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## Swilling Hemlock: The Legal Ethics of Defending a Client Who Wishes to Volunteer for Execution

J. C. Oleson

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# Swilling Hemlock: The Legal Ethics of Defending a Client Who Wishes to Volunteer for Execution

J.C. Oleson\*

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*There is but one truly serious philosophical problem, and that is suicide.*

Albert Camus<sup>1</sup>

### *I. Introduction*

Lawyers are regularly called upon to make decisions with ethical consequences. In criminal cases, the client's freedom often depends upon the defense lawyer's decisions, and within the arena of capital punishment, the stakes are literally life-and-death. Death penalty representations are, accordingly, inherently fraught with some of the most difficult ethical choices that the lawyer can face. Among the most difficult of these choices is what to do when the death row client wishes to terminate his appeals and to volunteer for execution. The death row volunteer forces the capital attorney to make excruciating decisions about the goals of representation and the allocation of responsibility in legal decisionmaking and to weigh the relative merits of paternalism and autonomy.

This Article advances in six Parts. The first, this introduction, summarizes the scope of the article and its key concepts. The second Part, entitled "Lawyers' Nightmares Do Come True: When the Client Volunteers for Execution," reviews three seminal Supreme Court cases that established the modern death penalty,

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1. ALBERT CAMUS, *THE MYTH OF SISYPHUS* 3 (Justin O'Brien trans., Vintage Books 1955) (1942).

describes the swelling ranks of death row in the United States and the commensurate need for death row representation, addresses the disorienting ethical universe of the capital volunteer, and analyzes a number of ethical approaches to lawyering.

The third Part, entitled "Grasping at Straws: Competence As a Means of Avoiding the Volunteering Conundrum," describes the competence hearing as an illusory solution to the problem of the volunteer. It outlines the legal standards of competence, contrasts legal standards against medical standards, and concludes that competence assessments are ineffectual as checks on the volunteering client. While competence hearings may prevent the overtly psychotic defendant from committing state-assisted suicide by volunteering for execution, they cannot prevent the competent-but-severely-depressed defendant from doing so. This Part of the Article also analyzes *Smith v. State*.<sup>2</sup>

The fourth Part, entitled "The Ethics of Killing Your Client," suggests that the ambiguities of the Model Rules allow lawyers to construe their obligations in whatever manner they wish. Because of these ambiguities, the Model Rules fail to provide meaningful guidance to the capital attorney. There are also difficulties in applying abstract Model Rules to concrete facts involving real clients.

The fifth Part of the Article, entitled "*Primum Non Nocere*: Reasoning by Analogy," suggests that some meaningful ethical guidance might be available from outside the profession. It notes that medical professionals are often confronted with analogous decisions and concludes that medical ethics may shed valuable light on legal ethics. This Part of the Article contrasts the roles of physicians and attorneys, compares terminal illnesses and pending executions, and concludes that dealing with the volunteering death row client more resembles physician-assisted suicide than mere withdrawal of treatment. This Part of the Article also discusses *Soering v. United Kingdom*,<sup>3</sup> describes the phenomenon of "death row syndrome," and considers the implications of death row syndrome on a defendant's waiver of appeals.

The sixth Part of the Article, the conclusion, recapitulates the principal themes of the argument and concludes that the ethical lawyer should refuse to acquiesce to the volunteering client's wishes, not because the lawyer has paternalistically substituted his or her judgment for that of the client, but because it is impossible to distinguish the will of the client from the situational effects of death row syndrome.

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2. *Smith v. State*, 686 N.E.2d 1264 (Ind. 1997).

3. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989).

## *II. Lawyers' Nightmares Do Come True: When the Client Volunteers for Execution*

About 3500 individuals await execution in America.<sup>4</sup> While a handful of these individuals live in the shadow of federal execution,<sup>5</sup> ninety-nine percent of America's death row inmates face execution by the thirty-eight states that currently authorize capital punishment.<sup>6</sup>

In one sense, it is strange that any of these individuals should live in the shadow of the gallows. It is strange because, not so very long ago, the United States was following the same abolitionist trajectory as many other Western nations.<sup>7</sup> Like many nations in Western Europe, the United States had restricted the use of capital punishment by the turn of the twentieth century; "the death penalty had become an exceptional punishment[,] . . . reserved for only the most serious of offenses, rarely imposed, and regarded as particularly problematic."<sup>8</sup> Following the same pattern as many European countries, the United States seemed to be moving "from sporadic execution to a continuation of death penalties but without executions to suspension or abolition of the death penalty."<sup>9</sup> Indeed, throughout the 1960s and 1970s, the United States appeared to be on the same course as other countries that abandoned capital punishment

4. See CRIMINAL JUSTICE PROJECT, NAACP LEGAL DEF. & EDUC. FUND, SPRING 2004 DEATH ROW USA 1 (2004), [http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA\\_Spring\\_2004.pdf](http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Spring_2004.pdf) (last visited Oct. 26, 2005) [hereinafter DRUSA] (reporting 3487 on death row as of Apr. 1, 2004).

5. *Id.* at 31 (reporting that thirty-one inmates are on the federal government's death row and seven are on the military's death row). Federal executions are, relatively speaking, rare. See John McCormick, *Death Took a Long Holiday, But Feds Are Now Set to Resume Executions*, S.F. EXAMINER, Nov. 17, 2000, at A23 (outlining long hiatus in federal executions). There have been only thirty-seven federal executions since 1927. Federal Executions 1927–2003, <http://www.deathpenaltyinfo.org/article.php?scid=29&did=149> (last visited Oct. 16, 2005). Until recently, the federal government had not executed anyone in decades. Victor Feguer was executed in May of 1963, but over the subsequent thirty-eight years, there were no executions. *Id.* In 2001, however, the federal government resumed executions, putting Timothy McVeigh to death by lethal injection on June 11. *Id.* Another federal execution, of Juan Raul Garza, took place just eight days later and was followed by a third in 2003. *Id.*

6. See DEATH PENALTY INFO. CTR., STATE BY STATE INFORMATION, <http://www.deathpenaltyinfo.org/state/> (last visited Oct. 16, 2005) (noting that thirty-eight states, the federal government, and the military authorize capital punishment, while twelve states and the District of Columbia do not). In 2004, death penalty statutes in New York and Kansas were struck down as unconstitutional. *Id.*

7. See FRANKLIN ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 18 (2003) (describing the decline of capital punishment in developed nations).

8. *Id.* at 18.

9. *Id.* at 24.

during a brief window of time.<sup>10</sup> But while most Western nations have abolished capital punishment,<sup>11</sup> the United States has retained it. With a trilogy of seminal Supreme Court cases—*McGautha*, *Furman*, and *Gregg*—the country has reconfirmed its commitment to capital punishment.

#### A. Three Cornerstone Cases of American Capital Jurisprudence

In *McGautha v. California*,<sup>12</sup> the Supreme Court rejected the claim that unfettered jury discretion resulted in arbitrary sentencing, and therefore violated the Fourteenth Amendment right to due process.<sup>13</sup> In this six-to-three decision, the Court concluded that affording a capital jury with untrammelled discretion to decide issues of life and death did not violate the Constitution.<sup>14</sup> Indeed, the majority suggested that it was beyond "the present limitations of human knowledge" to establish any sort of judicial process that could adequately guide a jury's discretion.<sup>15</sup>

The holding in *McGautha*, however, was contradicted only fourteen months later in *Furman v. Georgia*.<sup>16</sup> There the Court held that, as it was being applied, the death penalty violated the Eighth and Fourteenth Amendments.<sup>17</sup> *Furman* is a landmark decision in at least three ways. First, it was a close decision (five-to-four) in which every member of the Court wrote a separate opinion. Second, it was a massive decision (both in its impact and its length): the *Furman* decision filled 233 pages of the official reports.<sup>18</sup> Third, and most importantly, *Furman* articulated many of the themes that would dominate capital jurisprudence for the next thirty years. The *Furman* dissenters

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10. See *id.* at 6 fig.1.1 (charting the dramatic decline in executions in the United States during the 1960s).

11. See *id.* at 16–38 (tracing abolition trends worldwide); *id.* at 38–39 (noting that, with the exception of Japan and the United States, almost all of the First World is now committed to abolition).

12. *McGautha v. California*, 402 U.S. 183 (1971).

13. *Id.* at 196.

14. *Id.* at 207.

15. *Id.*

16. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam). These antipodal opinions were issued only 423 days apart. *McGautha* was decided on May 3, 1971, and *Furman* was decided on June 29, 1972.

17. *Id.* at 239–40.

18. *Furman* is not the longest opinion issued (it is said that the 300-page opinion in *McConnell v. F.E.C.*, 540 U.S. 93 (2003), holds that honor), but it is extraordinarily long. The *Furman* syllabus begins on page 238 of the official reports, and Justice Rehnquist's dissent ends on page 470.

emphasized the long tradition of capital sentencing,<sup>19</sup> noting that the Court had just reaffirmed the constitutionality of unfettered jury sentencing in *McGautha*.<sup>20</sup> The *Furman* plurality, on the other hand, indicated that although allowing unguided juries to decide between life and death might be consistent with the Fourteenth Amendment's due process requirements, the consequences of this approach (i.e., capricious and arbitrary sentencing) violated the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>21</sup> In his concurrence, Justice Stewart claimed that the imposition of capital punishment was "cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed."<sup>22</sup> A truly watershed case, *Furman* meant that the death penalty was effectively dead in America.

The American abolition of capital punishment was short-lived, however. Four years later, in *Gregg v. Georgia*,<sup>23</sup> the Court changed course yet again, concluding that Georgia's new death penalty scheme adequately limited the risk of arbitrary application.<sup>24</sup> The statute at issue in *Gregg* overcame *Furman*'s prohibition by providing both guidance (insuring consistency in application) and discretion (insuring individualized sentencing) to the jury.<sup>25</sup> *Gregg* also approved three important procedural reforms: (1) bifurcated trials, with guilt and sentencing phases,<sup>26</sup> (2) automatic appellate review of capital convictions

19. See *Furman*, 408 U.S. at 407–08 (Blackmun, J., dissenting) (noting that "until today capital punishment was accepted and assumed as not unconstitutional per se under the Eighth Amendment or the Fourteenth Amendment").

20. See *id.* at 408–09 (Blackmun, J., dissenting) ("[T]he Court [is] evidently persuaded that somehow the passage of time has taken us to a place of greater maturity and outlook. The argument, plausible and high-sounding as it may be, is not persuasive, for it is only one year since *McGautha* . . .").

21. See *id.* at 256–58 (Douglas, J., concurring) (noting that laws that are facially nondiscriminatory violate the Equal Protection Clause of the Fourteenth Amendment if their application nonetheless results in discrimination).

22. *Id.* at 309–10 (Stewart, J., concurring).

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

24. See *id.* at 206–07 (stating that Georgia's legislative guidelines prevent juries from "wantonly and freakishly impos[ing] the death penalty").

25. See *id.* at 197–98 ("As a result, while some jury discretion still exists, 'the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application.'") (citations omitted).

26. See *id.* at 195 (stating that the concerns of the Court in *Furman* are "best met by . . . a bifurcated proceeding").

and sentences,<sup>27</sup> and (3) proportionality review, allowing courts to compare the instant case to sentences imposed in comparable cases.<sup>28</sup>

In the wake of the Court's decision in *Gregg*, states quickly passed guided discretion statutes to comply with the Eighth Amendment;<sup>29</sup> these revised death penalty statutes were subsequently upheld as constitutionally permissible.<sup>30</sup> After only four years of their experiment with abolition, state legislatures had rehabilitated capital punishment in America.

### B. Death: A Growth Industry

Today, the American death penalty is alive and well.<sup>31</sup> In 1973, the year after capital punishment was struck down in *Furman*, there were only 134 inmates on death row in the United States.<sup>32</sup> By 1977, one year after *Gregg* was decided, that figure had jumped to 423.<sup>33</sup> By 1980, it had increased to 691 inmates; by 1990, it had increased exponentially to 2356; and by 2000, it had ballooned to 3593.<sup>34</sup>

As death row continues to swell, the need for capital attorneys correspondingly increases.<sup>35</sup> Not surprisingly, death penalty classes have

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27. See *id.* at 198 (noting that automatic appeals are an "important additional safeguard against arbitrariness and caprice").

28. See *id.* at 203 (noting that proportionality review is intended to prevent caprice).

29. See generally James R. Acker & Charles S. Lanier, *Matters of Life or Death: The Sentencing Provisions in Capital Punishment Statutes*, 31 CRIM. L. BULL. 19 (1995) (describing state capital punishment statutes).

30. See, e.g., Robert Woll, *The Death Penalty and Federalism: Eighth Amendment Constraints on the Allocation of State Decisionmaking Power*, 35 STAN. L. REV. 787, 787 (1983) (describing the responses of state legislatures to the Supreme Court's death penalty holdings).

31. While death row continued to increase in size, the number of executions actually carried out fell in 2004. Bill Mears, *Fewer Executions in 2004: Group Opposed to Death Penalty Finds Five-Year Decline*, [www.cnn.com/2004/LAW/12/13/death.penalty/index.html](http://www.cnn.com/2004/LAW/12/13/death.penalty/index.html) (Dec. 13, 2004).

32. DEATH PENALTY INFO. CTR., DEATH ROW INMATES BY STATE AND SIZE OF DEATH ROW BY YEAR, <http://www.deathpenaltyinfo.org/article.php?scid=9&did=188> (last visited Oct. 16, 2005).

33. *Id.*

34. *Id.*

35. The demand for capital representation exceeds the current supply. Mack Reed, *An Even Longer Wait on Death Row*, L.A. TIMES, Apr. 3, 1996, available at <http://factoid.lavoicce.org/portfolio/writing/death.html> (last visited Oct. 16, 2005). Reed identifies several reasons why lawyers are "not exactly jumping over one another" to become involved in death row appeals: low pay (California's rate of ninety-five dollars per hour is well below the \$110 to \$150 rate paid by the federal government for appeals work, and far below the \$200 to \$300 rate



become commonplace in the law school curriculum; death penalty clinics have become regular fixtures.<sup>36</sup> Legal publishers now print death penalty casebooks and hornbooks,<sup>37</sup> and capital punishment is taught in the same way that torts and contracts are taught. Death penalty students are carefully trained to identify and analyze substantive issues, procedural claims, and habeas corpus matters. Yet even equipped with a flawless education, the fledgling attorneys involved in death penalty litigation will face profound ethical dilemmas. Capital cases are, after all, proceedings in which the legal stakes are literally life-and-death.

### C. *The Looking-Glass Ethics of the Volunteering Client*

The most difficult ethical dilemma that faces capital attorneys may be what to do about the "volunteer,"<sup>38</sup> the client who wishes to waive his appeals and to expedite his own execution.<sup>39</sup> The situation is a defense lawyer's

available in private practice), long hours, unpleasant and fruitless work, and "zero prestige." *Id.* One attorney suggested, "You're not going to get any accolades—except possibly from some of your peers—nor any understanding from the public. . . . If the case becomes a high-profile one, you will be vilified in every way imaginable. It's a painful and frustrating experience." *Id.*

36. For examples, see American University's Mid-Atlantic Innocence Project, <http://wcl.american.edu/innocenceproject/> (last visited Oct. 16, 2005); California Western School of Law's California Innocence Project, [http://www.cwsl.edu/main/default.asp?nav=icda.asp&body=icda/innocence\\_project.asp](http://www.cwsl.edu/main/default.asp?nav=icda.asp&body=icda/innocence_project.asp) (last visited Oct. 16, 2005); Cornell Law School's Death Penalty Project, <http://www.lawschool.cornell.edu/library/death/> (last visited Oct. 16, 2005); Santa Clara University's Northern California Innocence Project, [http://www.scu.edu/law/socialjustice/ncip\\_home.html](http://www.scu.edu/law/socialjustice/ncip_home.html) (last visited Oct. 16, 2005); University of California, Berkeley's Death Penalty Clinic, <http://www.law.berkeley.edu/cenpro/clinical/dpclinic/> (last visited Oct. 16, 2005); University of Wisconsin's Wisconsin Innocence Project, <http://www.law.wisc.edu/fjr/innocence/> (last visited Oct. 16, 2005); Yeshiva University's Innocence Project, <http://www.innocenceproject.org/> (last visited Oct. 16, 2005).

37. For examples, see LINDA E. CARTER & ELLEN KREITZBERG, *UNDERSTANDING CAPITAL PUNISHMENT LAW* (2004); RANDALL COYNE & LYN ENTZEROTH, *CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS* (2d ed. 2001); BARRY LATZER, *DEATH PENALTY CASES* (2d ed. 2002); NINA RIVKIND & STEVEN F. SHATZ, *CASES AND MATERIALS ON THE DEATH PENALTY* (2001); VICTOR STREIB, *DEATH PENALTY IN A NUTSHELL* (2003).

38. "Volunteer" is the term utilized in the capital defense community, but this may be a misnomer. See Janill L. Richards, *A Lawyer's Ethical Considerations When Her Client Elects Death: The Model Rules in the Capital Context*, 3 SAN DIEGO JUST. J. 127, 154 ("All clients who seek death are not truly 'volunteers.'"); Bryan Robinson, *Give Me Death: Rise of 'Volunteer' Executions May Mean Death Isn't Worst Punishment*, ABC News, Jan. 7, 2004 (quoting Diane Clements, Executive Director of Justice for All, as arguing that "[t]here is no such thing [as a consensual execution]. . . . [I]t is a phrase coined by those who would oppose the death penalty. . . . It's just not true. Why can't death-penalty opponents call it what it is: a prisoner's decision to end his appellate process?") (on file with the Washington and Lee Law Review).

39. I refer to "his" appeals and to "his" execution for parsimony in writing. The gendered pronoun is warranted in this context: the overwhelming majority of death row inmates are male.

nightmare, a breakdown in the adversarial system upon which American criminal law is founded.<sup>40</sup> It disrupts the normal processes of the law and leaves the defense attorney in an awkward no-man's land, wrestling against a knot of thorns, unsure of what legal duty ultimately requires.<sup>41</sup> Michael Mello describes the situation:

The familiar paradigm is that a lawyer, especially a criminal defense lawyer, owes an absolute duty of loyalty to his or her client in carrying out the wishes of that client "zealously," assuming that the wishes are "within the bounds of the law." However—in the actual law offices and hearts of actual lawyers representing actual death row prisoners with actual execution dates—the lawyer's duty of undivided loyalty to the client becomes far more complicated. Of course, the ultimate duty is to the client. Yet that loyalty must be balanced against the lawyer's (1) duty to the integrity of the criminal justice system; (2) duty to other condemned clients who *don't* want to volunteer for execution but whose executions might become more likely if the volunteer for execution gets his way (the ACLU's position in the Gary Gilmore case); and (3) duty to his or her own conscience, which may include a moral conviction that capital punishment is wrong or lawless.<sup>42</sup>

It presents a Gordian knot. Is it the responsibility of lawyers to serve their clients' interests to the exclusion of all other considerations?<sup>43</sup> Assuming that it

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See DRUSA, *supra* note 4, at 1 (reporting that as of April 1, 2004, 98.5% of America's death row inmates were male).

40. See Richard C. Dieter, *Ethical Choices for Attorneys Whose Clients Elect Execution*, 3 GEO. J. LEGAL ETHICS 799, 818 (1990) ("The problem with voluntary executions is that both parties, the state and the defendant, are seeking the same goal, death of the defendant, and this may be contrary to higher societal interests.").

41. One attorney described the chaos that ensues when the adversarial system breaks down:

There is suddenly the awful problem of how to feel grounded in your position as the lawyer. Suddenly you're in a position of being "against" your client and there is no precedent for that. And the client hates you for it. The judge hates you for it. It's just a phenomenal and confusing sort of theater that no one is prepared for. . . . It's a torturous position to be in because you know that your decisions are coming out of your own values, and to whatever extent the criminal defense function has some kind of formal respect in the courtroom suddenly you feel like you have no respected position at all. You're suddenly in no-man's land and everybody's looking at you like you're a sleazeball.

C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849, 876 (2000) (quoting Attorney #8).

42. Michael Mello, *Representing Death Row: An Argument for Attorney-Assisted Suicide*, 34 CRIM. L. BULL. 48, 50 (1998) (footnotes omitted).

43. Model Rule 1.2 notes,

[A] lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they

is the duty of lawyers to so serve their clients' interests, what does that mean? Does that mean that lawyers are required to assist clients affirmatively in ending their lives, or is terminating appeals not truly in clients' interests?<sup>44</sup>

Perhaps lawyers must balance their principal duty to their client against their collateral duty to challenge the state's conviction with a vigorous appeal, thereby safeguarding the Eighth Amendment and the integrity of the criminal justice system.<sup>45</sup> Perhaps Mello is correct in claiming that lawyers' consciences also matter.<sup>46</sup> Perhaps, in limited circumstances, good lawyers should

are to be pursued. . . . In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

MODEL RULES OF PROF'L CONDUCT R. 1.2 (2004). The client has "ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations." *Id.* cmt. 1 (2004). Within those limits, the lawyer must "reasonably consult with the client about the means by which the client's objectives are to be accomplished. . . ." MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(2) (2004).

44. Regardless of how death row lawyers proceed, it is clear that their decisions have moral consequences. In a different context, Julie Hilden has insisted that "the attorney should realize that giving legal advice that one knows will be used in a certain way is a morally freighted act, and that when basic human rights are at stake, the moral import of that advice is even graver." Julie Hilden, *Did a Government Lawyer 'Aid and Abet' Possible War Crimes?*, <http://www.cnn.com/2004/LAW/06/08/hilden.torture/index.html> (Jun. 8, 2004). She hints that lawyers may bear moral responsibility for the decisions made by counseled clients: "Lawyers' advice matters: It can make people hesitate, or spur them on." *Id.*

45. Only in South Carolina are competent defendants free to waive sentence review. *See State v. Torrence*, 473 S.E.2d 703, 706 (S.C. 1996) (recognizing that a defendant may knowingly and voluntarily waive both constitutional and statutory rights, including capital sentencing review). This suggests that society, as well as the condemned defendant, has an interest in verifying the legitimacy of all death sentences.

Appellate review is necessary not only to safeguard a defendant's right not to suffer cruel and unusual punishment but also to protect society's fundamental interest in ensuring that the coercive power of the State is not employed in a manner that shocks the community's conscience or undermines the integrity of our criminal justice system.

*Whitmore v. Arkansas*, 495 U.S. 149, 171-72 (1990) (Marshall, J., dissenting); *see also* Michelle C. Goldbach, *Like Oil and Water: Medical and Legal Competency in Capital Appeal Waivers*, 1 CAL. CRIM. L. REV. 2, ¶ 6 (noting that a strong need for reliability in the adjudication of capital cases explains why direct appeals are automatic and non-waivable in all but one state).

46. *See supra* note 42 and accompanying text (listing factors to be considered along with a lawyer's duty to a client). Formal weight may be afforded to the lawyer's conscience. Model Rule 1.16 permits an attorney to withdraw from representation if "a client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(4) (2004). Withdrawal from a capital appeal, however, will not necessarily prevent a client from volunteering. The defendant may be assigned new counsel, or he could waive subsequent

substitute their judgment for that of their clients, securing the objectives that their clients should want.<sup>47</sup> These issues cloud the ethics of managing a client who wants to volunteer, and complicate the lawyer's ethical role in such a situation.

The death penalty lawyer who seeks guidance in the problem of volunteering will find no shortage of advice. Indeed, tides of ink have been spilled on the matter. Unfortunately, there is no clear consensus within the literature: some jurists argue that the lawyer is ethically bound to honor the client's wishes, while others insist that the ethical attorney must oppose any act that increases the likelihood of execution—even the acts of the client.

The dilemma of the volunteering client, however, is no mere theoretical puzzle for armchair lawyers and legal ethicists. It is a matter of grave practical concern, and all of the scholarship in the legal databases has not solved the problem. Ever since Socrates chose to raise the cup of hemlock to his lips instead of escaping from custody,<sup>48</sup> the relationship of the Lawful and the Good has become clouded within the sphere of capital punishment. The problem is not one restricted to ancient history: Contemporary volunteering is a worsening problem.<sup>49</sup> In 2004, sixteen percent of the fifty-nine people executed were volunteers, up from an average of about eleven percent.<sup>50</sup>

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legal representation at the same time he waives his appeals.

47. Some requests cannot be ethically honored. For example, in the military, an order to kill unarmed civilians is an unlawful order and should be refused, even if issued by a legitimate authority. *See Riggs v. State*, 43 Tenn. 85, 86–87 (1866) (stating that an unlawful order, a command "in its substance being clearly illegal, so that a man of ordinary sense and understanding would know as soon as he heard the order read or given that such order was illegal, would afford a private no protection for a crime committed under such order"). The Model Rules similarly limit the lawyer's behavior. For example, a lawyer cannot knowingly assist a client in committing a criminal offense. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2004). There may be analogous circumstances where the lawyer is obligated to refuse the client's requests. The Model Rules recognize that some clients may not be situated to make prudent and appropriate decisions, and accordingly afford the attorney increased discretion in these cases. *See* MODEL RULES OF PROF'L CONDUCT R. 1.14 (2004) (stating rules for the client-lawyer relationship where the client has a diminished capacity).

48. *See* PLATO, *SOCRATES' DEFENSE* (Hugh Tredennick trans.) in *THE COLLECTED WORKS OF PLATO* 3, 26 (Edith Hamilton & Huntington Cairns eds., 1961) (quoting the volunteer Socrates as observing, "Now it is time that we were going, I to die and you to live, but which of us has the happier prospect is unknown to anyone but God").

49. *See* AMNESTY INT'L, *THE ILLUSION OF CONTROL* (2001), <http://web.amnesty.org/library/Index/ENGAMR510532001> (last visited Oct. 16, 2005) (reporting that approximately 12.5% of the executions conducted since the death penalty was reinstated involved volunteers, and that about two-thirds of these consensual executions had taken place in the six years prior to 2001).

50. John Cristoffersen, *Connecticut Execution Puts the Spotlight on "Death Row Syndrome,"* AP Online, Feb. 1, 2005, available at 2/1/05 ASSOCPR 19:11:44 (reporting

Gary Gilmore, the first individual to be executed after the Supreme Court reinstated the death penalty, was a volunteer.<sup>51</sup> Timothy McVeigh, the first federal prisoner to be executed in thirty-eight years, was executed after terminating his appeals.<sup>52</sup> Of the thirty-four jurisdictions that have carried out executions since *Gregg*, ten resumed capital punishment by executing a volunteer, and another four states have executed only volunteers.<sup>53</sup> Between 1977 and 1992, there were twenty-two volunteers (among the 188 executions carried out in America); between 1993 and 2002, there were seventy-five volunteers (among 632 executions).<sup>54</sup> Anecdotal evidence (as well as the scant empirical evidence available on the subject) suggests that most death row inmates consider volunteering at least once throughout the course of their appeals.<sup>55</sup> There are many reasons why a volunteer might wish to terminate his appeals:

[H]e does not want to grow old in prison; because of the dehumanizing conditions of most death row facilities; because of severe depression or pre-existing suicidal urges; because of lingering guilt and remorse about the crime(s) committed; to escape the roller-coaster experience of the habeas appeals process or to seize control over it; to spare family and friends ongoing pain; or as a "macho" confrontation with death.<sup>56</sup>

Mello argues that volunteering for execution may be an act of courage, valor, or principle.<sup>57</sup> He believes that ethical lawyers must respect their

statistics on volunteering).

51. See *Gilmore v. Utah*, 429 U.S. 1012, 1014–15 (1976) (finding that Gilmore "made a knowing and intelligent waiver" of his right to appeal sentencing). See generally MIKAL GILMORE, *SHOT IN THE HEART* (1994) (recounting the events surrounding Gary Gilmore's decision to forego his appeals).

52. See Notice to Court, *United States v. McVeigh*, No. 96-CR-68-M (D. Colo. Dec. 7, 2000), available at <http://courttv.com/national/oklahoma/mcveigh-121200.html> (last visited Oct. 26, 2005) (stating McVeigh's intent to forego further appeals).

53. The jurisdictions that have resumed executions with volunteers are: Delaware, Illinois, Indiana, Maryland, Nevada, Ohio, Virginia, Utah, Washington, and the federal government. The jurisdictions that have executed only volunteers are: Idaho, New Mexico, Oregon, and Pennsylvania. See DRUSA, *supra* note 4, at 11–30 (providing a chronological listing of executed defendants and identifying those who were volunteers).

54. Robinson, *supra* note 38 (citing data obtained from the Death Penalty Information Center).

55. See Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 857 (1987) (citing interviews with defense attorneys); Harrington, *supra* note 41, at 850 ("[P]reliminary evidence suggests that the majority [of death row inmates] elect to halt appeals at some point . . . though most eventually change their minds.").

56. Harrington, *supra* note 41, at 850.

57. See Mello, *supra* note 42, at 57–59 (discussing philosophical discourse on suicide).

volunteering clients' wishes, and either step aside or affirmatively assist their clients in obtaining executions.<sup>58</sup> What appears to be nobility or courage, however, might actually be nothing more than a bid for the attorney's time and attention.<sup>59</sup> It may not be conscious, but the client (who has probably been failed by his family, by institutions, and by his trial lawyers for the whole of his life) might "test" his appellate counsel by stating his intention to give up his appeals, to see whether or not his lawyers care enough to fight for him.<sup>60</sup> Ultimately, even the client's intentions may not be what they appear. Indeed, in the death penalty context, little is ethically certain.

Although the "macabre solution" of defense counsel joining the prosecution in seeking the defendant's execution has been dismissed as theoretical poppycock,<sup>61</sup> proof that truth is indeed stranger than fiction can be found in the case of *State v. Smith*.<sup>62</sup> The *Smith* case inverted traditional courtroom roles. Arizona prosecutors pleaded with the jury to spare the defendant's life while defense counsel insisted upon the death penalty.<sup>63</sup>

Douglas Alan Smith, on trial for first-degree murder, burglary, and theft, explained that he would prefer to be executed than to spend the rest of his life in prison. His attorney, Jamie McAllister, agreed to subordinate her personal views against the death penalty and to "be a vigorous advocate" on Smith's behalf.<sup>64</sup> The defense community ignited in outrage. Her boss, Phoenix Public Defender Dean Trebesch, removed McAllister from the case, but she resigned from the public defender's office and was immediately reappointed as private counsel to represent Smith.<sup>65</sup> Paul Rothstein has suggested:

A defense lawyer in McAllister's position "would be on unassailable grounds" had she agreed to the death penalty in a case where the prosecutors sought it. "But she went further than anyone has apparently

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58. See *id.* at 64 ("The question [is] whether an attorney should assist the state in its will to execute his . . . client. This question should be answered in the affirmative.").

59. See Harrington, *supra* note 41, at 850 (citing dehumanizing prison conditions and the "roller-coaster" appeals process as motivations for volunteering).

60. *Id.*

61. See David A. Davis, *Capital Cases: When the Defendant Wants to Die*, 16 CHAMPION 45, 46 (1992) (describing the breakdown of the adversarial system when a defendant volunteers for the death penalty).

62. *Arizona v. Smith*, No. CR1995-007070 (Ariz. Super. Ct. filed July 28, 1995). Docket information is available at <http://www.superiorcourt.maricopa.gov/docket/criminal/caseInfo.asp?caseNumber=CR1995-007070> (last visited Oct. 16, 2005).

63. See Mark Hansen, *Death's Advocate*, 84 A.B.A. J. 22, 22 (Dec. 1998) (describing the history of the case).

64. *Id.*

65. *Id.*

ever gone before, by affirmatively pressing for a death sentence even the prosecution didn't want."<sup>66</sup>

Smith was not sentenced to die. Instead, he was sentenced to sixty-two years in prison. McAllister, however, vowed to appeal the conviction and the sentence. She said that she was confident she did the right thing. "What would bother me more," she said, "would be to see somebody stripped of his right to make his own decisions about the course of his life."<sup>67</sup>

There is a definite through-the-looking-glass quality to the universe of capital volunteers. Our expectations about legal roles and duties collapse; fundamental assumptions about human nature are tested. Legal ethics become a labyrinth in which one can become disoriented and lost.

Thankfully, at least three situations confronting death row lawyers are ethically straightforward. First, it is ethically uncomplicated when the client wants to appeal his conviction and the death row attorney wants to help him do so. Presumably, this category of cases constitutes the bulk of capital appeals.

Second, while nightmarish, legal ethics are clear when the client wishes to appeal his conviction but the attorney intentionally sabotages the client's case in an effort to insure his execution. In 1998, David Smith, a highly respected North Carolina attorney with eighteen years of experience as an Assistant United States Attorney, took on the capital appeal of Russell Tucker. But when Smith read through the transcripts of Tucker's trial, he concluded that he "did not like Mr. Tucker" and "decided that Mr. Tucker deserved to die."<sup>68</sup> He then intentionally missed a deadline for filing an appeal, effectively condemning his client.<sup>69</sup> The situation is horrifying, but analytically simple: Smith's sabotage of his client not only violates the American Bar Association's (ABA) Model Rules,<sup>70</sup> but it is analogous to the capital crime of procuring the execution of an innocent person by perjury.<sup>71</sup>

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66. *Id.* (quoting Paul Rothstein).

67. *Id.*

68. Sara Rimer, *Lawyer Sabotaged Case of a Client on Death Row*, N.Y. TIMES, Nov. 24, 2000, at A37.

69. *Id.*

70. Smith's behavior violated the Model Rule's standards of Competence (Rule 1.1), Scope of Representation (Rule 1.2), Diligence (Rule 1.3), and his duty as an Advisor (Rule 2.1). His behavior violated several provisions of the Model Rule governing Misconduct (Rule 8.4). *See generally* STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS (1999).

71. *See* CAL. PENAL CODE § 128 (2005) ("Every person who, by willful perjury or subornation of perjury procures the conviction and execution of any innocent person, is punishable by death or life imprisonment without possibility of parole."). Tucker was not an

Third, it is straightforward when a client raises the possibility of volunteering but is dissuaded by his lawyers. Almost all attorneys agree that it is ethically permissible to use moral persuasion in counseling a client against volunteering. Indeed, most attorneys believe the lawyer is not only permitted to counsel the client against volunteering, but ethically must counsel the client against it.<sup>72</sup> Richard Dieter, for example, claims the capital attorney is bound by a responsibility to "effective persuasion," of vigorously attempting to dissuade one's client from volunteering.<sup>73</sup> But even persuasion has its limits.<sup>74</sup> This raises a series of threshold questions: What, precisely, constitutes "volunteering"? Is it volunteering when a client jokes about waiving his appeals? Half-jokes? When a client asks his lawyers if they think it's a good idea? When a client tells his lawyers that it's what he wants to do, but can be dissuaded? When a client insists upon it and is resolute? And assuming that the lawyers do seek to change the mind of the volunteering client, at what point does persuasion become unethical? When does persuasion blur into manipulation?<sup>75</sup> When does it become bullying? Are there situations when

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"innocent person," and Smith did not affirmatively perjure himself, but Smith's conduct and the consequences of his omission were analogous.

72. Indeed, much of what a lawyer does is to offer his clients sound, objective advice. Anthony Kronman argues that the essence of the "good lawyer" is found in offering this kind of prudent counsel:

[A] lawyer is likely to begin by asking his client if he has thought the matter through and really wants to do what he now says he does. It may not always be clear that the client's decision is impetuous, but when surrounding circumstances suggest that it is, a responsible lawyer will test his client's judgment before accepting it, recognizing that in such situations the danger of regret is large and that a lawyer must protect his client from this familiar species of self-inflicted harm as well as the harms caused by others.

ANTHONY T. KRONMAN, *THE LOST LAWYER* 129 (1993).

73. Dieter, *supra* note 40, at 812.

74. Kronman suggests that the good lawyer should never simply substitute his own judgment for that of his client:

[O]ne thing at least seems clear. It would be inappropriate for the lawyer to conduct this inquiry [of what is truly in the client's interest] from the perspective of his own personal desires by asking whether *he* would want to do what the client has proposed, and to conclude that the client's decision is impetuous if the lawyer would not have made it for himself. After all, the client's desires may simply be different from those of his lawyer, and the fact that they differ in their wants is not itself a sign that the client is acting in a foolish or self-destructive way.

KRONMAN, *supra* note 72, at 130. Volunteering objectively seems like a "self-destructive" decision, but it may paradoxically give a death row inmate the strength to continue living. See Mello, *supra* note 42, at 52-59 (describing the comfort of volunteering in light of the moral terror of being incarcerated on death row).

75. See generally ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* (3d ed. 1993)



even bullying is warranted? When should the attorneys act paternalistically? When should the agency of the lawyers' client be subordinated to other, larger goals?

#### *D. Client- and Cause-Lawyering*

Ultimately, the answers to these questions may depend upon what kind of lawyer the attorney is. In the archetypal client-lawyer situation, a client comes to a lawyer with a problem (a contract dispute, perhaps) and the lawyer uses her specialized knowledge to ascertain the best means to realize the client's objectives.<sup>76</sup> This is a prosaic example of client-centered lawyering. One way of characterizing client-centered lawyering is to say that it places the autonomy of the client at the center of the legal transaction. Another, less charitable, way is to say that it makes the lawyer into a hired gun, a mercenary, and a whore.<sup>77</sup> The cause-centered approach to lawyering, on the other hand, attempts to use the law as an instrument of social justice. Cause-centered lawyers believe that they are ethically accountable (along with their clients) for the legal ends they seek.<sup>78</sup> A less charitable description of cause-centered lawyering would suggest

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(identifying numerous social psychology techniques of use to attorneys, used to shape opinions and gain compliance over others).

76. This is effectively what is articulated by Model Rule 1.2. *See supra* note 43 (discussing Model Rule 1.2). Of course, in criminal defense, even non-capital criminal defense, the lawyer is afforded unusual latitude in securing the client's objectives. *See United States v. Wade*, 388 U.S. 218, 250 (1967) (White, J., whom Harlan, J. and Stewart, J. join, dissenting in part and concurring in part) (dissenting to the opinion because it produces "a broad constitutional rule barring use of a wide spectrum of relevant and probative evidence, solely because a step in its ascertainment or discovery occurs outside the presence of defense counsel"). Justice White stated:

The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. . . .

*Id.* at 257 (White, J., with whom Harlan, J. and Stewart, J. join, dissenting in part and concurring in part); *see also infra* note 86 (describing the very different legal duties of the prosecutor).

77. Under this view, lawyers are not "morally accountable for decisions they make . . . so long as those decisions do not run afoul of the law or the relevant lawyer code of conduct." Robert P. Lawry, *Damned and Damnable: A Lawyer's Moral Duties with Life on the Line*, 29 LOY. L.A. L. REV. 1641, 1643 (1996).

78. CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 3 (Austin Sarat & Stuart Scheingold eds., 1998).

that it uses clients as pawns, compromising the objectives of the client by weighing them against collateral objectives.<sup>79</sup>

In the capital context, the distinction between cause- and client-centered lawyering is particularly important. The attorneys who handle death penalty appeals often hold deep-seated convictions about the impropriety of capital punishment.<sup>80</sup> Many object to the death penalty on moral grounds (maintaining that it is necessarily immoral to execute a human being); others object on administrative grounds (arguing that capital punishment is either per se unconstitutional or unjust in its application). Despite the fact that almost all death-penalty attorneys are cause lawyers inasmuch as they oppose capital punishment, capital attorneys disagree on whether the client or the cause should be paramount in the representation.

One client-centered attorney conceived of his job this way: "If somebody really wants to volunteer, fighting that sort of runs counter to the idea that the client should be treated as an autonomous individual because at some point you would be elevating your own feelings about the death penalty over that person's autonomy. . . ."<sup>81</sup> Another client-centered attorney reasoned that "I would respect [the decision to volunteer] if I thought that somebody really was competent. . . . It's a miserable life on death row. If somebody's judgment is not impaired, if they're competent to make a decision like that, then you really do have to respect it."<sup>82</sup>

Cause-centered attorneys, however, conceive of their responsibilities in a somewhat different light. One attorney claimed that his job was not to serve the various legal needs of his client, but to contest "the state's determinations to carry out executions."<sup>83</sup> He bluntly stated that his "interest is assisting death

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79. See *Lenhard v. Wolff*, 443 U.S. 1306, 1307 (1979) (holding that "it is appropriate to continue the stay of execution pending consideration by the full Court"). The Court stated:

[Such a cause lawyer] inevitably run[s] the risk of making the actual defendant a pawn to be manipulated on a chessboard larger than his own case. The idea that the deliberate decision of one under a sentence of death to abandon possible legal alternatives cannot be a rational decision, regardless of its motive, suggests that the preservation of one's own life at whatever cost is the *summum bonum*, a proposition with respect to which the greatest philosophers and theologians have not agreed.

*Id.* at 1312-13.

80. See John R. Mitchell, Comment, *Attorneys Representing Death Row Clients: Client Autonomy over Personal Opinions*, 25 CAP. U. L. REV. 643, 644 (1996) (discussing the opinion of capital attorneys in regard to the death penalty).

81. Harrington, *supra* note 41, at 865 (quoting Attorney #9); *cf. supra* note 74 (suggesting that a lawyer should never substitute his own judgment for that of his client).

82. Harrington, *supra* note 41, at 868 (quoting Attorney #14).

83. *Id.* at 865 (quoting Attorney #3).

row inmates who want to stay alive. Inmates who want to die can find other attorneys."<sup>84</sup> Another cause-centered attorney echoed that view:

The machinery that is in place to kill people is actually dishonest and morally bankrupt. It is not a machine that should be allowed to operate unchallenged. Even if the machine . . . has chewed up and spit out my client's will to live that does not validate what has become the machine's choice articulated through his mouth, that he be allowed to die. . . . Therefore it doesn't change my moral duty to challenge the intellectually dishonest and morally bankrupt machine.<sup>85</sup>

Thus, some cause-centered lawyers have reconceived their roles, viewing themselves as institutional gadflies. Their duty lies not with the individual client, but in opposing a death machine that is running amok in America. Some lawyers of this sort view their role as the counterpart to that of the prosecutor. Prosecutors, after all, have a special role in the law. Instead of advocating for a single client, they act on behalf of society, seeking to serve justice.<sup>86</sup> Similarly, some cause-centered lawyers do not represent one client's interests against those of another party (as a defense attorney might advocate against a plaintiff in a tort matter), but squarely direct their efforts at opposing every action of a death-seeking prosecutor. This deviates from the vision articulated by the Model Rules but does establish a kind of adversarial symmetry in the criminal process.

Rand and Dana Crowley Jack have conceptualized the ethical positions that lawyers adopt in dealing with moral dilemmas, identifying four different positions that attorneys assume.<sup>87</sup> The first of these positions is squarely client-

84. *Id.*

85. Harrington, *supra* note 41, at 869 (quoting Attorney #12).

86. *See Berger v. United States*, 295 U.S. 78, 89 (1935) (ruling that the misconduct of the prosecuting attorney was "pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential"). The Court stated:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

*Id.* at 88; *see* ABA STANDARDS FOR CRIMINAL JUSTICE 3-1.2(b), (c) (3d ed. 1993) (stating the prosecutor is an advocate, but "[t]he duty of the prosecutor is to seek justice, not merely to convict").

87. *See generally* RAND JACK & DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS (1989).

centered. They designate this position "Maximum Role Identification" and suggest that attorneys who take this position experience no moral conflict because they act completely within the scope of their professional role and feel no moral accountability for the outcome of their actions.<sup>88</sup> The second position closely resembles the first, although attorneys taking this position are aware of the disjoint between their personal ethics and their professional obligations. Jack and Jack designate this position "Subjugation of Personal Morality."<sup>89</sup> The third position, "Recognition of Moral Cost," involves the awareness of a conflict between personal beliefs and professional obligations that the attorney tries to resolve by balancing legal duty against moral accountability.<sup>90</sup> The fourth of these positions dovetails smoothly with cause-centered lawyering. Here, lawyers subordinate their professional obligations to their personal morality. Jack and Jack call this fourth position "Minimum Role Identification." Different lawyers adopt different ethical positions, for various reasons.<sup>91</sup> These four ethical positions can be graphed against client- and cause-centered lawyering, indicating whether the ethical position is highly likely, possible, or highly unlikely in the capital context. These outcomes are graphed in Table 1, below.

Table 1 indicates that client-centered attorneys are most likely to ignore or subordinate moral convictions in an effort to "act like a lawyer," serving the client's interests as long as they are not barred by legal ethics. Cause-centered attorneys are most likely to subordinate client interests to larger social objectives. The cause-centered attorney also serves as an advocate, but advocates for a social group, not an individual client. In practice, it is unusual to find working capital attorneys who subscribe to either of the extreme views (maximum or minimum role identification). Instead, most lawyers are painfully aware of the two competing values of (1) respect for client autonomy, and (2) a benevolent paternalism. Whether a client-centered attorney or a cause-centered one, whether a lawyer who subjugates his personal morality or one who subjugates the client's demands to the greater good, the capital attorney is forced to make difficult decisions whenever a client decides to volunteer.<sup>92</sup>

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88. See *supra* note 77 (discussing the notion of a lawyer as a hired gun).

89. See JACK & JACK, *supra* note 87, at 99–126 (describing the four different ethical positions that lawyers may assume when dealing with moral dilemmas).

90. See *id.* at 99–126 (describing the four different ethical positions that lawyers may assume when dealing with moral dilemmas).

91. See *id.* (describing the four different ethical positions that lawyers may assume when dealing with moral dilemmas).

92. See Harrington, *supra* note 41, at 861 (quoting Attorney #18 as stating that whenever the issue of terminating appeals arises, he "just sort of go[es] limp"). To try to manage a client who has given up emotionally is an additional drain on the already-taxing endeavor of litigating

	<b>Client-Centered Lawyer</b>	<b>Cause-Centered Lawyer</b>
<b>Maximum Role Identification</b>	<b>Highly likely:</b> client-lawyer does what client wants without sense of ethical responsibility, acts in a purely professional capacity	<b>Highly unlikely:</b> cause-lawyer feels personally accountable for legal ends obtained, <i>cannot</i> act in a purely professional capacity
<b>Subjugate Personal Morality</b>	<b>Possible:</b> client-lawyer is aware of moral consequences of his actions, but subordinates them to legal obligations because legal duty trumps personal moral convictions	<b>Possible:</b> cause-lawyer is aware of moral consequences of his actions, and wishes to achieve social justice ends, but may be willing to subordinate personal goals to legal duty in some cases
<b>Recognition of Moral Cost</b>	<b>Possible:</b> client-lawyer is aware of moral consequences of his actions and simultaneously aware of legal obligations, and tries to balance them	<b>Possible:</b> cause-lawyer is aware of moral consequences of his actions and simultaneously aware of legal obligations, and tries to balance them
<b>Minimum Role Identification</b>	<b>Highly unlikely:</b> client-lawyer <i>cannot</i> subordinate the client's interest to personal moral interest, even if strongly held	<b>Highly likely:</b> cause-lawyer does what will most help social justice ends, subordinates client's interests to serve a greater good

Table 1: Characterization of Types of Lawyering and Ethical Positions in a Capital Context

### *III. Grasping at Straws: Competence as a Means of Avoiding the Volunteering Conundrum*

The ethical implications of a volunteering client are profound. In an attempt to avoid the ethical morass that attends the volunteer, some lawyers demand a competency hearing whenever a client seeks to volunteer.<sup>93</sup> In one sense, it is *Catch-22* logic,<sup>94</sup> reasoning that anyone who affirmatively wants to be executed must be

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a capital appeal.

93. See Ross E. Eisenberg, *The Lawyer's Role When the Defendant Seeks Death*, 14 CAP. DEF. J. 55, 59 (2001) ("The client will be best served by an attorney who initiates a competency assessment as soon as the client begins to discuss a guilty plea and request the death penalty.").

94. See Mello, *supra* note 42, at 62 (stating that it is "Catch-22-esque logic that anyone who wants to be executed (or to commit suicide by other means) must be crazy, and that if he's crazy he can't be executed"). See generally JOSEPH HELLER, *CATCH-22* (1955) (explaining that someone crazy can be excused from combat duty, but that asking to be excused from combat duty is proof of sanity, precluding any hope of getting out of combat duty). But see Charisse Jones, *Iowa, Ohio Prisons See Inmate Suicide Spike*, USA TODAY, Dec. 6, 2004, at 11A (noting

crazy, and if you're crazy, you can't be executed under the Court's ruling in *Ford v. Wainwright*.<sup>95</sup> But insisting upon a competency hearing is responsible lawyering. The hearing is intended to ensure that the defendant is capable of making intelligent and knowing decisions.<sup>96</sup> Unfortunately for ethically troubled attorneys, however, the legal threshold for establishing competence is quite low and easily satisfied.<sup>97</sup>

Furthermore, many attorneys play fast and loose with definitions of competence. They do not employ a formalistic legal standard in thinking about whether their clients are competent; instead, they conceive of competence as a mental health question. They think holistically about the circumstances under which their clients are laboring.<sup>98</sup> One attorney expressed a commonly held view when he made the following observation:

People on death row are not in an ideal position for making tough emotional, moral decisions. A lot of them are cognitively limited. They're either mentally retarded or they have very low intelligence. Many of them are brain damaged. Some of them are mentally ill. Some were juvenile when they got to death row and they've never had any opportunity to mature. . . . Then you add to that the fact that they're living in an environment where they don't get sufficient rest, they're not well fed, their health isn't well taken care of and they're treated like animals. . . . None of those people are in a position to make a reasoned, difficult decision of the magnitude of "I am going to give up my life."<sup>99</sup>

Whether it is conscious or not, treating competence as a medical question rather than a purely legal one probably allows some lawyers to substitute their judgment for that of their client, and to be a more zealous advocate in opposing the death penalty. Other attorneys emphasize the autonomy of the client and acquiesce to the client's wishes. These attorneys probably adhere to a strict legal standard in thinking about competence and, whether consciously or not, put personal concerns about the competence threshold (and the death penalty in general) out of their minds. This

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that "[t]here is a connection between mental illness and suicide, but it's a misnomer to believe that you have to be mentally ill to kill yourself").

95. See *Ford v. Wainwright*, 477 U.S. 399, 417 (1986) (prohibiting execution of the insane).

96. See *Godinez v. Moran*, 509 U.S. 389, 392 (1993) (employing the language of "intelligently and knowingly" in articulating the standard of competence).

97. In *Godinez*, the Supreme Court asked "whether the competency standard for pleading guilty or waiving the right to counsel [volunteering] is higher than the competency standard for standing trial." Writing for the Court, Justice Thomas concluded that "it is not." *Id.* at 391.

98. Many attorneys believe that a decision to volunteer can never be rational. Others believe that it is possible (such as in the case of a Socrates or a John Brown) but have never seen such a client. See, e.g., *supra* note 82 and accompanying text (discussing the competency of someone on death row to make the decision to volunteer). A minority of capital defense attorneys believe that the legal standard is sufficient.

99. Harrington, *supra* note 41, at 867 n.24 (quoting Attorney #6).

probably allows them to be more effective in serving as the client's agent and permits them to simultaneously do their job without torturing themselves psychologically or harming themselves professionally.<sup>100</sup> But neither the client-centered autonomist nor the cause-centered paternalist can ever completely avoid these questions.

### A. Clearing the Dusky-Rees Hurdle

In *Dusky v. United States*,<sup>101</sup> the Supreme Court held that the standard of competence was whether the defendant had "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."<sup>102</sup> In the context of volunteering, the controlling case is *Rees v. Peyton*,<sup>103</sup> which follows *Dusky* in holding that the appropriate test is whether a defendant has "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity."<sup>104</sup> The *Dusky* and *Rees* standards are low thresholds for a defendant to clear. Even Colin Ferguson, who represented himself at trial by spewing rambling conspiracy theories and engaging in surreal cross-examination of his victims, was found competent.<sup>105</sup> One

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100. Lawyers who acquiesce to a volunteer's wishes may be stigmatized. See Robert Anthony Phillips, *Volunteering for Death: The Fast Track to the Death House*, CRIME MAGAZINE: AN ENCYCLOPEDIA OF CRIME, available at [http://crimemagazine.com/deathrow\\_volunteers.htm](http://crimemagazine.com/deathrow_volunteers.htm) (last visited Mar. 8, 2005) ("[W]hen a criminal defense lawyer decides to help an admitted killer die, he can become a pariah in the defense community."). The decision can also entail professional risk. See *infra* note 440 (discussing a federal judge's threat to revoke an attorney's license). One attorney described what happened when he cooperated with his client in waiving appeals:

I made an agreement [with my client to not pursue appeals], and I feel like at the time it was the only thing I could have done, . . . but I've been criticized for it. And the criticism came from within the death penalty community. It came from people I admire very much. It was hard to take.

Harrington, *supra* note 41, at 877 (quoting Attorney #11).

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

102. *Id.*

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

104. *Id.* at 314. It has been claimed that the second prong of the *Rees* test, the determination of whether a defendant suffers from a mental disease, disorder, or defect that affects his capacity, has "largely disappeared" in practice. Goldbach, *supra* note 45, ¶ 77.

105. See Lewis Grossberger, *Spring Unsprung*, MEDIAWEEK, Mar. 27, 1995, at 46

reporter characterized the *Dusky* and *Rees* standards by asserting that "short of severe mental instability or sheer idiocy," the defendant is found competent.<sup>106</sup> Like the *M'Naughten* test for insanity,<sup>107</sup> the *Dusky* and *Rees* standards are legal ones, not medical ones.<sup>108</sup> Like the *M'Naughten* test, the *Dusky* and *Rees* tests consider the defendant's state of mind, but they are cognitive—not affective—in nature.<sup>109</sup> They focus upon what a defendant knows, not on what he feels.<sup>110</sup> Thus, under the standards of

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(discussing "shocking murder-shooting" cases); Carolyn McCarthy, *Order in the Court*, N.Y. TIMES, Jan. 12, 1998, at A21 (discussing the trial in which Colin Ferguson chose to defend himself).

106. Jon Bonné, *A Question of Competency*, <http://courttv.com/trials/unabomber/competency.html> (last visited Mar. 8, 2005). The *Dusky* standard is actually more rigorous than the one that preceded it, which required only that "the defendant [is] oriented to time and place and [has] some recollection of events." *Dusky*, 362 U.S. at 402.

107. See generally NORMAN J. FINKEL, *INSANITY ON TRIAL* (1988) (discussing the *M'Naughten* test). Finkel stated:

To establish a defense on the ground of insanity it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or [if] he did know it, that he did not know he was doing what was wrong.

*Id.* at 21.

108. Goldbach, *supra* note 45, ¶ 60. Goldbach stated:

[L]egal competency is a determination that focuses on whether a defendant can meet a certain legal standard . . . without inquiring whether the defendant is incapable, due to some mental disorder or defect, of truly meeting that standard . . . [while medical competency] takes into consideration a defendant's mental status and assesses the effect any disorder or disease may have on the defendant's decisionmaking process.

*Id.*

109. See FINKEL, *supra* note 107, at 26–29 (discussing the "cognitively tilted" nature of the *M'Naughten* test and asking whether emotional knowledge should play a role in the analysis); see also RICHARD J. BONNIE ET AL., *A CASE STUDY IN THE INSANITY DEFENSE: THE TRIAL OF JOHN W. HINKLEY, JR.* 12 (2d ed. 2000) (exploring the cognitive nature of *M'Naughten's* "know" requirement).

110. Or does not feel. Individuals who suffer from "Anti-Social Personality Disorder" (a diagnosis previously characterized as sociopathy or psychopathy) do not suffer cognitive deficits, but lack empathy. AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 701–706 (4th ed., text revision 2000). See generally HERVEY CLECKLEY, *THE MASK OF SANITY* (5th ed. 1976); RICHARD D. HARE, *PSYCHOPATHY: THEORY AND RESEARCH* (1970). One researcher characterizes the "core features" of psychopathy as "lack of real affect, an inability to relate feelings to the words with which they are expressed, and the chaos and destruction that the essential psychopath leaves behind." HERSCHEL PRINS, *DANGEROUS BEHAVIOUR, THE LAW, AND MENTAL DISORDER* 155 (1986). The individual suffering from antisocial personality disorder would typically pass a legal test for competence, yet would be viewed as severely mentally disturbed from a psychiatric standpoint. Thus, while the psychopath's personality disorder will not shield him from trial (i.e., he is still competent), the



*Dusky* and *Rees*, it is entirely possible for a clinically depressed but non-psychotic defendant to waive his appeals and to volunteer for execution.

*B. Depression and Death Row: The Psychology of Hopelessness*

There is a substantial body of research linking imprisonment to psychological disturbance.<sup>111</sup> It is unknown whether this is because the mentally ill are more likely to be arrested or convicted,<sup>112</sup> or rather more ominously, because prisons somehow exacerbate or precipitate mental illness in otherwise healthy individuals.<sup>113</sup> But there is no doubt that rates of mental disorder are disproportionately high in incarcerated populations. Human Rights Watch has concluded that there are three times more mentally ill people in prison than in mental health hospitals,<sup>114</sup> that prisoners have rates of mental illness two to four times greater than the rates found in the general population,<sup>115</sup> and that one in six American prisoners is mentally ill.<sup>116</sup> In reality, the rate may be even higher. A report by the American Psychiatric Association estimated that as many as one in five prisoners are seriously mentally ill, with up to five percent actively psychotic at any given moment.<sup>117</sup> In 2002, the National Commission on

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disorder may nonetheless increase the likelihood of his execution in those jurisdictions that ask juries to base their decisions upon the risk of future dangerousness. See Ron Rosenbaum, *Travels with Dr. Death*, VANITY FAIR, May 1990, reprinted in RIVKIND & SHATZ, *supra* note 37, at 469 (detailing the psychiatric testimony of Dr. James Grigson in capital cases, and the effect of that testimony on Texas jurors).

111. See generally L.H. Bukstel & P.R. Kilman, *Psychological Effects of Imprisonment on Confined Individuals*, 88 PSYCH. BULL. 469 (1980) (linking imprisonment with mental disorders); F.J. Porporino & E. Zamble, *Coping with Imprisonment*, 26 CANADIAN J. OF CRIMINOLOGY 403 (1984) (same).

112. See L.A. Teplin, *Criminalizing Mental Disorder: The Comparative Arrest Rate of the Mentally Ill*, 39 AM. PSYCHOL. 794, 798–801 (1984) (reporting that individuals with mental disorder are significantly more likely to be arrested than those without mental disorder).

113. See J.S. Wormith, *The Controversy Over the Effects of Long-Term Incarceration*, 26 CANADIAN J. OF CRIMINOLOGY 423, 434–35 (1984) (describing literature linking prison conditions to elevated rates of psychiatric disorder); see also J.C. Oleson, *The Punitive Coma*, 90 CAL. L. REV. 829, 851–52 (2002) (same).

114. HUMAN RIGHTS WATCH, *ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS* 1 (2003).

115. *Id.*

116. Human Rights Watch, *U.S.: Mentally Ill Mistreated in Prison*, <http://www.hrw.org/press/2003/10/us102203.htm> (Oct. 22, 2003).

117. AM. PSYCHIATRIC ASS'N, *PSYCHIATRIC SERVICES IN JAILS AND PRISONS* xix (2d ed. 2000).

Correctional Health Care provided Congress with a chilling report of prevalence rates:

On any given day, between 2.3 and 3.9 percent of inmates in State prisons are estimated to have schizophrenia or other psychotic disorder, between 13.1 and 18.6 percent major depression, and between 2.1 and 4.3 percent bipolar disorder (manic episode). A substantial percentage of inmates exhibit symptoms of other disorders as well, including between 8.4 and 13.4 percent with dysthymia, between 22.0 and 30.1 percent with an anxiety disorder, and between 6.2 and 11.7 percent with post-traumatic stress disorder.<sup>118</sup>

Many forms of mental disturbance appear to be overrepresented in prison populations, but a number of studies have found that depression is the most common of these.<sup>119</sup> The relationship between depression and death row is complicated. Gunn and his colleagues have noted that:

[I]t is very difficult to establish . . . whether a depressed murderer is depressed because he has been imprisoned for life, depressed because of the conditions in which he is imprisoned, depressed by the enormity of his crime, or whether he committed murder because he was depressed in the first place.<sup>120</sup>

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118. 1 NAT'L COMM'N ON CORR. HEALTH CARE, *THE HEALTH STATUS OF SOON-TO-BE-RELEASED INMATES: A REPORT TO CONGRESS 25* (2002), available at [http://www.ncchc.org/stbr/Volume1/Health%20Status%20\(vol%201\).pdf](http://www.ncchc.org/stbr/Volume1/Health%20Status%20(vol%201).pdf). The quoted 13.1% to 18.6% prevalence rate of major depression among prisoners is particularly sobering when one considers that major depression is twice as common among women (6.5%) than among men (3.3%). NAT'L INST. OF MENTAL HEALTH, NAT'L INSTS. OF HEALTH, U.S. DEP'T OF HEALTH & HUM. SERVS., *THE NUMBERS COUNT* (NIH PUB. NO. 01-4584, 2001), <http://www.mental-health-matters.com/articles/article.php?artID=335> (citing an unpublished NIMH table). Ninety-three percent of prisoners under state and federal supervision are male. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE at tbl.6.28 (Ann L. Pastore & Kathleen Maguire, eds.), at <http://www.albany.edu/sourcebook/pdf/t6282004.pdf> (last visited Nov. 11, 2005) [hereinafter SOURCEBOOK]. Such an elevated prevalence rate in such an overwhelmingly male population suggests that there is some link between mental illness and incarceration.

119. See, e.g., JOHN GUNN ET AL., *PSYCHIATRIC ASPECTS OF IMPRISONMENT* 219–29 (1978) (concluding that half of the thirty-four percent of the sample who were classified as suffering from moderate, marked, or severe psychiatric disturbance suffered from depression); HERSHEL PRINS, *OFFENDERS, DEVIANTS, OR PATIENTS? AN INTRODUCTION TO THE STUDY OF SOCIO-FORENSIC PROBLEMS* 45 tbl.3(1), 55 (1980) (noting that cases of reported psychosis, ranging between 0.5% and 26% prevalence rates, consisted principally of schizophrenia and depression); P.J. Taylor, *Psychiatric Disorder in London's Life-Sentenced Offenders*, 26 BRITISH J. CRIMINOLOGY 63, 69–70 (1986) (stating that more than two-thirds of those facing life sentences appeared to have some form of mental disorder, and that depression and personality disorders were the principal problems in the sample).

120. GUNN ET AL., *supra* note 119, at 35.

Other reasons may include feelings of futility and inevitability, isolation from family and friends, contempt for other death row inmates, or the inability to endure the "roller-coaster" of the habeas appeals process.<sup>121</sup>

The utter powerlessness of the death row inmate to alter his fate may also foster depression. Psychologist Martin Seligman has proposed a model of human depression based upon what he calls "learned helplessness."<sup>122</sup> Based on his research with classical conditioning, Seligman believes that some people "learn" that whatever they do is futile and suggests that learned helplessness is the causal mechanism of human depression.<sup>123</sup>

For prisoners who have been condemned to death, who pass their waiting hours in cramped death row cells,<sup>124</sup> oscillating between ennui and terror,<sup>125</sup> everything is futile: they have nothing but longshot dreams of clemency<sup>126</sup> and an eventual execution at the hands of the state. Frankly, it is astonishing that more capital defendants do not suffer from clinical depression.

What does constitute clinical depression? How does clinical depression differ from more prosaic forms of sadness, sorrow, and despondency? Table 2 lists the criteria for major depressive episode according to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR).<sup>127</sup>

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121. See Harrington, *supra* note 56 and accompanying text (quoting Harrington, *supra* note 41, at 850) (describing various reasons a defendant might wish to waive appeals and volunteer for execution—most of these reasons could also contribute to depression).

122. See generally Martin E.P. Seligman, *Learned Helplessness*, 23 ANN. REV. MED. 407 (1972) (describing model of learned helplessness).

123. See *id.* at 411 (speculating as to the relationship between learned helplessness in animals and maladaptive behaviors in humans).

124. See *infra* notes 333–42 and accompanying text (describing conditions of confinement on death row).

125. See Mello, *supra* note 42, at 55–56 (describing the uncertainty resulting from "the monotony and boredom, punctuated only by the sheer terror of having their death warrants signed and an execution date and time set, only to win an eleventh-hour stay from the courts, another few years of waiting, then another warrant, and so on").

126. See *infra* note 309 (noting that on average only one sentence per year is commuted in the United States).

127. AM. PSYCHIATRIC ASS'N, *supra* note 110, at 356.

<p>A. Five or more of the following symptoms have been present during the same 2-week period and represent a change from previous functioning; at least one of the symptoms is either (1) depressed mood or (2) loss of interest or pleasure.</p> <p>Note: Do not include symptoms that are clearly due to a general medical condition, or mood-incongruent delusions or hallucinations.</p> <ol style="list-style-type: none"> <li>(1) depressed mood most of the day, nearly every day, as indicated by either subjective report (e.g., feels sad or empty) or observation made by others (e.g., appears tearful). Note: in children and adolescents, can be irritable mood.</li> <li>(2) markedly diminished interest or pleasure in all, or almost all, activities most of the day, nearly every day (as indicated by either subjective account or observation made by others)</li> <li>(3) significant weight loss when not dieting or weight gain (e.g., a change of more than 5% of body weight in a month), or decrease or increase in appetite nearly every day. Note: In children, consider failure to make expected weight gains.</li> <li>(4) insomnia or hypersomnia nearly every day</li> <li>(5) psychomotor agitation or retardation nearly every day (observable by others, not merely subjective feelings of restlessness or being slowed down)</li> <li>(6) fatigue or loss of energy nearly every day</li> <li>(7) feelings of worthlessness or excessive or inappropriate guilt (which may be delusional) nearly every day (not merely self-reproach or guilt about being sick)</li> <li>(8) diminished ability to think or concentrate, or indecisiveness, nearly every day (either by subjective account or as observed by others)</li> <li>(9) recurrent thoughts of death (not just fear of dying), recurrent suicidal ideation without a specific plan, or a suicide attempt or a specific plan for committing suicide</li> </ol> <p>B. The symptoms do not meet criteria for a Mixed Episode (see p. 365).</p> <p>C. The symptoms cause clinically significant distress or impairment in social, occupational, or other important areas of functioning.</p> <p>D. The symptoms are not due to the direct physiological effects of a substance (e.g., a drug of abuse, a medication) or a general medical condition (e.g., hypothyroidism).</p> <p>E. The symptoms are not better accounted for by Bereavement, i.e., after the loss of a loved one, the symptoms persist for longer than 2 months or are characterized by marked functional impairment, morbid preoccupation with worthlessness, suicidal ideation, psychotic symptoms, or psychomotor retardation.</p>
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Table 2: Diagnostic Criteria for Major Depressive Episode (from DSM-IV-TR)

The DSM checklist is the industry standard, but it presents the reader with a dry and desiccated view of major depression. Far more visceral, more tangible descriptions of depression can be found in the writings of those who have suffered from mood disorders.<sup>128</sup> In *The Crack-Up*, novelist F. Scott Fitzgerald described his disorder in very human terms:

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128. See generally KAY REDFIELD JAMISON, *TOUCHED WITH FIRE* (1993) (tracing a long line of mood disorders among well-known writers).

I saw that for a long time I had not liked people and things, but only followed the rickety old pretense of liking. I saw that even my love for those closest to me was become only an attempt to love, that my casual relations—with an editor, a tobacco seller, the child of a friend, were only what I remembered I *should* do, from other days. All in the same month I became bitter about such things as the sound of the radio, the advertisements in magazines, the screech of tracks, the dead silence of the country—contemptuous at human softness, immediately (if secretly) quarrelsome toward hardness—hating the night when I couldn't sleep and hating the day because it went toward night.<sup>129</sup>

In *Darkness Visible*, novelist William Styron described the difficulty in finding words to convey a sense of depression:

For myself, the pain is most closely connected to drowning or suffocation—but even these images are off the mark. William James, who battled depression for many years, gave up the search for an adequate portrayal, implying its near-impossibility when he wrote in *The Varieties of Religious Experience*: "It is a positive and active anguish, a sort of psychical neuralgia wholly unknown to normal life."<sup>130</sup>

A potentially crippling disorder, major depression affects approximately one in twenty Americans in any given year.<sup>131</sup> Even for those who enjoy nurturing relationships, social support networks, and who have access to antidepressant medication and counseling, depression can be devastating.<sup>132</sup> What about depressed individuals in prison, who lack such resources?<sup>133</sup> What happens when a competent-but-clinically-depressed defendant is placed on death row? Is it even possible to distinguish between clinical depression and the effects of being on death row? And what happens when the suicidal death row inmate is afforded ample opportunity to take his own life, at government expense? The case of *Smith v. State*<sup>134</sup> provides one answer to these hard questions.

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129. F. SCOTT FITZGERALD, *THE CRACK-UP* 72 (Edmund Wilson ed., 1996).

130. WILLIAM STYRON, *DARKNESS VISIBLE: A MEMOIR OF MADNESS* 17 (1990).

131. See Darrel A. Regier et al., *The de Facto Mental and Addictive Disorders Service System. Epidemiologic Catchment Area Prospective 1-Year Prevalence Rates of Disorders and Services*, 50 *ARCHIVES OF GEN. PSYCHIATRY* 85, 88 tbl.1 (1993) (noting that, of persons eighteen years and older, approximately five percent have unipolar major depression).

132. See, e.g., ANDREW SOLOMON, *THE NOONDAY DEMON: AN ATLAS OF DEPRESSION passim* (2001) (describing effects of depression).

133. See *supra* notes 118–19 (describing rates of depression among prison populations).

134. *Smith v. State*, 686 N.E.2d 1264 (Ind. 1997).

## C. Case Study: Smith v. State

In 1995, Robert Smith was serving a thirty-eight-year sentence for battery in Indiana's Wabash Valley Correctional Institution.<sup>135</sup> On June 30th of that year, Smith and another Wabash inmate (Ronald Lunsford) attacked a fellow inmate named Michael Wedmore (who was serving a sixty-year sentence for the murder of his girlfriend's two-year-old daughter).<sup>136</sup> Using a sharpened putty knife and a blade from a pair of scissors, Smith and Lunsford stabbed Wedmore thirty-seven times, including two fatal wounds (one from each weapon) that pierced Wedmore's heart.<sup>137</sup> When correctional officers intervened, Smith and Lunsford immediately surrendered and handed over their improvised weapons.<sup>138</sup>

Smith was charged with murder and conspiracy to commit murder. After the initial hearing, Smith mailed a letter to a local newspaper, the *Sullivan Daily Times*. In his letter, he expressed his willingness to volunteer for the death penalty.

Editor,

I'm one of the men charged with the murder at [the Wabash Valley Correctional Facility] i understand the county is having aruff time figuring out where there gonna get the money to take this case to trial. they don't have to on my account if they file the death penalty on me i will pled guilty & wont appeal, if by chance they take the case to trial & find me guilty & give me 50 or 60 more years, if they do that it would be awaste of taxpayers money, my earliest out date in Indiana is 2028, then i have a 15 year parole hold to do in Michigan. i'm 45 years old. as it stands right now ill be in my 90s when i get out. 50-60 more years would be—meaning-less, aslap on the hand, a Joke. Let me tell you just where im coming from if they dont give me the death penalty for the murder of the Baby Killer the next one to die will be a tax payer—*The only tax payers in here "work here"*. I don't say things i don't mean. Robert A Smith # 30636[.]<sup>139</sup>

After the prosecutor requested the death penalty, two attorneys were hired on Smith's behalf: Smock and Etling.<sup>140</sup> At a pretrial hearing, over the protests

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135. Indiana Death Row, Smith, Robert A. #86, <http://www.clarkprosecutor.org/html/death/row/smithr.htm> (last visited Oct. 14, 2005).

136. *Id.*

137. *Smith*, 686 N.E.2d at 1265.

138. Indiana Death Row, Smith, Robert A. #86, *supra* note 135.

139. *Smith*, 686 N.E.2d at 1265-66 (capitalization, spelling, and punctuation in the original).

140. *Id.* at 1266.

of Smock and Etling, Smith agreed to plead guilty, but only if the State would give him the death penalty.<sup>141</sup>

The State submitted a written agreement, which stated that Smith would plead guilty to murder in exchange for the State's recommending the death penalty and dropping the conspiracy charge.<sup>142</sup> The judge thoroughly questioned Smith about his signature on the agreement, his mental capacity, and his understanding of the rights he would waive by pleading guilty. The judge concluded that Smith's waiver was knowing and voluntary.<sup>143</sup>

Soon thereafter, a competency hearing was held.<sup>144</sup> Dr. Wooden, a clinical psychologist who had been meeting with Smith for several months, "testified that Smith was suffering from severe depression which caused him to be incompetent to stand trial or make rational decisions regarding his defense."<sup>145</sup> Wooden stated that Smith's depression stemmed from being housed in solitary confinement for the nine months since the killing, and that Smith would change his mind about pursuing the death penalty if he could be moved out of solitary.<sup>146</sup> Accordingly, Dr. Wooden concluded that Smith was incompetent to waive his appellate rights.<sup>147</sup> At the close of the hearing, Smith requested permission to speak, and the court granted his request.<sup>148</sup>

Smith's comments say a great deal about the conditions of death row, about the link between depression and death row volunteering, and about how difficult it can be to disentangle the effects of clinical depression from the effects of incarceration. Smith told the court:

I know what I'm doing, you know. I'm fully aware, you know. This is one of the tests they gave me here. I want to read it to the court here, some of the questions on here, and this is how they say I'm extremely depressed, you know. I mean, I'm in prison. Everybody in prison is depressed, you know. . . . I'm tired of being in prison, you know, and I'm at the point now where life doesn't have a whole lot of meaning for me and—you know, these are some of the questions that they—Question One, ["I feel

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141. *See id.* (stating that Smith warned the court that if it did not give him the death penalty, he would kill again, and this time it would not be a fellow inmate that died, but a correctional officer). He continued: "If [the prosecutor] doesn't do it I'm telling the Court that the next person that I go at won't be a baby killer, it will be a state employee and I will butcher him. It will be a massacre. I'll butcher the son-of-a-bitch." *Id.* at 1267.

142. *Id.* at 1267.

143. *Id.*

144. *See id.* (stating that the court held a competency hearing on April 4, 1996).

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 1268.

downhearted, blue, and sad.["] It says ["]none or little of the time, some of the time, a good part of the time, more or all of the time.["] I mean, how would anybody in prison answer that question? All of the time.<sup>149</sup>

Robert Smith's withering sarcasm underscores an important question. How can a psychological instrument that was designed to measure mood disorders among a noncustodial population measure depression on death row? How can the test distinguish between clinical depression and results that resemble depression, but are nothing more than the artifact of answering while incarcerated on death row?<sup>150</sup> Smith's continuing testimony emphasizes the point:

The second question is, ["]Morning is when I feel the best.["] You know, I don't feel good any of the time, you know. I'm miserable. You know, my life is miserable. It's a miserable existence. . . . Any normal man that's in prison, you know, is, you know, going to feel downhearted, blue, or sad, you know. I mean, I don't see anybody running around the prison smiling and laughing, you know. I mean, it don't happen. . . . ["]My mind is as clear as it used to be.["] My mind is probably more clear now that it's ever been. . . . ["]I feel hopeful about the future.["] I don't have a future, you know. I mean, if I don't get the death sentence, I still don't have a future. What I've got is a slow death.<sup>151</sup>

Smith was then examined by two additional psychologists, Doctors Singh and Murphy, who testified that Smith was depressed-but-competent.<sup>152</sup> Dr. Murphy agreed with Dr. Wooden that Smith's decision to seek the death penalty was motivated in part by the isolation of solitary confinement, but he felt that Smith's willingness to abandon the death penalty if transferred out of solitary was proof of competence, not incompetence.<sup>153</sup>

The court then concluded that Smith was competent, accepted the plea agreement and found him guilty of murder.<sup>154</sup> At the sentencing hearing, Smith did not offer any mitigating evidence. Instead, he provided a letter:

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149. *Id.*

150. Others have noted that standard personality inventories are inappropriate for assessing mental disorder in prison. Responses that are perfectly normal in the prison context register as "abnormal" on objective indices because the test is administered under such not-normal circumstances. "There's not much point in asking a man who's been inside for ten years and faces another twenty, whether or not he can 'easily get some life into a rather dull party' (to quote item 51 of the widely used Eysenck Personality Inventory)." STANLEY COHEN & LAURIE TAYLOR, *PSYCHOLOGICAL SURVIVAL: THE EXPERIENCE OF LONG TERM IMPRISONMENT* 35 (1972).

151. *Smith*, 686 N.E.2d at 1268.

152. *See id.* at 1268–69 (stating that the two court appointed experts found Smith depressed but competent).

153. *Id.* at 1269.

154. *Id.*



I Robert A. Smith on June 30, 1995, lured Michael Wedmore to a cell i was being housed in at the Walbash Corr. Inst with the intent of Killing him. I'm proud to say it is the only thing i ever did in my life that turned out as planned although it could of been carried out a bit more proficient im very satisfied with the results. i'm asking the court to let justice be served & carry out the sentence. Very Truly yours, Robert A. Smith[.]<sup>155</sup>

The court accepted the plea agreement and sentenced Smith to death on July 12, 1996.<sup>156</sup> His death sentence was affirmed five-to-zero by the Supreme Court of Indiana on October 23, 1997, and Robert Smith was executed by lethal injection on January 29, 1998, at 12:27 a.m., Eastern Standard Time.<sup>157</sup>

This Part of the Article has suggested that a competence hearing might seem like a promising avenue out of an ethical labyrinth of wrong turns and bad directions, but has shown that a competence hearing is unlikely to resolve the dilemma of the volunteering capital client. As long as the defendant is capable of working with his lawyers and has a fundamental grasp of what is happening in the courtroom, he—like Robert Smith—is free to plead guilty, to waive counsel, and to waive his appeals. Thus, the oasis of resolution proves to be a mirage. Perhaps meaningful guidance can be found in the Model Rules that govern the legal profession.

#### IV. *The Ethics of Killing Your Client*

The Model Rules of the ABA serve as the ethical standard upon which most state professional codes are founded.<sup>158</sup> They articulate the "shall" and the "shall-not" of practicing law in the United States and are a useful guide in navigating many ethical labyrinths. Unfortunately, however, there is little useful content in the Model Rules for the attorney who wishes to know what to do when a death row client wants to volunteer. Indeed, the Model Rules are silent on the subject of volunteering and are effectively useless in resolving the attendant ethical dilemmas.

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155. *Id.* at 1270 (capitalization, spelling, and punctuation in the original).

156. *Id.* at 1269.

157. Indiana Death Row, Smith, Robert A. #86, *supra* note 135.

158. See GILLERS & SIMON, *supra* note 70, at xix ("As of fall 1997, about 41 states and the District of Columbia had adopted all or significant portions of the Model Rules, and several others were in the process of doing so.").

### A. *The Uselessness of the Model Rules*

Under the Model Rules, the criminal defense attorney is generally required to abide by the client's wishes. The Model Code indicates that "a lawyer shall abide by a client's decisions concerning the objectives of representation,"<sup>159</sup> and states that a lawyer may not intentionally "[f]ail to seek the lawful objectives of his client through reasonably available means."<sup>160</sup> Furthermore, according to the ABA, "the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself."<sup>161</sup> The Model Rules, however, "do not specifically identify the decision whether to oppose the death penalty as one of those [situations] in which the defendant has ultimate authority."<sup>162</sup> And, of course, under Model Rule 1.14, an attorney may assume more responsibility for decision making when his client functions under a disability.<sup>163</sup> The Model Rules are not constrained by a rigid *Rees* standard; they acknowledge "intermediate degrees of competence."<sup>164</sup> Thus, an attorney who pursues appeals, even when he does so against his client's wishes, has a justifiable ethical foundation.<sup>165</sup> It seems that, in legal ethics, as in the jurisprudence of capital punishment generally, "death is different."<sup>166</sup>

It is one thing to articulate an abstract principle such as, "an attorney may assume additional decisionmaking responsibility when the client labors under a disability,"<sup>167</sup> but it is an altogether different matter to try to implement such a principle. Just operationalizing the term is difficult. What qualifies as a

159. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1999).

160. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101(a)(1) (1980).

161. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (1980). In the event that the client insists upon a course of action that is contrary to the judgment of the lawyer but not prohibited by disciplinary rules, the attorney is permitted to withdraw from representation. *Id.*

162. White, *supra* note 55, at 856.

163. See MODEL RULES OF PROF'L CONDUCT R. 1.14 (1999) (stating that when an attorney has a disabled client, the attorney shall make reasonable attempts to maintain a client-lawyer relationship and the attorney may seek to appoint a guardian or take additional protective action).

164. *Id.* cmt. 1.

165. See Dieter, *supra* note 40, at 818 (noting the competing interests associated with the uniqueness of the death penalty).

166. See Jeffrey Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 117 (2004) (identifying a long and distinguished line of capital cases articulating the "death-is-different" principle); ABA Standard 4-1.2 (1993) ("Since the death penalty differs in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused.").

167. MODEL RULES OF PROF'L CONDUCT R. 1.14 (1999).

"disability"?<sup>168</sup> What factors can capital lawyers consider in deciding to substitute their judgment for that of disabled clients? Dementia and delirium seem straightforward enough, but what about stress? Depression? Anxiety? What about low IQ scores or a history of child abuse or economic deprivation? What about intermittent conditions, such as episodic hallucinations punctuated by long periods of lucidity? What about situational disability? What about the boredom and terror inherent in the death row experience?<sup>169</sup> Might even that be per se disabling?<sup>170</sup>

Other questions make the implementation of Model Rule 1.14 problematic. How disabled do death row clients have to be before lawyers are permitted to substitute their judgment? Does any imperfection, however modest, warrant a lawyer's paternalism? Presumably, the lawyer would be acting ethically if she assumed additional decisionmaking responsibility for a mentally retarded (IQ of seventy or less) client. But what about the lawyer who assumes responsibility for the client who is dull-but-not-retarded (an IQ score of seventy-five)? Or the lawyer who assumes responsibility for the client with an average IQ (100), simply because the lawyer has a Mensa-level IQ score? Is this ethical conduct?

Once the lawyer has determined that the client does suffer from some measure of a disability, how expansive can a lawyer's assumption of responsibility be? Assume the death row client suffers from a modest (5%) disability: Is it unethical for a lawyer to assume 6% of the decisionmaking responsibility? 10%? 50%? 100%?

The difficulties of implementing the Model Rules are not limited to line-drawing exercises (e.g., deciding whether the client is disabled or not) and judgment calls (e.g., deciding whether *X* amount of disability warrants *Y* amount of paternalism). Even the fundamental decision of whether or not to look for disability is problematic. A lawyer who wants to leave decisionmaking

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168. The comment to Rule 1.14 does not define disability. It notes that "to an increasing extent the law recognizes intermediate degrees of competence" but does not indicate whether these intermediate degrees of competence are strictly legal in nature (reflecting the client's cognitive abilities) or whether they may include elements of clinical competence (reflecting the client's affective and emotional states, as well). See *supra* note 108 (distinguishing legal competence from clinical competence).

169. See *supra* note 125 (noting the monotony, boredom, and terror of death row).

170. See Phillips, *supra* note 100 (quoting Julie Hall, an Arizona lawyer, who stated that on death row "[p]eople are being put in long-term solitary confinement that the human mind is not wired to survive[.]" and that she "has yet to see a case where the inmate seeking death has been competent to make that decision"). Perhaps the extreme conditions of death row noted by Hall actually cause disabling and incapacitating mental disorders that render condemned inmates incompetent.

in the hands of the client can, by limiting the scope of questioning, avoid difficult issues that might necessitate an inquiry into the client's mental and emotional state. This kind of lawyer needs only to verify that the client is competent and is then free to do the client's bidding. But a lawyer who disapproves of the client's request might be more inclined to probe for forms of disability. Perhaps these forms of disability are not sufficient to render the client incompetent, but under Model Rule 1.14, they may permit the lawyer to usurp the goals of representation.

The problem with this is that death row lawyers looking for proof of disability in their clients need only to open their eyes.<sup>171</sup> Every condemned individual on death row is disabled in some way. It is axiomatic that at some time, something went profoundly wrong with each person on death row; otherwise, it would not have been possible for the individual to commit a capital crime.<sup>172</sup> Healthy and well-adjusted individuals are not immediately transformed into cold-blooded pitiless slayers who exhibit "the highest, the utmost, callous disregard for human life" and thereby become eligible for the death penalty.<sup>173</sup> Healthy and well-adjusted individuals do not suddenly commit murders that are "especially heinous, atrocious, or cruel."<sup>174</sup> Death row, after all, is not populated by run of the mill murderers, or even by those guilty of murder in the first degree, but is filled with the "worst of the worst."<sup>175</sup> Even those inmates who were not fundamentally damaged before their arrival

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171. See THETA H. WOLF, ALFRED BINET 347 n.3 (1973) (quoting *Les Premiers Mots De La These Idealiste*, REVUE PHILOSOPHIQUE 600 (1906) (Fr.)) (quoting psychologist Binet as saying, "Tell me what you are looking for and I will tell you what you will find"). The lawyer who wants to find disability in the capital client need only look. Even if it is not initially obvious, inquiring into the client's past to gather mitigation evidence will almost certainly reveal some form of "disability." The real question, then, is how deeply the lawyer is willing to dig to find the disability that will warrant usurpation of the decisionmaking power.

172. See Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 561 (1995) ("There is increased recognition that the roots of violent behavior extend beyond the personality or character structure of those people who perform it, and connect historically to the brutalizing experiences they have commonly shared as well as the immediately precipitating situations in which violence transpires.").

173. See *Arave v. Creech*, 507 U.S. 463, 468 (1993) (noting that the "utter disregard" circumstance should be limited to the cold-blooded, pitiless slayer).

174. *Proffitt v. Florida*, 428 U.S. 242, 255 (1976).

175. See *Zant v. Stephens*, 462 U.S. 862, 877 (1983) (holding that a capital statute's aggravating factors must "genuinely narrow the class of persons eligible for the death penalty" in a way that reasonably justifies "the imposition of a more severe sentence on the defendant compared to others found guilty of murder").

on death row have in all likelihood been broken by their experiences on the row.<sup>176</sup> Perceiving disability is as simple as looking for it.

Thus, trying to apply the nebulous abstractions of the Model Rules to real cases, involving real defendants who are making real statements about volunteering for real executions, is exceptionally difficult to do in any principled manner. To try is like attempting to climb a rope of sand.

### *B. Legal Realism: Applying Model Rules to Real Cases*

Many death penalty attorneys do not believe that the Model Rules are relevant in a capital context in the same way they are relevant to non-capital representation. One attorney suggested:

There are two things that limit rigorous [application] of the Code of ethics to the situation of people on death row. One is that there's almost no parallel situation in the legal profession where you're representing a population who, through a legal choice, can accomplish their own death. . . . Secondly, the relationship between lawyers and death row prisoners is also highly unusual in the legal context because it's almost never compensated, at least by the client. It's such a discretionary universe you don't see the same kind of application or even consideration of what the lawyer's role is. I don't see the Code as having much bearing on this stuff.<sup>177</sup>

Other attorneys have gone further, saying that the Model Rules are not only irrelevant, but worthy of scorn and (where necessary) outright violation:

The Rules say that the decisions whether to pursue an appeal are for the client to make, . . . but those rules are drafted with an eye to noncapital appeals. I think the Rule is stupid in the context of a capital appeal and so I ignore it, and I freely admit to you that I didn't give a shit if my client said [he wanted to drop appeals]. I had no intention of letting that happen.<sup>178</sup>

Most attorneys are not this explicit in expressing their willingness to disregard the prescriptions of the Model Rules and the wishes of the client, but there are some attorneys who feel so strongly about their opposition to the death penalty that no ethical code will temper their zeal. They are abolitionists, true believers, and they will fight the death penalty tooth and claw until this punishment is abandoned.<sup>179</sup>

176. See *infra* Part V.C.2 (outlining death row syndrome).

177. Harrington, *supra* note 41, at 870–71 (quoting Attorney #13) (alterations in original).

178. *Id.* at 870 (quoting Attorney #12) (alterations in original).

179. *Id.* at 869 (quoting Attorney #11 as knowing other attorneys who would "lie, cheat,

Such true believers exist, but it is probably more common for lawyers to struggle against the silence of the Model Rules and to follow an amorphous and intuitive ethical code in doing what is in the best interests of the client. One attorney suggested:

I don't think the Rules are very clear at all and I think that's part of the dilemma. It's not like there's some rule that [says] if your client wishes to volunteer . . . you must or must not support them. It's a lot more murky, and the Rules essentially just say that you're supposed to work in the best interest of your client. The question is, is volunteering in the best interest of your client?<sup>180</sup>

Unfortunately, the Model Rules are of little use in answering that question. They are like Rorschach blots: capital attorneys see whatever they project into them and then act accordingly. And because the Model Rules are largely silent, lawyers are ultimately left to exercise their discretion in determining ethical conduct, weighing up the values of autonomy against paternalism and using their own idiosyncratic belief systems as decisionmaking heuristics.<sup>181</sup>

#### V. Primum Non Nocere: *Reasoning by Analogy*

Thus far, this Article has argued that death row volunteering is a serious and worsening problem,<sup>182</sup> has indicated that legal challenges to the defendant's competence are inadequate to prevent the depressed-but-sane client from waiving his appeals,<sup>183</sup> and has indicated that the Model Rules of Professional Conduct provide inadequate guidance for capital attorneys.<sup>184</sup> A great deal has

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and steal to avoid the execution of a client"); White, *supra* note 55, at 859 (describing defense lawyers who are singularly focused on abolishing capital punishment).

180. Harrington, *supra* note 41, at 870 (quoting Attorney #7) (alterations in original).

181. Those predisposed to fighting against the death penalty, regardless of the personal hardships that must be borne by the attorney and the client, might think about "the best interest of the client" in terms of the Ranger credo: "I will never leave a fallen comrade to fall into the hands of the enemy." The Ranger Creed, <http://www.ranger.org/rangerCreed.html> (last visited Oct. 18, 2005). Those who are inclined to defer to the judgment of the client, however, might think about the "the best interest of the client" by using the framework of another person who volunteered for execution: Joan of Arc. "You promised me my life; but you lied. You think that life is nothing but not being stone dead." GEORGE BERNARD SHAW, SAINT JOAN: MAJOR BARBARA: ANDROCLES AND THE LION 150 (1952).

182. See *supra* Part II (noting the recent increase in both the number of death row inmates and the percentage of those who volunteer).

183. See *supra* Part III (cataloging a list of defects that compromise the competency hearing).

184. See *supra* Part IV (noting that while the Code provides useful ethical guidance, it is silent on the subject of volunteering).

been written about the problem of the volunteering client, but the volunteer remains an ethical puzzle.

Yet meaningful guidance may be available. Although competence hearings and the Model Rules may not resolve the problem for capital attorneys, it might be possible to look outside the profession of law and to ascertain how other professionals, confronted with analogous circumstances, have established clear ethical guidelines. I argue that lawyers can glean meaningful guidance from medical ethics by studying the conduct of physicians confronted with end-of-life issues.

This Part of the Article proceeds in three steps. The first section reviews the role of the physician in end-of-life decisionmaking, describing the legal and ethical controversies surrounding euthanasia and physician-assisted suicide. It articulates the theoretical arguments for and against the practices, describes what is empirically known about the attitudes and behaviors of the public, physicians, and terminally-ill patients, and outlines the legal and ethical constraints on physician acquiescence. The second section examines the similarities and differences between capital lawyers with volunteering clients and medical doctors with terminally-ill patients. It draws contrasts between doctors and lawyers, between executions and illness, and it tries to ascertain whether waiving appeals is more akin to withdrawal of treatment (which is permitted under contemporary medical ethics) or physician-assisted suicide (which is forbidden). The third and final section evaluates the extant literature on the effects of long-term death row confinement. It reviews the case of *Soering v. United Kingdom*, describes the phenomenon of "death row syndrome," and asks whether an individual suffering from death row syndrome is capable of knowingly and voluntarily waiving his capital appeals.

#### A. *The Role of Medical Professionals in Terminating Life*

Medical ethics enjoy a long and robust history. The Hippocratic Oath, described by the American Medical Association (AMA) as "a living statement of ideals to be cherished by the physician,"<sup>185</sup> was codified in about 400 B.C.<sup>186</sup> The heart of the Hippocratic Oath is, of course, the prohibition against harming one's patient,<sup>187</sup> often rendered in Latin as "*Primum non nocere*" ("First, do no

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185. AM. MED. ASS'N, CODE OF MEDICAL ETHICS x (1996-97).

186. See 38 HARVARD CLASSICS: SCIENTIFIC PAPERS 2 (Charles W. Eliot ed., 1910) (describing the origins of the Hippocratic Oath).

187. The Oath includes the following pledge:

harm").<sup>188</sup> While the administration of the Oath has been criticized by some critics,<sup>189</sup> most medical schools administer some form of the Oath.<sup>190</sup> This, of course, means that most practicing physicians are bound by the principle of beneficence.

How, then, is the physician, as an ethically bound healer, supposed to respond when a patient asks to die? On the one hand, the physician has pledged under the Hippocratic Oath to work to the benefit of the patient, and the overarching principle of beneficence might justify such an action. On the other hand, the Oath is unequivocal in prohibiting the physician from doing harm: "I will give no deadly medicine to any one if asked, nor suggest any such counsel."<sup>191</sup> How is the ethical physician expected to respond when a terminally-ill patient, in intolerable pain, begs the doctor to end his life?<sup>192</sup> The

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I will follow that system of regimen which, according to my ability and judgment, I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous. I will give no deadly medicine to any one if asked, nor suggest any such counsel. . . .

*Id.* at 3.

188. The Hippocratic Oath, itself, does not contain these exact words. Many scholars believe that Hippocrates did originate the phrase, in another of his writings, *Epidemics, Bk. 1, Sect. XI* ("[M]ake a habit of two things—to help, or at least to do no harm."). But Hippocrates wrote in his native Greek, and it is uncertain who is responsible for coining the Latin term. Some attribute "*Primum non nocere*" to a translation of Hippocrates' Greek, while others credit the Roman physician, Galen. "First, Do No Harm" Is Not in the Hippocratic Oath, <http://www.geocities.com/everwild7/noharm.html> (last visited Oct. 20, 2005).

189. See, e.g., Robert M. Veatch, *White Coat Ceremonies: A Second Opinion*, 28 J. MED. ETHICS 5, 5–6 (2002) (criticizing medical schools for thrusting a single, monolithic oath upon a diverse body of students, and doing so before they can decide if they agree with it or whether they can live up to it).

190. See Robert D. Orr et al., *Use of the Hippocratic Oath: A Review of Twentieth Century Practice and a Content Analysis of Oaths Administered in Medical Schools in the U.S. and Canada in 1993*, 8 J. CLINICAL ETHICS 377, 379–82 (1997) (reporting that ninety-eight percent of the 150 medical schools that responded to the survey administered some form of the Oath, that only one school used the classical version of the Hippocratic Oath, that one hundred percent of the current Oaths pledged a commitment to patients, and that fourteen percent included a prohibition against euthanasia).

191. *Supra* note 187.

192. The American Medical Association offers relevant guidance. The AMA believes that "[t]he principle of patient autonomy requires that physicians must respect the decision to forgo life-sustaining treatment of a patient who possesses decisionmaking capacity," and the AMA believes that "[t]here is no ethical distinction between withdrawing and withholding life-sustaining treatment," but the AMA states that "[p]hysicians must not perform euthanasia or participate in assisted suicide. A more careful examination of the issue is necessary. Support, comfort, respect for patient autonomy, good communication, and adequate pain control may decrease dramatically the public demand for euthanasia and assisted suicide." See AM. MED. ASS'N, POLICYFINDER H-140.996, DECISIONS NEAR THE END OF LIFE, available at <http://www.ama-assn.org> (last visited Mar. 8, 2005). Although the AMA states that physicians



principle of beneficence requires that the doctor alleviate the suffering, but the principle of doing no harm prevents the doctor from ending life (even a life the patient wishes to end). Could there ever be circumstances in which the patient's life expectancy is so short and the patient's suffering is so great that balancing the two principles would allow the doctor to engage in euthanasia (ending the patient's suffering by intentionally ending the patient's life)?<sup>193</sup> Even if the physician should be absolutely barred from acting as the agent of another's death, could there be circumstances in which the doctor could assist the patient in terminating his or her own life (physician-assisted suicide)?<sup>194</sup> These difficult questions have fostered a vigorous debate among ethicists, physicians, legislators, and the public.

Strong arguments have been marshaled on both sides of the debate. Those who support euthanasia and physician-assisted suicide have identified at least six important themes:

- *The right to die* (autonomy): People should have the fundamental right to make decisions about ending their own lives.<sup>195</sup>

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cannot perform euthanasia, they are permitted to provide palliative treatment to reduce pain and suffering, even if this should have the consequence of hastening death.

193. Euthanasia has been alternatively defined as "the hastening of death of a patient to prevent further sufferings" or as the "direct intentional killing of a person as part of the medical care being offered." D.V.K. Chao et al., *Euthanasia Revisited*, 19 FAM. PRAC. 128, 128 (2002). The American Medical Association defines euthanasia as "the administration of a lethal agent by another person to a patient for the purpose of relieving the patient's intolerable and incurable suffering." AM. MED. ASS'N, CODE OF ETHICS E-2.21 (1996), available at <http://www.ama-assn.org/ama/pub/category/8458.html> (last visited Oct. 24, 2005). The academic literature on euthanasia has spawned at least two taxonomies. Euthanasia can be characterized as "voluntary" (the patient has expressed a wish to die, and someone else implements that wish), "involuntary" (the competent patient has not expressed a wish to die, but someone else terminates the patient's life), and "non-voluntary" (the patient is incompetent, and someone else terminates the patient's life). Chao et al., *supra*, at 128. Euthanasia also can be characterized as active (the patient's life is ended with an affirmative act, such as the injection of a lethal drug) or passive (the patient's life is ended through the omission of an act). *Id.* Some have argued that active euthanasia is no worse than passive euthanasia, and drawing distinctions between the two approaches is nothing more than an exaltation of form over substance. *E.g.*, James Rachels, *Active and Passive Euthanasia*, 292 NEW ENG. J. MED. 78, 180 (1975).

194. The American Medical Association states that "[p]hysician-assisted suicide occurs when a physician facilitates a patient's death by providing the necessary means and/or information to enable the patient to perform the life ending act." AM. MED. ASS'N, CODE OF ETHICS E-2.211, *supra* note 193. Typically, the physician provides the patient with a lethal dose of a drug, which the patient can then self-administer to end his or her life. Chao et al., *supra* note 193, at 129.

195. *E.g.*, RONALD DWORKIN, LIFE'S DOMINION 190-92, 222-29 (1993) (discussing how autonomy is used in supporting the right to die); Chao et al., *supra* note 193, at 131 (listing five reasons for allowing physician-assisted suicide); Joe Messerli, BalancedPolitics.org, Physician

- *Death with dignity*: People should not be forced to remain dependent upon others, to helplessly witness their own loss of control, or to otherwise endure conditions that unacceptably compromise human dignity.<sup>196</sup>
- *Relief of unbearable suffering* (compassion): Medication cannot adequately eliminate all physical and emotional suffering, and people should not be forced to endure intolerable pain.<sup>197</sup>
- *Limited state interest*: While the state may have an interest in insuring the life of its citizens, such a state interest is dramatically attenuated in the case of a terminally-ill patient.<sup>198</sup>
- *Relief of burdens on family members*: A terminally-ill patient can exact tremendous economic and emotional costs from family members. Euthanasia or physician-assisted suicide can limit the fiscal and emotional hardships visited upon the patient's relatives.<sup>199</sup>
- *Ability to reallocate limited medical resources*: If terminally-ill patients are allowed to end their lives, doctors will be able to spend their time with patients who have better prognoses. Funding for medication or hospitalization can be shifted to those

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Assisted Suicide (Pros & Cons, Arguments For and Against), [http://www.balancedpolitics.org/assisted\\_suicide.htm](http://www.balancedpolitics.org/assisted_suicide.htm) (last visited Jan. 27, 2006) (describing the right to die as something that should be a fundamental freedom).

196. *E.g.*, DWORKIN, *supra* note 195, at 233–37 (discussing the right to dignity in death); Chao et al., *supra* note 193, at 132 (listing the reasons to allow physician-assisted suicide); Harvey Max Chochinov, *Dignity and the Eye of the Beholder*, 22 J. CLINICAL ONCOLOGY 1336, 1337 (2004) (investigating what it means to die with dignity); Margaret A. Drickamer et al., *Practical Issues in Physician-Assisted Suicide*, 126 ANNALS OF INTERNAL MED. 146, 147 (1997) (reporting survey results showing dignity as a factor in requesting physician-assisted suicide); Messerli, *supra* note 195 (citing a patient's desire for dignity as a reason to allow the right to die).

197. *E.g.*, DWORKIN, *supra* note 195, at 16–18 (describing all living creatures' desires to avoid pain); Chao et al., *supra* note 193, at 131 (listing limiting pain as a reason to allow physician-assisted suicide); Drickamer et al., *supra* note 196, at 147 (reporting survey results showing pain as a reason for requesting physician-assisted suicide); Messerli, *supra* note 195 (noting both patient and family pain as a basis for allowing physician-assisted suicide).

198. *See, e.g.*, *Compassion in Dying v. Washington*, 79 F.3d 790, 820 (9th Cir. 1996) (noting that, though the state does have an interest in preserving life, that interest is attenuated when individuals cannot pursue happiness or liberty and no longer wish to live). *But see Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (concluding that it is sufficient that the state's prohibition on assisted suicide is rationally related to a legitimate state interest).

199. *E.g.*, Chao et al., *supra* note 193, at 131 (listing reasons for allowing physician-assisted suicide); Messerli, *supra* note 195 (noting reduced healthcare costs and family pain).

who either could recover or who, while terminal, wish to remain alive.<sup>200</sup>

Similarly, those who oppose the practices of euthanasia and physician-assisted suicide have identified at least nine important themes:

- *Sanctity of life*: Life is inherently sacred, and nothing can justify the deliberate taking of a human life.<sup>201</sup>
- *Ability to alleviate suffering through less drastic means*: The "unbearable" suffering of a terminal illness can be made bearable through palliative care and aggressive use of medication for pain management.<sup>202</sup>
- *Risk of error*: While doctors are particularly conscientious about making terminal diagnoses, human error remains a problem. It is possible to mix up patient files or to misdiagnose the patient as terminal. A patient who is sick, but not actually terminal, may elect to end his life in response to the label, "terminally ill."<sup>203</sup>
- *Patients change their minds*: Some terminally-ill patients who request euthanasia will decide that, for a variety of reasons, life is bearable.<sup>204</sup>
- *Patients' decisions may be affected by pressure from relatives*: Because of the medical costs associated with their treatment,

200. *E.g.*, Chao et al., *supra* note 193, at 132 (listing reasons for allowing physician-assisted suicide); Messerli, *supra* note 195 (noting that the funds spent keeping dying patients alive could be spent on patients who could be saved).

201. *E.g.*, DWORKIN, *supra* note 195, at 68–101, 194–96 (discussing the sanctity of life); Chao et al., *supra* note 193, at 133 (listing the reasons for not allowing physician-assisted suicide); Messerli, *supra* note 195 (citing the intrinsic value of human life as a basis for denying physician-assisted suicide). *But see* Richard Hull, *The Case for Physician-Assisted Suicide*, FREE INQUIRY, Spring 2003, at 35, 35 (noting that despite talk of sanctity of life, when a soldier throws himself on a grenade, the knowing sacrifice of human life is lauded, not condemned).

202. *E.g.*, AM. MED. ASS'N, *supra* note 192 (noting that adequate pain control may lessen public demand for euthanasia); Chao et al., *supra* note 193, at 132 (stating that unbearable suffering may be due to inadequate palliative care).

203. *E.g.*, Messerli, *supra* note 195 (citing the possibility of mistake as a basis for denying physician-assisted suicide).

204. *E.g.*, Chao et al., *supra* note 193, at 132 (stating that many patients change their minds after requesting euthanasia); P.J. van der Maas et al., *Euthanasia and Other Medical Decisions Concerning the End of Life*, 338 LANCET 669, 673 (1991) (noting that, in one study, two-thirds of those who requested euthanasia and physician-assisted suicide changed their minds). *But see* Hull, *supra* note 201, at 35 (noting that the act of requesting physician-assisted suicide may allow patients to draw attention to their suffering and to command the resources they need to continue living).

patients will feel pressured to end their lives as a means to limit the financial burdens on their families. Even if family members do not explicitly pressure the patient to end his life, a conscientious patient may be sensitive to the crushing burden incurred by health care costs.<sup>205</sup>

- *Slippery slope phenomenon*: The practice of intentionally ending human life will be widened from competent and terminally-ill patients to other groups (e.g., the chronically ill, those in persistent vegetative states, AIDS patients, or the elderly). Applied more broadly, euthanasia may be used on an involuntary basis, wielded as a weapon against the mentally retarded, the socially unproductive, or the racially undesirable.<sup>206</sup>
- *Abuse by policy-makers*: Legislators might establish laws that coerce patients to end their lives, or—in more extreme versions such as the Nazi T4 program—that authorize involuntary euthanasia for certain categories of undesirable persons.<sup>207</sup>
- *Prohibition of the Hippocratic Oath*: Even if patients have a theoretical right to die, there is no corresponding obligation for physicians to assist patients in ending their lives. The Hippocratic Oath unequivocally states that "I will give no deadly medicine to any one if asked, nor suggest any such counsel."<sup>208</sup>

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205. E.g., Chao et al., *supra* note 193, at 133 (commenting that knowledge of the burden would mean that any request would not be completely voluntary); Drickamer et al., *supra* note 196, at 147 (reporting survey results showing that ninety-three percent of physicians thought that a patient might request physician-assisted suicide because they feared being a burden to others); E.J. Emanuel, *The History of Euthanasia Debates in the United States and Britain*, 121 ANNALS OF INTERNAL MED. 793, 794 (1994) (describing how the issue of pressure on patients has been a concern for many years).

206. E.g., DWORKIN, *supra* note 195, at 216–17 (mentioning the "slippery slope" argument); Chao et al., *supra* note 193, at 132 (discussing concerns that euthanasia will expand to other patients); D.J. Nyman et al., *Euthanasia*, 12 CRITICAL CARE CLINIC: ETHICAL ISSUES 85, 90 (1996) (noting the "slippery slope" argument in Nazi Germany); Messerli, *supra* note 195 (citing the slippery slope as a reason to deny physician-assisted suicide). Recent articles report that Dutch physicians are considering guidelines that would authorize the euthanizing of people "with no free will," including children, the severely mentally retarded, and those in irreversible comas. See, e.g., *Dutch Ponder Mercy Killing Rules*, CNN, Dec. 2, 2004, <http://www.cnn.com/2004/HEALTH/12/01/netherlands.mercykill/> (describing new guidelines for euthanizing those without free will).

207. E.g., Chao et al., *supra* note 193, at 133 (citing Nazi Germany as the worst example of politicians abusing euthanasia); E. Ernst, *Killing in the Name of Healing: The Active Role of the German Medical Profession During the Third Reich*, 100 AM. J. MED. 579, 580 (1996) (describing the Nazi euthanasia program).

208. E.g., Chao et al., *supra* note 193, at 133 (stating that a patient's right to die does not

- *Public's loss of trust in physicians:* If doctors are permitted to save lives or end lives as they see fit, the public will lose confidence in the doctor's principle of beneficence, and the integrity of the medical profession will be compromised.<sup>209</sup>

These theoretical arguments and counter-arguments have shaped political debate in both the United States and abroad. While euthanasia has been legalized in Belgium and the Netherlands,<sup>210</sup> it is illegal in all United States jurisdictions and has been roundly condemned by the American Medical Association,<sup>211</sup> the American Nurses' Association,<sup>212</sup> and the American Geriatrics Society.<sup>213</sup> Similarly, while physician-assisted suicide has been legalized in both Switzerland and the Netherlands<sup>214</sup> and was briefly legalized in the Northern Territory of Australia,<sup>215</sup> the United States Supreme Court has concluded that there is no

mean a physician's right to kill); Messerli, *supra* note 195 (citing the Hippocratic Oath as a reason to deny physician-assisted suicide); *see also supra* notes 187–90 and associated text (describing the Hippocratic Oath's prohibitions against doing harm).

209. *E.g.*, Chao et al., *supra* note 193, at 132–33 (finding that ambiguity in the doctor's role may result in a loss of trust); Emanuel, *supra* note 205, at 800 (noting that increased interest in euthanasia corresponds with attacks on physician authority). *But see* Hull, *supra* note 201, at 35 (noting that limiting euthanasia to physicians specializing in pain management and subjecting decisions to ethics boards may adequately compensate for any increased public suspicion).

210. *See, e.g.*, Valerie J. Vollmar, Recent Developments in Physician-Assisted Suicide (Oct. 2004), [http://www.willamette.edu/wucl/pas/2004\\_reports/102004.html](http://www.willamette.edu/wucl/pas/2004_reports/102004.html) (describing developments in a number of countries, including Belgium and the Netherlands). Technically, euthanasia remains illegal in the Netherlands, but under a theory of "medical necessity" (i.e., there was a conflict of duties that justified the act), physicians are guaranteed immunity from prosecution as long as they follow rules of careful practice. *See* Chao et al., *supra* note 193, at 129–30 (discussing the Dutch system).

211. AM. MED. ASS'N, CODE OF ETHICS E-2.21, *supra* note 193 (noting that "[e]uthanasia is fundamentally incompatible with the physician's role as healer, would be difficult or impossible to control, and would pose serious societal risks"); AM. MED. ASS'N, POLICY STATEMENT H-140.966(4), *supra* note 192 (stating unequivocally that "[p]hysicians must not perform euthanasia").

212. AM. NURSES' ASS'N, POSITION STATEMENT ON ASSISTED SUICIDE (1994), *available at* <http://nursingworld.org/readroom/position/ethics/prtetsuic.htm>.

213. Am. Geriatric Soc'y Ethics Comm., *Physician-Assisted Suicide and Voluntary Active Euthanasia*, 43 J. AM. GERIATRIC SOC'Y 579, 579 (1995).

214. *See, e.g.*, Vollmar, *supra* note 210 (describing international developments in a number of countries, including Switzerland and the Netherlands).

215. *See* Chao et al., *supra* note 193, at 129 (describing passage and repeal of Act); S. Cordner & K. Eitershank, *Australian Senate Overturns World's First Euthanasia Law*, 349 LANCET 932, 932 (1997) (reporting repeal of Rights of the Terminally Ill Act); S. Cordner, *Australia's Northern Territory Euthanasia Law Passed*, 347 LANCET 609, 609 (1996) (reporting passage of Rights of the Terminally Ill Act).

constitutional right to physician-assisted suicide.<sup>216</sup> Rather, it is a matter for each state to decide. Today, the practice remains illegal in all but one United States jurisdiction: Oregon.

In November 1994, Oregon voters passed the Oregon Death with Dignity Act,<sup>217</sup> a voter initiative, by a narrow margin of fifty-one to forty-nine percent.<sup>218</sup> The implementation of the Act was delayed by an injunction, but after the Ninth Circuit lifted the injunction,<sup>219</sup> physician-assisted suicide became a legal option for terminally-ill patients in Oregon beginning in October 1997. In November 1997, Oregon House Bill 2954 (repealing the Death with Dignity Act) was placed on the general election ballot, but Oregon voters chose to retain the Act by a margin of sixty to forty percent.<sup>220</sup>

The Act permits physicians to honor patients' requests for a lethal dose of drugs, provided that the patient has less than six months to live, that two doctors confirm the diagnosis, and that they determine the patient is competent to make the request.<sup>221</sup> The Act authorizes physician-assisted suicide but explicitly prohibits euthanasia.<sup>222</sup> Research indicates that during the first year of the Act's implementation, twenty-three individuals received prescriptions for lethal medication and that fifteen of these twenty-three died after taking their medication.<sup>223</sup> Other studies of the Oregon experience suggest that a modest number of terminally-ill Oregonians pursue and employ physician-assisted suicide.<sup>224</sup> Only 171 people have ended their lives via physician-assisted

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216. See *Washington v. Glucksberg*, 521 U.S. 702, 723–24 (1997) (finding that the liberty protected by the Due Process Clause does not include the right to suicide); *Vacco v. Quill*, 521 U.S. 793, 804–06 (1997) (drawing a line between assisting suicide and withdrawal of unwanted lifesaving medical treatment).

217. OR. REV. STAT. § 127.800 (2003).

218. DEP'T OF HUMAN SERVS., SEVENTH ANNUAL REPORT ON OREGON'S DEATH WITH DIGNITY ACT (2005), available at <http://www.egov.oregon.gov/DHS/ph/pas/docs/year7.pdf> (reporting Nov. 1994 voter results).

219. David G. Savage, *Justices to Hear Case on Oregon's Suicide Law*, L.A. TIMES, Feb. 23, 2005, at 1.

220. DEP'T OF HUMAN SERVS., *supra* note 218 (reporting Nov. 1997 voter results).

221. OR. REV. STAT. § 127.815 (2003).

222. OR. REV. STAT. § 127.880 (2003) ("Nothing in ORS 127.800 to 127.897 shall be construed to authorize a physician or any other person to end a patient's life by lethal injection, mercy killing or active euthanasia.").

223. Arthur E. Chin et al., *Legalized Physician-Assisted Suicide in Oregon—the First Year's Experience*, 340 NEW ENG. J. MED. 577, 578 (1999).

224. See Linda Ganzini et al., *Physicians' Experiences with the Oregon Death with Dignity Act*, 342 NEW ENG. J. MED. 557, 558–61 (2000) (reporting that five percent of survey respondents reported requests for lethal medication, that eighteen percent received prescriptions, and that ten percent died from taking the prescribed medication).

suicide since the Act took effect.<sup>225</sup> Supporters of the Act believe the law is functioning as it was designed.<sup>226</sup>

Oregon's Death with Dignity Act, however, continues to attract legal challenges. On November 6, 2001, Attorney General John Ashcroft issued a directive entitled "Dispensing of Controlled Substances to Assist Suicide,"<sup>227</sup> claiming that assisted suicide is not a legitimate medical purpose, and that federal law regulating controlled substances supersedes state laws permitting physician-assisted suicide.<sup>228</sup> The next day, the Oregon Attorney General filed suit in district court, seeking an injunction against the federal government to bar it from interfering with the Death with Dignity Act. On November 8, District Judge Robert E. Jones issued a temporary restraining order, "enjoining the defendants from enforcing, applying, or otherwise giving any legal effect to the attorney general's directive,"<sup>229</sup> reasoning that Ashcroft's directive would do "irreparable harm" to those citizens of Oregon who were relying on the Death with Dignity Act.<sup>230</sup> In April 2002, Judge Jones issued a permanent injunction against the Ashcroft directive, reasoning that Congress never intended, through the Controlled Substances Act or through any other federal law, to confer blanket authority to the Attorney General to define what constitutes the legitimate practice of medicine.<sup>231</sup> Rather, Jones concluded, the control and regulation of medicine remains fundamentally an area of state prerogative.<sup>232</sup> Ashcroft appealed the decision to the Ninth Circuit, but the decision was upheld.<sup>233</sup>

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225. Savage, *supra* note 219.

226. See Lois Snyder & Arthur L. Kaplan, *Assisted Suicide: Finding Common Ground*, 132 ANNALS INTERNAL MEDICINE 468, 468-69 (2000) ("Proponents will say the law is working, that the floodgates have not, in fact, been opened and that no abuses have occurred."). *But see Man Survives Doctor-Assisted Suicide Attempt*, MSNBC, Mar. 4, 2005, <http://msnbc.com/id/7090928> (reporting that an Oregon patient awoke after ingesting a "lethal" dose of barbiturates).

227. 66 Fed. Reg. 56,607 (Nov. 9, 2001) (to be codified at 21 C.F.R. pt. 1306).

228. *Id.*

229. See Amber Orr & Linda MacDonald Glenn, *Oregon v. Ashcroft: Physician Assisted Suicide with Federally Controlled Substances*, VIRTUAL MENTOR, Jan. 2003, <http://www.ama-assn.org/ama/pub/category/9462.html>.

230. *Id.*

231. *Oregon v. Ashcroft*, 192 F. Supp. 2d 1077, 1089 (D. Or. 2002).

232. *Id.* at 1092 ("The determination of what constitutes a legitimate medical practice or purpose traditionally has been left to the individual states. State statutes, state medical boards, and state regulations control the practice of medicine.").

233. *Oregon v. Ashcroft*, 368 F.3d 1118 (9th Cir. 2004).

More recently, the United States Supreme Court granted certiorari in the case.<sup>234</sup> On January 17, 2006, the Court ruled, in a six-to-three decision, that the Controlled Substances Act does not allow the United States Attorney General to prohibit doctors from prescribing drugs for use in physician-assisted suicide under the law permitting the procedure.<sup>235</sup>

Oregon passed the Death with Dignity Act more than ten years ago and has successfully defended it against both legislation and litigation, but curiously, all comparable state initiatives have failed. Voters in Washington, California, and Maine have considered—and rejected—legalizing physician-assisted suicide.<sup>236</sup> Michigan voters rejected a physician-assisted suicide measure as well.<sup>237</sup> Indeed, responding to the notorious assisted suicides of Jack Kevorkian, the iconic champion of American euthanasia,<sup>238</sup> the Michigan legislature amended its state laws to criminalize the acts of anyone who assisted in suicide.<sup>239</sup> In 1999, Dr. Kevorkian was sentenced to ten to twenty-five years in prison for second-degree murder.<sup>240</sup>

Today, Oregon remains a curious anomaly, standing alone among American states. "Forty-six states stand opposed to Oregon, formally criminalizing [physician-assisted suicide]. Forty of them (most recently Ohio in November 2002) have passed statutes that prohibit the practice, and six prohibit

234. *Gonzales v. Oregon*, 543 U.S. 1145 (2005).

235. *Gonzales v. Oregon*, 126 S. Ct. 904, 925 (2006).

236. Faith Lagay, *Physician-Assisted Suicide: The Law and Professional Ethics*, VIRTUAL MENTOR, Jan. 2003, <http://www.ama-assn.org/ama/pub/category/9422.html>.

237. *Id.*

238. Jack Lessenberry, *Death Becomes Him*, VANITY FAIR, July 1994, at 108, available at <http://www.kevork.org/vanityfa.htm> (last visited Nov. 7, 2005) (noting that Dr. Jack Kevorkian's "fame is nationwide: 94 percent of Americans know who he is; only the president and First Lady have higher name recognition").

239. See MICH. COMP. LAWS ANN. § 750.329(a) (West 2004) (effective Sept. 1, 1998). The law criminalized the actions of any person who:

(a) Provides the means by which the individual attempts to kill himself or herself or kills himself or herself

(b) Participates in an act by which the individual attempts to kill himself or herself or kills himself or herself

(c) Helps the individual plan to attempt to kill himself or herself.

*Id.*

240. Bryan Robinson et al., *Kevorkian Sentenced to 10 to 25 Years for Murder*, COURT TV, Apr. 13, 1999, [http://www.courtvtv.com/trials/kevorkian/041399\\_pm\\_ctv.html](http://www.courtvtv.com/trials/kevorkian/041399_pm_ctv.html) (reporting that Kevorkian was sentenced to ten to twenty-five years for the second-degree murder of Thomas Youk).



it by common law. Three states—North Carolina, Utah, and Wyoming—have neither criminalized nor legalized physician-assisted suicide.<sup>241</sup>

This is peculiar, given the widespread public support for physician-assisted suicide. Public opinion polls indicate that most Americans favor legalization.<sup>242</sup> Even physicians, as a class, are not unanimous in their condemnation of the practice. Although the AMA has taken a firm position against physician-assisted suicide,<sup>243</sup> and although their position carries significant weight,<sup>244</sup> research indicates that many physicians condone or affirmatively support the practice.<sup>245</sup> One study reported that only about one-third of Oregon physicians had moral, ethical, or religious objections to assisting in suicides.<sup>246</sup> Another study reported that, in Oregon, about one in six requests for physician-assisted suicide were granted, and that about one in ten of these requests resulted in suicide.<sup>247</sup>

A nationwide study of physicians indicated that nearly one in five doctors (18.3%) had received a request for life-ending medication and that 11.1% had received a request for a lethal injection; 11% of the physicians said they would prescribe lethal medication under current legal constraints (36% if it was legal),

241. Lagay, *supra* note 236.

242. See SOURCEBOOK, *supra* note 118, at tbl.2.94, available at <http://www.albany.edu/sourcebook/pdf/t296.pdf> (noting that, between 1996 and 2004, public support for legalizing physician-assisted suicide ranged between a low of fifty-two percent and a high of sixty-eight percent).

243. See AM. MED. ASS'N, CODE OF ETHICS E-2.211, *supra* note 193 (noting that "physician-assisted suicide is fundamentally incompatible with the physician's role as healer, would be difficult or impossible to control, and would pose serious societal risks"). This language is identical to that used in the AMA's prohibition against euthanasia. See *supra* note 211 (emphasizing the contrast between the physician's role as healer and euthanasia).

244. See Kenneth Baum, "To Comfort Always": Physician Participation in Executions, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 47, 56 n.32 (2001) ("The fact that the AMA has weighed in against physician participation is of great importance, due to its recognized role, both inside and outside the profession, as the voice of organized medicine. . . . Even the judicial system looks to the AMA for guidance on issues of medical ethics."); David Orentlicher, *The Influence of a Professional Organization on Physician Behavior*, 57 ALB. L. REV. 583, 591 (1994) (concluding that "professional regulation can have a substantial impact on physician behavior").

245. See Simon M. Whitney et al., *Views of United States Physicians and Members of the American Medical Association House of Delegates on Physician-Assisted Suicide*, 16 J. GEN. INTERNAL MED. 290, 293 (2001) (reporting that while only 23.5% of AMA delegates believe there should be a law legalizing physician-assisted suicide, 44.5% of surveyed rank-and-file physicians favor such a law); *Physicians: Leave Assisted Suicide to Doctors, Patients*, AMEDNEWS.COM, June 4, 2001, <http://www.ama-assn.org/amednews/2001/06/04/prsa0604.htm>.

246. Melinda A. Lee et al., *Legalizing Assisted Suicide—Views of Physicians in Oregon*, 334 NEW ENG. J. MED. 310, 311 (1996).

247. See Ganzini, *supra* note 224, at 563 (studying the effect of the Death With Dignity Act).

and 7% said they would provide a lethal injection (24% if it was legal); 3.3% reported that they had written at least one lethal prescription, and 4.7% reported administering at least one lethal injection.<sup>248</sup> Overall, 6.4% of the doctors "reported having acceded to at least one request for assistance with suicide or a lethal injection."<sup>249</sup> This study indicated that pain control was the main reason that doctors acquiesced to patients' requests for life-ending treatment;<sup>250</sup> interestingly, though, the doctors perceived that most patients were motivated to end their lives not because of pain, but because of psychological distress.<sup>251</sup>

A growing body of literature indicates that terminally-ill patients do not end their lives because of physical pain, but because of psychological conditions.<sup>252</sup> The physicians surveyed in the nationwide study believed that patients asked for assistance because of the following reasons: discomfort other than pain, loss of dignity, fear of uncontrollable symptoms, actual pain, loss of meaning in their lives, being a burden, and dependency.<sup>253</sup> Similarly, other researchers have found that decisions to seek physician-assisted suicide were associated with concerns about loss of autonomy and control, not fear of pain.<sup>254</sup>

Two psychological states appear to be particularly linked to requests for euthanasia and physician-assisted suicide: depression and hopelessness.<sup>255</sup> The

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248. See Diane E. Meier et al., *A National Survey of Physician-Assisted Suicide and Euthanasia in the United States*, 338 NEW ENG. J. MED. 1193, 1195, 1199 (1998) (reporting data from national physician survey).

249. *Id.* at 1195.

250. See *id.* at 1195–96 (reporting data from national physician survey).

251. See *id.* at 1195 (reporting data from national physician survey).

252. See Harvey Max Chochinov et al., *Depression, Hopelessness, and Suicidal Ideation in the Terminally Ill*, 39 PSYCHOSOMATICS 366, 368–69 (1998) (identifying a range of putative risk factors for suicide and stating that depression is the dimension of psychopathology with the most empirical support); Ezekiel J. Emmanuel et al., *Euthanasia and Physician-Assisted Suicide: Attitudes and Experience of Oncology Patients, Oncologists, and the Public*, 347 LANCET 1805, 1809 (1996) (reporting that depression, not pain, was related to the hoarding of drugs for possible future suicide attempts); Keith G. Wilson et al., *Attitudes of Terminally Ill Patients Toward Euthanasia and Physician-Assisted Suicide*, 160 ARCHIVES OF INTERNAL MED. 2454, 2454 (2000) (concluding that "psychological considerations may be at least as salient as physical symptoms").

253. See Meier et al., *supra* note 248, at 1195 (listing the cited reasons in descending order of reporting).

254. See Chin et al., *supra* note 223, at 582 (studying Oregon's legalization of physician-assisted suicide); see also Meier et al., *supra* note 248, at 1195 (listing "discomfort other than pain," "loss of dignity," and "fear of uncontrollable symptoms" as more prominent in physicians' perception of their patients' end-of-life decisionmaking than actual pain).

255. See William Breitbart et al., *Depression, Hopelessness, and Desire for Hastened Death in Terminally Ill Cancer Patients*, 284 JAMA 2907, 2910 (2000) (identifying both depression and hopelessness as correlative factors); Harvey Max Chochinov et al., *Prevalence of*

two conditions sometimes overlap,<sup>256</sup> but research indicates that both factors contribute independently toward the desire for a hastened death.<sup>257</sup>

Clinical depression,<sup>258</sup> relatively common among terminal patients considering physician-assisted suicide,<sup>259</sup> may increase the likelihood of suicide "by diminishing the ability to appreciate life's benefits and magnifying life's burdens."<sup>260</sup> One study found that "all of the patients who had either desired premature death or contemplated suicide were judged to be suffering from clinical depressive illness; that is, none of those patients who did not have clinical depression had thoughts of suicide or wished that death would come early."<sup>261</sup> Another study found that depressed patients were four times more likely to have a high desire for hastened death than non-depressed patients.<sup>262</sup> But among terminally-ill patients, depressive symptoms are not necessarily evidence of psychopathology. Indeed, Margaret Drickamer and her colleagues have suggested that "[w]hen mild, such depressive psychological symptoms as dysphoria, hopelessness, diminished self-esteem, and difficulty experiencing

*Depression in the Terminally Ill: Effects of Diagnostic Criteria and Symptom Threshold Judgements*, 151 AM. J. PSYCHIATRY 537, 539 (1994) (studying the prevalence of depression and the difficulty of accurate diagnosis).

256. See Chochinov, *supra* note 196, at 1337 ("Several studies have reported that hopelessness is an ardent predictor of suicidal ideation, even among the terminally ill, and that hopelessness is usually most pronounced in patients meeting criteria for major depression."). But see Breitbart et al., *supra* note 255, at 2911 (noting only a modest correlation ( $r = 0.29$ ) between depression and hopelessness).

257. See Breitbart et al., *supra* note 255, at 2910 (concluding that "depression and hopelessness provide independent contributions to desire for hastened death"); Chochinov et al., *supra* note 252, at 366 (reporting a "relatively consistent association between hopelessness and suicide that cannot be explained by depression alone").

258. See *supra* note 127 & tbl.2 (identifying diagnostic criteria for major depression).

259. See Drickamer et al., *supra* note 196, at 147 (describing the mental state of patients); Emmanuel et al., *supra* note 252 (describing "patients who had seriously considered and prepared for . . . physician-assisted suicide . . . [as] significantly more likely to be depressed"); see also Breitbart et al., *supra* note 255, at 2910 (reporting "substantial rates" (17%) of clinical depression among his sample).

260. Drickamer et al., *supra* note 196; see also Mark D. Sullivan & Stuart J. Younger, *Depression, Competence, and the Right to Refuse Lifesaving Medical Treatment*, 151 AM. J. PSYCHIATRY 971, 976 (1994) (studying the complex interaction between depression-related suicidal ideation and a competent patient's right to refuse medical care).

261. James H. Brown et al., *Is It Normal for Terminally Ill Patients to Desire Death?*, 143 AM. J. OF PSYCHIATRY 208, 210 (1986) (suggesting that terminally-ill patients not suffering from depression were no more likely to desire premature death than the general population).

262. See Breitbart et al., *supra* note 255, at 2910 (emphasizing the effect of depression on patients' desires for death).

pleasure may be realistic responses to a terminal prognosis and the limitations associated with terminal illness.<sup>263</sup>

Hopelessness appears to play an even greater role in patient suicide than depression.<sup>264</sup> Hopelessness, "characterized as a pessimistic cognitive style rather than an assessment of . . . poor prognosis,"<sup>265</sup> can become the lens through which patients view all issues of death and dying. Hopelessness may be closely linked to feelings of helplessness, which has been advanced as a causal theory for human depression.<sup>266</sup> A sense of powerlessness, of futility, and of vainness may lead to both (1) feelings of despair and depression, and (2) a need to do something—anything—decisive, such as terminating one's life. Thus, for individuals consumed with hopelessness, physician-assisted suicide can loom as a particularly compelling alternative.<sup>267</sup>

When depression and hopelessness are simultaneously present, the likelihood of suicide becomes even greater. William Breitbart and his colleagues wrote:

Among [terminal] patients who were neither depressed nor hopeless, none had high desire for hastened death, whereas approximately one fourth of the patients with either one of these factors had high desire for hastened death, and nearly two thirds of patients with both depression and hopelessness had high desire for hastened death.<sup>268</sup>

For those who suffer from both depression and hopelessness, perseverance becomes the exception, and suicidal ideation becomes the rule. The promise of assisted suicide becomes a comfort. But how should the medical profession respond to the plight of terminally-ill patients who are motivated not by the need to escape intolerable physical pain, but by the desire to retain a vestige of

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263. Drickamer et al., *supra* note 196, at 148. In the same way, what diagnostically appears to be clinical depression may be nothing more than an adaptive response to the conditions of death row. *See supra* note 150 (noting that it can be extraordinarily difficult to diagnose depression on death row because responses that are appropriate to life on death row register as depressive symptoms on psychological instruments).

264. *See* Breitbart et al., *supra* note 255, at 2909 (reporting a stronger relationship between hopelessness and desire for death than between depression and desire for death); Chochinov et al., *supra* note 252, at 369 (stating that studies show "hopelessness is associated with suicidal ideation more strongly than is depression").

265. Breitbart et al., *supra* note 255, at 2910; *see also* Chochinov et al., *supra* note 252, at 367 (examining the relation between depression and hopelessness).

266. *See* Seligman, *supra* note 122, at 411 (studying the "behavioral and psychological impact of uncontrollable traumatic events").

267. *See* Chochinov et al., *supra* note 252, at 369 (concluding that hopelessness is a better indicator of suicidal ideation than depression).

268. Breitbart et al., *supra* note 255, at 2910.

dignity?<sup>269</sup> How should the medical profession respond to incurable patients who make their decisions because of subjective states of depression and hopelessness?<sup>270</sup> Should it honor their wishes or, with regret, refuse their requests? Though individual physicians may be sympathetic,<sup>271</sup> and though the practice may be legally permissible in Oregon, the AMA has stated that physician-assisted suicide is inconsistent with the role of the physician and therefore has forbidden it as unethical.<sup>272</sup>

Can the AMA's bright-line rule provide meaningful guidance to the death row lawyer confronted with a volunteering client?<sup>273</sup> Can the same principle of beneficence be superimposed on the framework of the capital attorney? Given the elevated rates of depression on death row<sup>274</sup> and the hopelessness borne of dehumanizing conditions of incarceration,<sup>275</sup> the rate of desire for hastened death among condemned men must be *very* high. Having a bright-line legal rule prohibiting the attorney's involvement might be useful, but such a rule would be appropriate only if the situation of the attorney with a volunteering death row client is sufficiently analogous to that of the physician with a terminally-ill patient who requests physician-assisted suicide.

Accordingly, the next section compares the role of the doctor and lawyer and contrasts death by terminal illness to death by execution. It asks whether the lawyer's role in a case of capital volunteering more resembles physician-assisted suicide, which is forbidden, or the withdrawal of life-sustaining treatment, which is legal in all United States jurisdictions, and is viewed as non-controversial,<sup>276</sup> even by medical associations such as the AMA.<sup>277</sup> If the analogies

269. See *supra* note 252 and accompanying text (suggesting that psychological factors play a greater role than pain in decisions to pursue physician-assisted suicide).

270. See *supra* notes 255–65 and accompanying text (describing roles of depression and hopelessness in making end-of-life decisions).

271. See *supra* notes 246, 248 and accompanying text (describing moderate physician support for physician-assisted suicide).

272. See *supra* notes 192, 211, 243 (forbidding involvement of physicians in euthanasia or physician-assisted suicide).

273. Presumably, the same analysis might apply to lawyers who represent terminally-ill patients, but that discussion is beyond the scope of this Article.

274. See *supra* note 119 and accompanying text (describing elevated rates of clinical depression in prison).

275. See *infra* notes 333–71 and accompanying text (describing the dehumanizing conditions of confinement on death row).

276. See Allen C. Snyder, *Competency to Refuse Lifesaving Treatment: Valuing the Nonlogical Aspects of a Person's Decisions*, 10 ISSUES LAW & MED. 299, 300 (noting that since 1986, "courts have accepted the principle that a patient retains the right to refuse treatment, even when halting that treatment would result in the patient's death").

277. AM. MED. ASS'N, CODE OF ETHICS E-2.20 (1996). The Code states:

are sound, and if death row representation is more akin to physician-assisted suicide than to withdrawal of treatment, the AMA's unequivocal position on physician-assisted suicide may shed important light on the ambiguous demands of contemporary legal ethics.

### *B. Adequacy of the Analogy*

There are obvious similarities between the lawyer with a death row client who wants to volunteer for execution and the doctor with a terminally-ill patient who wants to volunteer for physician-assisted suicide. Several others have touched upon the theme,<sup>278</sup> and at least one scholar has published a sustained comparison of the two.<sup>279</sup> There are, however, essential differences between the two. The application of medical ethics to the conundrum of the death volunteer is only warranted if the situations are sufficiently analogous: if lawyers sufficiently resemble doctors, and if pending executions sufficiently resemble terminal illness.

#### *1. Equating Doctors and Lawyers*

In her comparison of physician-assisted suicide and capital volunteering, Julie Levinsohn Milner notes that several themes figure prominently in both cases—competency, potential for abuse, irreversibility of death, and the preservation of life—and concludes that the situations should be treated similarly.<sup>280</sup> She goes on to argue that "[n]ot only are the legal issues and state interests comparable and analogous between these two topics, so too are the issues facing the

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The social commitment of the physician is to sustain life and relieve suffering. Where the performance of one duty conflicts with the other, the preferences of the patient should prevail. The principle of patient autonomy requires that physicians respect the decision to forego life-sustaining treatment of a patient who possesses decisionmaking capacity.

*Id.*

278. See, e.g., *Lenhard ex rel. Bishop v. Wolff*, 444 U.S. 807, 815 (1979) (Marshall, J., dissenting) (insisting that a condemned prisoner's waiver of appeals "amounts to nothing less than state-administered suicide"); Mello, *supra* note 42, at 49 (noting that death row prisoners, uniquely, can receive state-assisted suicide).

279. See Julie Levinsohn Milner, Note, *Dignity or Death Row: Are Death Row Rights to Die Diminished? A Comparison of the Right to Die for the Terminally Ill and the Terminally Sentenced*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 279 *passim* (1998) (comparing physician-assisted suicide by terminally ill patients with death row inmates who volunteer for execution).

280. See *id.* at 291 (comparing physician-assisted suicide by terminally ill patients with death row inmates who volunteer for execution).

lawyers and doctors involved. Both a doctor and a defense lawyer cope with similar personal and professional conflicts.<sup>281</sup> Milner focuses her comparison on three tensions: (1) the tension between what the client-patient wants and what is permitted by standard professional practice,<sup>282</sup> (2) the tension between what the client-patient wants and what can be risked under the threat of malpractice claims,<sup>283</sup> and (3) the tension between what the client-patient wants and the personal beliefs of the doctor-lawyer.<sup>284</sup> These similarities are both relevant and meaningful, but the physician and the attorney are also similar in several other (less abstract) ways.

Physicians and attorneys both possess advanced academic degrees. The AMA describes the educational process of becoming a doctor as "lengthy."<sup>285</sup> A physician begins with four years at a college or university to earn a B.A. or B.S. degree, studies for four more years at an accredited medical school to earn a M.D. degree, takes up a residency for three to seven more years, and then, if interested in a specialized area of practice, studies for an additional one to three years.<sup>286</sup> It takes anywhere from eleven to nearly twenty years of higher education to become a doctor. While the educational process of becoming a lawyer is not as arduous, it still involves four years of college for a B.A. or B.S. degree and three years in an accredited law school to earn a J.D. degree.<sup>287</sup> It typically takes seven years of higher education to become a lawyer.

Moreover, both doctors and lawyers must become licensed by the state in which they wish to practice before they can put their educations to work. Doctors must obtain a license to practice medicine, and lawyers must be admitted to the bar. Even after becoming licensed, doctors and lawyers may be required to earn continuing education credits to maintain their knowledge and skills.<sup>288</sup> But once they have been appropriately licensed, doctors and lawyers

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281. *Id.* at 302.

282. *See id.* at 302–08 (exploring the similarities between doctors and lawyers).

283. *See id.* at 308–09 (discussing the possibility of malpractice claims from the perspectives of both doctors and lawyers).

284. *See id.* at 310–12 (noting the difficulties inherent in the situation when a client-patient wishes to die).

285. AM. MED. ASS'N, HOW DO YOU BECOME A PHYSICIAN?, <http://www.ama-assn.org/ama/pub/category/14365.html> (last visited Nov. 7, 2005) ("The education of physicians in the United States is lengthy and involves undergraduate education, medical school and graduate medical education.").

286. *Id.*

287. LAWFORKIDS.ORG, HOW LONG DOES IT TAKE AND WHAT DO YOU HAVE TO DO TO BECOME A LAWYER?, [http://www.lawforkids.org/speakup/view\\_question.cfm?id=422](http://www.lawforkids.org/speakup/view_question.cfm?id=422) (last visited Mar. 8, 2005).

288. *See* AM. MED. ASS'N, *supra* note 285 (describing state requirements for continuing medical education).

enjoy near-unique professional status. Both medicine and law are potentially lucrative careers. In 2002, family practitioners in America averaged an annual salary of \$150,267 and anesthesiologists averaged \$306,964;<sup>289</sup> lawyers in America averaged \$90,290.<sup>290</sup> And as members of the "professions"<sup>291</sup>—careers which require extensive training and specialized study—doctors and lawyers belong to the most prestigious careers in existence. The Nam-Powers-Boyd Occupational Status Scale ranks the status of occupations between one and one hundred.<sup>292</sup> Dishwashers, cafeteria attendants, and counter attendants have a status score of one.<sup>293</sup> Physicians and surgeons, on the other hand, have a status score of one hundred.<sup>294</sup> And despite all the mean-spirited lawyer jokes in the world, lawyers have a status score of ninety-nine: nearly as high as physicians.<sup>295</sup>

Perhaps doctors and lawyers enjoy this kind of status because they obfuscate their work with a cant of appropriated Latin<sup>296</sup> or because they have specialized knowledge and skills. Doctors can give an injection, set a broken bone, or prescribe narcotic medication; lawyers can draft a contract, prepare a will, or subpoena documents. Perhaps they enjoy this kind of status because

289. BUREAU OF LABOR STATISTICS, PHYSICIANS AND SURGEONS, <http://www.bls.gov/oco/ocos074.htm> (last visited Nov. 7, 2005) (reporting educational requirements, working conditions, job outlook, and income of physicians and surgeons).

290. BUREAU OF LABOR STATISTICS, LAWYERS, <http://www.bls.gov/oco/ocos053.htm> (last visited Feb. 25, 2005) (reporting educational requirements, working conditions, job outlook, and income of lawyers).

291. See Michael Davis, *Professions and War*, 16 PERSPS. ON PROFS. 1, 1 (1997) (tracing the etymological history of the word "professions").

292. Charles B. Nam & Monica Boyd, *Occupational Status in 2000: Over a Century of Census-Based Measurement*, 23 POPULATION RES. & POL'Y REV. 327, 331 (2004) (reviewing occupational status). A table identifying the Nam-Powers-Boyd occupational status scores is available at <http://www.fsu.edu/~popctr/papers/floridastate/04-149.pdf> (last visited Nov. 7, 2005).

293. See *id.*

294. See *id.* The only other occupation to enjoy a status score of 100 is that of a dentist. *Id.*

295. *Id.* Lawyers actually have a higher score than "judges, magistrates, and other judicial workers" (ninety-eight) and, with a score of ninety-nine, rival occupations such as "astronomers and physicists," "optometrists," and "podiatrists." Except for these three careers, no other listed occupation matches the status associated with lawyers. *Id.*

296. See RUSS VERSTEEG, *ESSENTIAL LATIN FOR LAWYERS* (1990) (explaining Latin terms commonly used in law); Elena Marečková et al., *Latin as the Language of Medical Terminology: Some Remarks on Its Role and Prospects*, 132 SWISS MED. WKLY. 581, 581 (2002), available at <http://www.smw.ch/pdf200x/2002/41/smw-10027.pdf> (last visited Mar. 8, 2005) (noting that Latin phrases are commonly used in anatomical, clinical, pharmaceutical, and other medical contexts).



they are so educated and because, at least in the minds of some members of the public, education translates into wisdom.

Perhaps it is something else. Maybe doctors and lawyers enjoy the status they do because the public understands, or intuits, that they are bound by principles of professional ethics, the hallmarks of which are beneficence,<sup>297</sup> responsibility to the client,<sup>298</sup> and a duty of confidentiality.<sup>299</sup> The need for clients and patients to confide openly and candidly with their counsel and their healers is so essential to the practices of medicine and law that some of these individuals, like a spouse or a member of the clergy, enjoy a legal privilege against testifying.<sup>300</sup>

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297. See MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (1999) (noting that the lawyer "should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf"); *id.* R. 1.2(a) (noting the lawyer's duty to serve the interests of the client); *supra* note 187 (noting the physician's oath to do all that is advantageous and to refrain from anything that is harmful). In some ways, the beneficence of the doctor and the lawyer appear to be distinguishable. The doctor's beneficence is defined by an objective good—avoiding harm to the patient—while the lawyer's beneficence is defined by a subjective good—serving the lawful interests of the client, whatever these might be. But the distinction between medical and legal beneficence is not as clear-cut as it appears. The doctor's polestar of *harm* is actually somewhat subjective. Cosmetic surgeons regularly subject their patients to all of the risks associated with surgery (e.g., general anesthesia, drug reactions, infection, and pain) even though there may be no physical benefit associated with the procedure. Yet this is ethical because the psychological benefits of the surgery outweigh the medical risks. Similarly, the lawyer's polestar of "the client's interests" is actually somewhat objective. Even though a condemned client might want to waive his rights of appeal, he cannot do so. His conviction must be appealed, even if he instructs his lawyer not to appeal. See *supra* note 45 (noting that forty-nine states do not allow defendants to waive their sentence reviews). And while lawyers must generally abide by their clients' decisions concerning the goals of representation, they are prohibited from violating the law or their professional obligations. See MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (1999), R. 1.2 cmt. 1 (noting that the lawyer must act "within the limits imposed by the law and . . . professional obligations").

298. See MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (1999) (describing the lawyer's obligations regarding the scope of representation); *supra* note 187 (stating the physician's oath to act on behalf of the patient).

299. See MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (1999) (noting that the "lawyer shall not reveal information of a client"); AMA, PATIENT CONFIDENTIALITY, <http://www.ama-assn.org/ama/pub/category/4610.html> (last visited Mar. 8, 2005) ("Physicians have always had a duty to keep their patients' confidences. In essence, the physician's duty to maintain confidentiality means that a physician may not disclose any medical information revealed by a patient or discovered by a physician in connection with the treatment of a patient.").

300. See Kenneth S. Broun, *Giving Codification a Second Chance—Testimonial Privileges and the Federal Rules of Evidence*, 53 HASTINGS L.J. 769, 772 (2002) (tracing the common law development of legal privilege and describing the efforts to codify it); *id.* at 780 (describing evolution of the attorney-client privilege); *id.* at 781 (noting that though there is no general privilege for physicians, certain types of medical information are protected); *id.* at 780–81 (recognizing the spousal testimony privilege and the clergy-communicant privilege).

Physicians and attorneys have fundamentally different skill sets. While physicians are trained as scientists and interact with their patients as organisms, lawyers are trained as advocates (achieving their objectives with the power of rhetoric and logic) and interact with their clients as egos, as wills. Yet physicians and attorneys are not so very different. Both doctors and lawyers use their specialized knowledge to solve other people's problems. Both doctors and lawyers apply their specialized skills in situations involving real human beings, and both are regularly called upon to navigate complicated ethical circumstances. The circumstances surrounding the capital volunteer are different from those surrounding the terminal patient seeking physician-assisted suicide, but the obligations of the doctor and the lawyer are equivalent. Both must offer the best counsel they can, and both must seek to advance the interests of the patient-client under the principles of beneficence, responsibility, and confidentiality. Thus, for purposes of the analysis, physicians (as healers) and attorneys (as champions) are analytically analogous.

## 2. Equating Illness and Execution

In her comparison of terminal patients and death row volunteers, Julie Levinsohn Milner identifies several ways in which terminal illnesses and executions are different.<sup>301</sup> She acknowledges that the death of a terminal patient is a private matter while the death of a condemned inmate is generally considered to be a public matter,<sup>302</sup> she recognizes that the distinction between active and passive approaches to ending life complicate the analysis,<sup>303</sup> and she addresses the essential difference between someone whose life is ending because of disease and someone whose life is ending because of state-imposed punishment.<sup>304</sup> In Milner's view, however, these distinctions are not dispositive.<sup>305</sup> Terminal illness and pending execution are to be treated as analogues.

There are other sound reasons to equate the two. For both the terminal patient exploring physician-assisted suicide and the condemned inmate

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301. Milner, *supra* note 279, at 322 ("There are, of course, differences between the terminally ill patient and death row inmate and their respective situations.").

302. *Id.* at 322–24 (distinguishing between public and private matters).

303. *Id.* at 324–27 (distinguishing between active and passive death); *see infra* Part V.B.3 (comparing physician-assisted suicide with "attorney-assisted suicide").

304. Milner, *supra* note 279, at 327 (noting that punishment is a difference in the issues facing the client and the patient).

305. *Id.* at 322 (noting that "the differences that do exist between these individuals are not dispositive in determining that they should be treated differently").

considering volunteering, death is imminent. All human beings, as sentient creatures, know that they shall some day die, but the condemned inmate and the terminal patient view death quite differently than the rest of us. Death, for them, is no distant specter. Death is very real and is close enough to glimpse. Terminal patients, as "terminal," know to expect death within six or twelve months.<sup>306</sup> Condemned prisoners know that death by lethal injection, electric chair, hanging, gas chamber, or firing squad waits on the other side of the appeals process.<sup>307</sup> Their executions may be years away, but many condemned men wake in the morning and go to sleep at night knowing the date upon which they are scheduled to die.<sup>308</sup> Yet deaths do not always occur as expected. Diseases sometimes go into remission, and death row sentences can be modified by grants of clemency.<sup>309</sup> After demonstrating that they were wrongly convicted, some death row prisoners (even those who came precariously close to execution) have even been freed from prison and returned to their communities.<sup>310</sup>

Death is imminent for both the condemned prisoner and the terminal patient, but not equally so. This seems like a significant distinction. After all, to be eligible for physician-assisted suicide, Oregon patients must have a life

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306. See Drickamer, *supra* note 196, at 148–49 (providing one definition of "terminally ill" as "having an incurable or irreversible condition that has a high probability of causing death within a relatively short period of time with or without treatment [one year]" and providing a definition of "terminal disease" as "an incurable and irreversible disease that has been medically confirmed and will, within reasonable medical judgment, produce death within six months").

307. See L. KAY GILLESPIE, *INSIDE THE DEATH CHAMBER: EXPLORING EXECUTIONS* 51–69 (2003) (describing the five methods of execution available in the United States).

308. *District Attorney for Suffolk District v. Watson*, 411 N.E.2d 1274, 1292 (Mass. 1980) ("A condemned man knows, subject to the possibility of successful appeal or commutation, the time and manner of his death. His thoughts about death must necessarily be focused more precisely than other people's. He must wait for a specific death, not merely expect death in the abstract.").

309. See ROBERT M. BOHM, *DEATHQUEST II*, at 179 (2d ed., 2003) (identifying three kinds of clemency: reprieve [staying an execution], commutation [substituting a lesser punishment for death], and pardon [an "erasing" of the crime]). In 1972, the United States Supreme Court's holding in *Furman* commuted the sentences of those who were on death row, and in 2002, Governor George Ryan commuted the sentences of all those on Illinois's death row. Monica Davey & Steve Mills, *Illinois Governor Sweeps Inmates from Death Row*, ORLANDO SENTINEL, Jan. 12, 2003, at A1. But Bohm refers to the "illusive hope of clemency" for a very good reason. BOHM, *supra* at 178. "While prior to 1970, governors in death penalty states 'routinely commuted up to a third of the death sentences that they reviewed,'" that rate has plummeted to "about one death sentence per year (in the entire country)." *Id.* at 180.

310. See, e.g., MARGARET EDDIS, *AN EXPENDABLE MAN: THE NEAR-EXECUTION OF EARL WASHINGTON JR.* 208–09 (2003) (describing the return of death row inmate Earl Washington Jr. to his community).

expectancy of less than six months,<sup>311</sup> while the mean duration on death row from sentencing to execution exceeds ten years.<sup>312</sup> But the ten-year average on death row is a product of the protracted capital appeals process. Volunteers often move expeditiously from death row to the death chamber. There were only 186 days between Timothy McVeigh's notification of the court that he wished to waive his appeals and his execution;<sup>313</sup> for Robert Smith, there were only 566 days between his sentencing and execution, and only ninety-eight days between his (compulsory and unwaivable) appellate review and execution.<sup>314</sup> Thus, in terms of proximity to death, the terminal patient and the volunteer are not so very different.

The role of punishment, identified by Milner,<sup>315</sup> seems like another apparently meaningful distinction between the terminal patient and the death row prisoner. Yet here, too, the patient and the prisoner are not as different as they might seem. Though it may be tempting to demonize death row inmates as

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311. OR. REV. STAT. § 127.800(12) (2003) (defining "terminal disease" as "an incurable and irreversible disease that has been medically confirmed and will, within reasonable medical judgment, produce death within six months"); *id.* § 127.805 (permitting a patient suffering from a terminal disease to request assisted suicide in writing); *see supra* note 306 (defining "terminal disease").

312. *See* THOMAS P. BONCZAR & TRACY L. SNELL, CAPITAL PUNISHMENT, 2003, at 11 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp03.pdf> (last visited Mar. 8, 2005) (reporting an average of 131 months from sentencing to execution in 2003).

313. Oklahoma City bomber Timothy McVeigh wrote a statement on Dec. 7, 2000, foregoing all appellate remedies. He also asked to be executed within 120 days of filing the statement. Statement of Timothy McVeigh Regarding Notice of Intent to Forego Further Appeals, <http://www.thesmokinggun.com/archive/mcveighaff1.html> (last visited Mar. 8, 2005). His attorneys conveyed his wishes to the court on Dec. 11, 2000. *Id.* The court granted McVeigh's request on Dec. 28, 2000. Ed Halloran, *Judge Grants Bomber's Request to Stop Appeals*, [http://courttv.com/news/2000/1228/mcveigh\\_ctv.html](http://courttv.com/news/2000/1228/mcveigh_ctv.html) (last visited Mar. 8, 2005). The Bureau of Prisons set a May 16, 2001 date for his execution. *Federal Officials Set May Execution Date for McVeigh*, [http://courttv.com/news/2001/0117/mcveigh\\_ap.html](http://courttv.com/news/2001/0117/mcveigh_ap.html) (last visited Mar. 8, 2005). But after it was revealed that the government had failed to disclose exculpatory documents during McVeigh's trial, Attorney General John Ashcroft delayed the execution until June 11, 2001. *Timothy McVeigh Timeline*, CNN <http://www.cnn.com/CNN/Programs/people/shows/mcveigh/timeline.html> (last visited Mar. 8, 2005). McVeigh was put to death at 7:14 a.m. on June 11th by lethal injection in Terre Haute, Indiana. *Id.* He was the first person to be executed by the federal government in 38 years. *Supra* note 5. Exactly 186 days (six months and four days) lapsed between the date upon which McVeigh drafted his waiver and the date upon which he was put to death.

314. For a discussion of the Robert A. Smith case, *see supra* Part III.C. For the dates of Smith's sentencing, appellate review, and execution, *see supra* notes 156–57 and accompanying text. In terms of years, 566 days equals one year, six months, and seventeen days. In terms of months, ninety-eight days is only three months and six days.

315. *See* Milner, *supra* note 279, at 327 (noting punishment as a distinguishing factor between patients and prisoners).

deserving whatever they get, and though it may be tempting to beatify terminal patients as innocents victimized by fate, a philosophical analysis of "just deserts" is more complicated than that. Not everyone on death row is a monster. Not everyone is even guilty.<sup>316</sup> Even among the guilty, not all are equally culpable: Some death row inmates were under the influence of drugs when they committed their crimes, and others were mentally ill. Some were juveniles, and others were mentally handicapped.<sup>317</sup> Conversely, not all terminal patients are altogether innocent. Some terminally-ill patients are causally responsible, either in whole or in part, for their conditions. Some of those dying of lung cancer smoked two packs a day; some of those dying of AIDS contracted the HIV virus from shooting narcotics with dirty hypodermics. In a very real sense, those who contracted HIV from shooting up with an infected needle "caused" their diseases via illegal conduct. "The only differences are that the conduct was not murder, and that it was not tried in the legal system," Milner notes, "[and] these differences should not be dispositive."<sup>318</sup>

There is one other way in which a terminal illness and a pending execution are analogous: Both the dying patient and the condemned prisoner suffer terribly. Anticipating death, they are keenly susceptible to feelings of depression and hopelessness and are confronted with stark end-of-life decisions. The terminally-ill patient suffers from a physical ailment and may be forced to endure symptoms like physical pain, nausea, loss of appetite, and insomnia. Through good palliative care, doctors and nurses can do a great deal to alleviate the terminal patient's physical symptoms. The suffering of the death row prisoner, on the other hand, is situational, not corporeal in nature. They also suffer, but from isolation, confined spaces, uncertainty, and sensory

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316. See generally STANLEY COHEN, *THE WRONG MEN: AMERICA'S EPIDEMIC OF WRONGFUL DEATH ROW CONVICTIONS* (2003) (identifying 102 cases where death row inmates were exonerated and often proved to be innocent of the crimes for which they had been convicted); MICHAEL L. RADELET ET AL., *IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES* (1994) (tracing about 400 capital cases of wrongful conviction); BARRY SCHECK ET AL., *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* (2000) (describing the release of ten wrongly-convicted prisoners).

317. The execution of juveniles and the mentally retarded are among the most controversial practices associated with the death penalty. In 2002, the United States Supreme Court concluded that it violates the Eighth Amendment to execute the mentally retarded (i.e., those with an IQ score of seventy or below). *Atkins v. Virginia*, 536 U.S. 304, 308 n.4, 321 (2002). In March 2005, the Court held that executing offenders who were juveniles when they committed their offenses also violated the Eighth Amendment. *Roper v. Simmons*, 543 U.S. 551 (2005).

318. Milner, *supra* note 279, at 327–28.

deprivation.<sup>319</sup> While, in theory, something might be done to alleviate the suffering of the death row prisoner, there is little incentive to do so in the field of corrections. After all, conventional wisdom teaches that condemned prisoners are the "worst of the worst"<sup>320</sup> and deserve whatever they get. The collective heart of the public bleeds for one group (patients) and hardens against the other (prisoners), but both groups suffer. Thus, for purposes of the analysis, terminal illness and pending execution are analogous.

### 3. *Physician-Assisted Suicide or Withdrawal of Treatment?*

Attorneys are analogous to physicians, and execution is analogous to illness, but one important question remains. When a condemned prisoner volunteers for execution, is it more akin to physician-assisted suicide (which is forbidden under AMA ethics) or to withdrawal of treatment (which is permitted under AMA ethics)? A great deal depends upon this answer. If the situation is analogous to physician-assisted suicide, then the AMA's prohibition would suggest that—despite the ambiguity of the Model Rules—it is unethical for an attorney to participate in a client's waiver of appeals. But if the situation is analogous to the withdrawal of life-sustaining treatment, medical ethics would suggest that the attorney not only may assist the client, but must do so. It is a subtle distinction, and one without ethical significance in the eyes of some,<sup>321</sup> but how the situation is characterized determines what is permissible.

In some ways, a death row prisoner volunteering for execution seems more like withdrawal of treatment than physician-assisted suicide. It seems passive. "Terminal illness and terminal sentence are analogous; letting a preexisting medical condition run its course is no more passive than allowing a preexisting jury sentence to run its course."<sup>322</sup> In the same way that a physician may permissibly withdraw a feeding tube and allow the patient's death to occur, an attorney may permissibly withdraw a habeas petition and allow the prisoner's execution. In both cases, death is foreseeable but occurs through the course of normal events.<sup>323</sup>

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319. See *infra* notes 344–56 and accompanying text (describing conditions on death row).

320. See *supra* note 175 (discussing the concept of the "worst of the worst").

321. See Rachels, *supra* note 193, at 79–80 (arguing that active euthanasia is no worse than passive euthanasia).

322. Milner, *supra* note 279, at 325.

323. The whole notion that death occurs "naturally" when a patient foregoes life-sustaining treatment merits more careful consideration. When a terminal patient instructs the physician to withdraw a life-sustaining ventilator and dies when the device is removed, we tend to say that death was a product of the disease. See Milner, *supra* note 279, at 325 (discussing the

One, however, can argue that the situation is more analogous to physician-assisted suicide than withdrawal of treatment. The AMA prohibits physician-assisted suicide not because the doctor acts in some affirmative manner to end the patient's life,<sup>324</sup> but because providing a patient with information or access to lethal medication remains fundamentally inconsistent with the physician's duty of beneficence.<sup>325</sup> An equivalent principle of beneficence also compels the attorney.<sup>326</sup> Accordingly, this principle appears to prohibit the lawyer from providing the client with information about how to end his life or with the means to do so. The lawyer who aids a volunteering client in waiving appeals not only strays from the polestar duty of beneficence, but takes an affirmative step in harming the client.

The situation might equate to withdrawal of treatment when the lawyer either withdraws or is dismissed by the client, the former client then waives his appeals, and the former attorney does nothing to prevent the execution.<sup>327</sup> That might comport with the AMA's policy on end-of-life decisions.<sup>328</sup> But when the attorney affirmatively champions the client's cause, arguing for the

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circumstances under which society accepts physicians' actions that ultimately lead to the death of the patient and those under which society does not). But if the patient said she wanted to remain alive and instructed the doctor to use the ventilator, and if the doctor then removed the ventilator, it is unlikely that we would say that her death was the product of the disease. *See id.* at 326 (same). We would be more likely to say the doctor caused her death, even though it involved nothing more than the withdrawal of life-sustaining treatment. *See id.* (same).

324. This would be euthanasia. *See* Rachels, *supra* note 193, at 78 (defining euthanasia).

325. AM. MED. ASS'N., CODE OF MEDICAL ETHICS E-2.211 (2004-05) ("Physician assisted suicide is fundamentally incompatible with the physician's role as healer.").

326. *See* ANNOTATED MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (1999) (stating that "[a] lawyer should pursue a matter on behalf of a client despite opposition . . ." and that "a lawyer should act with commitment . . . to the interests of a client and with zeal in advocacy upon the client's behalf").

327. These were the circumstances surrounding the representation of Robert A. Smith. *See supra* Part III.C (containing a case study of *Smith v. State*). Smith's attorneys, Smock and Etling, refused to sign Smith's negotiated plea agreement. *See Smith v. State*, 686 N.E.2d 1264, 1267 (Ind. 1997) (describing how attorneys refused to sign a plea "agreement or a death sentence penalty when a 'lesser punishment' has been offered"). After a competency hearing and a hearing "to determine whether Smith could proceed pro se," Smock and Etling were dismissed as counsel but retained as stand-by counsel. *Id.* at 1269. Once Smith was sentenced to death, the court appointed them as counsel for the appeal. *Id.* When Smith requested to represent himself on appeal, Smock and Etling opposed his motion. *Id.* at 1270. When the court ruled in Smith's favor, Smock and Etling were appointed as amicus. *Id.*

328. *See* AM. MED. ASS'N., HEALTH AND SCIENCE POLICIES OF THE AMA HOUSE OF DELEGATES 192-93 (H-140.966), available at [www.ama-assn.org/ad-com/polfind/hlth-ethics.pdf](http://www.ama-assn.org/ad-com/polfind/hlth-ethics.pdf) (last visited Oct. 31, 2005) (outlining AMA policy on end-of-life decisions).

client's death in court,<sup>329</sup> drafting waivers of appellate rights,<sup>330</sup> or even delivering such documents on the client's behalf, the attorney affirmatively assists the client in ending his life. This is lawyer-assisted suicide.<sup>331</sup> While lawyers who believe that client autonomy should trump other ethical considerations may find these affirmative actions agreeable,<sup>332</sup> they subordinate the duty of beneficence to a level that, at least within the field of medical ethics, would be impermissible.

Medical ethics can provide meaningful guidance to the attorney confronted with the dilemma of the volunteering client. The AMA's bright-line prohibition against euthanasia and physician-assisted suicide can serve as a compass for the lawyer seeking to navigate the labyrinth of capital ethics. The role of the physician and the role of the attorney are sufficiently analogous to warrant this step, and terminal illness and pending execution are sufficiently analogous to justify the comparison. While reasonable people could differ about whether the volunteering client is better analogized to withdrawal of treatment than physician-assisted suicide, the lawyer's agency in waiving appellate rights implies that physician-assisted suicide is a better analog. Thus, to the extent that one can apply medical ethics to the legal proceedings of a volunteering client, the fundamental principle of beneficence bars the lawyer from aiding the client in waiving appeals. But even those who remain unconvinced that the principle of "*primum non nocere*" should also apply to lawyers should understand that another reason exists as to why death row lawyers should be extraordinarily reluctant to honor the volunteer's request: torture.

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329. See Hansen, *supra* note 63, at 22 (describing Jamie McAllister's demand that her client, Douglas Alan Smith, be given the death penalty).

330. See Statement of Timothy McVeigh Regarding Notice of Intent to Forego Further Appeals, *supra* note 313 (reproducing documents from counsel for Timothy McVeigh).

331. See Mello, *supra* note 42, at 48–49, 62–64 (describing "attorney-assisted suicide"); see also *Lenhard ex rel. Bishop v. Wolf*, 444 U.S. 807, 815 (1979) (Marshall, J., dissenting) (noting Justice Marshall's characterization of the defendant's waiver of appeal as "state-administered suicide").

332. See *supra* Part II.D (describing the autonomy-based thinking of client-centered lawyers).



### C. *The Torture of Being*

The brutality and savagery of America's prisons is well-documented.<sup>333</sup> Yet even against the background of notorious institutions such as Corcoran,<sup>334</sup> Florence,<sup>335</sup> Marion,<sup>336</sup> and Pelican Bay,<sup>337</sup> death row is acknowledged as the hardest time that a prisoner can do.<sup>338</sup> It subjects a prisoner to such oppressive and dehumanizing conditions that the New York Bar Association has characterized it as "dying twice."<sup>339</sup> The physical environment of death row is severe, and it unquestionably contributes to the suffering of death row inmates. But the psychological aspects of death row are even more corrosive and—when combined with the austere physical environment—can "press the outer bounds

333. See, e.g., PAUL KEVE, *PRISON LIFE AND HUMAN WORTH* 54 (1974) ("Prison is a barely controlled jungle where the aggressive and the strong will exploit the weak, and the weak are dreadfully aware of it."); Oleson, *supra* note 113, at 849–61 (describing modern prisons as "animal factories" and recounting the endemic problems of suicide, aggression, rape, and torture).

334. See Oleson, *supra* note 113, at 854–58 (describing reports of Corcoran's gladiator fights and coordinated rapes); J.C. Oleson, *Corcoran Prison*, in 1 *ENCYCLOPEDIA OF PRISONS AND CORRECTIONAL FACILITIES* 180, 180–82 (Mary Bosworth ed., 2005) [hereinafter *ENCYCLOPEDIA*] (same).

335. See David Ward, *ADX (administrative maximum): Florence*, in 1 *ENCYCLOPEDIA*, *supra* note 334, at 15, 15–18 (describing conditions of confinement).

336. See Stephen Richards, *Marion U.S. Penitentiary*, in 1 *ENCYCLOPEDIA*, *supra* note 334, at 569, 569–72 (describing conditions of confinement).

337. See *Madrid v. Gomez*, 889 F. Supp. 1146, 1155, 1160–1240 (N.D. Cal. 1995) (describing conditions at Pelican Bay); Sally Mann Romano, Comment, *If the SHU Fits: Cruel and Unusual Punishment at California's Pelican Bay State Prison*, 45 *EMORY L.J.* 1089, 1089–93, 1098–1104 (1996) (describing the cramped, isolated conditions at Pelican Bay); Benjamin Steiner, *Pelican Bay State Prison*, in 1 *ENCYCLOPEDIA*, *supra* note 334, at 686, 686–88 (describing Pelican Bay as a place of silence illuminated by little natural light).

338. See ROBERT JOHNSON, *DEATH WORK: A STUDY OF THE MODERN EXECUTION PROCESS* 63–64, 70–74, 80–87, 92–113 (2d ed. 1998) (comparing the life of an inmate on death row to an existence "not much higher than that of a maggot"). He stated:

[D]eath row is the most total of total institutions, the penitentiary most demanding of penitence, the prison most debilitating and disabling in its confinement. On death row the allegorical pound of flesh is just the beginning. Here the whole person is consumed. The spirit is captured and gradually worn down, then the body is disposed of. . . .

*Id.* at 71.

339. See generally David S. Hammer et al., *Dying Twice: Conditions on New York's Death Row*, 22 *PACE L. REV.* 347 (2002) (noting that keeping the lights on to prevent suicide may have the unintended result of increasing the likelihood of prisoners committing the very act). The title of the article comes from an Albert Camus quote: "[A] man is undone by waiting for capital punishment well before he dies. Two deaths are inflicted upon him, the first being worse than the second . . . ." *Id.* at 349.

of what most humans can psychologically tolerate."<sup>340</sup> Under these conditions, life itself may become unendurable, a form of torture from which the condemned prisoner seeks to escape.<sup>341</sup> It may sound hyperbolic to describe the conditions on death row as "torture"—prison, after all, is supposed to be "punishment"<sup>342</sup>—but unfortunately, ample empirical evidence substantiates this characterization of death row.<sup>343</sup>

Super-maximum prison facilities serve as the model of most death row facilities.<sup>344</sup> They segregate condemned prisoners from the general prison

340. *Madrid*, 889 F. Supp. at 1267.

341. *See, e.g.*, *Miller v. Stewart*, 231 F.3d 1248, 1251 (9th Cir. 2000) (describing how a prisoner preferred death to incarceration in a supermax facility); *Groseclose ex rel. Harries v. Dutton*, 594 F. Supp. 949, 959–61 (M.D. Tenn. 1984) (finding a prisoner's guilty plea and request for expedited execution were brought on by conditions of solitary confinement on death row); *State v. Creech*, 710 P.2d 502, 509 (Idaho 1985) (citing a letter written by a condemned prisoner indicating that his guilty plea and request for expedited execution had been caused by a wish to escape extended solitary confinement).

342. *See* Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 980 (1999) (quoting California's Penal Code: "The Legislature finds and declares that the purpose of imprisonment for crime is punishment").

343. *See* *Madrid v. Gomez*, 889 F. Supp. 1146, 1264 (N.D. Cal. 1995) ("[I]f the particular conditions of segregation . . . are such that they inflict a serious mental illness, greatly exacerbate mental illness, or deprive inmates of their sanity, then [prison officials] have deprived inmates of a basic necessity of human existence . . . [and] have crossed into the realm of psychological torture."); *see also* *Lackey v. Texas*, 514 U.S. 1045, 1046 n.\* (1995) (mem.) (Stevens, J., dissenting) (characterizing long stays on death row as "psychological torture"); *State v. Miller*, 111 P.2d 1053, 1053–55 (Wash. 1910) (describing circumstances in which solitary confinement becomes "torture"); Christine Rebman, Comment, *The Eighth Amendment and Solitary Confinement: The Gap in Protection from Psychological Consequences*, 49 DEPAUL L. REV. 567, 579 (1999) (reporting prison conditions of "mental torture").

344. *See* Oleson, *ENCYCLOPEDIA, supra* note 334, at 214, 214–17 ("The physical environment of death row closely resembles that of super-maximum secure facilities."). Supermax prisons, in turn, are modeled on the regime at Marion. *See* Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 489–90 (1997) (describing how the "Federal Bureau of Prisons [has] committed itself to the continuation of the Control Unit philosophy"); *see also* Richards, *supra* note 336, at 572 (stating that Marion is a "blueprint for building super-secure federal and state facilities" and that it is harsher than some death row facilities). For a brief overview of supermax confinement, *see* Oleson, *supra* note 113, at 849–61. The author stated:

In supermax facilities, inmates are entombed within solitary cells of about seven by twelve feet (slightly larger than a king-sized bed) bound by seven layers of steel and cement. The spartan furniture (for example, a stool, a writing desk, and a mattress pedestal) is made of poured concrete in order to prevent prisoners from fashioning weapons out of metal parts. Inmates are often confined within their tiny one-man cells for twenty-three hours per day; they only get one hour of exercise (in an even-smaller outdoor cage that is attached to the rear of their cell). This hour is also spent in solitude.

population, house them in cramped cells, subject them to continuous surveillance, and afford them only limited visiting privileges. Illinois' Tamms Correctional Center confines prisoners in cells that are seventy square feet (smaller than eight feet by nine feet), and this modest space contains "a toilet, a sink, a desk, a bed, storage for personal items, and an outside window."<sup>345</sup> Arizona and New York have comparably sized cells for condemned men.<sup>346</sup> Because it is difficult to comprehend what living in a seventy square foot area would actually be like, one educator suggests that students try locking themselves in a bathroom for forty-eight hours.<sup>347</sup>

In reality, guards occasionally permit condemned prisoners to leave their cells. The prisoners may take showers (typically one to three of them per week); they may exercise (typically between one and three hours per week).<sup>348</sup> But exercise periods do not consist of spirited games of touch football on the prison yard. Rather, condemned prisoners are placed inside a wire mesh "dog run" and allowed to exercise in the same way that they live: isolated and alone.<sup>349</sup> All exercise is solitary.<sup>350</sup> Perhaps because prisoners must submit to a visual strip search in order to go outside, many forego even this indulgence.<sup>351</sup>

*Id.* at 859 n.161 (citations omitted).

345. See Rebman, *supra* note 343, at 568 (describing conditions in Tamms Correctional Center).

346. See Hammer et al., *supra* note 339, at 356 (describing living area as about seventy-eight square feet); Robert M. Ferrier, Note, "An Atypical and Significant Hardship": *The Supermax Confinement of Death Row Prisoners Based Purely on Status—A Plea for Procedural Due Process*, 46 ARIZ. L. REV. 291, 294 (2004) (comparing cells in Arizona State Prison Complex Eyman to the seven by twelve foot cells used in Marion).

347. See GILLESPIE, *supra* note 307, at 43 (following up on the question, "Could you live in a ten- by six-foot cell for twenty-three out of twenty-four hours?" by suggesting this experiment: "Lock yourself in your bathroom for forty-eight hours. You can take anything in with you that you wish—but you cannot leave or have visitors. Keep a journal—making entries at least two or three times an hour.").

348. See Ferrier, *supra* note 346, at 295 ("In Arizona, prisoners are allowed out for three thirty-minute showers a week. They are also allowed an exercise period three times a week for an hour."); Hammer et al., *supra* note 339, at 356 ("The men . . . are allowed three showers per week, in open stainless steel stalls without curtains."); *id.* at 359 ("[Prisoners are] allowed to exercise daily for one hour. . ."); Rebman, *supra* note 343, at 571 ("[S]howers are limited to once per week for disciplinary segregation and twice per week for administrative detention" and "inmates are guaranteed only a minimum of one hour per week of exercise in the yard.").

349. See Ferrier, *supra* note 346, at 295 (describing a wire mesh exercise enclosure slightly larger than the prisoner's cell); Rebman, *supra* note 343, at 571 ("The 10' x 20' concrete box hardly serves its purpose as an exercise yard. High walls and a partially covered concrete and mesh ceiling provide the only view to the outside.").

350. See Hammer et al., *supra* note 339, at 359 (describing the exercise yard as a "dog run" of about 2,000 square feet).

351. See Ferrier, *supra* note 346, at 295 (describing procedures when prisoners exercise in

Condemned prisoners live under continuous surveillance in a modern panopticon.<sup>352</sup> Everything a death row prisoner does is subject to monitoring: guards monitor him when he exercises, visits with his family, uses the toilet, showers, and sleeps. Indeed, death row has such a commitment to high-tech monitoring that prison cells remain illuminated twenty-four hours per day. Some prisoners complain that they cannot sleep because of the lights and that correctional officers thwart their attempts to block out the light.<sup>353</sup>

Condemned prisoners may have visits, but only limited ones. Only blood-relatives, legal counsel, and clergy may visit, and Illinois prisoners have only one personal visit per month.<sup>354</sup> There is no contact visitation. Visitors remain separated from prisoners by a thick sheet of Plexiglas® and communicate by telephone.<sup>355</sup> In New York's Unit for Condemned Persons (the "UCP"), lawyers have noted that the "phones do not function properly and that inmates must speak very loudly, or even yell, to be heard through the Plexiglas® shield."<sup>356</sup> To get a sense of what a visit might be like, imagine trying to conduct a privileged legal conversation with a client through the glass screen used by all-night service stations and box offices.

In addition to one personal visit per month, condemned prisoners might receive one ten-minute phone call per week.<sup>357</sup> One monthly visit, one weekly call: that constitutes the extent of their interaction with other human beings. They spend the rest of their lives in isolation, boxed in a cell the size of a bathroom, left with little or nothing to do. It is live burial.

What happens to a prisoner's mind when he is entombed within a seventy square foot universe?<sup>358</sup> In 1999, the National Institute of Corrections wrote

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supermax facilities).

352. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 200 (Vintage Book 2d ed. 1995) (Alan Sheridan trans., 1979) (describing the architecture of the panopticon envisioned by Jeremy Bentham: all the prison's cells would be constructed around a central guard post, and by observing silhouettes cast by light coming into cells from the outside windows, a single guard would be able to monitor an entire prison).

353. See Hammer et al., *supra* note 339, at 364 (reporting that one prisoner "tries to sleep by putting his head under his blanket" and noting that "the strategy is often ineffective since the officers wake him up and require that he uncover his head").

354. See Rebman, *supra* note 343, at 571 (noting that the monthly visit is limited to two hours); Hammer et al., *supra* note 339, at 357 (reporting that New York's condemned prisoners are allowed one non-legal visit per week).

355. See Hammer et al., *supra* note 339, at 358 (describing non-legal and legal visitation).

356. *Id.*

357. See *id.* (noting that prisoners are limited to one ten-minute telephone call per week).

358. See Woodburn Heron, *The Pathology of Boredom*, *SCI. AM.*, Jan. 1957, at 52, 53-55 (finding that subjects confined to an experimental cubicle under conditions of confinement more restrictive than those on death row exhibited marked cognitive effects after only ninety-six

that "[l]ittle is known about the impact of locking an inmate in an isolated cell for an average of 23 hours per day with limited human interaction, little constructive activity, and an environment that assures maximum control over the individual."<sup>359</sup> This statement is inaccurate. Our understanding about the effects of isolation stretches all the way back to Charles Darwin and Alexis de Tocqueville.<sup>360</sup> In 1910, the Washington Supreme Court wrote:

The effect of solitary confinement on the mind of a person charged with a crime may be imagined. It is a well-known psychological fact that men and women have frequently confessed to crimes they did not commit. They have done it sometimes to escape punishment which had become torture to them . . . .<sup>361</sup>

Clinical research has borne out these preliminary findings, and the results are unsettling. Stuart Grassian interviewed fifteen prisoners who were kept in solitary confinement in Massachusetts's Walpole State Prison.<sup>362</sup> The Walpole prisoners were initially cavalier about their isolation, but as their bravado yielded to candor, "Dr. Grassian found that the inmates' earlier statements reflected a denial of the mind-altering conditions and gave way to troubling descriptions of mental torture."<sup>363</sup> Grassian found that more than two-thirds had experienced free-floating anxiety and hypersensitivity to external stimuli (often associated with sensory deprivation); half reported perceptual distortions (including auditory and visual hallucinations) or serious interference with cognitive processes (e.g., confusion, difficulty concentrating, or lapses in memory).<sup>364</sup> A third of the group experienced feelings of paranoia, difficulty with impulse control (sometimes involving self-mutilation), and uncontrollable "fantasies of revenge, torture, and mutilation of the prison guards."<sup>365</sup>

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hours).

359. CHASE RIVELAND, NAT'L INST. OF CORRS., U.S. DEP'T. OF JUSTICE, SUPERMAX PRISONS: OVERVIEW AND GENERAL CONSIDERATIONS 2 (1999).

360. See Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450, 1450–51 (1983) (describing the concerns about solitary confinement articulated by Darwin and Tocqueville).

361. *Washington v. Miller*, 111 P. 1053, 1054 (Wash. 1910).

362. See Grassian, *supra* note 360, at 1452–54 (describing Walpole study); Haney & Lynch, *supra* note 344, at 521 (same).

363. Rebman, *supra* note 343, at 579.

364. See Grassian, *supra* note 360, at 1452 (reporting results of the Walpole study). These symptoms are consistent with the responses documented in Heron's study of sensory deprivation. See Heron, *supra* note 358, at 52 (relating the psychological consequences of solitary confinement).

365. Grassian, *supra* note 360, at 1453.

Later, when Stuart Grassian and Craig Haney interviewed prisoners in Pelican Bay's Secure Housing Unit (SHU), they reported a comparable constellation of pathological symptoms.<sup>366</sup> More than forty percent of the prisoners suffered from perceptual distortions and hallucinations; more than seventy percent suffered from mood swings, emotional flatness, and chronic depression; and more than eighty percent were plagued by ruminations, confused thought processes, hypersensitivity to stimuli, and irrational anger.<sup>367</sup> Some of these symptoms were mild, but many were not. More than one prisoner in Pelican Bay reported seeing—and fighting against—demons.<sup>368</sup>

I still have trouble with entities and demons—evil spirits—comic books I read are about the antichrist. I can see them through the walls, black evil. Used to be real heavy. If you pay attention to them, you give in. Mostly it is the devil—no doubt about it . . . . Got to fight back . . . .<sup>369</sup>

Robert Ferrier understated the matter when he wrote, "Haney and Grassian had uncovered an ugly secret."<sup>370</sup> Yet while the corrosive effects of isolation and deprivation were horrible in Walpole's solitary confinement cells and in Pelican Bay's SHU, things are even worse, psychologically speaking, on death row. One commentator wrote bluntly, "Condemned inmates face far greater psychological stress."<sup>371</sup> In addition to the austere environment, the death row prisoner lives with the horror of knowing how and when he will die.<sup>372</sup> The condemned man knows that on the morning of his execution, correctional officers he has known for a decade will lead him to a chamber where, before an

366. See *Madrid v. Gomez*, 889 F. Supp. 1146, 1223–37 (N.D. Cal. 1995) (reporting SHU prisoners' varied mental disorders).

367. *Id.* at 1234 n.173 (reporting the results from Dr. Haney's survey of 100 randomly-selected SHU prisoners).

368. *Id.* at 1233–34 (describing symptoms of Inmates 2 and 4).

369. *Id.* at 1233 (quoting Inmate 2).

370. Ferrier, *supra* note 346, at 300.

371. *Id.*

372. See *Suffolk County v. Watson*, 411 N.E.2d 1274, 1292 (Mass. 1980) ("[A condemned man] must wait for a specific death, not merely expect death in the abstract . . ."). In his formidable essay, *Reflections on the Guillotine*, Albert Camus rejected the notion that the execution, by trading an eye for an eye, re-established parity between the murderer and the victim. The two situations were not equivalent because the condemned man not only forfeits his life, but also suffers, indefinitely, in a suspended state of horror while awaiting his death. Camus wrote:

For there to be equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life.

ALBERT CAMUS, *RESISTANCE, REBELLION, AND DEATH* 199 (1961).

audience of ghouls, he will be ceremonially put down like a stray dog. The certainty of execution is an excruciating psychological burden.<sup>373</sup> But in many ways, the uncertainty of death row is even worse.<sup>374</sup> Even the United States Supreme Court has recognized this fact, noting that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it."<sup>375</sup>

Today, condemned prisoners may be required to endure that crushing sense of uncertainty for a decade or more.<sup>376</sup> Ten years, alone, in a cell the size of a bathroom. Ten years, and for companionship, only hopelessness, uncertainty, and demons in the walls. Numerous commentators have suggested that the protracted durations that condemned prisoners now spend on death row should give rise to a cognizable Eighth Amendment claim.<sup>377</sup> While this has been dismissed as brazen chutzpah by some,<sup>378</sup> the argument was considered in

373. In his dissent from the denial of certiorari in *Rector v. Bryant*, Justice Stevens recognized that many individuals on death row suffered from serious mental illness before they committed their crimes and acknowledged "that many more develop such impairments during the excruciating interval between sentencing and execution." *Rector v. Bryant*, 501 U.S. 1239, 1243 (1991) (Stevens, J., dissenting).

374. See Reed, *supra* note 35, at A1 (quoting Michael Laurence as saying, "The people on death row fear uncertainty more than they fear death. It is the uncertainty of the process, how it works, what to expect, as well as what the final result is going to be.").

375. *In re Medley*, 134 U.S. 160, 172 (1890).

376. See BONCZAR & SNELL, *supra* note 312, at 11 (reporting an average 131 months between sentencing and execution).

377. See, e.g., Dwight Aarons, *Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?* 29 SETON HALL L. REV. 147, 210–12 (1998) (arguing that a delayed execution constitutes cruel and unusual punishment); Richard E. Shugrue, *A Fate Worse Than Death—An Essay on Whether Long Times on Death Row are Cruel Times*, 29 CREIGHTON L. REV. 1, 24 (1995) (same); Michael P. Connolly, Note, *Better Never Than Late: Prolonged Stays on Death Row Violate the Eighth Amendment*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 101, 137–38 (1997) (same); Jessica Feldman, Comment, *A Death Row Incarceration Calculus: When Prolonged Death Row Imprisonment Becomes Unconstitutional*, 40 SANTA CLARA L. REV. 187, 219 (1999) (same); Kathleen M. Flynn, Note, *The "Agony of Suspense": How Protracted Death Row Confinement Gives Rise to an Eighth Amendment Claim of Cruel and Unusual Punishment*, 54 WASH. & LEE L. REV. 291, 332–33 (1997) (same); Ryan S. Hedges, Note, *Justices Blind: How the Rehnquist Court's Refusal To Hear a Claim for Inordinate Delay of Execution Undermines Its Death Penalty Jurisprudence*, 74 S. CAL. L. REV. 577, 613–15 (2001) (same).

378. See, e.g., Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. REV. 1, 25 (1995) ("It is somewhat akin to the classic definition of chutzpah for death penalty opponents to say we can't execute someone too fast because he is entitled to a searching review, and then to say what we are doing is immoral when we delay the execution precisely to afford such review."). *But see* Ronald Dworkin, Editorial, *The Court's Impatience To Execute*, L.A. TIMES, July 11, 1999, at M1 (noting that the Supreme Court has become impatient and that super-due process has turned into process-lite). Dworkin reasoned:

sympathetic terms in Justice Stevens's dissent from the denial of certiorari in *Lackey v. Texas*.<sup>379</sup>

In *Lackey*, Justice Stevens (joined by Justice Breyer) acknowledged the novelty of the claim, noted its legal complexity, and wrote that it had potentially far-reaching consequences.<sup>380</sup> He noted that after seventeen years on death row, an execution might no longer advance the penological justifications of retribution and deterrence, and he also noted that many penologists and medical experts agreed that a prolonged wait on death row constitutes "psychological torture."<sup>381</sup> Finally, Justice Stevens observed that the highest courts in other nations had found similar arguments to be persuasive and often had commuted death sentences.<sup>382</sup> Justice Stevens's view did not prevail, however. The Court denied certiorari, and on May 20, 1997, Clarence Lackey was executed in Texas.<sup>383</sup>

Since *Lackey*, the Court has repeatedly passed up opportunities to reconsider the claim of inordinate delay. In a 1998 dissent from the denial of certiorari in *Elledge v. Florida*,<sup>384</sup> Justice Breyer argued that the petitioner's twenty-three years on death row was unusual (whether under contemporary standards or those of the Framers) and argued that such an inordinate delay was also cruel (whether evaluated by indicia of domestic penology or by judicial practices in foreign jurisdictions).<sup>385</sup> But again, the Supreme Court denied certiorari.<sup>386</sup> In his 1999 dissent from the denial of certiorari in *Knight v.*

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What if we cannot tolerate all the stays and appeals and retrials that a decent respect for human life requires without making the law seem foolish and without subverting the point of a death sentence . . . ? Then we must abandon capital punishment, even if we think it right in principle, because then we cannot have it, even if it is right, without cheating.

*Id.*

379. *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (mem.) (Stevens, J., dissenting).

380. *Id.* (Stevens, J., dissenting).

381. *Id.* (Stevens, J., dissenting).

382. *Id.* (Stevens, J., dissenting).

383. *Clarence Lackey: Last Statement* (2005), <http://www.tdcj.state.tx.us/stat/lackeyclarencelast.htm>.

384. *Elledge v. Florida*, 525 U.S. 944, 944 (1998) (Breyer, J., dissenting).

385. *Id.* (Breyer, J., dissenting).

386. *Id.* (Breyer, J., dissenting). William Elledge remains alive on Florida's death row. FLORIDA DEP'T OF CORR., DEATH ROW ROSTER (2005), <http://www.dc.state.fl.us/activeinmates/deathrowroster.asp>. Elledge was received by the Florida Department of Corrections on April 16, 1975, and was sentenced to death on August 3, 1977. *Id.* As of January 2006, more than twenty-eight years and seven months have lapsed since William Elledge was sentenced to death.



*Florida*,<sup>387</sup> Justice Breyer raised the same arguments articulated in *Lackey* and *Elledge*. Again, he indicated that many Commonwealth nations had acknowledged the claim, and he argued that the Court should address the issue because increasing numbers of condemned prisoners are facing twenty or more years on death row.<sup>388</sup>

But in his concurrence in the denial of certiorari, Justice Thomas indicated some of the reasons why the Court might not want to address the issue of inordinate delay.<sup>389</sup> Justice Thomas observed that the intolerable delays associated with *Lackey* claims are the by-product of the Court's "Byzantine death penalty jurisprudence,"<sup>390</sup> and argued that it is "incongruous" to arm defendants with an arsenal of constitutional claims with which to delay their executions and then to complain when their executions are inevitably delayed.<sup>391</sup> He also noted that ever since Justice Stevens invited the state and lower courts to serve as laboratories for the viability of the claim, the courts had "resoundingly rejected the claim as meritless."<sup>392</sup> Accordingly, he urged the Court to "consider the experiment concluded."<sup>393</sup>

Justice Thomas, however, may have been premature in his pronouncement: the experiment is not yet over.<sup>394</sup> The legal debate about inordinate delay has not ended, and the notion that conditions on death row might constitute torture continues to stimulate discussion around the world. Internationally, a great deal of this debate can be traced to a seminal 1989 case from the European Court of Human Rights: *Soering v. United Kingdom*.<sup>395</sup>

### 1. Case Study: *Soering v. United Kingdom*

The facts in *Soering* are, like the facts in almost all capital cases, depressing and sad. Jens Soering, a German national, moved to the United States with his diplomat father when he was eleven years old. He enrolled in

387. *Knight v. Florida*, 528 U.S. 990, 993 (1999) (Breyer, J., dissenting).

388. *Id.* at 995–99 (Breyer, J., dissenting).

389. *Id.* at 990–93 (Thomas, J., concurring).

390. *Id.* at 991 (Thomas, J., concurring).

391. *Id.* at 992 (Thomas, J., concurring) (citing *Kozinski & Gallagher*, *supra* note 378, at 25).

392. *Id.* (Thomas, J., concurring).

393. *Id.* at 993 (Thomas, J., concurring).

394. *See id.* at 999 (Breyer, J., dissenting) (arguing that "although the experiment may have begun, it is hardly evident that we 'should consider the experiment concluded'").

395. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989), *reprinted* in 11 EUR. H.R. REP. 439 (1989).

the University of Virginia in 1984, and there met Elizabeth Haysom, a fellow student. They became quite close, despite her parents' strident opposition to the relationship. Eventually, Soering and Haysom decided to kill her parents.<sup>396</sup>

To establish an alibi, they rented a car in Charlottesville and drove to Washington, D.C. On March 30, 1985, Soering then drove alone to Haysom's parents' home, initiated an argument with them, and attacked them with a knife. Haysom's parents were later found dead, with multiple stab and slash wounds on their necks and bodies.<sup>397</sup>

Soering and Haysom fled to Europe and were subsequently arrested in England for check fraud. The United States requested extradition under its 1972 extradition treaty with the United Kingdom. Haysom did not contest extradition, pled guilty as an accessory to the murder of her parents, and was sentenced to ninety years in prison.<sup>398</sup> Lillich understated matters considerably when he wrote, "Soering's extradition, however, proved to be more complicated."<sup>399</sup>

Before his extradition, Soering applied for a writ of habeas corpus and petitioned for leave to apply for judicial review. In so doing, Soering relied upon a provision in the U.S.-U.K. Extradition Treaty that provides:

If the offense for which extradition is requested is punishable by death under the relevant law of the requesting Party, but the relevant law of the requested Party does not provide for the death penalty in a similar case, extradition may be refused unless the requesting Party gives assurances satisfactory to the requested Party that the death penalty will not be carried out.<sup>400</sup>

The British embassy requested an assurance from the United States that Soering would not be executed. The Commonwealth Attorney of Bedford County, Virginia, proffered a sworn affidavit to this effect, but Soering dismissed this as being insufficient to satisfy Article IV of the Extradition Treaty.<sup>401</sup> While the English Secretary of State was evaluating the case, Soering also filed an application with the European Commission of Human Rights.<sup>402</sup> He argued that, despite assurances from United States authorities, there was a substantial

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396. See Richard B. Lillich, Note, *The Soering Case*, 85 AM. J. INT'L. L. 128, 128 (1991) (recounting the facts of the *Soering* case).

397. *Id.*

398. *Id.* at 129.

399. *Id.*

400. Extradition Treaty, U.S.-U.K., art. IV, June 8, 1972, 28 U.S.T. 227.

401. See Lillich, *supra* note 396, at 130 (summarizing the procedural history of Soering's suit).

402. *Id.*

risk that he would be executed. This, however, was insufficient to bar Soering's extradition under the European Convention (which permits the death penalty), so in addition, he argued that the circumstances of his case, notably the delay between sentencing and execution in Virginia, would expose him to "death row phenomenon" and therefore violate Article Three of the European Convention.<sup>403</sup>

In a six-to-five vote, the members of the Commission determined that extraditing Soering to the United States would not violate Article Three of the Convention.<sup>404</sup> The Commissioners concluded that England could be held liable for Article Three violations committed by the United States and concluded that, notwithstanding the Commonwealth Attorney's assurances and the presence of mitigating factors, there was a serious risk that Soering would be sentenced to death.<sup>405</sup> But the Commission determined that Soering's exposure to death row syndrome did not constitute the "inhuman or degrading treatment or punishment" prohibited by Article Three of the European Convention.<sup>406</sup> It reached this conclusion by analyzing five factors associated with the risk of exposure to death row syndrome: (1) delays of six to eight years in Virginia's appellate system; (2) the possibility that Soering's age or mental condition might not be taken into account; (3) the conditions of confinement on Virginia's death row; (4) the execution procedure (electrocution); and (5) the possibility that Soering could be extradited to Germany, where the death penalty had been abolished.<sup>407</sup> In its report, the Commission concluded that the first four factors were insufficient to prove a violation of Article Three, and that the fifth factor was irrelevant to the analysis.<sup>408</sup>

After receiving the Commission's report, the European Court of Human Rights followed a parallel line of analysis. For example, the Court first determined that as an extraditing agent, England could be responsible for Article Three violations committed by the United States.<sup>409</sup> Then the Court

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403. *Id.* at 130–31.

404. *Id.* at 131.

405. *Id.* at 131–34.

406. *Id.* at 137.

407. *Id.* at 134.

408. *Id.* at 137.

409. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) ¶ 91 (1989), 11 EUR. H.R. REP. 473. The Court ruled that:

[T]he decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to

concluded that Soering faced a real risk of being sentenced to death.<sup>410</sup> When the Court came to the matter of death row syndrome, however, it deviated from the Commission's analysis, and all eighteen judges unanimously concluded that "taking all the circumstances together, the treatment awaiting the applicant in Virginia would go so far beyond treatment inevitably connected with the imposition and execution of a death penalty as to be 'inhuman' within the meaning of Article Three."<sup>411</sup> In making this determination, the Court assessed four factors: (1) the length of detention prior to execution; (2) the conditions on death row; (3) Soering's age and mental state; and (4) the possibility of extraditing Soering to Germany.<sup>412</sup>

In light of the Court's decision, the British Government sought binding assurances from the United States Government that Soering would not be tried for capital murder. After these assurances were made, Soering was extradited to Virginia, where he was convicted of first-degree murder and sentenced to two life terms.<sup>413</sup> The *Soering* case is important not only because it heralded an era when America's death penalty practices had profound extradition consequences,<sup>414</sup> but also because it established the concept of death row syndrome.<sup>415</sup>

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inhuman or degrading treatment or punishment in the requesting country.

*Id.* ¶ 91, 11 EUR. H.R. REP., at 473.

410. *Id.* ¶¶ 93–94, 11 EUR. H.R. REP., at 474–75.

411. *Id.* ¶ 105, 11 EUR. H.R. REP., at 480.

412. *Id.* ¶¶ 106–10, 11 EUR. H.R. REP., at 481.

413. See *Soering v. Deeds*, 499 S.E.2d 514, 514–15 (Va. 1998) (describing Soering's 1990 conviction before rejecting the claim in his habeas petition that the state had failed to provide exculpatory materials under its *Brady* obligation). Jens Soering remains in prison, where he has written several books and articles about prison and spirituality. See, e.g., JENS SOERING, AN EXPENSIVE WAY TO MAKE BAD PEOPLE WORSE: AN ESSAY ON PRISON REFORM FROM AN INSIDER'S PERSPECTIVE (2004) (critiquing American prison policy); JENS SOERING, THE WAY OF THE PRISONER: BREAKING THE CHAINS OF SELF THROUGH CENTERING PRAYER AND CENTERING PRACTICE (2003) (teaching meditative techniques); Jens Soering, *No Way Out*, WASH. CITY PAPER, Sept. 3, 2004, at A1 (recounting the prison death of child molester Richard Ausley).

414. See Lillich, *supra* note 396, at 145–47 (describing the impact of *Soering* on United States extradition cases); see also Mark E. DeWitt, Comment, *Extradition Enigma: Italy and Human Rights vs. America and the Death Penalty*, 47 CATHOLIC U. L. REV. 535, 565–73 (1998) (describing Italy's refusal to extradite Pietro Venezia to the United States despite assurances that the death penalty would not be sought).

415. See David Wallace-Wells, *What Is Death Row Syndrome? And Who Came Up with It?* SLATE, Feb. 1, 2005, <http://slate.msn.com/id/2112901/> (equating death row syndrome to "death row phenomenon" conceived in the *Soering* case).

## 2. Death Row Syndrome

"Death row syndrome" denotes the dehumanizing stress and anxiety that attend sustained periods on death row. Like insanity or competence,<sup>416</sup> death row syndrome is a legal—not a medical—concept.<sup>417</sup> It draws upon psychiatric research, but it is a term of art coined by jurists, not physicians.<sup>418</sup> Assuredly it has psychological dimensions, but it is integrally linked to normative concepts as well.<sup>419</sup>

While the concept has not gained currency in the United States,<sup>420</sup> the international community has embraced the idea of a death row syndrome.<sup>421</sup> At about the same time the European Court of Human Rights was deciding the *Soering* case, the Human Rights Committee of the International Covenant on Civil and Political Rights was deciding another death row phenomenon case: *Pratt and Morgan v. Jamaica*.<sup>422</sup> In *Pratt and Morgan*, the Committee stated that "prolonged judicial proceedings do not per se constitute cruel, inhuman or degrading treatment even if they can be a source of mental strain for the convicted prisoners" but that "in cases involving capital punishment . . . an assessment of the circumstances of each case [is] necessary."<sup>423</sup> The Committee concluded that Pratt and Morgan had failed to prove that delay constituted cruel, inhuman, and degrading treatment, but the Privy Council later overturned this decision in *Pratt v. Attorney General*.<sup>424</sup> Their sentences were

416. See Part III.A (describing competence tests).

417. Wallace-Wells, *supra* note 415.

418. *Id.*

419. See NILS CHRISTIE, CRIME CONTROL AS INDUSTRY: TOWARDS GULAGS, WESTERN STYLE? 184 (1993) (suggesting that "the delivery of pain, to whom, and for what, contains an endless line of deep moral questions").

420. See *supra* note 392 and accompanying text (noting that many lower and state courts have rejected the legitimacy of an Eighth Amendment claim based on inordinate delay).

421. See Richard B. Lillich, *Harmonizing Human Rights Law Nationally and Internationally: The Death Row Phenomenon as a Case Study*, 40 ST. LOUIS U. L.J. 699, 702–11 (1996) (tracing the development of death row phenomenon jurisprudence).

422. *Pratt and Morgan v. Jamaica*, U.N. GAOR, Hum. Rts. Comm., 44th Sess., Supp. No. 40, at 222, U.N. Doc. A/44/40 (Sept. 29, 1989).

423. *Id.* at 230.

424. *Pratt v. Attorney General*, [1993] 4 All E.R. 769 (P.C.) (appeal taken from Jam.). The Privy Council suggested that prisoners should be able to adjudicate their claims within eighteen months, and recommended the rule that "in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute 'inhuman or degrading punishment or other treatment.'" *Id.* at 788–89. Interestingly, this dictum applies not only to Jamaica, but also to Belize, Trinidad, and Mauritius (where Privy Council decisions are binding) and to countries such as India, Malaysia, Nigeria, and Pakistan (where Privy Council decisions are treated as "persuasive authority").

commuted to life imprisonment. In *Kindler v. Canada*,<sup>425</sup> the Supreme Court of Canada became the first national court to follow *Soering* as precedent.<sup>426</sup> Although the Court held that Kindler's extradition to the United States did not violate the promise of the Canadian Charter of Rights and Freedoms that "everyone has the right to be protected from any cruel and unusual treatment or punishment"<sup>427</sup>—a conclusion later affirmed by the Human Rights Commission<sup>428</sup>—both the Canadian Supreme Court and the Human Rights Commission acknowledged the existence of death row phenomenon and followed *Soering* in exploring its topography. More recently, death row phenomenon played a role in the European Court of Human Rights' decisions in *Iorgov v. Bulgaria*,<sup>429</sup> and *G.B. v. Bulgaria*.<sup>430</sup> The concept of death row syndrome was also embraced by the Supreme Court of Zimbabwe in *Catholic Commission for Justice and Peace v. Attorney General*.<sup>431</sup> In *Catholic Commission*, the Chief Justice drew extensively from the *Soering* case and enthusiastically adopted its multi-factored approach:

Rejecting a "narrow interpretation" of its holding, i.e., that a variety of factors and not just *Soering's* potential incarceration for six to eight years on death row combined to constitute inhuman or degrading treatment or punishment contrary to Article 3 of the European Convention, the Chief Justice found that none of these other factors "were either crucial to or determinative of the result."<sup>432</sup>

Thus, under international law, both the concept of death row syndrome and the totality of circumstances analysis employed in *Soering* have met with widespread acceptance.

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Lillich, *supra* note 421, at 710–11.

425. *Kindler v. Canada* (Minister of Justice), [1991] 2 S.C.R. 779.

426. Lillich, *supra* note 421, at 704–05.

427. *Kindler*, [1991] 2 S.C.R. at 780; Constitution Act, 1982, Part I, as reprinted in R.S.C., No. 44 (Appendix 1985).

428. *Kindler v. Canada*, U.N. GAOR, Hum. Rts. Comm., 48th Sess., Supp. No. 40, at 138, U.N. Doc. A/48/40 (Nov. 1, 1993).

429. See *Iorgov v. Bulgaria*, [2004] ECHR 40653/98, ¶ 78 (Mar. 11, 2004) (LEXIS, Human Rights Cases) (noting that the applicant did not suffer from genuine death row phenomenon, which in some cases involved a transfer of the condemned prisoner to the death house, only to be granted a last minute stay of execution).

430. See *G.B. v. Bulgaria*, [2004] ECHR 42346/98, ¶ 79 (Mar. 11, 2004) (LEXIS, Human Rights Cases) (same).

431. *Catholic Comm'n for Justice & Peace in Zimb. v. Attorney General*, [1993] 2 Z.L.R. 279 (Zimb.), reprinted in 14 HUM. RTS. L.J. 323 (1993).

432. Lillich, *supra* note 421, at 706.

In the United States, however, courts have ignored the concept. Perhaps this is because the Supreme Court rejected a plenary approach to Eighth Amendment claims in *Wilson v. Seiter*.<sup>433</sup> While the Court said that conditions of confinement can establish an Eighth Amendment claim "in combination" when each condition would not do so alone, the *Wilson* Court limited this approach to factors having "a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth or exercise—for example, a low cell temperature at night combined with a failure to issue blankets."<sup>434</sup> The Court emphasized the nature of a single, identifiable need, and rejected a totality of circumstances approach:

To say that some prison conditions may interact in this fashion is a far cry from saying that all prison conditions are a seamless web for Eighth Amendment purposes. Nothing so amorphous as "overall conditions" can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists.<sup>435</sup>

Because of the holding in *Wilson*, it will prove extraordinarily difficult for a prisoner to prevail on an Eighth Amendment claim of death row syndrome.<sup>436</sup> But just because a court will not recognize the syndrome does not mean that the defense lawyer should not recognize it. Legal duties and professional obligations are not coterminous.<sup>437</sup> Perhaps the ethical lawyer should recognize death row syndrome, even if the Supreme Court will not. Recent proceedings in Connecticut suggest as much.

In December 2004, public defenders attempted to intervene in the case of Connecticut volunteer Michael Ross, arguing that, because of death row syndrome, Ross was incompetent to waive his appeals and to volunteer for execution.<sup>438</sup> A superior court judge ruled that the defenders did not have

433. *Wilson v. Seiter*, 501 U.S. 294 (1991).

434. *Id.* at 304.

435. *Id.* at 305.

436. *See* Rebman, *supra* note 343, at 607 (noting that courts are reluctant to find constitutional violations based on psychological effects caused by conditions of confinement).

437. *See* Faith Lagay, *Physician-Assisted Suicide: What's Legal and What's Professional?* AMA VIRTUAL MENTOR, Jan. 2001, <http://www.ama-assn.org/ama/pub/category/3784.html> (noting "the difference between what's legal and what's ethical; what the state *allows* residents to do and what members of a given profession . . . believe they *ought* to do").

438. *See* Cristoffersen, *supra* note 50 (noting claims that death row syndrome rendered Ross incompetent); Wallace-Wells, *supra* note 415 (same). His lawyers claimed that death row syndrome rendered Ross incapable of fighting for himself by pursuing his appeals. In his dissent from the denial of certiorari in *Rector v. Bryant*, 501 U.S. 1239 (1991), Justice Marshall said that while the Court had ruled that the execution of insane people was unconstitutional in *Ford v. Wainwright*, 477 U.S. 399 (1986), an unsettled and important question remained: Whether a prisoner whose mental incapacity makes him incapable of communicating facts that

standing in the case.<sup>439</sup> But after Chief Public Defender Gerald Smyth filed a habeas petition in federal district court, Chief District Court Judge Robert Chatigny appeared to be deeply troubled by the specter of death row syndrome. Speaking with T.R. Paulding, the lawyer representing Ross, Judge Chatigny warned, "You better be prepared to live with yourself the rest of your life. And you better be prepared to deal with me if, in the wake of this, an investigation is conducted and it turns out that [Ross was coerced into volunteering by death row syndrome], because I'll have your law license."<sup>440</sup> Judge Chatigny has been both applauded and excoriated for the remark,<sup>441</sup> but the moral is clear: When a volunteer waives his appeals while suffering from death row syndrome, the stakes are dizzyingly high. The wrong choice may cost lawyers their careers; the wrong choice will cost condemned prisoners their lives. Thus, it is imperative to consider the significance of death row syndrome on the prisoner's decision to waive his appeals.

### 3. Consequences for Waiver

Death row syndrome, like clinical depression,<sup>442</sup> may increase the likelihood of volunteering, but it is unlikely to succeed as a basis for stopping an execution. Despite three previous suicide attempts, Michael Ross, a Cornell University graduate, appeared as a sufficiently lucid agent at his competency hearing.<sup>443</sup> Unless the seeds of anxiety and depression blossom into overt psychosis, prisoners suffering from death row syndrome are unlikely to be

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would make his execution unlawful or unjust is nonetheless competent to be executed. *Rector*, 501 U.S. at 1239 (Marshall, J., dissenting). The repressive effects of death row syndrome would seem to raise serious *Rector* issues.

439. See Ken Dixon, *Execution Closer on Judge's Ruling*, CONN. POST, Dec. 16, 2004, at A1 (describing Judge Clifford's ruling).

440. William Yardley, *After a Serial Killer Gets a Reprieve, the Spotlight Shines on a Federal Judge's Challenges*, N.Y. TIMES, Feb. 2, 2005, at B5.

441. See *id.* (quoting various reactions of law professors to Judge Chatigny's conduct); see also Fred Lucas, *Clinton-Appointed Judge Evokes Calls for Impeachment*, HUM. EVENTS ONLINE, Apr. 29, 2005, <http://www.humaneventsonline.com/article.php?id=7311> (discussing the disapproval of Judge Chatigny's actions by conservative politicians); Edmund H. Mahony, *Judge's Teleconference Has Experts Talking*, HARTFORD COURANT, Feb. 2, 2005, at A1 (noting the contradictory reactions within legal circles to Judge Chatigny's chastising of Paulding).

442. See *supra* notes 258–63 and associated text (describing effect of depression on desire for hastened death); *supra* notes 145–48 and associated text (describing the role of depression in Robert Smith's decision to pursue execution).

443. Christoffersen, *supra* note 50. Deemed competent, Michael Ross was executed by the state of Connecticut on May 13, 2005. *Connecticut Serial Killer Put to Death*, CNN, <http://www.cnn.com/2005/LAW/05/13/ross.execution/> (last visited Oct. 16, 2005).



legally impeded in volunteering by their condition. As long as the prisoner is competent and makes a knowing and voluntary waiver of his rights, he is free to waive his appeals.<sup>444</sup>

The comparison of death row syndrome to torture, however, raises fundamental questions about the voluntariness of the volunteer's waiver. The waiver of a constitutionally afforded right is invalid unless it is informed and freely made.<sup>445</sup> It is possible to compare the volunteer's waiver of appeal to a contract between the government and the death row prisoner.<sup>446</sup> As a general rule, a contract that represents a "meeting of the minds" is valid and binding, but a contract formed under duress is not. A contract formed under duress is not only voidable by the victim, but inherently void.<sup>447</sup> Given that conditions on death row can be comparable to physical torture, it is far from clear that volunteers are situationally capable of assenting to the waiver of their appellate rights.

Because of the inherently coercive nature of death row syndrome, capital attorneys cannot know whether a decision to volunteer is truly the will of the client or whether it is an artifact of isolation, anxiety, depression, hopelessness, guilt, anger, or self-loathing.

Social psychologists have repeatedly demonstrated that situations are inestimably powerful in shaping human conduct, leading people to make decisions that they might think themselves incapable of making.<sup>448</sup> For

444. See *supra* Part III.A (describing competency tests).

445. See, e.g., *Moore v. Michigan*, 355 U.S. 155, 164 (1957) ("A rejection of federal constitutional rights motivated by fear cannot, in the circumstances of this case, constitute an intelligent waiver.").

446. There may sometimes be a literal contract between the prosecutor and the volunteer. See *supra* note 141 (describing Robert Smith's agreement to plead guilty in exchange for the death penalty).

447. RESTATEMENT (SECOND) OF CONTRACTS § 175(1) (1981).

448. Craig Haney, *Psychology and the Limits to Prison Pain: Confronting the Coming Crisis in Eighth Amendment Law*, 3 PSYCHOL. PUB. POL'Y & L. 499, 502-03 (1997). The author continued:

Situational structure is now recognized as exerting a powerful influence over behavior in a range of social settings. Psychologists also have demonstrated that the cognitive representation of situations exercises an important effect on behavioral consistency. Contemporary psychological research has provided empirical documentation of the powerful influence of situational characteristics on various forms of psychopathology, including depression, and on behavior as diverse as altruism, coping, cheating, and a police officer's decision to take someone into custody. In a more directly relevant way, we also know that variations in social setting and context play an extremely important causal role in the incidence of criminality, aggression and violence, homicide, and even torture.

*Id.* (citations omitted).

example, Solomon Asch found that people would intentionally make false statements, just to conform to the judgments of others, all because of the pressure of the situation.<sup>449</sup> Stanley Milgram discovered that people were willing to electrocute other people, even to the point where they might die, simply because of the social pressure of the situation.<sup>450</sup> Philip Zimbardo found that situational pressures within a mock prison led some subjects to act sadistically and led others to suffer emotional breakdowns, even though his experiment lasted for only six days.<sup>451</sup> Indeed, social science indicates that under conditions that are far more benign and far more limited in duration than those observed on death row, people regularly confess to crimes they did not commit, simply because of the immense situational pressures applied during interrogation.<sup>452</sup> The situational pressures associated with death row, however, eclipse these others. Death row truly is the "worst of the worst."<sup>453</sup>

Death row is inherently coercive. Physically, the environment is extraordinarily bleak and austere—a cramped universe of sensory deprivation known to press the limits of human endurance.<sup>454</sup> Psychologically, death row is a place of rampant depression, hopelessness, and apprehension.<sup>455</sup> Because prisoners average more than ten years under these nightmarish circumstances,

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449. See generally Solomon Asch, *Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority*, 70 *PSYCHOL. MONOGRAPHS* 1 (1956) (explaining a series of experiments, ostensibly testing visual discrimination, in which a single subject is confronted by a clearly erroneous group of peers).

450. See generally STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY* (1974) (describing and analyzing the results of eighteen shock-treatment experiments).

451. See Craig Haney et al., *Interpersonal Dynamics in a Simulated Prison*, 1 *INT'L J. CRIMINOLOGY & PENOLOGY* 69, 80–81 (1973) (providing an overview of the results of the experiment); Philip Zimbardo et al., *The Mind Is a Formidable Jailer: A Pirandellian Prison*, *N.Y. TIMES*, Apr. 8, 1973, at 38, (Magazine), (giving a detailed account of the events of the experiment).

452. See generally GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS, AND TESTIMONY* (1992) (illustrating some of the processes involved in producing erroneous testimony and false confessions); S.M. Kassin, *The Psychology of Confession Evidence*, 52 *AM. PSYCHOLOGIST* 221 (1997) (arguing that there are serious dangers associated with confession evidence); S.M. Kassin, *More on the Psychology of False Confessions*, 53 *AM. PSYCHOLOGIST* 320 (1998) (discussing interrogations in which the suspect might come to believe his own false statements).

453. Cf. *supra* note 175 and accompanying text (describing "the worst of the worst" in terms of those who deserve execution).

454. See *supra* note 340 and accompanying text (suggesting same).

455. See *supra* notes 111–22 and accompanying text (describing rates of depression among prison populations); *supra* notes 415–41 and accompanying text (describing death row syndrome).

many courts have recognized that long stays on death row constitute—like torture—inhuman or degrading treatment.<sup>456</sup>

The pathological influence of death row makes it impossible to determine whether talk of waiving appeals and of volunteering is truly the will of the client or an artifact of the environment. Unfortunately, without removing the prisoner from death row and from the roller coaster of stays and execution dates, there is no reliable means to ascertain the client's true motivation. This uncertainty has ethical consequences: Without the ability to know—not merely to suspect, but to know—that the client's waiver of appeals is genuine, the ethical lawyer cannot acquiesce to the volunteering client's request. The stakes are simply too high, the risk that the request is situationally coerced is simply too great. Even if the lawyer does not believe that the duty of beneficence is incompatible with assisting the client in ending his life,<sup>457</sup> the inability of the client to make a voluntary waiver of his appeals should bar the attorney from participating in such proceedings.

## VI. Conclusion

This Article has argued that the phenomenon of the death row volunteer is a serious and worsening problem for capital attorneys,<sup>458</sup> that competence hearings are an inadequate check on the problem,<sup>459</sup> and that the Model Rules function more like Rorschach blots than binding rules (and therefore are another inadequate check on the problem).<sup>460</sup> Medical ethics, while contentious and ever-evolving, provides some bright-line guidance to the capital lawyer asked to traverse a labyrinth of ethics without a compass.<sup>461</sup> Because the roles of doctors and lawyers are comparable in many important ways,<sup>462</sup> and because terminal illness is analogous to pending execution in many important ways,<sup>463</sup> the medical community's prohibition against euthanasia and physician-assisted

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456. See *supra* notes 421–32 (outlining the acknowledgement of death row syndrome by international courts).

457. See *supra* Part V.B.3 (suggesting that analogizing the situation of the death row lawyer to that of the physician involved with terminally ill patients leads to the conclusion that attorneys probably cannot honor their duty to the client by participating in the waiver of appellate rights).

458. See *supra* Part II.C (suggesting same).

459. See *supra* Part III.A (suggesting same).

460. See *supra* Part IV.A (suggesting same).

461. See *supra* Part V.A (suggesting same).

462. See *supra* Part V.B.1 (suggesting same).

463. See *supra* Part V.B.2 (suggesting same).

suicide suggests that lawyers should not assist condemned prisoners in the waiver of their appeals.<sup>464</sup> It is incompatible with the duty of beneficence to do so. The recognition of death row syndrome suggests that even those lawyers who do not believe that a duty of beneficence prohibits them from assisting volunteers should not participate in the waiver of capital appeals.<sup>465</sup> The risk that prisoners have made their decisions under duress is too great.

Client-centered attorneys need to understand the immeasurable pressures exerted upon their clients by the conditions of death row and must not blindly follow orders from their despairing clients, simply because the client has told them to give up. Just as soldiers should reject unlawful orders to murder civilians,<sup>466</sup> lawyers should resist the volunteering of situationally disabled death row defendants.

Cause-centered attorneys who resist clients' requests to volunteer should not do so because they have paternalistically substituted their judgment for that of their clients, and because they think they know better. Rather, they should refuse to participate in the waiver of appellate rights because it is incompatible with the lawyer's duty of beneficence and because they cannot meaningfully distinguish the will of their client from the effects of death row syndrome.

Taking such a stand means that clients may be stripped of autonomy. It means that the client who demands execution may be denied.<sup>467</sup> Under this approach, individuals like Socrates or Joan of Arc who embrace execution over confinement for lucid and principled reasons will lose the opportunity to choose their outcomes.<sup>468</sup> It means that prisoners may be kept alive against their will

464. See *supra* Part V.B.3 (suggesting same).

465. See *supra* Part V.C.3 (suggesting same).

466. See *supra* note 47 (describing the legal standards for identifying when soldiers are obligated to disobey an unlawful order).

467. See White, *supra* note 55, at 859 (quoting Bruce Ledewitz as stating that his top priority is preventing the state from achieving its immoral goal of killing someone and that relative to that priority, "the defendant's desire to be killed is not important to me"). For a discussion of the case of *Smith v. State* and how Smith's attorneys were discharged from representation, see *supra* Part III.C.

468. Philosopher John Stuart Mill believed that it is very rational to choose execution over life imprisonment. He wrote:

What comparison can there really be, in a point of severity between consigning a man to the short pang of a rapid death, and immuring him in a living tomb, there to linger out what may be a long life in the hardest and most monotonous toil, without any of its alleviation or rewards—debarred from all pleasant sights and sounds, and cut off from all earthly hope, except a slight mitigation of bodily restraint, or a small improvement of diet?

*Smith v. State*, 686 N.E.2d 1264, 1273 (Ind. 1997) (quoting John Stuart Mill) (citation omitted); see also Alex Kozinski, *Tinkering with Death*, THE NEW YORKER, Feb. 10, 1997, at 48, 51 (noting that one defendant's "decision to forego the protracted trauma of numerous death-row

and forced to stage appeals they do not want.<sup>469</sup> But recognizing the coercive influence of death row syndrome, and the corruptive effect it exerts upon choice, is a necessary step to stem the tide of volunteers whose spirits have been broken by hard years of anxiety, depression, and hopelessness.

To remedy the coercive influences of death row, the dehumanizing elements of death row must be counteracted. The courts must distill an antidote to death row syndrome. Condemned prisoners must not be left languishing on death row for decades. They must not be buried alive in cramped cells where sensory deprivation pushes the bounds of endurance. They must not be subjected to a roller coaster of uncertainty and doubt. Until these pathological influences can be countered and until death row syndrome can be exorcised from American prisons, the volunteer's waiver of constitutionally guaranteed appeals cannot be knowing and voluntary. Until condemned prisoners are accordingly able to choose executions free from the cloud of duress, ethical lawyers cannot in good conscience participate in these proceedings.

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appeals was rational").

469. See, e.g., Robert Lee Massie, *Fixin' to Die: Let My Death Give Life to a Challenge of California's Machinery of Execution*, S.F. CHRON., Mar. 14, 2001, at A19 (describing the obstacles Massie faced in attempting to abandon the appeals process). The article continued:

Take my case. When I came up for trial in 1979, my state-appointed lawyer tried to prevent me from pleading guilty. When he failed, and I was sentenced to death, another state-appointed lawyer appealed my conviction to the state Supreme Court against my wishes. The Rose Bird court reversed my conviction because my state-appointed lawyer didn't agree with my guilty plea. It sent the case back for a retrial that I never asked for and didn't want.

*Id.* But see *Whitmore v. Arkansas*, 495 U.S. 149, 167 (1990) (Marshall, J., dissenting) (noting that capital appeals exist not just for the defendant, but also for the state).