death row imprisonment*. This is illustrated by the fact that the State relies heavily on the one 30-minute interview of Hays on death row by four staff members, and then consensus opinion therefrom. This, we conclude, was clearly inadequate to serve as a basis for such a serious determination.

*Id.* at 1011 (emphasis added). The court also criticized the lack of psychological testing and the attempt to substitute expert testimony for actual examination of the inmate. *Id.* at 1012-13; *see also Rees*, 384 U.S. at 314 (appropriate to place *Rees*, a state prisoner, in temporary federal hospitalization to accomplish the necessary psychiatric and medical examinations). The court in *Hays* distinguished the less stringent procedures required in *Lenhard*, *Evans*, and *Gilmore* on the ground that "[i]n these cases there was less evidence indicating incompetence than in the case before us." 663 F.2d at 1013 n.17. *Gilmore* was found competent on the basis of a one-hour interview conducted by a court-appointed prison psychiatrist with corroboration by two prison psychologists. *See Lenhard v. Wolff*, 443 U.S. at 1310-11. Bishop was found competent to plead guilty after being examined by three psychiatrists. No other judicial determination of his competency occurred. One psychiatrist, however, submitted a report after a four-hour interview, concluding that Bishop was competent to waive further proceedings. *Id.* at 1311. *See generally*, Annot., 37 A.L.R. Fed. 356 (1978).

evaluations are the *sine qua non* of an adequate inquiry into competency, the hearing may still be inadequate if the professional evaluations or examinations are not conducted and administered in a proper manner. Yet, however welcome the development of increased procedural requirements to implement the *Rees* standard may be, the defective substantive standard remains intact.

The standard articulated in *Rees* is substantively equivalent to the standard used to determine competence to stand trial: the "sufficient present ability to consult with [one's] lawyer with a reasonable degree of rational understanding [and have] a rational as well as factual understanding of the proceedings against him."<sup>65</sup> This standard is inadequate to satisfy the strict procedural protection required for a death sentence to be constitutionally executed.

In *Westbrook v. Arizona*<sup>66</sup> the Supreme Court, in a brief *per curiam* opinion, reversed a first degree murder conviction where the death penalty was imposed because the lower court failed to make an independent determination that the accused, though competent to stand trial, was also competent to conduct his own defense and thus able to voluntarily and intelligently waive his right to counsel. While courts do not agree in their interpretations of *Westbrook*, a number of courts construe the case to require a greater showing of competency where constitutional rights are involved. The leading articulation of this argument is that of the Ninth Circuit *Sieling v. Eyman*, which adopted an earlier dissenting opinion:

Judge Hufstedler, in *Schoeller v. Dunbar*, 423 F.2d 1183, 1194 (9th Cir. 1970), has suggested the following standard: "A defendant is not competent to plead guilty if a mental illness has substantially impaired his ability to make a reasoned choice among the alternatives presented to him and to understand the nature of the consequences of his plea." We think this formulation is the appropriate one, for it requires a court to assess a defendant's competency with specific reference to the gravity of the decisions with which the defendant is faced.<sup>67</sup>

To waive a constitutional right, then, an individual must have that

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<sup>65</sup> *Dusky v. United States*, 362 U.S. 402 (1960) (*per curiam*); *see also* *United States v. Dunn*, 594 F.2d 1367 (10th Cir. 1979), *cert. denied*, 444 U.S. 852 (1979).

<sup>66</sup> 384 U.S. 150 (1966) (*per curiam*).

<sup>67</sup> 478 F.2d 211, 215 (9th Cir. 1973); *accord* *Chavez v. United States*, 656 F.2d 512 (9th Cir. 1981); *United States v. David*, 511 F.2d 355 (D.C. Cir. 1975) (competence to stand trial alone does not establish competence to waive a jury trial); *People v. Vanderwerff*, 57 Ill. App. 3d 44, 49-50, 372 N.E.2d 1014, 1019 (1978); *State v. Walton*, 228 N.W.2d 21, 24 (Iowa 1975); *cf.* *State v. Likakur*, 26 Wash. App. 297, 302, 613 P.2d 156, 159 (1980) ("[w]e believe that the various constitutional rights of the accused are accorded different procedural safeguards depending on the nature of the right itself and the circumstances of each case"). Many courts, however, reject this distinction, holding that a determination of competency to stand trial is sufficient for other purposes. *See, e.g., United States ex rel. Heral v. Franzen*, 667 F.2d 633,

degree of competence required to make decisions of very serious import. The precise degree of competence must ultimately focus upon the consequences that are likely to flow from the decision in question. In the death penalty context the consequences are *sui generis*. As the Supreme Court has repeatedly recognized in requiring enhanced due process protections of other kinds in this area, the death penalty is unique in its finality.<sup>68</sup> Accordingly, an appropriate standard should be able to detect those "who, because of mental illness, would be likely to make decisions about their own interests which would result in substantial damage to their mental or physical well-being."<sup>69</sup>

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637-38 (7th Cir. 1981); *Bolius v. Wainwright*, 597 F.2d 986, 988 n.3 (5th Cir. 1979); *Allard v. Helgemoe*, 572 F.2d 1 (1st Cir.), *cert. denied*, 439 U.S. 858 (1978).

In other contexts, however, many of the courts that claim to reject the *Sieling* approach in fact vary the competency standard depending upon the issue involved. In *Rennie v. Klein*, 462 F. Supp. 1131, 1147 (D.N.J. 1978), *modified and remanded on other grounds*, 653 F.2d 836 (3d Cir. 1981), for example, the court upheld the right of an involuntarily committed mental patient to refuse treatment in non-emergency situations. While the patient is incompetent for most purposes, the court held that the factfinder must nevertheless determine the extent to which the specific act of refusing treatment was based on the underlying mental illness, stating that "[t]he greater the lack of insight [into the severity of the problem by the patient], the stronger the impetus to override the right to individual autonomy." 462 F. Supp. at 1146; *see also* *State v. Severns*, 184 Kan. 213, 219, 336 P.2d 447, 452 (1959) (for purposes of trial, defendant may be "sane" but may be "deranged" as to other matters); *Guardianship of Bassett*, 385 N.E.2d 1024, 1028 (Mass. App. 1979) (affirming trial court's finding that Bassett, a "moderately" retarded person, was "competent to handle 'some but not all' of his personal and financial matters"); *Lane v. Candura*, 376 N.E.2d 1232 (Mass. App. 1978). As Ulett explains:

In deciding competency, one should consider . . . whether competency for only a specific act is to be judged (e.g., executing a will or some particular business transaction). It is important that the psychiatrist not consider competence generally but understand that the question is, instead, 'competence for what particular purpose.' Therefore, his mental status examination should be tailored to throw light upon the specific question.

G. ULETT, A SYNOPSIS OF CONTEMPORARY PSYCHIATRY 337-38 (5th ed. 1972) *quoted in* Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. CAL. L. REV. 237, 308 n.249 (1974); *cf.* *Winters v. Miller*, 446 F.2d 65 (2d Cir.), *cert. denied*, 404 U.S. 815 (1971); Note, *Informed Consent and the Dying Patient*, 83 YALE L.J. 1632, 1652-53 (1974) [hereinafter Note, *Informed Consent*]; Note, *Civil Commitment of the Mentally Ill: Theories and Procedures*, 79 HARV. L. REV. 1288, 1295 (1966) [hereinafter Note, *Civil Commitment of the Mentally Ill*].

<sup>68</sup> *See, e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104, 117-18 (1982) (O'Connor, J., concurring); *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980); *Rummel v. Estelle*, 445 U.S. 263, 272 (1980); *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978); *Gardner v. Florida*, 428 U.S. 349, 357-58 (1977) (plurality opinion) (Stevens, J.); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) (Stewart, Powell, & Stevens, JJ.); *id.* at 322-23 (Rehnquist, J., dissenting); *Gregg*, 428 U.S. at 187; *Furman*, 408 U.S. at 286-91 (Brennan, J., concurring); *id.* at 345-46 (Marshall, J., concurring); *id.* at 306 (Stewart, J., concurring); *see Evans*, 440 U.S. at 1306 (Rehnquist, Circuit Justice) (irrevocability compels granting of stay request), 440 U.S. 987 (temporary stay vacated). *See generally* Note, *A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings*, 90 YALE L.J. 889, 902-03 (1981); Radin, *supra* note 9.

<sup>69</sup> Note, *Civil Commitment of the Mentally Ill*, *supra* note 67, at 1295 (whether persons should be deprived of power to make decisions about their own commitment) (emphasis added). A similar standard has been proposed in the context of mental patients' ability to "consent" to

Even this standard is inadequate, however, where the right involved is one of public, as well as private, importance. For example, a defendant competent enough to stand trial does not necessarily have the right to waive an insanity defense at trial.<sup>70</sup>

The power of society to punish an insane person is an issue that goes to the "very foundations of our criminal law."<sup>71</sup> There is a paramount societal interest in ensuring that criminal laws punish only the blameworthy. Accordingly, the risk of error in punishing a possibly insane defendant is viewed as qualitatively different from the risk of error inherent in acknowledging the competency of waivers of constitutional, and essentially procedural, rights a defendant may exercise at trial.<sup>72</sup>

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danger and irrevocable organic therapies. See Shapiro, *supra* note 67, at 310; Note, *Civil Commitment of the Mentally Ill*, *supra* note 67, at 1295.

<sup>70</sup> In *Whalem v. United States*, the United States Court of Appeals for the District of Columbia held that "when there is sufficient question as to a defendant's mental responsibility at the time of the crime, that issue must become part of the case. . . . [I]n the pursuit of justice, a trial judge must have the discretion to impose an unwanted defense on a defendant. . . ." 346 F.2d 812, 818-19 (D.C. Cir.) (en banc), cert. denied, 382 U.S. 862 (1965). On three occasions the court has affirmed the injection of the defense into a case over the objection of the accused. See *United States v. Wright*, 627 F.2d 1300 (D.C. Cir. 1980); *United States v. Wright*, 511 F.2d 1311 (D.C. Cir. 1975); *United States v. Ashe*, 478 F.2d 661 (D.C. Cir. 1973). Few other courts have considered the issue, but most have acknowledged the discretion to impose the insanity defense in appropriate circumstances. See, e.g., *State v. Fernald*, 248 A.2d 754, 761 (Me. 1968); *Walker v. State*, 21 Md. App. 666, 671, 321 A.2d 170, 174 (1974); *State v. Pautz*, 299 Minn. 113, 117, 217 N.W.2d 190, 192 (1974); *State v. Smith*, 88 Wash. 2d 639, 642-43, 564 P.2d 1154, 1156 (1977) (en banc); cf. *Freundak v. United States*, 408 A.2d 364 (D.C. App. 1979) (modifying *Whalem*); *List v. State*, 18 Md. App. 578, 585-87, 308 A.2d 451, 455-56 (1973), vacated on other grounds, 271 Md. 367, 316 A.2d 824 (1974); *State v. Hermann*, 283 S.W.2d 617, 620 (Mo. 1955) (dictum). But see *People v. Gauze*, 15 Cal. 3d 709, 717-18, 542 P.2d 1365, 1370, 125 Cal. Rptr. 773, 778 (1975) (en banc); *Boyd v. People*, 108 Colo. 289, 293-94, 116 P.2d 193, 194-95 (1941); *White v. State*, 17 Md. App. 58, 61-64, 299 A.2d 873, 875 (1973); *People v. Gonzales*, 20 N.Y.2d 289, 294-95, 229 N.E.2d 220, 223, 282 N.Y.S.2d 538, 542-43 (1967), cert. denied, 390 U.S. 971 (1968).

<sup>71</sup> *Wright*, 627 F.2d at 1310.

<sup>72</sup> As the *Whalem* court explained:

One of the major foundations for the structure of the criminal law is the concept of responsibility, and the law is clear that one whose acts would otherwise be criminal has committed no crime at all if because of incapacity due to age or mental condition he is not responsible for those acts. If he does not know what he is doing or cannot control his conduct or his acts are the product of a mental disease or defect, he is morally blameless and not criminally responsible. The judgment of society and the law in this respect is tested in any given case by an inquiry into the sanity of the accused. In other words, the legal definition of insanity in a criminal case is a codification of the moral judgment of society as respects a man's criminal responsibility; and if a man is insane in the eyes of the law, he is blameless in the eyes of society and is not subject to punishment in the criminal courts.

346 F.2d at 818; see also *United States v. Wright*, 627 F.2d at 1310.

The emphasis on society's obligation to withhold punishment from someone not blameworthy distinguishes the power of a defendant to waive the insanity defense from the right of a defendant to plead guilty while maintaining his innocence, *North Carolina v. Alford*, 400 U.S. 25 (1970), and the right of a defendant to conduct his own defense without appointed counsel. *Faretta v. California*, 422 U.S. 806 (1975). The decision to plead guilty discussed in

Thus, the defendant's opposition to raising the insanity defense, though relevant, is only the first factor to consider.<sup>73</sup> The court must also weigh (1) the quality of the defendant's reasoning; (2) "the quality of the evidence supporting the defense;" (3) "the reasonableness of the defendant's decision to raise the defense;" and (4) "the Court's personal observations of the defendant."<sup>74</sup>

At the very least,<sup>75</sup> a similar balancing test should be incorporated into the competency standard applied to waivers of challenges to the death penalty. While on its face the death penalty is merely a form of punishment chosen by society rather than an allocation of blame, that distinction is blurred under contemporary Supreme Court analysis. To be constitutional, a death penalty must be imposed in a rational and consistent manner<sup>76</sup> and only in cases where such an extraordinary punishment is proportional to the circumstances and severity of the crime.<sup>77</sup> These requirements reflect the view that society's power to exact the

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*Alford* presupposes the ability of the defendant to exercise free will. *Wright*, 627 F.2d at 1310. Moreover, *Alford* only protects the defendant's right to enter the plea, but does not guarantee or demand that the court accept it. In *Alford*, the court stated: "Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because [the] defendant wishes to so plead. A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the Court." 400 U.S. at 38 n.11; see also *Wright*, 627 F.2d at 1310. And *Faretta* did not purport to work radical changes upon the processes of criminal justice. *Faretta*, 422 U.S. at 834 n.46 (right of self-representation not a "license not to comply with relevant rules of procedural and substantive law"); see also *Wright*, 627 F.2d at 1310 ("[n]o defendant, whether acting *pro se* or through counsel, can restrain the court from considering whether the insanity defense should be raised"); *id.* at 1310 n.76. Indeed, courts interpreting *Faretta* have limited its scope to its factual setting. See *United States v. Wilhelm*, 570 F.2d 461, 464-66 (3d Cir. 1978) (sixth amendment does not entitle accused to representation by nonlawyer); *United States v. Cyphers*, 556 F.2d 630, 634 (2d Cir.), *cert. denied*, 431 U.S. 972 (1977) (sixth amendment does not guarantee a defendant represented by counsel the right to participate in trial as co-counsel); *United States v. Hill*, 526 F.2d 1019, 1024 (10th Cir. 1975), *cert. denied*, 425 U.S. 940 (1976); cf. *Fredak*, 408 A.2d at 376 n.19 ("[l]ower courts have been careful to construe *Faretta* to grant nothing more than a right to self-representation"); *Clyburn v. United States*, 381 A.2d 260, 263 n.7 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 999 (1978) (*Faretta* does not overrule *Whalem*) (dictum). It is difficult, however, to perceive why society's preemptive concern with the issue of criminal responsibility would not also be triggered in the guilty plea context. Why should an insane, but legally "competent" defendant be allowed to plead guilty but not be allowed to waive an insanity defense at trial? Both appear to rock the "very foundations of our criminal law." See *Wright*, 627 F.2d at 1310.

<sup>73</sup> See *Wright*, 627 F.2d at 1311; *Cross v. United States*, 389 F.2d 957, 960 (D.C. Cir. 1968); *United States v. Robertson*, 430 F. Supp. 444, 446 (D.D.C. 1977).

<sup>74</sup> *Wright*, 627 F.2d at 1311 (quoting *United States v. Robertson*, 430 F. Supp. 444, 446 (D.D.C. 1977)); see also *United States v. Simms*, 463 F.2d 1273, 1277 (D.C. Cir. 1972).

<sup>75</sup> Indeed, as this Article argues in Section IV, *infra*, a much more comprehensive balancing test must be engaged in to determine the validity of such waivers in the death penalty context.

<sup>76</sup> See *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982); *Gregg*, 428 U.S. at 206-07.

<sup>77</sup> *Furman*, 408 U.S. at 286-91 (Brennan, J., concurring); *id.* at 306 (Stewart, J., concurring).

death penalty is at least as fundamental a concern as society's power to allocate blame itself. The risk of error in both circumstances goes to the "very foundations of our criminal law."<sup>78</sup>

Because imposition of the death penalty is imbued with the public interest, unlike many constitutional rights which are deemed personal to the individual defendant (and thus waivable), many state courts have held that a capital defendant cannot waive challenges to his death sentence. The leading case is the Pennsylvania Supreme Court's decision in *Commonwealth v. McKenna*, where the court held:

We recognize, of course, that the doctrine of waiver is, in our adversary system of litigation, indispensable to the orderly functioning of the judicial process. There are, however, occasional rare situations where an appellate court must consider the interests of society as a whole in seeing to it that justice is done, regardless of what might otherwise be the normal procedure. One such situation is surely the imposition of capital punishment. . . . The doctrine of waiver developed not only out of a sense of fairness to an opposing party but also as a means of promoting jurisprudential efficiency by avoiding appellate court determinations of issues which the appealing party had failed to preserve. It was not, however, designed to block giving effect to a strong public interest, which itself is a jurisprudential concern. It is evident from the record that Gerard McKenna personally prefers death to spending the remainder of his life in prison. While this may be a genuine conviction on his part, the waiver concept was never intended as a means of allowing a criminal defendant to choose his own sentence. Especially is this so where, as here, to do so would result in state aided suicide. The waiver rule cannot be exalted to a position so lofty as to require this Court to blind itself to the real issue—the propriety of allowing the state to conduct an illegal execution of a citizen.<sup>79</sup>

Other courts have followed *McKenna*'s lead and refused to accept a capital defendant's attempted waiver of post-trial remedies,<sup>80</sup> especially

<sup>78</sup> *Wright*, 672 F.2d at 1310. The similarity in the importance of the insanity determination and the determination that death is the appropriate punishment is also reflected in the fact that the respective proceedings are usually bifurcated from the proceedings to determine "guilt." Compare *Gregg*, 428 U.S. at 191-92 ("a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman*") with *United States v. Robertson*, 507 F.2d 1148, 1160 n.51 (D.C. Cir. 1974) (noting that the court "has repeatedly recognized the value of the bifurcated procedure" to determine insanity).

<sup>79</sup> 476 Pa. 428, 439-41, 383 A.2d 174, 180-81 (1978). In his concurrence, Judge Nix took the view that the issue did not truly involve waiver at all but instead the power of the trial court to sentence McKenna under an unconstitutional statute. *Id.* at 182 (Nix, J., concurring) ("the essence of this controversy reaches the propriety of this Court's acquiescence in an obvious excess of sentencing power of one of its inferior tribunals, because it is the wish of the offender").

<sup>80</sup> Moreover, courts usually do not hold capital defendants to strict contemporaneous objection rules in reviewing errors that are claimed on appeal. See, e.g., *State v. Ceja*, 115 Ariz. 413, 565 P.2d 1274, cert. denied, 434 U.S. 975 (1977); *State v. Osborn*, 102 Idaho 405, 411, 631 P.2d 187, 193 (1981); *State v. White*, 97 Idaho 708, 551 P.2d 1344, cert. denied, 429 U.S. 842 (1976); *State v. Haggard*, 94 Idaho 249, 486 P.2d 260 (1971); *State v. Martin*, 243 Iowa 1323,



where there are indications that the condemned seeks "state aided suicide" or where there are other indications of mental illness, though not necessarily rising to the level of incompetency.<sup>81</sup>

Moreover, in other contexts where a constitutional right is deemed to have a public, as well as personal, aspect, the Supreme Court has not hesitated to acknowledge limitations on the power of the individual citi-

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55 N.W.2d 258 (1952); *Tuggle v. State*, 73 Okla. Cr. 208, 211-12, 119 P.2d 857, 859 (1941); *State v. Taylor*, 213 S.C. 330, 331, 49 S.E.2d 289, 289 (1948), *overruled on other grounds sub nom.* *State v. Jones*, 268 S.C. 227, 231-32, 233 S.E.2d 287, 289 (1977); *State v. Brown*, 607 P.2d 261, 265 (Utah 1980); *State v. St. Clair*, 3 Utah 2d 230, 235-36, 282 P.2d 323, 327 (1955); *State v. Russell*, 106 Utah 116, 124, 145 P.2d 1003, 1007 (1944).

<sup>81</sup> See, e.g., *People v. Teron*, 23 Cal. 3d 103, 588 P.2d 773, 151 Cal. Rptr. 633 (1979); *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981). Although these cases involve mandatory appellate procedures, the mandatory nature of the proceeding is of no theoretical significance. Even if these states did not require an automatic appeal, an appeal would be necessary for the sentence to comply with constitutional standards. See *infra* Section IV. The states' designation of these appellate procedures as "automatic" is thus largely superfluous. Moreover, at least one court has held that the State's "dominant and overriding interest in ensuring that the death penalty is imposed only for [the] utmost of compelling legal reasons" was sufficient to grant discretionary review beyond the automatic stage over the objection of the condemned men. See *Evans v. State*, 361 So. 2d 666, 667 (Ala. 1978) (per curiam); cf. Note, *The Death Row Right to Die*, *supra* note 10, at 583 (criticizing *Evans*).

On similar reasoning, the California Supreme Court more recently reversed the capital sentence in *People v. Chadd*, 28 Cal. 3d 739, 621 P.2d 837, 170 Cal. Rptr. 798 (en banc), *cert. denied*, 425 U.S. 931 (1981). Faced with charges of capital murder in Nevada as well as California, *id.* at 745 n.2, 621 P.2d at 840 n.2, 170 Cal. Rptr. at 801 n.2, Chadd attempted suicide while in a hospital prior to his preliminary hearing in the California case. Despite objections by defense counsel, who indicated that "[t]his particular defendant's basic desire is to commit suicide, and he's asking for the cooperation of the State in that endeavor," the trial court accepted Chadd's guilty plea. *Id.* at 744, 621 P.2d at 839-40, 170 Cal. Rptr. at 801; see also *supra* note 23, (discussing Chadd's reasons). On appeal, the State argued that Chadd had a "fundamental right" to plead guilty, based on *Faretta v. California*, 422 U.S. 806 (1975), but the court rejected this attempted reliance on *Faretta* because of "the larger public interest at stake in pleas of guilty to capital offenses." *Chadd*, 28 Cal. 3d at 747, 621 P.2d at 841, 170 Cal. Rptr. at 802. As did the District of Columbia Circuit in *Wright*, the Supreme Court of California found that the scope of *Faretta* was necessarily limited:

The Attorney General in effect stands *Faretta* on its head: from the defendant's conceded right to "make a defense" in "an adversary criminal trial," the Attorney General attempts to infer a defendant's right to make *no* such defense and to have *no* such trial, even when his life is at stake. But in capital cases, as noted above, the state has a strong interest in reducing the risk of mistaken judgments. Nothing in *Faretta*, either expressly or impliedly, deprives the state of the right to conclude that the danger of erroneously imposing a death sentence outweighs the minor infringement of the right of self-representation resulting when defendant's right to plead guilty in capital cases is subjected to the requirement of his counsel's consent.

*Id.* at 751, 621 P.2d at 844, 170 Cal. Rptr. at 805; see also *Lenhard v. Wolff*, 444 U.S. 807 (1979) (Marshall, J., dissenting from denial of certiorari); *People v. Ballentine*, 39 Cal. 2d 193, 246 P.2d 35 (1952); *Bishop v. State*, 95 Nev. 511, 520, 597 P.2d 273, 279 (1979) (Manoukian, J., dissenting). The Seventh Circuit stated in *United States v. Taylor*:

It does not inevitably follow, however, that this right of self-representation [found in *Faretta*] comprehends any correlative right to preclude the trial from appointing counsel and authorizing him to participate in the trial over the accused's objection in order to protect the public interest in the fairness and integrity of the proceedings.

569 F.2d 448, 452 (7th Cir.), *cert. denied*, 435 U.S. 952 (1978).

zen to waive those rights, even to his or her own detriment. For example, because of the great importance to our society of jury trials as the preferred methods of fact-finding in criminal cases, a defendant does not have an absolute right to demand a trial by a judge.<sup>82</sup> And, due to the public's interest in seeing that justice is swiftly and fairly administered, defendants may not indefinitely delay their trial, thereby waiving their sixth amendment right to a speedy trial.<sup>83</sup> Nor may a defendant bar the public from his or her trial because of the importance of giving the "assurance that the proceedings were conducted fairly to all concerned."<sup>84</sup> Similarly, a capital defendant should not have the absolute right to demand execution when to do so would impinge upon the public's right to demand that the State not violate the eighth amendment.<sup>85</sup>

When the factors enunciated in *Whalem v. United States*<sup>86</sup> and *United States v. Wright*<sup>87</sup> are applied to the imposition of the death penalty, the second and third factors protect fundamentally important societal interests. These factors require the court to weigh the objective "reasonableness" of the defendant's decision in light of the "quality of the evidence supporting" any defenses to the penalty that the defendant seeks to waive.<sup>88</sup> The stronger the possible defenses, the stronger must be the State's interest in "forcing" the trial and post-conviction procedural protections on him.

These interests must then be weighed against the "quality" of the

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<sup>82</sup> *Singer v. United States*, 380 U.S. 24 (1965). In *Singer* the Court upheld the constitutionality of Federal Rule of Criminal Procedure 23(a), stating that a defendant may only waive a jury trial "with the approval of the court and the consent of the government." *Id.* at 24. As the Court itself explained:

The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right. For example, although a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial. . . ."

*Id.* at 34-35. Moreover, the Court added, in a statement equally applicable to the death penalty context:

The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result.

*Id.* at 36. See generally *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975). It is through the criminal justice process that the death penalty acquires whatever legitimacy it has. Acquiescing in one's own execution frustrates "the evolving standards of decency" that may one day mark the end of capital punishment altogether. *Gregg*, 428 U.S. at 173 (quoting *Trop v. Dulles*, 356 U.S. 101 (1958)).

<sup>83</sup> *Barker v. Wingo*, 407 U.S. 514, 519 (1974).

<sup>84</sup> *Richmond Newspapers, Inc. v. Commonwealth of Virginia*, 448 U.S. 555, 569 (1980) (plurality opinion).

<sup>85</sup> See Note, *supra* note 7, at 792 n.115.

<sup>86</sup> 346 F.2d 812 (D.C. Cir.) (en banc), cert. denied, 382 U.S. 862 (1965).

<sup>87</sup> 627 F.2d 1300 (D.C. Cir. 1980).

<sup>88</sup> See *supra* text accompanying note 74; see also *supra* notes 71-74 and accompanying text.

condemned person's "reasoning."<sup>89</sup> The term "quality" itself implies the necessity for fine distinctions between barely perceptible gradations in cognitive powers for which no hard and fast standard of competency will suffice. The question is whether "mental illness" would be likely to impair the decision.<sup>90</sup> Traditional notions of competency are inadequate to cope with this question and, in particular, with the suicidal phenomena associated with the death penalty.<sup>91</sup>

#### B. VOLUNTARINESS

The *Rees* standard<sup>92</sup> not only requires an inquiry into the competency of the individual to make the decision, but also into the voluntari-

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<sup>89</sup> See *supra* notes 71-74 and accompanying text. The fourth factor, "the court's personal observations of the defendant," is largely subsumed by the "quality of [the defendant's] reasoning" factor, since the court's observations should ideally confirm the fitness or unfitness of the defendant to make his choice. This factor, however, should be given the least weight because of its inherent subjectivity. In "close" cases the court's observations should be used only to refuse to recognize the validity of the waiver. Unreviewable as they are, such observations should not be permitted to swing the balance toward execution.

<sup>90</sup> See *supra* note 69.

<sup>91</sup> As noted in Section II, many, if not most, of those who seek their own executions either have symptoms of severe mental disorders or are suicidal for one reason or another. See *supra* text accompanying notes 13-57. Although the relationship between mental illness and suicide is uncertain, see *Drope v. Missouri*, 420 U.S. 162, 180-81 (1975); cf. Note, *supra* note 7, at 797 n.127, there is substantial support in the psychiatric community for the proposition that, at the very least, certain categories of suicides are the product of disease. See generally Richards, *Constitutional Privacy, The Right to Die and the Meaning of Life: A Moral Analysis*, 22 WM. & MARY L. REV. 327 (1981). Richards observes that at least one class of suicides may be mentally disturbed. He describes them as predominantly "young, disproportionately female, not undertaking suicide in a way clearly calculated to succeed, and ambivalently hoping for help." *Id.* at 395 (citations omitted). The frequency with which the condemned change their minds about desiring execution, see *supra* note 57, indicates that they too may constitute a class of attempted suicides "not undertaking suicide in a way clearly calculated to succeed, and ambivalently hoping for help." *Id.*; cf. Note, *Informed Consent and the Dying Patient*, 83 YALE L.J. 1632, 1647-48 (1974) (discussing theory "that a decision to die by a terminal patient is a manifestation of mental incompetency; hence that a terminal patient cannot competently consent to any form of euthanasia").

"Competency to Stand Trial Instrument," designed by the Laboratory of Community Psychiatry of the Harvard Medical School, lists thirteen functions "related to what is required of a defendant in criminal proceedings in order that he may adequately cope with and protect himself in such proceedings" as required for effective competency evaluations, including "self-defeating v. self-serving motivation (legal sense)." CENTER FOR STUDIES OF CRIME AND DELINQUENCY, NATIONAL INSTITUTE OF MENTAL HEALTH, COMPETENCY TO STAND TRIAL AND MENTAL ILLNESS 99-100 (1973). As detected by the Laboratory, this copying mechanism often is manifested by the intentional abandonment of legal safeguards:

This item calls for an assessment of the accused's motivation to adequately protect himself and appropriately utilize legal safeguards to this end. It is recognized that accused persons may appropriately be motivated to seek expiation and appropriate punishment in their trials. At issue here is the pathological seeking of punishment and the deliberate failure of the accused to avail himself of appropriate legal protections.

*Id.* at 103.

<sup>92</sup> See *supra* text accompanying note 59.

ness of the decision itself. A person who, because of his present circumstances, lacks the ability to make a rational choice, or one who is under coercion or duress as a consequence of brutal and dehumanizing conditions, simply cannot make an "intelligent and competent waiver"<sup>93</sup> of his right to seek federal constitutional relief from his death sentence.<sup>94</sup> Any minimally professional evaluation of a prisoner's "choice" to forgo post-conviction remedies must investigate the extent to which this decision is an involuntary response to oppressive conditions of confinement. While an *individual's* attempt to manipulate the machinery of execution to assist him in performing "state aided suicide" is surely grounds for concern, the *State's* attempt to manipulate that machinery to coerce the individual to acquiesce in what amounts to state conducted homicide is cause for alarm.

Constitutional standards for determining "voluntariness" have been developed largely in the fifth amendment context. The test for voluntariness is whether, under the totality of the circumstances,<sup>95</sup> the conduct in question is "the product of an essentially free and unconstrained choice by its maker."<sup>96</sup> When conduct is challenged on voluntariness grounds, as with competency, the court must hold an evidentiary hearing to determine the issue. It may have an obligation to hold such a hearing even if the issue is not raised by the defendant or counsel.<sup>97</sup> The burden is on the State to prove voluntariness by a preponderance of the evidence,<sup>98</sup> and the reviewing courts must make independent evaluations of the issue.<sup>99</sup> When analyzed under these general principles, the death row decision of the condemned to accept death "with grace and dignity" rather than suffer increasing debilitation

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<sup>93</sup> *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938).

<sup>94</sup> *See Gilmore v. Utah*, 429 U.S. 989, 1013 (1976) (Court "convinced" that Gilmore "made a knowing and intelligent waiver of any and all federal rights"); *id.* at 1015 n.4 (Gilmore's decision not made "as a result of the way he was treated in prison") (Burger, C.J., concurring).

<sup>95</sup> *Haynes v. Washington*, 373 U.S. 503, 513-14 (1963); *United States v. White Bear*, 668 F.2d 409, 412-13 (8th Cir. 1982); *United States v. Seni*, 662 F.2d 277, 282 (4th Cir. 1981); *United States ex rel. Riley v. Franzen*, 653 F.2d 1153, 1162-63 (7th Cir. 1981).

<sup>96</sup> *Townsend v. Sain*, 372 U.S. 293, 307 (1963) (whether suspect's "will was overborne"); *Columbe v. Connecticut*, 367 U.S. 568, 602 (1961) (plurality opinion). This test has been applied to both statements and non-verbal conduct. *See United States v. Jackson*, 627 F.2d 1198, 1210-12 (D.C. Cir. 1980) (standard fifth amendment analysis used to determine admissibility of defendant's conduct in turning over large sum of money obtained in heroin trafficking to government).

<sup>97</sup> *See United States v. Powe*, 591 F.2d 833, 842-44, 846-48, nn.28-34, 44-54 (D.C. Cir. 1978).

<sup>98</sup> *Lego v. Twomey*, 404 U.S. 477, 489 (1972); *United States v. Tingle*, 658 F.2d 1332, 1335 (9th Cir. 1981); *United States v. Wiggins*, 509 F.2d 454, 461 (D.C. Cir. 1975).

<sup>99</sup> *Mincey v. Arizona*, 437 U.S. 385, 398 (1978); *Beckwith v. United States*, 425 U.S. 341, 348 (1976). *See generally* Project, *Twelfth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1981-1982*, 71 GEO. L.J. 339, 432-34 (1982).

as a result of extremely brutal prison conditions cannot honestly be deemed "free and unconstrained."

### 1. Length and Conditions of Confinement

Courts have long held that both the length of time spent on death row<sup>100</sup> and the conditions of one's physical environment can be so coercive as to vitiate the voluntariness of his actions.<sup>101</sup> In *Brooks v. Florida*,<sup>102</sup> for example, the Supreme Court ruled that a confession was involuntarily obtained from an inmate after a prison riot because of the conditions to which he was subjected.<sup>103</sup> Similarly, in *Stidham v. Swenson*,<sup>104</sup> the Eighth Circuit, relying on *Brooks*, looked to the totality of conditions to determine whether an inmate's confession to murder committed in the course of a prison riot was involuntary.<sup>105</sup>

As discussed in Section II, the "realities" of life on death row convey to the prisoner such a resounding message that no "spoken words" of coercion need be expressed. Through the daily indignities both big and small, the near total isolation which extends for years, the absence of virtually all activities, and other brutal conditions, the death row pris-

<sup>100</sup> See generally *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973); *Turner v. Pennsylvania*, 338 U.S. 62 (1949); *Chambers v. Florida*, 309 U.S. 227 (1940).

<sup>101</sup> *Brooks v. Florida*, 389 U.S. 413 (1967) (per curiam); *United States v. Koch*, 552 F.2d 1216 (7th Cir. 1977); *Stidham v. Swenson*, 443 F.2d 1327 (8th Cir. 1971), *rev'd on other grounds and remanded*, 409 U.S. 234 (1972), *modified*, 410 U.S. 904 (1973), *remanded*, 506 F.2d 478 (1974) (en banc), *cert. denied*, 429 U.S. 941 (1976); *Townsend v. Henderson*, 405 F.2d 324 (6th Cir. 1968).

<sup>102</sup> 389 U.S. 413 (1967) (per curiam).

<sup>103</sup> *Brooks* and two other men were thrown naked into a "windowless sweatbox" for fifteen days, fed only a thin vegetable soup, and deprived of all visitors. 389 U.S. at 414.

<sup>104</sup> 506 F.2d 478 (8th Cir. 1974).

<sup>105</sup> The court remanded the case to redetermine the issue of voluntariness based on nine enumerated factors:

(1) The size of the cells in which Stidham was held in solitary confinement from January, 1953, until September, 1954;

(2) The facilities available in said cells;

(3) The extent, if any, to which the cells were infested with cockroaches, rodents and pigeons;

(4) Whether the cells were or were not poorly ventilated;

(5) Whether Stidham was permitted to visit with family or friends during the time that he was held in solitary confinement;

(6) The extent, if any, to which Stidham was given food and water in the period between the prison riot and his confession;

(7) Whether Stidham was given an opportunity to rest during the period from the prison riot to his confession;

(8) Whether officials of the prison refused or neglected to mail a letter from Stidham to his family in which he requested that counsel be appointed for him in the period between the riot and his confession; and

(9) Such other matters as it may feel appropriate.

*Id.* at 488. A similar "totality" approach is used to determine the constitutionality under the eighth amendment of prison conditions generally. See *infra* notes 109-11 and accompanying text.

oner is "told" he is worthless and should be and will be dead. The "choice" presented by the State is to die now or continue to be punished for challenging the State's decision by the harsh regimes reigning on death row.

Moreover, in *United States v. Koch*,<sup>106</sup> the Seventh Circuit acknowledged that a confession obtained by offering a "choice" between two equally unpleasant alternatives rendered the confession so obtained involuntary despite full *Miranda* warnings. The court held that the impact of the conditions of confinement and the prisoner's perception that by confessing his conditions would be improved were irreconcilable with a free and voluntary waiver.<sup>107</sup>

It is important at this juncture to emphasize that the inquiry into factors rendering a decision involuntary is discrete from that necessary to prove an independent eighth amendment violation. The fact that conditions of confinement may, in fact, be justifiable and lawful for other reasons (such as security), hence not an eighth amendment violation, does not transform every decision made under those conditions into a voluntary one.<sup>108</sup> Where conditions of confinement are truly torturous

<sup>106</sup> 552 F.2d 1216 (7th Cir. 1977). In *Koch*, the prisoner/suspect was confined in a six foot by eight foot segregation cell or "box-car" and was deprived of all personal property, necessary hygiene, and the ability to speak to others for six hours. He testified that he believed that if he confessed, he would be moved to a less oppressive segregation cell in a less secure unit. When the prisoner was asked whether he gave his statement voluntarily, the prisoner replied, "It's either a question of getting out of the boxcar and going to I Unit (regular segregation) or stay in the boxcar until trial and not give a statement." *Id.* at 1218.

<sup>107</sup> See also *Townsend v. Henderson*, 405 F.2d 324 (6th Cir. 1968). Cases which reach a similar conclusion about the need to evaluate the totality of circumstances in assessing a person's voluntariness are not limited to the criminal justice system. A contract between two parties in which one party has little or no meaningful choice will be declared void as "unconscionable" after a review of all of the circumstances surrounding the transaction. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965). It also has long been the practice to invalidate a will when it is shown that the testator has been the subject of "undue influence." See generally Hogan, *When Does Influence Become Undue?*, 7 LOY. U. CHI. L.J. 629 (1976); King, *Undue Influence in Wills in Illinois*, 2 U. CHI. L. REV. 457 (1935). Similarly, the absence of meaningful alternatives to the terms presented by a party to a contract is the key element in the defense of duress. See *Sonnleitner v. C.I.R.*, 598 F.2d 464 (5th Cir. 1979); *Jamestown Farmers Elevator v. General Mills*, 552 F.2d 1285 (8th Cir. 1977); *LaBeach v. Beatrice Foods Co.*, 461 F. Supp. 152, 156 (S.D.N.Y. 1978); *In re Consol. Pretrial Proceedings in Air West*, 436 F. Supp. 1281, 1290 (N.D. Cal. 1977).

<sup>108</sup> Again, a comparison to the law of contracts is instructive. The means employed to accomplish duress need not be inherently wrongful; it is their use in a particular context that makes that use wrongful. For example, threats to exercise legal rights in "oppressive ways" may constitute duress. J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* 264-65, 267 (2d ed. 1977) (quoting *Link v. Link*, 278 N.C. 181, 194, 179 S.E.2d 697, 705 (1971)).

The distinction between voluntariness and the requirements for an eighth amendment violation were recently confused by the court in *Bailey v. Lally*, 481 F. Supp. 203 (D. Md. 1979). In *Bailey*, prisoners incarcerated at the Maryland House of Correction sought damages for injuries sustained as a result of their participation in a medical research program conducted at the prison. The prisoners argued that the consent obtained prior to their participa-

in violation of the eighth amendment, however, the involuntariness of "waivers" of constitutional rights must be *assumed*. It is "intolerable that one constitutional right should have to be surrendered in order to assert another."<sup>109</sup> Yet, that is precisely the predicament prisoners on death row are faced with when the conditions are unconstitutional. In order to challenge the constitutionality of their convictions or sentences, they are forced to surrender their right not to be subjected to cruel and unusual punishment while those challenges are taking place. It is the cruelest of ironies and incompatible with the fundamental values of our society to impose such oppressive conditions on the condemned that they are compelled to "waive" further legal proceedings and then to assert that such decisions are rational and voluntary.<sup>110</sup> While a complete discussion of the constitutionality of death row conditions under the eighth amendment is beyond the scope of this Article, the conditions described in Section II are more than severe enough to render most death rows unconstitutional under current eighth amendment analysis.<sup>111</sup>

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tion was involuntary because of harsh prison conditions. *Id.* at 205. Indeed, conditions relating to overcrowding already had been declared unconstitutional in *Johnson v. Levine*, 450 F. Supp. 648 (D. Md.), *aff'd in relevant part*, 588 F.2d 1378 (4th Cir. 1978) (en banc) (per curiam). The court in *Bailey*, however, found that the conditions under which the consent was obtained did not constitute cruel and unusual punishment and immediately concluded that the consent was therefore voluntarily obtained. 481 F. Supp. at 220-21. Even assuming the court was correct in finding no eighth amendment violation, its conclusion that the voluntariness inquiry was automatically satisfied was pure *ipse dixit* and contrary to established fifth and sixth amendment principles.

<sup>109</sup> *Simmons v. United States*, 390 U.S. 377, 394 (1968); *see also Rhodes v. Chapman*, 452 U.S. 337, 374 n.6 (1981) (Marshall, J., dissenting); *Furman*, 408 U.S. at 288 n.37 (Brennan, J., concurring); *Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, 592 (1926); *Wojtczak v. Cuyler*, 480 F. Supp. 1288, 1304 (E.D. Pa. 1979).

<sup>110</sup> The fact that a prisoner may genuinely desire to die rather than spend an interminable period of time on death row does not make that decision any more voluntary than the payment of ransom to an extortionist:

[W]hen a parent pays a kidnapper because he wishes to save his daughter's life, his choice may be the "expression of the most genuine, heartfelt consent." The consent is real enough, the vice of it is that it was coerced in a manner that society brands as wrongful and is therefore not deemed the product of free will. Consequently, in determining whether a transaction may be avoided for duress the main inquiry is to ascertain what acts or threats are branded as wrongful.

J. CALAMARI & J. PERILLO, *supra* note 108, at 263 (footnotes omitted).

<sup>111</sup> The eighth amendment protects prisoners from more than just torture or barbarous physical methods of punishment. *Rhodes v. Chapman*, 452 U.S. 337 (1981); *Hutto v. Finney*, 437 U.S. 678 (1978); *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976); *Gregg*, 428 U.S. at 171; *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958). Its ban applies to all punishments which do not comport with "broad and idealistic concepts of dignity, civilized standards, humanity and decency." *Hutto*, 437 U.S. at 685 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)). Contemporary standards of decency require that state prison systems "protect and safeguard a prison inmate from an environment where degeneration is probable and self-improvement unlikely because of the conditions existing which inflict needless suffering, whether physical or mental." *Battle v. Anderson*, 564 F.2d 388, 393 (10th Cir. 1977); *see also Pugh v. Locke*,

"Next friends" attempting to intervene on behalf of both Jesse

406 F. Supp. 318, 329 (M.D. Ala. 1976), *aff'd in part and rev'd in part sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); Laaman v. Helgemoe, 437 F. Supp. 269, 323 (D.N.H. 1977); James v. Wallace, 382 F. Supp. 1177, 1181 (M.D. Ala. 1974); *cf.* Youngberg v. Romeo, 457 U.S. 307, 327 (1982) (Blackmun, Brennan, and O'Connor, JJ., concurring) (involuntarily committed mentally retarded patient may have a due process right to "such training as is reasonably necessary to prevent a person's pre-existing self-care skills from deteriorating because of his commitment") (emphasis in original). Justice Blackmun in *Youngberg* emphasized that the maintenance of such "pre-existing self-care skills" is "necessary" for the patient to maintain "his personal autonomy." 457 U.S. at 328 (Blackmun, J., concurring). Conditions may be unconstitutional under this standard either "alone or in combination." *Rhodes*, 452 U.S. at 347. In *Rhodes*, the Supreme Court recently approved the "totality" approach already in use by a majority of courts. *Id.* at 363 n.10 (Brennan, J., concurring); *see also Hutto*, 437 U.S. at 687; *Ruiz v. Estelle*, 697 F.2d 1115, 1139 (5th Cir. 1982); *cf.* *Hoptowit v. Ray*, 682 F.2d 1237 (9th Cir. 1982). *See generally*, Note, *Eighth Amendment Challenges to Conditions of Confinement: State Prison Reform by Federal Judicial Decree*, 18 WASHBURN L.J. 288 (1979); Comment, *supra* note 48; Comment, *Cruel But Not So Unusual Punishment: The Role of the Federal Judiciary In State Prison Reform*, 7 CUM. L. REV. 31 (1976). While each element contributing to the violation must be addressed, it is the "interdependence of the conditions" that ultimately produces the violation. *Hutto*, 437 U.S. at 688. The factors contributing to the "totality" approach include confinement without fresh air or exercise, unsanitary conditions, inadequate clothing and bedding, denial of medical care, limitations on visitation, irrational classification systems, overcrowding, disproportionate sanctions, and failure to provide educational and vocational training. *See supra* note 105.

In the only reported decision squarely addressing the constitutionality of death row conditions under the eighth amendment, *Sinclair v. Henderson*, 331 F. Supp. 1123 (E.D. La. 1971), the court found that conditions on Louisiana's death row violated the eighth amendment. Prisoners were held in virtual solitary confinement for over 23 hours a day without the opportunity for regular outdoor exercise. *Id.* at 1129, 1131. Moreover, many had been living under these conditions for as long as nine years. *Id.* at 1129.

An eighth amendment challenge to death row conditions was presented in *Glenn v. Wilkinson*, 309 F. Supp. 411, 412 (W.D. Mo. 1970), but was mooted when the state "voluntarily" moved the inmates to a separate facility. *Id.* at 413. Three other reported decisions are simply too old to be of significant precedential value. *See McElvaine v. Brush*, 142 U.S. 155 (1891) (not cruel and unusual punishment to be held in solitary confinement until execution); *Rosenberg v. Carroll*, 99 F. Supp. 630 (S.D.N.Y. 1951) (confinement on death row in Sing Sing not cruel and unusual using totality approach); *cf. In re Anderson*, 639 Cal. 2d 613, 631-32, 447 P.2d 117, 129-30, 73 Cal. Rptr. 21, 33-34 (1968) (rejecting as unproven eighth amendment challenge to death penalty alleging that it "drives men mad and to suicide" and that long wait on death row causes "deterioration of personality").

Recently, there has been a spate of litigation over the constitutionality of conditions on death row. No decisions have been reported yet. There have, however, been two consent decrees. *See Jacobs v. Britton*, No. 78-309-H (S.D. Ala., 1980); *Daniels v. Zant*, No. 79-110-MAC (M.D. Ga., June 5, 1981). Two other suits are still pending. *See Delvecchio v. Lane*, No. 81-3208 (S.D. Ill., Apr. 2, 1981); *Delvecchio v. Lane*, No. 82-3208 (S.D. Ill., Dec. 20, 1982) (denying defendant's motion to dismiss); *Brown v. Hutto*, No. 81-0853-R (E.D. Va., Feb. 23, 1982). One unreported state court decision found that the placement and retention of prisoners in solitary confinement solely because of their death sentences violated both their eighth amendment rights and their rights under the Pennsylvania Constitution. *See Story v. Robinson*, No. 75-29657 (Ct. of Common Pleas of Allegheny Co., Pa., June 28, 1976) (involving confinement in cells for 23 hours a day). Other cases stemming from death row confinement attack only particular practices. *See, e.g., Otey v. Best*, 680 F.2d 1231 (8th Cir. 1982) (upholding Nebraska prison regulation prohibiting prisoners on death row from attending group religious services with prisoners from general population due to increased security risk); *Wilson v.*



Bishop<sup>112</sup> and Frank Coppola<sup>113</sup> attempted to raise the issue of prison conditions in challenging the voluntariness of their decisions to terminate legal proceedings. Virtually without analysis, the courts, including the Supreme Court, ignored the seriousness of these allegations. Where a Frank Coppola is a named plaintiff in a class action suit challenging the constitutionality of the conditions of his confinement,<sup>114</sup> the involuntariness claim should be afforded *prima facie* merit, requiring at least as comprehensive an inquiry as is commonplace when the inmate's competency is challenged.<sup>115</sup>

## 2. Psychological Stress and Mental Illness

Even if an individual is legally "competent," a waiver of rights by him may be deemed involuntary if he is suffering from mental illness at the time.<sup>116</sup> Moreover, "[e]ven where it is only *probable* that the defendant was mentally ill at the time," a waiver may be involuntary.<sup>117</sup> As illustrated in Section II, many of those who seek to cut off challenges to their executions are suffering from various forms of mental illness.<sup>118</sup>

Apart from the suffering caused by death row conditions, the psychological stress attendant to living under a sentence of death is an additional factor that must be weighed in the voluntariness inquiry: "The

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Nevada Department of Prisons, 511 F. Supp. 750 (D. Nev. 1981) (upholding differential in visitation policies between regular inmates and death row inmates as rationally based); United States *ex rel.* Raymond v. Rundle, 276 F. Supp. 637 (E.D. Pa. 1967) (permissible to limit death row inmate's visitation privileges since institution lacked sufficient personnel to supervise visits); Labat v. McKeithen, 243 F. Supp. 662 (E.D. La. 1965), *aff'd*, 362 F.2d 747 (5th Cir. 1966) (dismissing condemned prisoner's complaint concerning mail censorship).

<sup>112</sup> In addition to competency questions, Bishop's attorneys argued that his decision was a product of duress caused by poor conditions on death row and of pain and drug intoxication caused by his neglected medical needs. Lenhard v. Wolff, 444 U.S. 811 n.2 (1979) (Marshall, J., dissenting from vacation of stay of execution).

<sup>113</sup> See *supra* note 54.

<sup>114</sup> Frank Coppola, at one time, was a named plaintiff in Brown v. Hutto, No. 81-0853-R (E.D. Va., Feb. 23, 1982).

<sup>115</sup> See discussion *supra* notes 58-91 and accompanying text; see also Note, *supra* note 7, at 795 n.123 (suggesting that the approach taken to determine present competency "is equally applicable to circumstances of involuntariness because in such circumstances the prisoner's decision is no more 'rational' as intended by the *Rees* test than when the decision is the product of mental disorder").

<sup>116</sup> See Blackburn v. Alabama, 361 U.S. 199, 207-11 (1960); United States v. Robinson, 439 F.2d 553, 560-61 n.6 (D.C. Cir. 1970) (even if not rising to level of insanity, evidence of mental illness rendered confessions involuntary). See generally Spano v. New York, 360 U.S. 315, 322 n.3 (1959) (defendant had a "history of mental instability"); Fiske v. Alabama, 352 U.S. 191, 196 (1957) (defendant was of low mentality, if not mentally ill); Jurek v. Estelle, 623 F.2d 929 (5th Cir. 1980) (en banc); Eisen v. Picard, 452 F.2d 860, 864-65 (1st Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

<sup>117</sup> Jackson v. United States, 404 A.2d 911, 924 (D.C. Ct. App. 1979) (emphasis in original).

<sup>118</sup> See *supra* notes 13-23 and accompanying text.

tremendous mental strain of inexorably approaching a foreordained death is unique to the condemned man. The imposition of this strain violates society's standard that a man should be treated with human dignity, and robs the condemned prisoner of his own human dignity and psychological integrity."<sup>119</sup> Stripped of the "psychological integrity" necessary to make a fully rational decision, death row inmates cannot, with any intellectual honesty, be considered to be acting voluntarily when they demand their swift executions.

### 3. *The Nature of the Decision*

Just as the standard for determining competency must be elevated in the death penalty context,<sup>120</sup> so the standard for determining whether a condemned prisoner has made an intelligent waiver must be elevated in the death penalty context because of the significance of the decision. Indeed, the Supreme Court in *Fay v. Noia*<sup>121</sup> implicitly recognized that the death penalty itself is a factor that may distort the inmate's decision-making process. After being convicted of first degree murder and sentenced to life imprisonment, the defendant in *Fay* chose not to appeal for fear that he would be exposing himself to the death penalty if retried and convicted. The Court held that "the grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death sentence" excused what otherwise appeared to be both a knowing and arguably intelligent waiver.<sup>122</sup> Similarly, in *United States v. Jackson*,<sup>123</sup> the Court struck down a provision in the federal kidnapping statute that permitted the death penalty if the defendant was convicted by a jury, but only permitted life imprisonment if the defendant waived a jury trial because of the undue pressure such a life or death decision places on the accused.<sup>124</sup> As one commentator concludes from these decisions, "the Court's analysis makes it clear that whenever the possibility of the death-penalty is a factor which may distort the defendant's decision-

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<sup>119</sup> Note, *Mental Suffering Under Sentence of Death*, *supra* note 10, at 830 (footnotes omitted); see also *Furman v. Georgia*, 408 U.S. at 288-89 (Brennan, J., concurring) (discussing mental suffering of "a person confined in prison awaiting death"); *id.* at 382 (Burger, C.J., Blackmun, Powell, and Rehnquist, JJ., dissenting) ("a man awaiting execution must inevitably experience extraordinary mental anguish"); *In re Medley*, 134 U.S. 160, 172 (1890); *State v. Osborn*, 102 Idaho 405, 433 n.1, 631 P.2d 187, 215 n.1 (1981) (Bistine, J., concurring and dissenting).

<sup>120</sup> See *supra* notes 58-91.

<sup>121</sup> 372 U.S. 391 (1963).

<sup>122</sup> *Id.* at 440.

<sup>123</sup> 390 U.S. 570 (1968).

<sup>124</sup> Compare *Corbitt v. New Jersey*, 439 U.S. 212, 217 (1978) (since the death penalty is not involved, it is constitutional for New Jersey to provide for the possibility of a lesser term of incarceration if the defendant pleads nonvult or nolo contendere to a charge of first degree murder rather than going to trial).

making process, stricter standards of waiver are appropriate."<sup>125</sup> Elevating the standard of waiver is fully in accord with the Court's repeated emphasis that "death is different,"<sup>126</sup> as well as the common law's recognition that the power of the State to circumscribe individual freedom of choice rises in direct proportion to the dangerousness of the activity.<sup>127</sup> Indeed, in the analogous context of experimentation with human subjects, both the courts<sup>128</sup> and the executive<sup>129</sup> recognize that a prisoner's ability to "consent" must be curtailed as the risk of harm increases.

<sup>125</sup> White, *Waiver and the Death Penalty: The Implications of Estelle v. Smith*, 72 J. CRIM. L. & CRIMINOLOGY 1522, 1548 (1981).

<sup>126</sup> See *supra* note 68.

<sup>127</sup> See L. TRIBE, AMERICAN CONSTITUTIONAL LAW 938-39 (1978). Indeed, as this Article argues in Section IV, the societal interest in ensuring that the death penalty is administered fairly may prohibit the State from ever acknowledging the individual's right to demand execution.

<sup>128</sup> The court in *Kaimowitz v. Dep't of Mental Health*, 42 U.S.L.W. 2063, 13 Cr. L. 2453, C.A. No. 73-19434 (Cir. Ct. Mich., July 10, 1973), ruled that an involuntarily committed mental patient could not consent to psychosurgery in part because the court determined that the environment of a mental hospital rendered such decisions involuntary. The court based its conclusion on many of the same factors eviscerating the voluntariness of a death row inmate's "consent" to his own execution:

Although an involuntarily detained mental patient may have a sufficient I.Q. to intellectually comprehend his circumstances . . . the very nature of his incarceration diminishes the capacity to consent to psychosurgery. He is particularly vulnerable as a result of his mental condition, the deprivation stemming from involuntary confinement, and the effects of the phenomenon of "institutionalization. . . ." Institutionalization tends to strip the individual of the support which permits him to maintain his sense of self-worth and the value of his own physical and mental integrity. . . . The privileges of an involuntarily detained patient and the rights he exercises in the institution are within the control of institutional authorities. . . . [S]uch minor things as the right to have a lamp in his room, or the right to have ground privileges to go for a picnic with his family assumed major proportions. For 17 years he lived completely under the control of the hospital. Nearly every important aspect of his life was decided without an opportunity on his part to participate in the decision-making process.

The involuntarily detained mental patient is in an inherently coercive atmosphere even though no direct pressure may be placed upon him. He finds himself stripped of customary amenities and defenses. Free movement is restricted. He becomes part of communal living subject to the control of institutional authorities.

*Id.*, slip op. at 25-28.

<sup>129</sup> See generally Research, 28 C.F.R. § 512.10-22 (1981); Protection of Human Subjects, 45 C.F.R. § 46 (1978). For example, experimentation with prisoners must comply with regulations promulgated by the Department of Health and Human Services, which include comprehensive rules concerning informed consent. See 45 C.F.R. at § 46.302-306. Consent is limited to situations where there is minimal risk to the prisoner in recognition of the principle that "prisoners may be under constraints because of their incarceration which could affect their ability to make a truly voluntary and uncoerced decision." *Id.* at § 46.302. The Department's explanation for the reason for these restrictions included the following:

In general, the prohibitions have been based on the demonstrable inequities of such research and on the questionable voluntariness of prisoner consent. Though in theory the benefits of such research are usually to society as a whole, prisoners included, only one segment of society, prisoners, is asked to accept the research risks. Even if prisoner consent is obtained, the circumstances of that consent in a confined, restrictive, unattractive and boring environment, raise questions as to the voluntary nature of that consent. . . .

43 Fed. Reg. 53,652, 53,654 (1978) (emphasis added).

#### 4. *Lack of Education and Intellectual Capacity*

Since an inmate who expresses the desire to be executed is waiving potentially complex legal arguments that could be made in his behalf, it is even more important in the death penalty context than in the context of confessions that the inmate have the intellectual ability to comprehend those arguments.<sup>130</sup> While death row statistics concerning this factor are scarce, intelligence and levels of educational achievement among prisoners as a class are quite low.<sup>131</sup> In Florida, for example, more than half of the prison population is functionally illiterate.<sup>132</sup> More than fifty percent read below the seventh grade level, and approximately twenty-five percent have IQ's of less than ninety—a figure indicating at least borderline retardation.<sup>133</sup> Under these circumstances, a court cannot with confidence conclude that a decision to forgo post-conviction remedies is “knowingly and intelligently” made.

In conclusion, before a death row decision to seek execution should be accepted, there must be at least as comprehensive an inquiry into voluntariness as is routine with competency. And, like the competency inquiry, the determination of voluntariness must take into account the significance and finality of the death decision and the coercive nature of the forces uniquely pressing upon a condemned prisoner on death row. As a society we must face the hypocrisy of stripping the condemned of their humanity, of everything that normally *permits* an individual to make autonomous decisions, and then almost unblinkingly recognizing the suffering inmate's decision to “die with dignity” as a free and voluntary choice of an autonomous individual. The State, in treating death row inmates with such barbarity, is not free to divorce itself from responsibility for the “choices” that this barbarity inexorably produces, whether or not the barbarity is justified.

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<sup>130</sup> See generally *Crisp v. Mayabb*, 668 F.2d 1127, 1135, 1139-40 (10th Cir. 1982) (defendant's literacy relevant to legitimacy of waiver); *Jurek v. Estelle*, 623 F.2d 929, 937-38, 941 (5th Cir. 1980)(en banc), *cert. denied*, 450 U.S. 1001 (1981)(confession involuntary, in part, due to defendant's limited intelligence).

<sup>131</sup> Bluestone and McGahee point out that not one of the 19 inmates on death row in Sing Sing had an education better than the tenth grade, and some were illiterate. Bluestone & McGahee, *supra* note 10, at 393. One inmate interviewed had an IQ as low as 60. *Id.* Lewis estimates that 15% of death row inmates in Florida had IQ's of less than 90 and that the mean education level was approximately the ninth grade. Lewis, *supra* note 10, at 211 (quoting P. LEWIS & K. PEOPLES, *THE SUPREME COURT AND THE CRIMINAL PROCESS: CASES AND COMMENTS* 1164-72 (1978)).

<sup>132</sup> *Hooks v. Wainwright*, 536 F. Supp. 1330, 1337 (M.D. Fla. 1982).

<sup>133</sup> 536 F. Supp. at 1337-38.

#### IV. THE INDEPENDENT FEDERAL INTEREST IN ENSURING THE PROCEEDINGS AND THE PRESERVATION OF LIFE

The underlying assumption in *Rees v. Peyton*<sup>134</sup> is that a competent inmate may voluntarily choose to terminate potentially life-saving legal proceedings and allow the State's execution procedures to run their course swiftly. One commentator analogized a condemned prisoner's decision to "die with grace and dignity" to a disease-ridden hospital patient's so-called "right to die" by refusing to consent to extraordinary, life-preserving medical procedures.<sup>135</sup> Upon closer analysis, however, this analogy actually requires governmental intervention in the death penalty context and thus a modification of *Rees*. The "right to die" cases do not automatically recognize an absolute right by a patient to refuse treatment. On the contrary, they hold that the question of whether the government will recognize the patient's death decision as legitimate requires a balancing of interests.

While it has long been recognized that the right to bodily integrity generally encompasses the right to refuse treatment, that right has always been qualified. For example, the Supreme Court has held that even a parent's right to religious freedom must give way to the State's right to require medical treatment, such as blood transfusions, for neglected children.<sup>136</sup> Courts have also found governmental interests sufficient in certain circumstances to require the giving of life-saving treatment to fully competent adults. For example, in *Application of the President and Directors of Georgetown College, Inc.*,<sup>137</sup> the United States Court of Appeals for the District of Columbia upheld the power of a hospital to perform a blood transfusion necessary to save the life of a Jehovah's Witness. The court identified three governmental interests, the protection of which under the circumstances had a greater import than the individual's right to refuse treatment: (1) the State's interest in the preservation of life and prevention of suicide; (2) a *parens patriae* interest in protecting the patient's minor children from "abandonment"

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<sup>134</sup> 384 U.S. 312 (1966)(per curiam). Rees attempted to withdraw his second petition for certiorari, but the Supreme Court refused pending a determination of Rees' competency. *Id.* at 313-14. In so holding, the Court set forth the threshold standards for recognizing an inmate's right to refuse post-conviction challenges to his execution. See *supra* notes 58-59 and accompanying text.

<sup>135</sup> See Note, *The Death Row Right to Die*, *supra* note 10.

<sup>136</sup> See *Jehovah's Witnesses of Washington v. King County Hospital*, 390 U.S. 598, *reh'g denied*, 391 U.S. 961 (1967)(Court affirmed without hearing decision ordering blood transfusions for children over parents' religious objection); see also *Prince v. Massachusetts*, 321 U.S. 158, *reh'g denied*, 321 U.S. 804 (1944); cf. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (overturning compulsory school attendance statute challenged by Amish parents, in part, because parents' decision posed no threat to the physical or mental health of the children involved).

<sup>137</sup> 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964).

by their parent; and (3) the protection of the medical profession's desire to act affirmatively to save life.<sup>138</sup> Moreover, the individual's interests were diluted because (1) the patient's decision was itself questionable since she was *in extremis* when she made it; (2) she was the mother of a seven-month old child; (3) death would be imminent without the transfusion while with the transfusion there was a better than fifty percent chance of survival; and (4) no dangerous or crippling operation was involved.<sup>139</sup> Other courts balancing similar factors have reached the same conclusion and ordered treatment.<sup>140</sup> In addition, since the seminal case of *Matter of Quinlan*,<sup>141</sup> courts have engaged in similar balancing of interests in determining whether measures that are merely life-prolonging may be terminated so that a dying or comatose patient can "die with dignity."<sup>142</sup>

In the death penalty context, application of the factors articulated in the right to refuse treatment cases indicates that the governmental interest in ensuring that the death penalty is administered in a constitutional manner should virtually always take precedence over the inmate's "right to die."

#### A. GOVERNMENTAL INTERESTS

##### 1. *Preservation of Life and the Likelihood of Survival*

The government's most powerful interest is the preservation of life.<sup>143</sup> That interest does not, however, always exist to the same degree. There is a "substantial distinction in the State's insistence that human life be saved where the affliction is curable, as opposed to the State interest where . . . the issue is not whether but when, for how long, and at

<sup>138</sup> 331 F.2d at 1007-08.

<sup>139</sup> *Id.*

<sup>140</sup> See, e.g., *John F. Kennedy Memorial Hospital v. Heston*, 58 N.J. 576, 279 A.2d 670 (1971). See generally Annot., 9 A.L.R.3d 1391 (1966).

<sup>141</sup> 70 N.J. 10, 355 A.2d 647 (1976).

<sup>142</sup> See *Severns v. Wilmington Medical Center*, 421 A.2d 1334 (Del. 1980); *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977); *Eichner v. Dillon*, 73 A.D.2d 431, 426 N.Y.S.2d 517 (1980). See generally Note, *Comatose Conservatee—Restrictions of Legal Capacity Substance or Procedure?*, 7 W. ST. U.L. REV. 205 (1980); Note, *Informed Consent*, *supra* note 67.

<sup>143</sup> The government's interest in the preservation of life is embedded in a number of sources:

The importance of the preservation of life is memorialized in various organic documents. The Declaration of Independence states as self-evident truths "that all men . . . are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." This ideal is inherent in the Constitution of the United States. . . .

*Matter of Quinlan*, 70 N.J. 10, 19 n.1, 355 A.2d 647, 651 n.1 (1976). The right to life is also inherent in the common law's proscriptions against homicide and suicide. *Id.*; see also *Commonwealth v. O'Neal*, 367 Mass. 440, 449, 327 N.E.2d 662, 668 (1975).

what cost to the individual that life may be briefly extended.”<sup>144</sup> Where the individual is all but comatose, the governmental interest in the preservation of life is small, because there is in fact little “life” left to protect.<sup>145</sup> In the “right to die” context, because of the significance of the decision, courts are careful to require proof that the patient “has no hope of recovery” from a state of “permanent vegetative coma.” For example, in *Custody of a Minor*,<sup>146</sup> the court ordered, over parental objections, chemotherapy treatments for a child suffering from leukemia. The chemotherapy program was required because it promised a “substantial chance for a cure and a normal life.”<sup>147</sup> The pessimism of the parents and the suffering accompanying the years of required treatment were insufficient interests to overcome the government’s substantial interest in maintaining the child’s life under these circumstances. Other courts have ordered treatment under similar circumstances where the chance of recovery was statistically possible or where the treatments themselves were not deemed “extraordinary” for other reasons.<sup>148</sup>

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<sup>144</sup> *Saikewicz*, 373 Mass. at 742, 370 N.E.2d at 425-26.

<sup>145</sup> As the court in *Eichner v. Dillon* recently explained:

[T]he patient in a permanent vegetative coma has no hope of recovery and merely lies, trapped in a technological limbo, awaiting the inevitable. As a matter of established fact, such a patient has no health and, in the true sense, no life, for the State to protect. Thus, the use of a respirator, or any other extraordinary means of life support, under these circumstances, does not serve to advance the State’s interest in protecting health or life and, hence, that interest does not defeat the privacy right asserted here.

73 A.D.2d 431, 465, 426 N.Y.S.2d 517, 543 (1980) (emphasis in original).

<sup>146</sup> 375 Mass. 733, 379 N.E.2d 1053 (1978).

<sup>147</sup> *Id.* at 753, 379 N.E.2d at 1065. The court noted that chemotherapy statistically results in a 50% chance of recovery. *Id.* at 738, 379 N.E.2d at 1057.

<sup>148</sup> See *Matter of Storar*, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, cert. denied, 454 U.S. 858 (1981) (ordering blood transfusions for incompetent, mentally retarded person suffering from terminal cancer over parents’ objection, because transfusions, like food, are not extraordinary treatments); *In re Vasko*, 238 A.D. 138, 263 N.Y.S. 552 (1933) (ordering eye removal operation over parents’ objection where child suffered from cancer and such operations effected a cure in about 50% of the cases); cf. *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977) (defining “extraordinary” treatment as the sort that promises merely to prolong life where there is no hope of recovery); *Matter of Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976) (permitting disconnection of respirator only after medical prognosis revealed that patient was in a permanent, noncognitive, vegetative state); *Severns v. Wilmington Medical Center*, 421 A.2d 1334 (Del. 1980) (in determining whether a competent person has the right to terminate treatment, the balancing test must take into account “the prognosis and . . . the magnitude of the proposed invasion”). Professor Tribe also has commented on this element of the balancing test:

[I]n the context of a claim to die in a dignified home environment rather than in the demeaning tangle of technology that has become death’s least human face, the state would be hard pressed to advance a sufficient rationale for insisting on the medical model.

More difficult for the individual would be an argument claiming not simply a right to die with dignity when death was conceded to be imminent, but a right to die sooner rather than later when ways to significantly prolong life appear available.

L. TRIBE, *supra* note 127, at 935.

The governmental interest in the preservation of life also serves as a limitation on individual autonomy in many other areas where ultrahazardous activities are involved. For example, many states require motorcycle drivers to wear crash helmets even though the decision would appear to affect only the individual driver.<sup>149</sup> As a general proposition, this interest can be stated as the "discourag[ement of] irrational and wanton acts of self-destruction which violate fundamental norms of society."<sup>150</sup> That interest is further enhanced when the individual is institutionalized and the duress factor is added to the equation.<sup>151</sup>

The probability of success in overturning a death sentence or reversing the underlying conviction is quite high; thus, fully exhausting post-conviction remedies cannot be deemed "extraordinary" under any definition. Greenberg demonstrates that between 1972 and 1980 approximately 75% of the 2402 prisoners, who had been on death row since the Supreme Court's decision in *Witherspoon v. Illinois*,<sup>152</sup> "had left death row or were certain to leave it because their convictions had been, or soon would be invalidated."<sup>153</sup> Using *Furman* as the starting point, the figure is estimated to be as high as 60% as of 1982.<sup>154</sup> Despite these statistics, the common perception among death row prisoners is that their chance of success on appeal or collateral attack is impossible.<sup>155</sup>

Moreover, the governmental interest in overriding individual autonomy in the death penalty context is further enhanced by the possibility of mistake. In the last one hundred years there have been more than seventy-five documented cases of wrongful conviction in capital cases,

<sup>149</sup> See *Kingery v. Chapple*, 504 P.2d 831 (Alaska 1972); *State v. Lombardi*, 110 R.I. 776, 298 A.2d 141 (1972). See generally Note, *Informed Consent*, *supra* note 67, at 1647.

<sup>150</sup> *Eichner*, 73 A.D.2d at 456, 426 N.Y.S.2d at 537; see also *Saikewicz*, 373 Mass. at 743 n.11, 370 N.E.2d at 426 n.11; Annas, *Reconciling Quinlan and Saikewicz: Decision Making for the Terminally Ill Incompetent*, 4 AM. J.L. & MED. 367, 373-74 n.19 (1979); Byrn, *Compulsory Lifesaving Treatment for the Competent Adult*, 44 FORDHAM L. REV. 1 (1975); Note, *Suicide and the Compulsion of Lifesaving Medical Procedures: An Analysis of the Refusal of Treatment Cases*, 44 BROOKLYN L. REV. 285 (1978).

<sup>151</sup> One commentator has stated:

The concern is that coercion of the terminal patient's decision will increase the number and frequency of incorrect decisions by the patient—decisions which are irreversible—imposing societal costs greater than the costs if the responsibility were placed on the individual's family, physicians and the state. If that were the case, it might be argued that the state should override the patient's expressed will.

Note, *Informed Consent*, *supra* note 67, at 1657 (footnotes omitted); see also *infra* notes 201-07 and accompanying text.

<sup>152</sup> 391 U.S. 510 (1968) (capital defendant's rights to an impartial jury under the sixth and fourteenth amendments violated by removal of jurors who merely express their distaste for or philosophical opposition to the death penalty).

<sup>153</sup> Greenberg, *supra* note 33, at 918.

<sup>154</sup> *Id.*; see also R. JOHNSON, *supra* note 10, at 19 n.7; Johnson, *Under Sentence of Death: The Psychology of Death Row Confinement*, 5 LAW & PSYCHOLOGY REV. 141, 143 n.7 (1979).

<sup>155</sup> Johnson, *supra* note 10, at 140-41.



resulting in at least eight executions.<sup>156</sup> Greenberg also documents at least six cases of erroneous convictions since *Furman*.<sup>157</sup> While a "prisoner discovered to be blameless can be freed . . . neither release nor compensation is possible for a corpse."<sup>158</sup>

Although suffering as a result of death row confinement and from living under a sentence of death, a condemned prisoner is hardly analogous to a brain-dead, comatose hospital patient. As *Custody of a Minor* illustrates, even the pain and often gruesome side effects of chemotherapy are insufficient to override the government's interest in the preservation of life when there is at least a hope of survival. The condemned have more than a hope.<sup>159</sup>

## 2. Ensuring the Fairness of the Proceedings

The government also has an overriding interest in guaranteeing that the procedures adopted by state legislatures and construed by state judicial systems comply with federal constitutional standards. This interest not only requires state appellate review, but also federal review. Thus, an inmate under sentence of death does not have the power to "waive" these procedures, since they are not entirely "his" to waive.

As already discussed in the context of competency, state courts consistently acknowledge that the State has so fundamental an interest in the application of the death penalty that normal waiver rules, both at trial and on appeal, do not necessarily apply.<sup>160</sup> Federal review of the

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<sup>156</sup> West, *Psychiatric Reflections*, *supra* note 13, at 419, 422; *see also* *Furman v. Georgia*, 408 U.S. at 366-67 & n.156 (Marshall, J., concurring).

<sup>157</sup> Greenberg, *supra* note 33, at 920 & n.69.

<sup>158</sup> West, *Psychiatric Reflections*, *supra* note 13, at 422.

<sup>159</sup> *See* H. BEDAU, *supra* note 19, at 122-23 (even if one assumes that a death row "right to die" may exist, Gilmore himself "was a long way from the paradigm of one who has this right: someone with intractable pain, incurable illness, or severe impairment of faculties").

<sup>160</sup> *See supra* notes 79-81 and accompanying text; *see also* *Massie v. Sumner*, 624 F.2d 72, 74 (9th Cir. 1980), *cert. denied*, 449 U.S. 1103 (1981); *People v. Powell*, 40 Cal. App. 3d 107, 115 Cal. Rptr. 109 (Cal. Ct. App. 1974), *cert. denied*, 420 U.S. 994 (1975); *People v. Stanworth*, 71 Cal. 2d 820, 834, 80 Cal. Rptr. 49, 59, 457 P.2d 889, 898 (1969); *Goode v. State*, 365 So.2d 381, 384 (Fla. 1979); *State v. Osborn*, 102 Idaho 405, 424, 631 P.2d 187, 206 (1981) (Bistline, J., concurring and dissenting); *Commonwealth v. McKenna*, 476 Pa. 428, 383 A.2d 174 (1978). Stated another way, attempted waivers of post-conviction remedies should not be recognized by the State any more than any other private agreement that contravenes public policy as articulated in criminal procedures. *See, e.g.,* *McBrearty v. United States Taxpayers' Union*, 668 F.2d 450 (8th Cir. 1982) (agreement in which tax protest organization agreed to pay defense and other expenses during member's incarceration for tax violations held illegal as against public policy because it encouraged violation of federal law); *In re Lloyd, Carr & Co.*, 617 F.2d 882 (1st Cir. 1980) (agreement to use bankruptcy funds for bail illegal); *Lachman v. Sperry-Sun Well Surveying*, 457 F.2d 850 (10th Cir. 1972) (contract illegal when it would frustrate state's policy to encourage the disclosure of criminal activity); *Singer Sewing Machine Co. v. Escoe*, 179 Okla. 100, 64 P.2d 855 (1937) (contract between uncle of defendant accused of embezzlement and Singer whereby uncle would give Singer promissory note in

scrupulousness with which states comply with their duty is now a matter of federal constitutional law.<sup>161</sup>

Although divergent views on the application of the death penalty were expressed in *Furman v. Georgia*,<sup>162</sup> the effect of the decision upon the cases under consideration was to reverse each judgment insofar as it left undisturbed the death sentence imposed. Four years later, in *Gregg v. Georgia*,<sup>163</sup> the Supreme Court attempted to distill the concerns expressed in *Furman* into procedural requirements necessary for any state death penalty scheme to pass constitutional muster.<sup>164</sup> *Gregg* makes clear that as a constitutional minimum in capital sentencing there must be: (1) a procedure whereby the sentencing authority makes explicit the rationale for its conclusion that death is an appropriate remedy, and (2) mandatory appellate review prior to execution based upon a record where such factors have been specified.<sup>165</sup> With some variations in technique, the second constitutional minimum, meaningful appellate review, is present in the statutes of Texas, Florida, and Georgia which

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exchange for Singer's promise to conceal crime held illegal because Oklahoma has expressed stronger interest in the punishment of wrongful behavior than in the strict enforcement of contracts). See generally *Northwest Airlines v. Alaska Airlines*, 351 F.2d 253, 256 (9th Cir.), cert. denied, 383 U.S. 936 (1966) (while it is desirable that "competent parties" be protected in their rights to contract, "[t]hese rights are restricted by the transcendent rule that denies enforceability to a private contractual provision which would require an unlawful act or which, given effect, would gravely violate paramount requirements of public interest"); 6A A. CORBIN, CONTRACTS § 1374 (1962). Decisions that go to the heart of the death penalty's constitutionality should be illegal as against public policy just as agreements that discriminate on the basis of race are. Cf. *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1968); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Shelley v. Kramer*, 334 U.S. 1 (1948).

<sup>161</sup> See, e.g., *Enmund v. Florida*, 102 S. Ct. 3368 (1982); *Godfrey v. Georgia*, 446 U.S. 420 (1980).

<sup>162</sup> 408 U.S. 238, 240 (1972). On the same day *Furman* was decided, the Court also vacated the death sentences in other pending cases. See, e.g., *Stewart v. Massachusetts*, 408 U.S. 845 (1972).

<sup>163</sup> 428 U.S. 153 (1976).

<sup>164</sup> Justice Stewart, a member of the controlling plurality in *Furman*, explained as follows:

While some have suggested that standards to guide a capital jury's sentencing deliberations are impossible to formulate, the fact is that such standards have been developed. When the drafters of the Model Penal Code faced this problem, they concluded "that it is within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be weighed *and weighed against each other* when they are presented in a concrete case. . . ." While such standards are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary. Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of *meaningful appellate review* is available to ensure that *death sentences are not imposed capriciously or in a freakish manner*.

428 U.S. at 193-95 (citations omitted)(emphasis added). The Court repeatedly emphasized the importance of appellate review in its decision that Georgia's scheme was constitutional on its face. *Id.* at 198, 206.

<sup>165</sup> *Gregg*, 428 U.S. 153, 198 (1976).

were reviewed by the Supreme Court after *Furman*.<sup>166</sup>

Appellate review guards against the arbitrary and capricious imposition of the death penalty in a number of ways. Generally, review ensures that the death penalty is adjudged only for death-deserving offenders who commit death-deserving offenses.<sup>167</sup> For example, a reviewing court may find that the trial judge erroneously precluded the defendant from offering evidence of a relevant character trait in extenuation and mitigation showing that the accused is not death-deserving.<sup>168</sup> The reviewing court must also make sure that the sentencing authority is not instructed to place undue weight on any evidence in aggravation,<sup>169</sup> and the reviewing court must be given a transcript of sentencing proceedings to ensure that improper considerations are not allowed to enter into the decision.<sup>170</sup> In short, the Supreme Court requires that where the trial procedures of a capital sentencing system are constitutionally sufficient, appellate courts must ensure that those procedures are properly followed.

When the state system proves deficient, however, federal intervention may be necessary to ensure compliance with the eighth amendment. Thus, in *Godfrey v. Georgia*,<sup>171</sup> the Court addressed Georgia's application of the statute found constitutional only on its face in *Gregg*. Specifically, the Court addressed the constitutionality of a statutory aggravating factor—whether the murder in question was “outrageously or wantonly vile, horrible, or inhuman”<sup>172</sup>—as applied to a case involving multiple shotgun murders. The Court struck down the death sentences administered under this factor on the grounds that the state system failed in its duty to “apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.”<sup>173</sup> State appellate courts thus have an “obligation” to ensure that sentences within their jurisdiction are constitutional; when they renege on this obligation, the federal courts are justified in intervening.<sup>174</sup> Indeed, the Court has reversed nu-

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<sup>166</sup> See *Jurek v. Texas*, 428 U.S. 242, 276 (1976); *Proffitt v. Florida*, 428 U.S. 262, 250-51; (1976); cf. *Louisiana v. Robinson*, 421 So. 2d 229 (La. 1982) (illustrating by the irony of improper argument at trial the importance of appellate review of death sentences for appropriateness in comparison with other death sentences); see also *Rosenberg v. United States*, 346 U.S. 273, 301 (1953) (Black, J., dissenting) (“[w]ithout an affirmation of the fairness of the trial by the highest court of the land there may always be questions as to whether these executions were legally and rightfully carried out”).

<sup>167</sup> See *Jurek*, 429 U.S. at 269-70 (plurality opinion of Stewart, Powell and Stevens, JJ.).

<sup>168</sup> See *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

<sup>169</sup> See *Zant v. Stephens*, 456 U.S. 410 (1982).

<sup>170</sup> See *Gardner v. Florida*, 430 U.S. 349, 361 (1977).

<sup>171</sup> 446 U.S. at 420 (1980).

<sup>172</sup> GA. CODE ANN. § 27-2534.1(b)(7) (Supp. 1981).

<sup>173</sup> 446 U.S. at 428.

<sup>174</sup> *Id.* at 429.

merous state court decisions upholding the death penalty.<sup>175</sup>

A second, related federal interest is ensuring that a particular *crime* is deserving of the death penalty. On three occasions, the Supreme Court has struck down categories of offenses from the list of those which states may punish with the sanction of death.<sup>176</sup> The duty of protecting this interest, it must be emphasized, is peculiarly a federal one since it entails a comparison of the evolving standards developed in the states taken as a whole. For example, in *Coker v. Georgia*,<sup>177</sup> the Court first found that the imposition of the death penalty for the rape of an adult woman was "grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment."<sup>178</sup> To fulfill its task of deciding whether the punishment was unconstitutionally excessive, the Court looked to the historical development of the punishment, legislative judgments, international opinion, and the sentencing of juries across the country.<sup>179</sup>

Thus, the Supreme Court's death penalty cases since *Furman* undeniably establish a federal interest in requiring strict adherence by the states to eighth amendment standards.<sup>180</sup> Indeed, the multi-state comparison required by the proportionality factor is peculiarly federal in nature. While state systems at best may be expected to ensure proportionality within their own borders, only the federal judiciary is capable of guaranteeing nationwide uniformity.<sup>181</sup>

There is no comparable federal interest in the typical "right to die"

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<sup>175</sup> *Id.* at 438 & n.5 (collecting cases); see also *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Zant v. Stephens*, 446 U.S. 410 (1982); *Enmund v. Florida*, 102 S. Ct. 3368 (1982).

<sup>176</sup> *Coker v. Georgia*, 443 U.S. 584 (1977); *Eberhart v. Georgia*, 433 U.S. 917 (1977); *Enmund v. Florida*, 102 S. Ct. 3368 (1982).

<sup>177</sup> 433 U.S. 584 (1977).

<sup>178</sup> 433 U.S. at 592.

<sup>179</sup> *Id.*; see also *Wilkerson v. Utah*, 99 U.S. 130 (1878) (in upholding public execution by shooting for premeditated murder, the Court compared this nation's practices with those of other countries). Other Supreme Court cases involving the eighth amendment have used a similar comparative approach. See, e.g., *Trop v. Dulles*, 356 U.S. 96 (1958); *Weems v. United States*, 217 U.S. 349 (1910); *O'Neil v. Vermont*, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting). More recently, in determining whether the *Furman* standard has been met, the Court has repeatedly evaluated "capital sentencing system[s], when viewed in their entirety." *Proffitt v. Florida*, 428 U.S. 242, 254 n.11 (1975) (Stewart, Powell, Stevens, JJ.) (emphasis added).

<sup>180</sup> See *Coleman v. Balkcom*, 451 U.S. 949, 951 (1981) (Stevens, J., concurring in denial of certiorari) (acknowledging that "the interest in protecting the constitutional rights of persons sentenced to death is properly characterized as a federal interest"); *id.* at 2035 (Marshall & Brennan, JJ., dissenting) ("[b]ecause of the unique finality of the death penalty, its imposition must be the result of careful procedures and must survive close scrutiny on post-trial review") (emphasis added); *Gillers*, *supra* note 10, at 23.

<sup>181</sup> The federal courts, of course, have a more general duty to supervise the states to ensure compliance with constitutional norms. See Sager, *Forward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 42-57 (1981).

case in the medical context. There is no inherent need for national uniformity in state systems and standards governing the pulling of the plug. Accordingly, unlike the dying patient, the inmate's "choice" must not only be weighed against the State's interests in the preservation of life, but the federal interest in ensuring compliance with the eighth amendment.

### 3. *Prevention of Suicide*

As a corollary to its interest in the preservation of life, the State has a strong interest in the prevention of suicide.<sup>182</sup> Courts and commentators, however, dispute whether this interest comes into play in the context of the dying patient. In *Matter of Quinlan*, for example, the court believed there was "a real distinction between the self-infliction of deadly harm and a self-determination against artificial life support or radical surgery, for instance, in the face of irreversible, painful and certain imminent death."<sup>183</sup> Two factors generally identified in the dying patient situation distinguish it from common law suicide: (1) the lack of specific intent to die, and (2) the fact that death will result from natural causes and not from a death-producing agent set in motion by the individual himself.<sup>184</sup>

Whatever validity these distinctions may possess in the medical context, they seem strained in the death penalty context. A patient may truly want to live but may prefer facing certain death to suffering another blood transfusion, and a condemned inmate may desire freedom more than execution but may prefer facing execution to continued suffering. These motivations for desiring death, however, are no more justifiable than those of a chronically unhappy person who, though truly wishing he could be happy, desires death rather than a life of continuous sorrow. Moreover, the method of fulfilling the death wish is not significant. Placing a gun to one's head may take more courage than lying down on railroad tracks, but the latter is still suicide even though the individual does not put the train in motion. Thus, other decisions, such as *Application of the President and Directors of Georgetown College*,<sup>185</sup> have re-

<sup>182</sup> See generally Richards, *supra* note 91, at 372-73; Byrn, *supra* note 150, at 16-24 (1975).

<sup>183</sup> 70 N.J. 10, 43, 355 A.2d 647, 665 (1976).

<sup>184</sup> *Id.* at 52-53 & n. 9, 335 A.2d at 670 & n.9; see also Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 743 n.11, 370 N.E.2d 417, 426 n.11 (1977); Eichner v. Dillon, 73 A.D.2d 431, 467, 426 N.Y.S.2d 517, 544 (1980). See generally Byrn, *supra* note 150, at 18.

<sup>185</sup> The Court there stated:

And, conversely, it would follow that where attempted suicide is illegal by the common law or by statute, a person may not be allowed to refuse necessary medical assistance when death is likely to ensue without it. Only quibbles about the distinction between misfeasance and non-feasance, or the specific intent necessary to be found guilty of attempted suicide, could be raised against this latter conclusion.

jected the *Quinlan* approach as one that ultimately places a value judgment on the motivations behind the various kinds of suicides.<sup>186</sup> While society is not seriously threatened when death is ultimately caused by disease, the danger of such value judgments becomes clear in the death penalty context where both the present state of suffering and the ultimate cause of death are affirmatively brought about by the State.

Finally, even if a condemned inmate's refusal to continue legal challenges to his or her execution is not technically suicide, that does not mean that the government has no interest in refusing to recognize this choice. The government does have an interest in refusing to enforce punishments that serve no purpose.<sup>187</sup> Certainly deterrence is not served by executing the individual who murdered only because he wished to die but does not have the courage to do it himself. Even the State's interest in retribution is diluted in the volunteer context. To the extent that execution is sought only because the inmate considers it less painful than life imprisonment, the State's interests in retribution are probably better served by requiring life imprisonment.

#### 4. *Protecting the Integrity of the Profession*

The State also has an interest in protecting the integrity of the legal profession, just as it has an interest in "the maintenance of the ethical integrity of the medical profession."<sup>188</sup> A lawyer has an ethical obligation to intervene on his client's behalf when "[a]ny mental or physical condition of a client . . . renders him incapable of making a considered judgment on his own behalf."<sup>189</sup> Allowing a condemned inmate to

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331 F.2d 1000, 1008-09 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); *see also* John F. Kennedy Memorial Hospital v. Heston, 58 N.J. 576, 279 A.2d 670, 672 (1971) (ordering transfusion for traffic accident victim over family's religious objections, in part, because failure to do so would condone suicide). *See generally* E. DURKHEIM, SUICIDE 42-44 (1951); Richards, *supra* note 91, at 374-77.

<sup>186</sup> *See Saikewicz*, 373 Mass. at 743 n.11, 370 N.E.2d at 417 n.11 (arguing that the underlying State interest in the prevention of suicide only "lies in the prevention of irrational self-destruction" and refusal of treatment by terminally ill patient deemed "rational" under the circumstances); *Eichner*, 73 A.D.2d at 467, 426 N.Y.S.2d at 544 ("[s]uch decision, directed to terminating the artificial prolongation of life, cannot be deemed 'irrational' in the sense generally connoted by the term 'suicide'").

<sup>187</sup> *See Coker v. Georgia*, 433 U.S. 584, 592 (1977) (a punishment is unconstitutional and would gratuitously inflict pain "if it . . . makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless infliction of pain and suffering").

<sup>188</sup> *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977); *see also Eichner*, 73 A.D.2d 431, 426 N.Y.S.2d 517 (1980); *Custody of a Minor*, 375 Mass. 733, 379 N.E.2d 1053 (1978); *Application of the President and Directors of Georgetown College*, 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964). *See generally* Byrn, *supra* note 150, at 29-33.

<sup>189</sup> Section 7-12 of the CODE OF PROFESSIONAL RESPONSIBILITY provides:

Any mental or physical condition of a client that renders him incapable of making a

waive further appeals may conflict with this ethical obligation, particularly where the inmate initially sought to avoid the death penalty and professes a desire to waive appeals only after a long incarceration on death row.<sup>190</sup>

### 5. *Protection of the Family*

The government also has an interest in the protection of third parties affected by the death-producing choices of others. In particular, courts often refuse to accede to a competent adult's decision to refuse treatment where minor children will be abandoned or caused emotional harm by the death of their parent.<sup>191</sup> Death is a particularly damaging

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considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-12 (1979); *see also* *State v. Aumann*, 265 N.W.2d 316, 318 (Iowa 1978) (CODE OF PROFESSIONAL RESPONSIBILITY in part justifies lawyer in pursuing criminal appeal against the wishes of his client).

<sup>190</sup> As the court explained in *United States v. George* in ordering transfusions for an adult Jehovah's Witness who had objected to the treatment on religious grounds,

[i]n addition to the factors weighed by Judge Wright one consideration is added to the scale. In the difficult realm of religious liberty it is often assumed only the religious conscience is imperiled. Here, however, the doctor's conscience and professional oath must also be respected. In the present case the patient voluntarily submitted himself to and insisted upon medical care. Simultaneously he sought to dictate to treating physicians a course of treatment amounting to medical malpractice. To require these doctors to ignore the mandates of their own conscience, even in the name of free religious exercise, cannot be justified under these circumstances. The patient may knowingly decline treatment, but he may not demand mistreatment.

239 F. Supp. 752, 754 (D. Conn. 1965); *see also* *Application of President and Directors of Georgetown College*, 331 F.2d at 1009 ("The Gordian knot of this suicide question may be cut by the simple fact that Mrs. Jones did not want to die. Her voluntary presence in the hospital as a patient seeking medical help testified to this."); *Byrn, supra* note 150, at 31 (no right to demand negligent treatment). *See generally* *Note, Informed Consent, supra* note 67, at 1649 ("[a]rguably, once a patient submits to a life-sustaining treatment, the physician has an obligation not only to him but also to society to maintain him, as a minimum, in his present condition").

<sup>191</sup> *See, e.g., Application of President and Directors of Georgetown College*, 331 F.2d at 1008; *Holmes v. Silver Cross Hospital of Joliet, Ill.*, 340 F. Supp. 125 (N.D. Ill. 1972); *United States v. George*, 239 F. Supp. 752 (D. Conn. 1965); *cf. Eichner*, 73 A.D.2d at 456, 466, 426 N.Y.S.2d at 537, 544; *In re Yetter*, 62 Pa. D. & C.2d 619 (C.P. Northampton County Ct. 1973) (permitting adult to refuse treatment where no minor children involved); *In re Estate of Brooks*, 32 Ill. 2d 361, 205 N.E.2d 435 (1965) (same). *See generally* *Byrn, supra* note 150, at 33-

form of abandonment to children and may have a severe psychological impact.<sup>192</sup>

Although incarcerated, perhaps for the rest of his or her life, a first degree murderer still possesses the right to some visitation.<sup>193</sup> Courts have repeatedly overturned regulations and practices that prohibited visits by children.<sup>194</sup> Moreover, at least one study indicates that children do benefit substantially from visiting their incarcerated parents even in maximum security situations.<sup>195</sup>

## B. INDIVIDUAL'S INTEREST

Because of the finality of the death decision and the substantial interests of the State in the preservation of life, in order for the individual's interests to control they must clearly and convincingly outweigh the governmental interests.<sup>196</sup> The primary interest of the individual is individual autonomy.<sup>197</sup> In the right to refuse treatment context, the

35; Cantor, *A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life*, 26 RUTGERS L. REV. 228, 251-54 (1973).

<sup>192</sup> Richards, *supra* note 91, at 390.

<sup>193</sup> See *Ramos v. Lamm*, 639 F.2d 559, 578-81 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *O'Bryan v. County of Saginaw, Mich.*, 437 F. Supp. 582, 598 (E.D. Mich. 1977); *Laaman v. Helgemoe*, 437 F. Supp. 269, 320 (D.N.H. 1977); *Hamilton v. Saxbe*, 428 F. Supp. 1101, 1111 (N.D. Ga. 1976); *Mitchell v. Untreiner*, 421 F. Supp. 886, 895 (N.D. Fla. 1976); *Pugh v. Locke*, 406 F. Supp. 318, 327 (M.D. Ala. 1976), *aff'd and remanded sub nom. Newman v. Alabama*, 559 F.2d 283, 291 (5th Cir. 1977), *cert. denied sub nom. Alabama v. Pugh*, 438 U.S. 791 (1978); *Miller v. Carson*, 401 F. Supp. 835, 840 (M.D. Fla. 1975), *aff'd in relevant part*, 563 F.2d 741, 748-49 (5th Cir. 1977); *Mabra v. Schmidt*, 356 F. Supp. 620, 630-32 (W.D. Wis. 1973); *Brenneman v. Madigan*, 343 F. Supp. 128, 141 (N.D. Cal. 1972); *Wesson v. Johnson*, 195 Colo. 521, 579 P.2d 1165 (1978) (en banc).

<sup>194</sup> See, e.g., *Duran v. Elrod*, 542 F.2d 998, 1000 (7th Cir. 1976); *Barnes v. Government of the Virgin Islands*, 415 F. Supp. 1218, 1234 (D.V.I. 1976).

<sup>195</sup> J. Hughes, *Play of Children in a Visiting Room of a Maximum Security Prison: A Comparison of Behavior Before Play Materials Were Available and After a Play Situation Was Provided* (1975) (Ph.D. dissertation, University of Michigan, Ann Arbor, Mich.) (available at University Microfilm, No. 75-13193). Visitation is also necessary to the death row inmate if he or she is to avoid mental and physical deterioration. See *Pugh*, 406 F. Supp. at 327.

<sup>196</sup> *Eichner*, 73 A.D.2d at 469, 426 N.Y.S.2d at 545; *Matter of Storar*, 52 N.Y.2d 363, 379, 420 N.E.2d 64, 72, 438 N.Y.S.2d 266, 274, *cert. denied*, 454 U.S. 858 (1981).

<sup>197</sup> Richards explains "autonomy" as follows:

Autonomy, in the sense fundamental to the idea of human rights, is an assumption about the capacities, developed or undeveloped, of persons *as such*—namely that persons *as such* have a range of capacities that enables them to develop, want to act on, and, in fact, act on higher order plans of action that take as their object one's life and the way it is lived, and evaluate one's life in terms of principles of conduct and canons of evidence to which one has given rational assent.

The cluster of capacities constitutive of autonomy include human capacities for language and self-consciousness, memory, logical relations, empirical reasoning about beliefs and their validity (human intelligence), and the capacity to use normative principles, including, *inter alia*, principles of rational choice in terms of which ends may be more effectively and coherently realized.



right to autonomous choice is usually defined in terms of the "freedom to choose to reject, or refuse to consent to, *intrusions of his bodily integrity and privacy*."<sup>198</sup> In the context of a criminal case, this right is usually defined in terms of the right to dictate the choices made in one's own defense.<sup>199</sup> Both rights, however, implicitly incorporate the notion of "rational assent."<sup>200</sup>

Although prison conditions may not always render a condemned inmate's decision legally "involuntary," the ability of the inmate to make a truly autonomous decision is nevertheless severely restricted by the prison environment. The ability to make a "free" choice is directly related to the "freedom" one already possesses.<sup>201</sup> As a "ward" of the State, prisoners have even less residual rights than involuntarily committed mental patients.<sup>202</sup> As the Supreme Court recently reiterated in *Hewitt v. Helms*, prisoners are entitled to no more than "the most basic

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Richards, *supra* note 91, at 339-40 (emphasis added).

<sup>198</sup> Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 745, 370 N.E.2d 417, 427 (1977); see also Matter of Quinlan, 70 N.J. 10, 40, 355 A.2d 647, 662-63 (1976); *Eichner*, 73 A.D.2d 431, 454-55, 458-59, 426 N.Y.S.2d at 536, 539.

<sup>199</sup> In *Faretta v. California* the Court stated that

[t]he right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. Although 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."

422 U.S. 806, 834 (1975) (citation omitted).

<sup>200</sup> See *supra* notes 186, 197 and Section III.

<sup>201</sup> See Garvey, *Freedom and Choice in Constitutional Law*, 94 HARV. L. REV. 1756, 1759, 1791 (1981). Garvey states:

If liberty involves the making of rational choices, its intelligent exercise demands practice. . . . According to this instrumental conception, the right to freedom may depend on the ability to choose. . . . *Id.* at 1768. . . . If its essential premise is that freedoms are protected in order to assist the individual's development into a healthy adult capable of exercising choice in an unrestricted fashion, it has little relevance for the attribution of liberties to the severely retarded, the very senile, or those who are comatose. . . . *Id.* at 1777. . . . Once the state, by involuntary commitment, has taken complete control of the individual's life and required his total dependence upon the institution, it is no longer in a position to make disclaimers about what the individual can expect. Its constitutional obligation to care for the incompetent arises not from what it explicitly promises—which may be nothing—but from what it does. By making the committed person look solely to the state for the necessities of life, it has in the clearest possible fashion created an expectation. The constitutional duty is coextensive with the degree of the claimant's dependence; its duty to act as surrogate is not simply a moral obligation but a constitutional one, equal to its duty not to interfere with private performance of the same function. . . . The role the state plays should thus define the contours of its obligation.

*Id.* at 1790-91.

<sup>202</sup> *Houchins v. KQED, Inc.*, 438 U.S. 1, 8 (1978) (prisoner described as "a ward of the state for whom society assumes broad responsibility"); cf. *Youngberg v. Romeo*, 102 S. Ct. 2452, — (1982) ("[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish").

liberty interests."<sup>203</sup> Furthermore, those rights most restricted by the prison environment are those that traditionally underlie the right to refuse treatment—privacy and rights of expression in general.<sup>204</sup> The State may thus validly regulate such aspects of intimacy as personal hygiene,<sup>205</sup> rights of procreation,<sup>206</sup> and the like.<sup>207</sup> Finally, current Federal Bureau of Prisons regulations permit the government to force feed inmates on hunger strikes.<sup>208</sup>

With autonomy necessarily curtailed and the inmate under the custody of the State, the condemned inmate's right to refuse legal assistance is far less than that of a free citizen or even of a defendant not yet convicted. Because the government's interests in preserving life, safeguarding the integrity of the proceedings and the legal profession, and protecting the rights of third parties affected by "suicidal" decisions is substantial, the individual's right to personal autonomy is insufficient to prove clearly and convincingly a significant countermeasure.

## V. THE PROBLEM OF STANDING

### A. "NEXT FRIENDS"

When the competency of the inmate is at issue or when the voluntariness of the inmate's decision is questioned, "next friends" may properly

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<sup>203</sup> 103 S. Ct. 864, 869 (1983). See generally *Pell v. Procunier*, 417 U.S. 817, 822 (1974); *Price v. Johnston*, 334 U.S. 266, 285 (1948).

<sup>204</sup> See generally *Bell v. Wolfish*, 441 U.S. 520, 545-46 (1979); *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 125 (1977); *Pell*, 417 U.S. at 822; *St. Claire v. Cuyler*, 634 F.2d 109, 112 (3d Cir. 1980).

<sup>205</sup> See *Hill v. Estelle*, 537 F.2d 214 (5th Cir. 1976); *Brooks v. Wainwright*, 428 F.2d 652 (5th Cir. 1970).

<sup>206</sup> See *Tarleton v. Clark*, 441 F.2d 384 (5th Cir.), cert. denied, 403 U.S. 934 (1971); *Lyons v. Gillian*, 382 F. Supp. 198, 201 (N.D. Ohio 1974). The significance of the limitations on the right to procreation in the privacy context is enhanced if one construes the Supreme Court's decisions in the privacy area as being limited to marriage, privacy in the home, and the right to use contraceptives. See generally *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); Eichbaum, *Towards an Autonomy-Based Theory of Constitutional Privacy: Beyond the Ideology of Familial Privacy*, 14 HARV. C.R.-C.L. L. REV. 361, 384 (1979).

<sup>207</sup> See, e.g., *Smith v. Fairman*, 678 F.2d 52, 53-54 (7th Cir. 1982) (per curiam) (rejecting attempted reliance on *Roe v. Wade*, upholding right to female guards to conduct pat-down search of male inmate, excluding genital area since "[o]ne of the most important rights which is necessarily limited as a result of one's incarceration is the right to be free of unwanted intrusions into one's personal privacy"); *United States v. Stine*, 675 F.2d 69 (3d Cir. 1982) (rejecting contention that probation condition requiring defendant to participate in psychological counseling violated right of mentation and right of privacy); see also *Bonner v. Coughlin*, 517 F.2d 1322 (7th Cir. 1975), modified, 545 F.2d 565 (1976) (en banc), cert. denied, 435 U.S. 932 (1978).

<sup>208</sup> See *Medical Services*, 28 C.F.R. § 549.65 (1982). Subpart (c) provides: "When, after reasonable efforts, or in an emergency preventing such efforts, a medical necessity for immediate treatment of a life or health threatening situation exists, the medical officer may order that treatment be administered without the consent of the inmate." *Id.* at § 549.65(c); see also *Suicide Prevention Program*, 28 C.F.R. § 549.70-549.71 (1982).

bring post-conviction challenges to sentences of death.<sup>209</sup> Indeed, 28 U.S.C. § 2242 has long incorporated the "next friend" concept by explicitly providing that an "[a]pplication for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf."<sup>210</sup> Since such actions are initiated on the inmate's behalf rather than as independent actions by third parties, no standing problem as such is actually presented. The key to "standing" is almost always demonstrating the inmate's incompetency or inability to present the action himself, not on demonstrating the "next friend's" qualifications.<sup>211</sup>

While challenges to competency are common, those based on conditions of confinement have met with mixed results. The Ninth Circuit recently approved a next friend petition brought by an out-of-state attorney retained by an inmate's wife in *Warren v. Cardwell*.<sup>212</sup> Since the prison was in a "locked down" condition, the court viewed the situation as "urgent" enough to warrant the unusual intervention.<sup>213</sup> In *Evans v. Bennett*, however, a federal district court concluded that there was "no indication of any intervening physical or mental disability" present to justify intervention despite complaints made about the conditions of confinement.<sup>214</sup> The court concluded that instead of raising a question about the voluntariness of Evans' decision to waive legal challenges to his execution, poor prison conditions simply made this decision *more ra-*

<sup>209</sup> See *United States ex rel. Sero v. Preiser*, 506 F.2d 1115, 1126 n.8 (2d Cir. 1974), *cert. denied*, 421 U.S. 921 (1975); *Collins v. Tresger*, 27 F.2d 842, 843 (9th Cir. 1928); *United States ex rel. Bryant v. Houston*, 273 F. 915, 916 (2d Cir. 1921); *United States ex rel. Funaro v. Watchorn*, 164 F. 152, 153 (C.C.S.D. N.Y. 1908); *United States ex rel. Kirk v. Kirkpatrick*, 330 F. Supp. 821, 822 n.1 (E.D. Pa. 1971); *In re Ferrens*, 8 F. Cas. 1158, 1159 (C.C.S.D. N.Y. 1869) (No. 4746); R. SOKOL, *FEDERAL HABEAS CORPUS* § 5.1, at 55-56 (2d ed. 1969). See generally *Hays v. Murphy*, 521 F. Supp. 1290, 1293 (E.D. Okla. 1981), *rev'd on other grounds*, 663 F.2d 1004 (10th Cir. 1981); *Webber v. Garza*, 570 F.2d 511 (5th Cir. 1978); *Davis v. Austin*, 492 F. Supp. 273 (N.D. Ga. 1980); Note, *supra* note 7, at 779-80.

<sup>210</sup> 28 U.S.C. § 2242 (1971) (emphasis added).

<sup>211</sup> In determining the standing of those seeking to act as next friend, the courts review the relationship of the petitioner to the prisoner in order to distinguish "intruders or uninvited meddlers" from persons with a genuine and legitimate interest in the prisoner's welfare. *Houston*, 273 F. at 916; *accord* *Wilson v. Dixon*, 256 F.2d 536, 538 (9th Cir. 1958); see also *Webber*, 570 F.2d at 513-14; *Hays*, 521 F. Supp. at 1293; *Davis*, 492 F. Supp. at 275-76. Both relatives and former attorneys have routinely been accepted under this standard. See, e.g., *Lenhard v. Wolff*, 443 U.S. 1306, 1310 (1979) (Rehnquist, Circuit Justice)(granting temporary stay of execution); *United States ex rel. Funaro v. Watchorn*, 164 F. 152 (C.C.S.D. N.Y. 1908); cf. *Rosenberg v. United States*, 346 U.S. 271 (1953) (per curiam).

<sup>212</sup> 621 F.2d 319 (9th Cir. 1980).

<sup>213</sup> *Id.* at 321 n.1; see also *Morris v. United States*, 399 F. Supp. 720 (E.D. Va. 1975) (jail house lawyer—petitioner's co-defendant—permitted to file petition pursuant to 28 U.S.C. § 2242 where prison authorities had restricted inmate's ability to communicate verbally or by mail with him).

<sup>214</sup> 467 F. Supp. 1108 (S.D. Ala.), *stay of execution denied*, 440 U.S. 987 (1979).

tional.<sup>215</sup> Confessing with a gun pointed at one's head may also be "rational," but it is hardly voluntary. The decision in *Evans* points out the need for more principled approaches to the effect of conditions of confinement on the decision-making process. Under the analysis presented in previous sections of this Article, standing should be as routinely granted to make such challenges as it is granted to those questioning traditional notions of competency.

#### B. INDEPENDENT THIRD PARTY STANDING

The question of whether third parties have independent standing to intervene to protect their own interests has not been discussed in the death penalty context. It has arisen, however, in the right to refuse treatment cases. In *Matter of Quinlan*, for example, the court permitted the father of a comatose adult woman to assert not only her "right to die" as her guardian, but *his* rights as a parent.<sup>216</sup> Similarly, in *Matter of Storar*,<sup>217</sup> the court granted standing to the director of the medical center where an incompetent patient was being treated. The mother of the patient had requested that blood transfusions be discontinued. Over a dissent, the majority held that the medical center served the role of a personal physician and had a legitimate concern about potential future liability strong enough to justify standing to intervene.<sup>218</sup>

<sup>215</sup> 467 F. Supp. at 1110; cf. *Davis*, 492 F. Supp. at 277, 278 n.2 (discussing poor medical care and other inadequate prison conditions as basis for next friend standing but finding them insufficient to question competency; question mooted when inmate changed his mind and retained attorneys).

<sup>216</sup> 70 N.J. 10, 34-35, 355 A.2d 647, 660-61 (1976). The court's discussion, however, was somewhat ambiguous:

Although generally [a] litigant may assert only his own constitutional rights, we have no doubt that plaintiff has sufficient standing to advance both positions. . . . And our courts hold that where the plaintiff is not simply an interloper and the proceeding serves the public interest, standing will be found. . . .

The father of Karen Quinlan is certainly no stranger to the present controversy. His interests are real and adverse and he raises questions of surpassing importance. Manifestly, he has standing to assert his daughter's constitutional rights, she being incompetent to do so.

*Id.* (citations omitted). Indeed, later the court seemed to reject the father's claim for independent standing: "Regarding Mr. Quinlan's right of privacy, we agree with Judge Muir's conclusion that there is no parental constitutional right that would entitle him to a grant of relief *in propria persona*." *Id.* at 42, 355 A.2d at 664 (citing *Matter of Quinlan*, 137 N.J. Super. 227, 266, 348 A.2d 801, 822 (1976)). Yet, in addressing the court's broad equity power, the court implied that not only Karen Quinlan herself, but "a parent, or a doctor, or a hospital, or a State" could invoke that power. *Id.* at 44, 355 A.2d at 665-66.

<sup>217</sup> 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266 (1981).

<sup>218</sup> *Id.* at 374 n.3, 420 N.E.2d at 69 n.3, 438 N.Y.S.2d at 271 n.3; see *id.* at 388-89, 420 N.E.2d at 77, 438 N.Y.S.2d at 279 (Jones, J., dissenting); see also *Application of President and Directors of Georgetown College*, 331 F.2d 1000, 1015 (D.C. Cir.), cert. denied, 377 U.S. 978 (1964) (Burger, J., concurring in denial of rehearing en banc, discussing whether standing may be asserted by physician or hospital based on relationship between doctor and patient).

In *Singleton v. Wulff*,<sup>219</sup> four Justices of the Supreme Court acknowledged the standing of physicians to challenge a Missouri statute outlawing abortions which are not "medically indicated."<sup>220</sup> The Court repeatedly emphasized that the importance of the confidential relationship existing between doctor and patient justified *jus tertii* standing.<sup>221</sup>

Finally, in deciding third party standing issues, the Court weighs the ability of the first party to assert his or her own rights.<sup>222</sup> Clearly, this ability need not be so lacking as to justify traditional "next friend" standing. Conduct that "chills" the assertion of rights may be a sufficient disability to permit intervention.<sup>223</sup> The attorney-client relationship is "chilled" by death row conditions, and the condemned inmate is plainly suffering sufficient disabilities to support third-party intervention.<sup>224</sup>

## VI. CONCLUSION

In light of the complexity of the moral and legal issues involved, the shallowness of the legal analyses by both courts and commentators in considering attempts to "volunteer" for execution is surprising. Moreover, the courts' treatment of these issues is in stark contrast to their treatment of similar issues in other contexts. In the less severe and obviously less permanent context of experimentation on prisoners, courts

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<sup>219</sup> 428 U.S. 106 (1976).

<sup>220</sup> *Id.* at 113-17. See generally Note, *The Generalized Grievance Restriction: Prudential Restraint or Constitutional Mandate*, 70 GEO. L.J. 1157 (1982); Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974).

<sup>221</sup> For example, Justice Blackmun cautioned:

Like any general rule, however, this one should not be applied where its underlying justifications are absent. With this in mind, the Court has looked primarily to two factual elements to determine whether the rule should apply in a particular case. *The first is the relationship of the litigant to the person whose right he seeks to assert.* If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit. Furthermore, *the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter.*

428 U.S. at 114-15 (emphasis added); see *id.* at 115 (stressing "confidential" nature of the relationship); *Eisenstadt v. Baird*, 405 U.S. 438, 445-46 (1972) (stressing "advocate" relationship and "impact of the litigation on the third-party interests"); see also Comment, *supra* note 15, 1286 n.141 ("innocent friends and relatives of condemned murderers have been known to commit suicide in apparent reaction to the executions") (citations omitted). See generally Annot., 91 A.L.R. 2d 618, 627-30 (1963) (noting numerous exceptions to general rule prohibiting attorney from prosecuting appeals against the clients' wishes where attorney had sufficient interest, such as fees or compensation, at stake).

<sup>222</sup> *Wulff*, 428 U.S. at 115-16.

<sup>223</sup> *Id.* at 117. The Court also pointed out that the imminent mootness of a pregnant woman's claim also supported intervention. *Id.* Execution of the condemned prisoner obviously would also moot his claims.

<sup>224</sup> See *supra* notes 188-90 and accompanying text.

and the executive branch freely acknowledge the inherent coerciveness of institutional environments. Similarly, in the context of those suffering from physical or psychological ailments, courts throughout the country limit an adult's "right to die" by imposing upon that decision a plethora of safeguards. Even in the context of waivers of legal proceedings, courts recognize that standards of voluntariness ought to be measured as a function of the importance and permanence of the decision at issue. These concepts are not yet fully interwoven into death penalty jurisprudence where the government's interests in ensuring the fairness of the proceedings, preventing suicide, and safeguarding the integrity of the legal profession are even more important than in these other contexts. At stake is not simply an individual's right to prevent the State from maintaining his life, but the State's right actively and lawfully to terminate that life.

As long as we are willing to grant the State that awesome power, the torturous environment of death rows across the country and the various suicidal dysfunctions often attendant to prisoners guilty of murder must not be casually ignored in the name of consent and free will, as if the prisoner were waiving nothing more than the right to a jury trial for petty larceny. Unless we are willing to countenance state-imposed homicide of individuals tortured into consenting to their own executions, the problem of voluntariness under harsh death row regimes deserves at least as full treatment as issues of present competency, and the issues of competency themselves must be flexible enough to take account of the unique pressures of living under a sentence of death.