

COMMENTS

REDEFINING A FINAL ACT: THE FOURTEENTH AMENDMENT AND STATES' OBLIGATION TO PREVENT DEATH ROW INMATES FROM VOLUNTEERING TO BE PUT TO DEATH

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INTRODUCTION

“Death row volunteerism,”¹ defined broadly, refers to criminal defendants who refuse to present mitigating evidence during sentencing in capital cases, or to criminal defendants² who are sentenced to death and then waive post-sentencing appeals.³ By at least one estimate, a majority of persons on death row request execution at some point during their criminal proceedings, and successful cases of volunteering are fairly common throughout the United States.⁴ To wit, between January 1, 1976, and December 31, 2005, 886 inmates in the United States were executed unwillingly, while 118, or approximately twelve percent of all executed inmates, were volunteers.⁵

Despite the prevalence of death row volunteerism, legal scholars have not reached a consensus as to whether states have a constitutional obligation to prevent defendants from volunteering to be put

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¹ The terms “death row volunteers” and “death row volunteerism” have been used by a number of scholars. See generally Anthony J. Casey, *Maintaining the Integrity of Death: An Argument for Restricting a Defendant's Right to Volunteer for Execution at Certain Stages in Capital Proceedings*, 30 AM. J. CRIM. L. 75, 76 n.2 (2002) (discussing the etymology of the phrase “volunteering for execution”).

² For consistency and ease of use, even death row inmates who have been sentenced to die are referred to as “defendants” or “capital defendants” throughout this Comment.

³ For purposes of this Comment, I will focus primarily on death row volunteerism after sentencing. Many of the arguments set out below also have implications for a defendant's refusal to present mitigating evidence at the sentencing phase of a capital trial.

⁴ See G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860, 861 (1983) (“Such instances of citizens ‘volunteering’ to be executed are by no means uncommon and certainly not “unique in the annals of the Court.” (citation omitted)).

⁵ Death Penalty Info. Ctr., Searchable Database of Executions, <http://www.deathpenaltyinfo.org/executions.php> (last visited Sept. 29, 2006).

to death, and the U.S. Supreme Court has never ruled on that specific issue. In fact, legal scholars struggle with how to *classify* death row volunteers: one camp of scholars argues that volunteers are individuals who are asserting their autonomy through an honorable, albeit tragic, “last act,”⁶ while another camp argues that volunteers who refuse to fight their death sentences are committing irrational suicide because of depression caused by the poor conditions that are prevalent on death row.⁷ In waging this debate, scholars from both camps largely have explored the constitutionality of death row volunteerism through the lens of the Eighth Amendment’s ban on “cruel and unusual punishment.”⁸

Part I of this Comment will explore the U.S. Supreme Court’s jurisprudence related to death row volunteerism and discuss how state courts have construed that jurisprudence in analyzing the rights of death row inmates. Part II will examine scholarship on the constitutionality of death row volunteerism under the Eighth Amendment and conclude that U.S. Supreme Court jurisprudence, taken as a whole, does not create a broad Eighth Amendment obligation for states to mandate post-conviction appeals. Part III will argue that substantive due process analysis under the Fourteenth Amendment represents a better approach to exploring states’ obligations to prevent death row volunteerism, specifically through comparison of post-conviction appeals with irrational suicide, physician-assisted suicide, or refusal of lifesaving treatment. This Comment will demonstrate that due process analysis allows for consideration of the autonomy-assertion versus irrational-suicide debate in a new light; it will establish that death row volunteerism by competent defendants is also constitutional under the Fourteenth Amendment. Part IV will briefly discuss the implications of allowing death row volunteerism on the death penalty abolition movement in the United States.

⁶ See, e.g., Kathleen L. Johnson, *The Death Row Right to Die: Suicide or an Intimate Decision?*, 54 S. CAL. L. REV. 575, 627 (1981) (proposing that states allow capital defendants to waive post-sentencing appeals to protect “the capital defendant’s right to the privacy of ‘intimate decision’” (footnote omitted)); Melvin I. Urofsky, *A Right to Die: Termination of Appeal for Condemned Prisoners*, 75 J. CRIM. L. & CRIMINOLOGY 553, 573 (1984) (“If one is going to argue that even condemned murderers retain some spark of humanity, some rights of individual autonomy, then something must be done to . . . permit those who wish to terminate that existence through execution of sentence the right to do so.”).

⁷ See, e.g., C. Lee Harrington, *Mental Competence and End-of-Life Decision Making: Death Row Volunteering and Euthanasia*, 29 J. HEALTH POL. POL’Y & L. 1109, 1130–32 (2004) (discussing capital defense attorneys’ beliefs that most death row volunteers are depressed and irrational).

⁸ See, e.g., Richard J. Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363, 1382–87 (1988) (denying an Eighth Amendment obligation to prevent death row volunteerism); Linda E. Carter, *Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death*, 55 TENN. L. REV. 95, 107–29 (1987) (reviewing the historical role of the Eighth Amendment vis-à-vis death row volunteerism, particularly at the mitigation phase of trial).

I. CONSTITUTIONAL DOCTRINE AND DEATH ROW VOLUNTEERISM

The U.S. Supreme Court has never ruled explicitly on whether state laws that allow defendants to expedite execution violate either the Eighth or Fourteenth Amendments. However, the Supreme Court has issued several decisions that have broad implications for the death row volunteerism debate. Most notably, in *Faretta v. California*, the Supreme Court held that a defendant has a right to proceed in his case without counsel under the Sixth Amendment.⁹ In *Faretta*, a criminal defendant attempted to waive his right to assistance of counsel, but the trial court refused to conduct the trial without intervention from the local public defender's office.¹⁰ The Court invalidated the trial court's actions, explaining that "[t]he language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally."¹¹ A decade later, the Court reiterated its *Faretta* holding in *McKaskle v. Wiggins*.¹² A number of lower courts have read *Faretta* and its progeny broadly to establish or protect defendant autonomy in a wide range of contexts, including in waiving post-sentencing appeals;¹³ to date, the Court has not discouraged them. For example, in *Lenhard v. Wolff*, the Court refused to address whether a capital defendant must be prevented from refusing to present mitigating evidence at sentencing,¹⁴ leaving undisturbed a state trial court's holding that, under *Faretta*, a defendant had the right to refuse to present mitigating evidence in his capital trial.¹⁵

A second body of U.S. Supreme Court decisions has established standards to determine defendants'—and particularly capital defen-

⁹ 422 U.S. 806, 836 (1974).

¹⁰ *Id.* at 807–11. In its ruling, the trial court cited *People v. Sharp*, 499 P.2d 489, 492–93 (Cal. 1972), in which the California Supreme Court held that the Sixth Amendment's guarantee that a criminal defendant "shall enjoy the right . . . to have the Assistance of Counsel for his defence" did not create a corresponding right for a criminal defendant to choose to proceed pro se. *Id.* at 811–12.

¹¹ *Id.* at 820.

¹² 465 U.S. 168, 187–88 (explaining that while "*Faretta* affirmed the defendant's constitutional right to appear on stage at his trial[,] courts could allow public defenders to be present at trial—even where defendants waive their right to counsel and proceed pro se—so that the public defenders could instruct the defendants about courtroom proceedings and assist them in mounting their own defense).

¹³ See notes 29–31 and the accompanying text for a brief survey of states' various applications of *Faretta*.

¹⁴ 444 U.S. 807, 807 (1979) (refusing to stay the defendant's execution at the behest of the public defenders in his jurisdiction).

¹⁵ See *id.* at 808–10 (Marshall, J., dissenting) (recounting the trial court's application of *Faretta* to the instant case).

dants'—mental competency during or after trial. In *Rees v. Peyton*, the Court held that it would not decide whether a capital defendant could waive his post-conviction appeals until a district court first determined the defendant's

mental competence in the present posture of things, that is, whether he 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 in the premises.¹⁶

One year later, the Court stayed the defendant's execution.¹⁷

In *Godínez v. Moran*, the Court reaffirmed the importance of determining the competence of defendants in capital cases.¹⁸ In *Godínez*, a Nevada trial court allowed a capital defendant to plead guilty to first-degree murder after two psychiatrists found that he was competent to stand trial.¹⁹ The defendant later challenged his conviction as violative of the Due Process Clause, alleging that the trial court failed to apply a sufficiently stringent standard to determine his competency.²⁰ The Court declined to reverse his conviction on due process grounds, holding that the trial court properly ascertained that the defendant was competent before accepting his guilty plea.²¹ Synthesizing its holdings in *Rees* and subsequent case law,²² the Court explained that defendants may plead guilty to capital crimes if they have a rational understanding of the proceedings against them²³ and if they have waived their constitutional rights knowingly and voluntarily.²⁴

The Court's holdings in *Rees* and *Godínez* are significant to the death row volunteerism debate for two primary reasons. First, and most important, the Court's articulations of competency tests for capital defendants who plead guilty or waive post-conviction appeals

¹⁶ 384 U.S. 312, 314 (1966).

¹⁷ *Rees v. Peyton*, 386 U.S. 989 (1967).

¹⁸ 509 U.S. 389, 395–96 (1993).

¹⁹ *Id.* at 392–93.

²⁰ *Id.* at 393–94.

²¹ *Id.* at 391.

²² See, e.g., *Whitmore v. Arkansas*, 495 U.S. 149, 165–66 (1990) (holding that a capital defendant may waive his right to appeal if he does so knowingly, intelligently, and voluntarily, and if there is no meaningful evidence that he suffers from a mental disease, disorder, or defect that affects his capacity to make an intelligent decision); *Gilmore v. Utah*, 429 U.S. 1012, 1013 (1976) (holding that the Court will not intervene where a capital defendant makes a "knowing and intelligent waiver" of his right to appeal).

²³ See *Godínez*, 509 U.S. at 396 (citing *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam)).

²⁴ *Id.* at 400. As the Court noted, criminal defendants who enter guilty pleas waive three constitutional rights: the privilege against self-incrimination, the right to a trial by jury, and the right to confront their accusers. *Id.* at 397 n.7.

implicitly establish that such capital defendants are not per se incompetent as a matter of law. Second, if the Court were to consider the constitutionality of allowing death row inmates to waive their post-conviction appeals, it first would determine, as a threshold matter, whether those inmates met the competency standard articulated in *Rees* and refined in *Godinez*.

Yet it is unlikely that the Court *would* consider the constitutionality of post-conviction appeal waivers by competent defendants based on its “next friend” jurisprudence:²⁵ the Court repeatedly has held that third parties do not have standing to challenge competent capital defendants’ decisions to waive their appeals.²⁶ First, in *Gilmore v. Utah*, the Court refused to grant standing to the mother of the defendant so that she could challenge the defendant’s decision to expedite his execution, explaining,

the Court is convinced that Gary Mark Gilmore made a knowing and intelligent waiver of any and all federal rights he might have asserted after the Utah trial court’s sentence was imposed, and, specifically, that the State’s determinations of his competence knowingly and intelligently to waive any and all such rights were firmly grounded.²⁷

The Supreme Court reiterated its unwillingness to recognize “next friends,” or third party interveners, in *Whitmore v. Arkansas*, holding that a capital defendant did not have “next friend” standing to challenge a fellow capital defendant’s waiver of appeal because the defendant had “given a knowing, intelligent, and voluntary waiver of his right to proceed, and his access to court is otherwise unimpeded.”²⁸

²⁵ For a good definition of “next friend” jurisprudence, see Casey, *supra* note 1, at 79 n.22. Casey explains:

“Next friend” standing is the concept that under certain circumstances a qualifying party may be able to bring claims as a “next friend” on behalf of the party with proper standing. These claims most frequently occur where a “next friend” appears in court “on behalf of detained prisoners who are unable, usually because of mental incompetence or inaccessibility, to seek relief themselves.”

Id. (citations omitted).

²⁶ Challenges to defendants’ decisions to be put to death typically (and usually unsuccessfully) come from third parties who seek “next friend” standing, such as family members, defense attorneys, or anti-death penalty activists. In the absence of recognized “next friends,” such challenges must come from parties with *automatic* standing: that is, the defendants themselves, who will challenge their own waiver of post-conviction appeals only under very rare circumstances, and governments, which have vested interests in seeing the defendants put to death. See generally 5 AM. JUR. 2D *Appellate Review* § 264 (2005) (noting that, in general, parties to litigation have the exclusive right to appeal decisions of lower courts related to that litigation).

²⁷ 429 U.S. 1012, 1013 (1976). In a scathing dissent that frequently is cited by opponents of the death penalty, Justice White opined that “the consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment.” *Id.* at 1018 (White, J., dissenting).

²⁸ 495 U.S. 149, 150 (1990).

Because the Court has refused to recognize “next friends” in the death row volunteerism context, only two categories of parties have standing to challenge competent defendants’ decisions to hasten their deaths: defendants that have asked to be put to death and the states that have sentenced them to die. Yet while such challenges are unlikely, they are not unthinkable, as the Court conceivably could agree to hear arguments in a case in which a defendant seeks to rescind his waiver of post-conviction appeals as his execution nears.

Because the Court has never explicitly ruled on the constitutionality of death row volunteerism by competent defendants, states have applied the Court’s holdings on defendant autonomy, competency requirements, and lack of “next friend” standing in a variety of ways. As noted above, a number of lower courts—including state supreme courts—have construed *Faretta* as recognizing the right of competent defendants to waive their post-conviction state and federal appeals.²⁹ Other states have allowed defendants to waive their state and federal appeals based on state common or statutory law rather than on their construction of U.S. Supreme Court decisions.³⁰ A third set of states explicitly or implicitly has refused to extend *Faretta* to defendants who wish to waive appeals to hasten their executions.³¹ Such divergent interpretations of U.S. Supreme Court jurisprudence demonstrate that states’ obligations to prevent capital defendants from waiving their post-conviction appeals are much less clear-cut than a cursory glance at the Court’s precedent might imply. On balance, however, the Supreme Court precedent probably does not obligate states to require capital defendants to appeal their convictions against their will.

²⁹ See, e.g., *Hamblen v. State*, 527 So. 2d 800 (Fla. 1988) (construing *Faretta* to support the assertion that “all competent defendants have a right to control their own destinies”); *Bishop v. State*, 597 P.2d 273 (Nev. 1979) (construing *Faretta* to mean that a defendant may waive the presentation of mitigating evidence as part of his self-representation); *State v. Tyler*, 553 N.E.2d 576 (Ohio 1990) (citing *Faretta* to validate a defendant’s autonomy and self-interest in controlling her future).

³⁰ These states include Arkansas, where the court in *State v. Robbins*, 5 S.W.3d 51 (Ark. 1999), ruled that while a defendant may waive his right to appeal his death penalty sentence, the appellate court is required to conduct a mandatory review of the record; Louisiana, where the court concluded in *State v. Felde*, 422 So. 2d 370 (La. 1982), that counsel is not ineffective for proceeding in compliance with a defendant’s willingness to be sentenced to death; and South Carolina, whose judges found in *State v. Torrence*, 473 S.E.2d 703 (S.C. 1996), that provisions for automatic appeal are waivable by defendants sentenced to the death penalty.

³¹ See, e.g., *People v. Deere*, 710 P.2d 925 (Cal. 1985) (holding that a defendant may not waive the presentation of mitigating evidence during the sentencing phase of a capital case); *State v. Martini*, 677 A.2d 1106 (N.J. 1996) (imposing an application for post-conviction relief, pursued by court-appointed counsel, that cannot be waived by a defendant).

II. EIGHTH AMENDMENT IMPLICATIONS FOR DEATH ROW VOLUNTEERISM

Traditionally, scholars have construed the constitutionality of death row volunteerism through the prism of the Eighth Amendment³²—albeit with dramatically different results. For example, in one oft-cited article,³³ Linda E. Carter argues that because the right to present mitigating evidence at the sentencing phase of a capital trial is protected by the Eighth Amendment, and because the Eighth Amendment is “unwaivable”³⁴ when the good of society is at stake, death row volunteerism at the sentencing phase is unconstitutional.³⁵ Specifically, she explains: “The integrity of the criminal justice system is . . . jeopardized if eighth amendment protections can be waived without principled limitations. The language and history of the amendment support such an interpretation.”³⁶ Carter adds: “Moreover, the societal interest in precluding arbitrary imposition of the death penalty is strong.”³⁷ She thus concludes that the Eighth Amendment is unwaivable, and so capital defendants may not refuse to prevent mitigating evidence at trial because such refusal “invalidates the delicately balanced protection for safeguarding against the arbitrary imposition of the death penalty.”³⁸

While Carter limits her reasoning to the mitigation phase of capital trials, it can be applied to post-sentencing appeals as well. In fact, Justice Thurgood Marshall took this approach in several dissents during his tenure on the Supreme Court, arguing that capital defendants could not waive their Eighth Amendment rights to post-conviction appeals. For example, in *Gilmore v. Utah*, Justice Marshall argued in his dissent: “I believe that the Eighth Amendment not only protects the right of individuals not to be victims of cruel and unusual punishment, but that it also expresses a fundamental interest of society in ensuring that state authority is not used to administer barbaric pun-

³² For helpful background on the history of the Eighth Amendment, see Jeffrey L. Kirchmeier, *Let's Make a Deal: Waiving the Eighth Amendment by Selecting a Cruel and Unusual Punishment*, 32 CONN. L. REV. 615, 618–30 (2000), and Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661, 667–82 (2004).

³³ See, e.g., Casey, *supra* note 1, at 80 n.25 (citing Carter, *supra* note 8, for her discussion of the *Whitmore v. Arkansas* and *Gilmore v. Utah* cases discussed in Part I).

³⁴ For a thorough discussion of the “waivability” of certain constitutional rights, see Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801 (2003).

³⁵ See Carter, *supra* note 8, at 109–11 (explaining that the Eighth Amendment prevents capital defendants from refusing to present mitigating evidence at sentencing).

³⁶ *Id.* at 110.

³⁷ *Id.*

³⁸ *Id.* at 111.

ishments.”³⁹ In *Whitmore v. Arkansas*, Justice Marshall, joined by Justice Brennan, reiterated this point of view, adding:

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.⁴⁰

Justice Marshall further explained: “Although death may, to some death row inmates, seem preferable to life in prison, society has the right, and indeed the obligation, to see that procedural safeguards are observed before the State takes a human life.”⁴¹

As persuasive as Carter’s and Justice Marshall’s perspective may be to some members of the legal community, no U.S. Supreme Court majority has endorsed the “unwaivability” of the Eighth Amendment. Other scholars also disagree with the view that the Eighth Amendment forecloses defendants from waiving their post-conviction appeals. For example, Richard J. Bonnie argues that the Eighth Amendment protects *individual* rights only;⁴² it therefore does not establish “a societal interest in promoting leniency or in reducing the number of death sentences.”⁴³ Bonnie adds that any state’s obligation to prevent death row volunteerism must be established by state statute, rather than by the Constitution,⁴⁴ although he expresses skepticism that such a statute reasonably could be implemented by the states.⁴⁵ Finally, the Supreme Court’s own jurisprudence creates a reasonable assumption that the Court almost certainly would not adopt Carter’s and Justice Marshall’s view of the Eighth Amendment. As discussed more extensively in Part I, the Court’s decisions supporting *competent* capital defendants’ decisional autonomy regarding prosecutions probably mean that competent death row inmates have a right to waive post-conviction appeals. This assumption is further

³⁹ 429 U.S. 1012, 1019 (1976) (Marshall, J., dissenting).

⁴⁰ 495 U.S. 149, 171–72 (1990) (Marshall, J., dissenting).

⁴¹ *Id.* at 175–76.

⁴² See Bonnie, *supra* note 8, at 1382–84 (arguing that capital defendants’ individual Eighth Amendment interests in reducing the risk of the arbitrary imposition of death sentences do not implicate states).

⁴³ *Id.* at 1383–84.

⁴⁴ See *id.* at 1384 (“Even if a capital defendant may waive *his* eighth amendment interest in individualized capital sentencing, an equivalent societal interest may be independently established by state capital sentencing statutes.”); *cf.* *State v. Osborn*, 631 P.2d 187 (Idaho 1981) (holding that an Idaho statute mandates review of the procedural elements of death penalty sentencing).

⁴⁵ See Bonnie, *supra* note 8, at 1387 (arguing that systemic and procedural barriers to preventing death row inmates from waiving their post-conviction appeals suggest “that arrangements designed to vindicate society’s supposedly independent interest in the integrity or reliability of capital sentencing determinations could not be sensibly or effectively implemented”).

strengthened by the Court's holdings that third parties cannot gain "next friend" standing to challenge death row inmates' waivers of appeal,⁴⁶ also discussed more extensively in Part I.

III. DEATH ROW VOLUNTEERISM AND THE FOURTEENTH AMENDMENT

In light of Supreme Court jurisprudence and the Court's unwillingness to adopt Justice Marshall's view of the Eighth Amendment as "unwaivable" for the benefit of the American public's faith in the criminal justice system, those who oppose death row volunteerism—based on a belief that it undermines the criminal justice system generally,⁴⁷ or that no competent defendant would choose to be put to death⁴⁸—must consider an alternative framework in calling into question its constitutionality. For that reason, a number of scholars have turned to Fourteenth Amendment jurisprudence, focusing specifically on Supreme Court case law related to refusal of medical treatment and suicide.⁴⁹ Such substantive due process analysis⁵⁰ allows for consideration of whether a waiver of post-conviction appeal is more comparable to irrational suicide, physician-assisted suicide, or refusal of lifesaving treatment—and, in turn, whether it is constitutional.

A. *Death Row Volunteerism as Constitutionally-Unsupportable Suicide*

Scholars and practitioners who construe death row volunteerism through Fourteenth Amendment analysis disagree as to whether such volunteerism is analogous to irrational (and constitutionally-unsupportable) suicide. At one end of the spectrum, Richard J. Bonnie dismisses this characterization as "hyperbole, of course,"⁵¹ ar-

⁴⁶ See *Casey*, *supra* note 1, at 79 ("In two cases, *Gilmore v. Utah* and *Whitmore v. Arkansas*, dealing with 'next friend' standing, the United States Supreme Court has essentially foreclosed the possibility of a constitutionally required mandatory and non-waivable appellate review of state death sentences." (footnotes omitted)).

⁴⁷ See, e.g., *Carter*, *supra* note 8, at 110 (asserting that the societal interest in preventing the death penalty from being imposed without significant safeguards is strong because "[t]he death penalty is irreversible").

⁴⁸ See, e.g., *Harrington*, *supra* note 7 (recounting the beliefs of capital defense attorneys that most death row volunteers are depressed and irrational, and thus are not competent to waive post-conviction appeals).

⁴⁹ See e.g., *Johnson*, *supra* note 6, at 604–05 (comparing the death row right to die with the right to refuse treatment under the Fourteenth Amendment); Julie Levinsohn Milner, *Dignity on 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, 291 (1998) (arguing that death row volunteerism should be allowed so long as the Fourteenth Amendment supports a right to physician-assisted suicide).

⁵⁰ For a brief but thorough history of substantive due process analysis, see Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501 (1999).

⁵¹ Bonnie, *supra* note 8, at 1375.

guing that “only if execution of a lawfully imposed death sentence amounts to homicide is the state an agent of suicide when it executes a competent prisoner who has declined to contest his death sentence.”⁵² From a more moderate perspective, Kathleen L. Johnson argues that capital defendants who choose to be put to death are akin to persons who face terminal illness, and not persons who, because of depression or other mental illness, choose to commit suicide.⁵³ She explains that capital defendants are *unlike* persons who irrationally seek to commit suicide, because their choices lack two characteristics of suicides.⁵⁴ First, both groups lack a specific intent to die. In other words, neither terminally ill persons nor persons on death row have a desire to die; they just seek to greet imminent and unavoidable death on their own terms.⁵⁵ Second, they lack an active causation—both terminally ill persons and persons on death row face imminent deaths for reasons beyond their control, and they choose to *hasten*, rather than to *cause*, their deaths.⁵⁶ Johnson further adds that “[m]any suicide attempts are the product of rash, unbalanced, or confused judgments—of mental disturbance[,]”⁵⁷ while “most instances of refusal of treatment represent careful decisions and not rash attempts at self-destruction.”⁵⁸ For Johnson, then, death row volunteers make thoughtful, rational choices that may be entitled to substantive due process protection, as discussed more extensively below.

In another widely-cited treatise⁵⁹ on this subject, Melvin I. Urofsky argues that death row volunteerism is akin to irrationally chosen suicide,⁶⁰ thus taking the opposite view from Richard Bonnie. However, citing anecdotal evidence, he argues that such volunteerism is *morally* supportable based on three principles of bioethics developed by Tom L. Beauchamp and Henry F. Childress.⁶¹ First, with regard to the principle of *autonomy*, Urofsky argues that death row inmates should

⁵² *Id.*

⁵³ See Johnson, *supra* note 6, at 604 (“The death row inmate’s assertion of a right to die by refusing to appeal is most closely analogous to the terminal patient’s asserted right to die in refusal of treatment or antidythanasia cases.”).

⁵⁴ *Id.* at 617.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 618.

⁵⁸ *Id.*

⁵⁹ See, e.g., Harrington, *supra* note 7, at 1110 (discussing Urofsky’s view of death row volunteerism as autonomy-enhancing).

⁶⁰ See Urofsky, *supra* note 6, at 576 (explaining that death row volunteerism “involves the right to die not only when a person is terminally ill and wants to forgo weeks or months of suffering with no hope of recovery, but when for other reasons, the quality of life is such that a person no longer wants to live”).

⁶¹ See *id.* at 578–79 (positing that principles of bioethics “provide a useful framework in which to examine decisions made on death row”).

have the right to choose death as a final act of self-determination.⁶² Second, with regard to the principle of *human worth*, Urofsky argues that, while society should prevent suicide generally based upon principles of human worth, refusing to allow death row inmates to waive appeals because of their intrinsic value as humans is hypocritical because those humans will be put to death by the state despite any “intrinsic value” that they may have.⁶³ Finally, with regard to the principle of *utility*, he argues that society has less of a stake in protecting death row inmates from choosing death because they will never contribute to their communities.⁶⁴ But while some members of the legal community might find compelling Urofsky’s argument supporting death row volunteerism because of a broad *moral* right for capital defendants to choose suicide, his theory hardly establishes a *constitutional* right to death row volunteerism under the Fourteenth Amendment because, as discussed below, the U.S. Supreme Court has considered the legality of assisted suicide only as it relates to competent, *terminally ill* adults.

In a 2004 survey of twenty attorneys who represent capital defendants, each of whom had represented at least one defendant that had volunteered to be put to death,⁶⁵ C. Lee Harrington challenges the conclusions of both Johnson and Urofsky. She finds that many capital attorneys have serious concerns about the competency of death row inmates who choose to waive their remaining appeals.⁶⁶ While the Supreme Court has set forth a competency requirement in *Godinez v. Moran*,⁶⁷ Harrington notes that states have no real stake in ensuring that death row inmates are legitimately competent and do not suffer from debilitating depression or other mental disorder.⁶⁸ She then cites the perspectives of several capital attorneys with regard to the mental competency of death row inmates who choose to expedite execution. One attorney is ambivalent that any capital defendant who chooses death can be competent:

I don’t know if you can determine whether or not [death row inmates] are making a rational decision. . . . There’s a part of me that thinks it can be done, but . . . the circumstances on death row and the pressures and stresses that people are sub-

⁶² *Id.*

⁶³ *Id.* at 579–80.

⁶⁴ *Id.* at 580–81.

⁶⁵ For an overview of the survey methodology, see Harrington, *supra* note 7, at 1122–26.

⁶⁶ See generally *id.* at 1126–40.

⁶⁷ 509 U.S. 389 (1993); see discussion *supra* Part I.

⁶⁸ See Harrington, *supra* note 7, at 1143 (“[T]he highly politicized world of death penalty litigation suggests that [some constitutional law scholars’] general assumption that competence assessments are made in good faith might need to be reexamined in certain legal contexts.”).

jected⁶⁹ to causes me to question every decision to those appeals.

Another attorney is more emphatic that death row volunteers most likely are not competent:

[Death row inmates] can have relatively good days but a relatively good day for someone condemned is a pretty bad day for the rest of us. There are a lot of people who wind up here who weren't dealt a great hand in the first place. Some were born with significant mental deficiencies and they just lack the capacity to deal with the pressures. Most were so abused that their limitations were made even more limited. What happens, very arbitrarily, is that they succumb to some kind of mental illness . . . that robs them of the ability to deal with the pressures when they come up.⁷⁰

A third attorney is similarly skeptical that death row volunteers are competent, explaining:

Is it rational to be depressed when you're facing some execution down the line? Is it rational to want to gain some modicum of control in that process by basically forcing the state to kill you when *you* want to be killed rather than when *they* want you to be killed? Well, that seems rational, but it's rational only in an insane sort of way.⁷¹

Yet while Harrington's findings are compelling, they do not lend themselves to a *constitutional* analysis of the status of death row volunteers. As discussed in Part I, the Supreme Court has held that inmates who meet the standard for competency set out in *Godinez v. Moran* may make decisions regarding their defenses—or lack thereof.⁷² While Harrington's data demonstrates flawed *application* of the *Godinez* standard, which largely is a state policy issue,⁷³ it does not demonstrate that the standard *itself* is constitutionally flawed.⁷⁴

⁶⁹ *Id.* at 1137.

⁷⁰ *Id.*

⁷¹ *Id.* at 1140.

⁷² As discussed in Part I, the Supreme Court has held that, to determine whether defendants are competent, lower courts must determine whether the defendants have a rational understanding of the proceedings against them and whether they have waived their constitutional rights knowingly and voluntarily. *Godinez*, 509 U.S. at 396–400.

⁷³ To prevent flawed competency determinations, Harrington argues that states should adopt a “therapeutic jurisprudence” approach to granting capital defendants’ waivers of post-conviction appeals, where defendants would be screened and treated for depression and other mental illnesses; competent defendants would be granted the right to “plan[] for death and assert[] some level of control over the process.” Harrington, *supra* note 7, at 1144–45.

⁷⁴ That is not to say that the Supreme Court could not determine that the standard for competency set out in *Godinez* is unworkable, and therefore unconstitutional as applied. But the Court has given no indication that such a ruling is likely, and that possibility is beyond the scope of this Comment.

In another study, published in 2005, John H. Blume similarly analogizes persons who commit suicide to death row volunteers.⁷⁵ First, he discusses aggregated government data on persons who commit suicide, noting that they frequently are white males with diagnosable mental health disorders.⁷⁶ He further explains that hopelessness and social isolation are strong predictors of suicide, and that suicide is contagious among vulnerable populations like psychiatric patients and prison inmates.⁷⁷ He then turns to death row volunteers, noting that, like persons who commit suicide, they overwhelmingly are white, and they overwhelmingly suffer from mental illnesses of varying degrees of severity.⁷⁸ Moreover, he surveys attorneys who have represented death row volunteers; thirty-nine percent of those attorneys report that their clients waived post-conviction appeals because of a sense of hopelessness.⁷⁹ Blume also offers anecdotal evidence of contagion among death row inmates, noting that rates of death row volunteerism significantly increase after a volunteer is executed.⁸⁰

Blume concludes that “there are important similarities between persons who commit suicide and those who volunteer for execution;” he asserts that those similarities are “extremely unlikely to be attributable to chance.”⁸¹ At the same time, thirty-six percent of the attorneys that he surveys report that acceptance of responsibility or acknowledgement of guilt was a factor in their clients’ decisions to volunteer to be put to death; Blume acknowledges that this statistic undermines a categorical analogy of death row volunteerism to suicide.⁸² Blume thus concedes: “I do not think that I have shown—or that subsequent data will show—that volunteering is inevitably a suicidal act.”⁸³ He ultimately advocates for a standard of competency that is far more stringent than the standard set out in *Godinez*, to ensure that no successful death row volunteers are suicidal.⁸⁴ Blume

⁷⁵ John H. Blume, *Killing the Willing: “Volunteers,” Suicide and Competency*, 103 MICH. L. REV. 939 (2005).

⁷⁶ *Id.* at 956–57 (noting that over ninety percent of suicide victims suffer from a diagnosable mental health disorder).

⁷⁷ *Id.* at 957–58.

⁷⁸ *Id.* at 960–63.

⁷⁹ *Id.* at 963.

⁸⁰ *Id.* at 964.

⁸¹ *Id.* at 968.

⁸² *Id.* at 967.

⁸³ *Id.*

⁸⁴ Blume suggests that courts should undertake a two-prong inquiry into death row volunteers’ competency: Courts first should ask if application of the death penalty objectively is just, and then courts should determine if defendants are motivated by acceptance of their punishment rather than a desire to commit suicide. *Id.* at 968. Blume does not believe that defendants should be allowed to hasten their deaths in an effort to assert their autonomy. See *id.* at 970 (“[J]ust as rationality does not excuse participation in a suicide, it also should not legitimize a death-row inmate’s decision to waive his appeals and submit to execution.”).

therefore demonstrates that death row volunteers cannot *categorically* be classified as persons who irrationally choose to commit suicide because of depression or other mental illness. Thus, as discussed below, as a broad category of actors, death row volunteers probably can be better analogized to terminally ill patients who choose to end their own lives.

B. Death Row Volunteerism as Physician-Assisted Suicide

Portraying *competent* death row volunteers as terminally ill patients who seek to end their lives through affirmative acts, rather than as irrationally suicidal individuals, may be conceptually appealing to some legal scholars or practitioners who believe that death row volunteerism is—or should be—constitutional. In recent months, such an analogy has become a relatively safe bet for those members of the legal community, as the Supreme Court held that states may allow physicians to assist terminally ill persons in ending their lives. The Court has addressed physician-assisted suicide on several occasions over the past decade. First, in *Washington v. Glucksberg*, the Court held that physician-assisted suicide is not a fundamental liberty interest protected by the Due Process Clause,⁸⁵ but the Court left the door open for states to allow physician-assisted suicide.⁸⁶ And in *Vacco v. Quill*, a companion case to *Glucksberg*, the Court asserted that, under the Due Process Clause, there is a legitimate state interest in “prohibiting intentional killing and preserving life; preventing suicide . . . ; protecting vulnerable people from indifference, prejudice, and psychological and financial pressure to end their lives; and avoiding a possible slide towards euthanasia”⁸⁷

In early 2006, the Supreme Court ruled⁸⁸ on the constitutionality of the Oregon Death With Dignity Act,⁸⁹ the sole state statute authorizing physician-assisted suicide in the United States, thus resolving, to some extent, the question it left unanswered in *Glucksberg* and *Quill*: Under the Federal Constitution, may states allow physicians to assist terminally ill patients in committing suicide? In *Gonzales v. Oregon*, the Court upheld the Death With Dignity Act, holding that the Fed-

⁸⁵ 521 U.S. 702, 705–06 (1997) (“The question presented in this case is whether Washington’s prohibition against ‘caus[ing]’ or ‘aid[ing]’ a suicide offends the Fourteenth Amendment to the United States Constitution. We hold that it does not.” (brackets in original)).

⁸⁶ See *id.* at 735 (noting that, because the Court’s holding merely allows states to ban physician-assisted suicide—and does not outlaw it altogether—states may continue to engage “in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide”).

⁸⁷ 521 U.S. 793, 794 (1997).

⁸⁸ 126 S. Ct. 904 (2006).

⁸⁹ Oregon Death With Dignity Act, OR. REV. STAT. §§ 127.800–.995 (2003).

eral Controlled Substance Act did not authorize the U.S. Attorney General “to bar dispensing controlled substances for assisted suicide in the face of a state medical regime permitting such conduct.”⁹⁰ The Death With Dignity Act requires a patient who seeks her physician’s assistance in ending her life to meet three broad requirements: the patient must have a terminal disease that will take her life within six months;⁹¹ the patient must be capable—not suffering from a psychiatric or psychological disorder or depression causing impaired judgment;⁹² and the patient must act voluntarily.⁹³

The requirements of the Death With Dignity Act arguably can be extended to death row volunteers, albeit with slight conceptual difficulty. For example, with regard to the requirement that persons choosing suicide have a terminal disease, Kathleen L. Johnson explains:

Both the terminal patient and the capital defendant face virtually certain and imminent death if the required treatment is not administered or the appeal waived; both face future suffering, physical as well as mental, if they live on in the hospital or on death row, and both will probably die anyway, if the treatment is unsuccessful or if the appeal is denied.⁹⁴

Furthermore, both the Death With Dignity Act and the Supreme Court’s jurisprudence regarding capital defendant decision-making require proof of competency.⁹⁵ While, as discussed above, both C. Lee Harrington and John H. Blume raise valid questions as to whether the *Godínez* standard adequately ensures that every death row volunteer is competent, the standard is not a toothless one.

Finally, both the Death With Dignity Act and standards related to death row volunteerism require that decisions to hasten death be voluntary. In the case of capital defendants, that means that the inmates must not choose death because of pressure from their attorneys to waive appeals or because of fear of losing access to counsel for financial or other reasons. This risk is minimal based on the extensive network of pro bono attorneys and organizations who champion

⁹⁰ *Oregon*, 126 S. Ct. at 925. It is important to note that the Court did not hold that there is a Fourteenth Amendment right to physician-assisted suicide in the absence of state bans akin to the one upheld in *Glucksberg*, rather, the Death With Dignity Act simply does not violate existing federal positive law. The Court’s ruling thus left the door open for Congress to attempt to preempt the Death With Dignity Act in other ways (for example, through the Commerce Clause). It is unclear whether the Court would uphold such attempts at federal preemption.

⁹¹ OR. REV. STAT. §§ 127.800–.805.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Johnson, *supra* note 6, at 604. *But see* Blume, *supra* note 75, at 947 (explaining that, “[w]ith rare exceptions, volunteers are not terminally ill” and thus rejecting a comparison of impending execution to terminal illness).

⁹⁵ *See supra* notes 18–24 and accompanying text (discussing *Godínez v. Moran*).

the rights of death row inmates.⁹⁶ In their articles, Harrington,⁹⁷ Johnson,⁹⁸ and Urofsky⁹⁹ all cite numerous anecdotes where attorneys fought extensively to *prevent* inmates from waiving appeals. In short, then, the requirements of the Oregon Death With Dignity Act vis-à-vis the ethical and constitutional requirements for death row volunteerism support the comparison between terminally ill individuals and capital defendants who seek to end their lives.

Julie Levinsohn Milner compellingly argues that this comparison justifies a right to death row volunteerism, explaining that, “if the right to die is allowed in other circumstances, namely those of the terminally or chronically ill patient, then it should be acceptable as applied to an inmate under a death sentence, which, in many salient and powerful respects, is comparable to a terminal illness.”¹⁰⁰ Echoing the analysis set out above, she argues that death row volunteerism and physician-assisted suicide are similarly structured to prevent abuse in the form of pressure from outside parties, such as health care providers and attorneys who demand payment; to ensure competence; and to preserve life whenever possible.¹⁰¹ Furthermore, she argues that attorneys and doctors have several key similarities, including a desire to keep their clients/patients alive and a fear of ethical and legal sanction.¹⁰² Finally, she argues that prisoners and patients share similar sets of concerns: Members of each group seek to assert their autonomy, die in a dignified manner, and escape grim confinement in hospices or hospitals, or on death row.¹⁰³

Conceptually, then, physician-assisted suicide is probably the most compelling analogy for characterizing death row volunteerism—and for determining the constitutionality of death row volunteerism under the Fourteenth Amendment. The primary drawback to this parallel is that the constitutionality of physician-assisted suicide is not fully resolved. As noted above, the Supreme Court recently upheld,

⁹⁶ See, e.g., Nat’l Coalition to Abolish the Death Penalty Affiliates, http://ncadp.org/affiliate_links.html (last visited Sept. 29, 2006) (listing national coalition members who are united to end the death penalty and their web sites).

⁹⁷ See Harrington, *supra* note 7, at 1123 (“[Capital defense lawyers interviewed for this article] agree that . . . they are ethically obligated to try to persuade their client to change his or her mind, and that it is ethically unacceptable for them to assist or facilitate the client in pursuing execution.” (citation omitted)).

⁹⁸ See Johnson, *supra* note 6, at 584 (detailing ACLU and NAACP efforts to assist the mother of Gary Gilmore, the death row volunteer who successfully sought execution in *Gilmore v. Utah*, 429 U.S. 1012 (1976)).

⁹⁹ See Urofsky, *supra* note 6, at 556 (describing the refusal of defendant’s attorney to waive the defendant’s appeals on his behalf in *Bishop v. Wolff*, 444 U.S. 810 (1979)).

¹⁰⁰ Milner, *supra* note 49, at 291.

¹⁰¹ *Id.* at 291–302.

¹⁰² *Id.* at 302–12.

¹⁰³ *Id.* at 312–19.

in *Gonzales v. Oregon*,¹⁰⁴ states' right to enforce statutes authorizing physician-assisted suicide under the Federal Controlled Substance Act, but it implicitly left the door open for Congress to attempt to preempt the Death With Dignity Act in other ways, such as through the Commerce Clause.¹⁰⁵

C. Death Row Volunteerism as Refusal of Treatment

Given the unresolved constitutional status of physician-assisted suicide, another appealing framework for analyzing the constitutionality of death row volunteerism under the Fourteenth Amendment may be as akin to refusal of lifesaving treatment. The Supreme Court's doctrine in this area is far more settled. In 1976, in *In re Quinlan*, the New Jersey Supreme Court established a right to refuse lifesaving medical treatment;¹⁰⁶ this was one of the first, and most direct, affirmations of this right. In *Cruzan v. Director, Missouri Department of Health*, the United States Supreme Court assumed for the sake of argument that the right of a competent adult to refuse lifesaving treatment is protected by the Due Process Clause;¹⁰⁷ this decision largely may be construed as an indirect affirmation of *Quinlan*. Finally, in *Washington v. Glucksberg*, the Court *definitively* recognized a fundamental liberty interest in refusing lifesaving treatment under the Due Process Clause of the Fourteenth Amendment.¹⁰⁸

Still, despite the appealing constitutional clarity associated with the analogy, likening death row volunteerism to refusal of treatment is not as compelling a conceptual framework for exploring Fourteenth Amendment implications to waiving post-conviction appeals as are comparisons with physician-assisted suicide. It is true, as argued above, that the defendant can be viewed as akin to a terminally ill patient. Yet the refusal-of-treatment analogy requires an *additional* conceptual leap—the conflation of post-conviction appeals with lifesaving

¹⁰⁴ 126 S. Ct. 904 (2006).

¹⁰⁵ See *supra* note 90 and accompanying text (discussing *Gonzales v. Oregon*).

¹⁰⁶ 355 A.2d 647, 663 (N.J. 1976) ("The Court in *Griswold* found the unwritten constitutional right of privacy to exist in the penumbra of specific guarantees of the Bill of Rights 'formed by emanations from those guarantees that help give them life and substance.' Presumably this right is broad enough to encompass a patient's decision to decline medical treatment under certain circumstances . . ." (citations omitted)).

¹⁰⁷ 497 U.S. 261, 279 (1990) ("[F]or purposes of this case, we assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.").

¹⁰⁸ 521 U.S. 702, 703 (1997) ("The constitutionally protected right to refuse lifesaving hydration and nutrition that was discussed in *Cruzan* was not simply deduced from abstract concepts of personal autonomy, but was instead grounded in the Nation's history and traditions, given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment." (citation omitted)).

treatment—that may strain the analogy too much. Kathleen L. Johnson argues that this conceptual leap is not a terribly difficult one:

Since the mental suffering engendered by the uncertainty and futility of continued death row confinement is closely analogous to the physical suffering endured by terminal patients pending the inevitable, but artificially suspended moment of death, the capital defendants' refusal to appeal seems to fall within [the same] zone of intimate decision.¹⁰⁹

Yet Johnson ignores a key distinction in American law between acts and omissions: American legal jurisprudence distinguishes between “killing,” which has questionable legal and moral status, and “letting die,” which is legally—and morally—acceptable.¹¹⁰ Removal of lifesaving treatment is widely viewed as “letting die,” or a legally permissible omission, because the cause of death is the disease. By contrast, physician-assisted suicide widely is viewed as “killing,” or a legally-ambiguous act, because the cause of death is the means used to commit suicide.¹¹¹ Analogously, the cause of death for death row volunteers is not their waiver of appeal—or, as Johnson argues, their re-

¹⁰⁹ Johnson, *supra* note 6, at 614.

¹¹⁰ The Supreme Court recognized the act-omission distinction as it relates to physician-assisted suicide and refusal of lifesaving treatment in *Vacco v. Quill*; the Court explained that the distinction rests on several fundamental differences:

First, when a patient refuses life-sustaining medical treatment, he dies from an underlying fatal disease or pathology; but if a patient ingests lethal medication prescribed by a physician, he is killed by that medication. Furthermore, a physician who withdraws, or honors a patient's refusal to begin, life-sustaining medical treatment purposefully intends, or may so intend, only to respect his patient's wishes and “to cease doing useless and futile or degrading things to the patient when [the patient] no longer stands to benefit from them.” The same is true when a doctor provides aggressive palliative care; in some cases, painkilling drugs may hasten a patient's death, but the physician's purpose and intent is, or may be, only to ease his patient's pain. A doctor who assists a suicide, however, “must, necessarily and indubitably, intend primarily that the patient be made dead.” Similarly, a patient who commits suicide with a doctor's aid necessarily has the specific intent to end his or her own life, while a patient who refuses or discontinues treatment might not.

521 U.S. 793, 801–02 (1997) (citations omitted). For an extensive discussion of the Court's recognition of the act-omission distinction, see Edward C. Lyons, *In Incognito—The Principle of Double Effect in American Constitutional Law*, 57 FLA. L. REV. 469 (2005).

¹¹¹ This distinction has been widely criticized by legal scholars and practitioners alike. Most notably, in *Cruzan v. Director, Missouri Department of Health*, Justice Scalia expressed his dissatisfaction with this distinction, explaining:

I readily acknowledge that the distinction between action and inaction has some bearing upon the legislative judgment of what ought to be prevented as suicide—though even there it would seem to me unreasonable to draw the line precisely between action and inaction, rather than between various forms of inaction.

497 U.S. 261, 296 (1990) (Scalia, J., concurring); see also Jonathan R. Rosenn, *The Constitutionality of Statutes Prohibiting and Permitting Physician-Assisted Suicide*, 51 U. MIAMI L. REV. 875, 890 (1997) (“[D]istinguishing between acts and omissions often becomes a matter of semantics.”); Donald R. Steinberg, *Limits to Death with Dignity*, 1 HARV. J.L. & TECH. 129, 156 n.134 (1988) (“[A]n omission [of withdrawing lifesaving treatment] seems to be equivalent to an act in that the intent in both cases is to cause the death of the patient and the motive is the same.”).

fusal of “life-prolonging treatment”—but the affirmative act of a lethal injection by state physicians or prison officials.¹¹²

Therefore, the comparison of death row volunteerism to physician-assisted suicide ultimately is both more elegant and more compelling than a comparison to refusal of lifesaving treatment because it does not require an additional conceptual leap. The appeal of choosing the refusal of lifesaving treatment as a framework for construing a state’s obligation to prevent death row volunteerism is its constitutional clarity as compared to the still-unsettled constitutionality of physician-assisted suicide. Accepting this framework means that, because states do not have an obligation to prevent competent terminally ill patients from refusing lifesaving treatment, states *also* do not have an obligation to prevent death row prisoners from waiving post-conviction appeals.

IV. CONCLUSION: A BRIEF DISCUSSION OF THE POLICY IMPLICATIONS OF DEATH ROW VOLUNTEERISM

As the foregoing discussion demonstrates, a close reading of the Supreme Court’s constitutional doctrine related to defendant autonomy, competency, and the lack of standing of “next friends” who wish to prevent competent capital defendants from waiving post-conviction appeals lends itself to the conclusion that states do not have a constitutional obligation to prevent death row volunteerism. Such an inference of constitutionality is further supported by the Court’s Eighth Amendment case law, while opponents of the death penalty, and even some Supreme Court Justices, argue that Eighth Amendment protections are unwaivable for the good of society, a majority of the Court has not adopted this position. Attempts to characterize death row volunteerism as suicide under the Fourteenth Amendment similarly support the right for capital defendants to waive post-conviction appeals. Death row volunteers probably are not irrational actors seeking to end their lives because of clinical depression or other mental illness—at least when states adhere to the con-

¹¹² Critics of this analogy may contend that a comparison between death row volunteerism and refusal of lifesaving treatment is more compelling, because both simply hasten a certain death, while physician-assisted suicide actually introduces an alternative means of ending a life. However, this argument ignores the patients who refuse lifesaving treatment and then die not because of their illness, but because of palliative care administered by medical professionals. See Lyons, *supra* note 110, at 551 (discussing the nature of palliative care and the frequency with which it is offered to patients who refuse lifesaving treatment). Furthermore, cessation of lifesaving treatment may occur for other purposes besides hastening death, while physician-assisted suicide occurs solely to end a life. See *Quill*, 521 U.S. at 802 (noting that while a patient may refuse lifesaving treatment and still wish to live, a patient who requests physician-assisted suicide has intent to die). Death row volunteerism that results in execution, too, typically is centered on quickly ending defendants’ lives on death row.

stitutional guidelines for competency set out in *Rees v. Peyton*,¹¹³ *Godinez v. Moran*,¹¹⁴ and their progeny. Rather, *competent* death row volunteers probably are more like terminally ill patients who seek to commit physician-assisted suicide or who reject lifesaving treatment—although both of these analogies have their drawbacks, either because constitutional doctrine is unsettled (in the case of physician-assisted suicide), or because the conceptual leap required by the analogy (in the case of refusal of lifesaving treatment) is a bit extreme.

Why are scholars and practitioners so eager to challenge the constitutionality of death row volunteerism despite little doctrinal support? Some are acting from a belief that states have little incentive to ensure that capital defendants who waive their appeals are competent.¹¹⁵ Others believe that the death penalty must be applied justly in all cases to preserve the public's faith in the "rightness" of the criminal justice system, and such a just application only can be attained through a rigorous appeals process.¹¹⁶ But in most cases, these members of the legal community are acting from a deeply rooted belief that the death penalty *itself* is inherently unjust, and that death row volunteerism undermines the abolition of capital punishment by allowing defendants to accept an unjust fate.¹¹⁷ Hugo A. Bedau, a prominent death penalty abolitionist, has been particularly outspoken against death row volunteerism. He argues that one defendant sentenced to death has no right to jeopardize the lives of his fellow death row inmates by waiving his post-conviction appeals; his theory is that execution of one defendant will make it that much easier for states to execute *other* defendants.¹¹⁸ Viewing the death penalty as state-sponsored murder, he argues that the death penalty becomes "no less [unjust and unconstitutional] on those occasions when a murderer welcomes his own legal execution[.]"¹¹⁹ though there is concern that states that administer capital punishment might dis-

¹¹³ 384 U.S. 312 (1966).

¹¹⁴ 509 U.S. 389 (1993).

¹¹⁵ See *supra* note 68 and accompanying text for a discussion of C. Lee Harrington's argument that states have little incentive to ensure that death row volunteers are competent when they waive their post-conviction appeals.

¹¹⁶ See *supra* notes 39–41 and accompanying text for a discussion of Justice Thurgood Marshall's view that allowing capital defendants to waive post-conviction appeals would undermine societal faith in the integrity of the criminal justice system.

¹¹⁷ Milner, *supra* note 49, at 628–29.

¹¹⁸ HUGO A. BEDAU, *THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT* 122 (Lexington Books 1977) (suggesting that if individual death row inmates are allowed to waive their post conviction appeals, "it will be just that much easier for such executions to become routine").

¹¹⁹ *Id.*

agree.¹²⁰ Yet while these arguments may be compelling from a policy perspective—in fact, they are viewpoints that I share—they are not rooted in constitutional doctrine. As constitutional law currently stands, to eliminate the individual right to death row volunteerism legal scholars and practitioners with abolitionist beliefs first must convince courts and/or legislatures to eliminate the death penalty itself.

¹²⁰ *Id.*