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A RIGHT TO DIE: TERMINATION OF APPEAL FOR CONDEMNED PRISONERS*

MELVIN I. UROFSKY**

There currently are nearly thirteen hundred persons in American prisons under sentence of death. For the vast majority of them, the elaborate state and federal appeals process can and will delay execution months, years, perhaps indefinitely. They wish to live, and their lawyers will explore every legal avenue in order to keep their clients alive. For some on death row, however, the darkest fear is not execution, but the prospect of living out their natural years incarcerated in a six-by-nine cell, under constant surveillance, with little or no hope of ever regaining their freedom. For these men and women, termination of their appeals and execution of sentence may well appear as a preferable option to an inexorable mental and physical deterioration. They want to hear the executioner's song.

Of those executions carried out in the United States since the Supreme Court ruled that capital punishment does not violate the eighth amendment,¹ several have been termed voluntary, in that the condemned prisoners cut off their appeals in order to hasten their punishment.² So long as the current system continues, with its opportunities for numerous appeals and delays but with the death sentence an ever more frequently imposed penalty, we may expect some of the present and future occupants of death row to terminate their appeals. Such a decision raises not only legal but moral questions as well; indeed, some opponents of capital punishment argue that there is no right to terminate appeals because this leads to

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

² The four voluntary executions were of Gary Gilmore (Utah, Jan. 17, 1977), Jesse Bishop (Nevada, Oct. 22, 1979), Steven Judy (Indiana, Mar. 9, 1981), and Frank Coppola (Virginia, Aug. 10, 1982). Their cases are discussed below. See *infra* notes 6-59 and accompanying text (Part I).

state-abetted suicide.³ Surprisingly little has been written on the subject,⁴ perhaps because advocates of the death penalty do not consider it an issue, while abolitionists find it an embarrassing dilemma.⁵ This Article will argue that so long as capital punishment is maintained, there are legal and moral justifications for permitting presently competent prisoners to knowingly elect termination of the appeals process and thus bring on execution of sentence.

I. CURRENT CASE LAW

Case law on this subject is sparse, but in general upholds the right of a prisoner to terminate his or her appeal if the person is presently competent, and knowingly and voluntarily undertakes that course of action.

The leading case is that of Gary Mark Gilmore, the first person executed after the *Gregg* decision. As Chief Justice Burger noted:

This case may be unique in the annals of the Court. Not only does Gary Mark Gilmore request no relief himself, but on the contrary, he has expressly and repeatedly stated since his conviction in the Utah courts that he had received a fair trial and had been well treated by the Utah authorities. Nor does he claim to be innocent of the crime for which he was convicted. Indeed, his only complaint against Utah or its judicial process . . . has been with respect to the delay on the part of the State in carrying out the sentence.⁶

Gilmore's case was certainly unique, in that he sought not only death, but carried on his campaign with the help of a literary agent and media eager to exploit this unusual story.⁷ "Don't the people of Utah have the courage of their convictions?" he asked. "You sentence a man to die—me—and when I accept this most extreme punishment with grace and dignity, you, the people of Utah want to back down and argue with me about it. You're silly."⁸

Gilmore's problem was not with the state, which wanted to carry out the sentence, but with opponents of capital punishment

³ See *Lenhard ex rel. Bishop v. Wolff*, 444 U.S. 807, 812 (1979) (stay of execution denied) (Marshall, J., dissenting).

⁴ See Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860 (1983); Note, *The Death Row Right to Die: Suicide or Intimate Decision?*, 54 S. CAL. L. REV. 575 (1981) [hereinafter cited as Note, *Death Row Right to Die*]; Note, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 STAN. L. REV. 765 (1980) [hereinafter cited as Note, *Execution of the Presently Incompetent*].

⁵ See, e.g., H. BEDAU, *THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT* 121-25 (1977).

⁶ *Gilmore v. Utah*, 429 U.S. 1012, 1013 n.1 (1976) (mem.) (temporary stay of execution vacated) (Burger, C.J., concurring in vacating of stay).

⁷ See N. MAILER, *THE EXECUTIONER'S SONG* (1979).

⁸ *Id.* at 521.

who, after Gilmore rebuffed their efforts, persuaded his mother, Bessie Gilmore, to file a next friend petition seeking review of the case. The Supreme Court granted a stay of execution on December 3, 1976, and after receiving responses from Utah and from Gilmore's attorneys, vacated the stay ten days later. In its brief order, the Court noted that it was convinced that Gilmore "made a knowing and intelligent waiver of any and all federal rights he might have asserted," and the execution could go forward.⁹ In a concurring opinion, Chief Justice Burger would have denied Bessie Gilmore any standing to file a next friend petition so long as Gilmore himself was competent and able to assert or waive his own rights.¹⁰

Justices White, Brennan, Marshall, and Blackmun dissented, with Justice White arguing 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."¹¹ Moreover, Justice White doubted that Gilmore could waive his rights in state court until the whole issue of the constitutionality of capital punishment had been resolved.¹² Justice Marshall, in a separate dissent, questioned Gilmore's competence in light of a suicide attempt as well as the reliability of the state's psychiatric examination, which he considered inadequate.¹³ Justice Blackmun, in a single paragraph, noted that he believed the constitutional issues involved were important enough to warrant a full hearing by the Court.¹⁴ With the Justices thus split five to four, Gilmore and Utah got their wish, and in the early morning of January 17, 1977, a firing squad executed Gilmore.

The next case dealing with this issue did not come before the Court until the fall of 1979.¹⁵ Jesse Walter Bishop had, from the time he was arrested for a murder committed in the course of a robbery, attempted to waive one right after another. He told the Nevada trial court that he wished to represent himself, and after three psychiatrists concluded he was competent, entered a plea of guilty. At the sentencing stage of the trial, Bishop refused to allow the court-appointed "standby counsel" to introduce mitigating evi-

⁹ *Gilmore v. Utah*, 429 U.S. 1012, 1013 (1976) (mem.).

¹⁰ *Id.* at 1014 (Burger, C.J., concurring in vacating of temporary stay of execution).

¹¹ *Id.* at 1018 (White, J., dissenting from vacating of temporary stay of execution).

¹² *Id.* (White, J., dissenting from vacating of temporary stay of execution).

¹³ *Id.* at 1019-20 (Marshall, J., dissenting from vacating of temporary stay of execution).

¹⁴ *Id.* at 1020 (Blackmun, J., dissenting from vacating of temporary stay of execution).

¹⁵ See *Lenhard ex rel. Bishop v. Wolff*, 444 U.S. 807 (1979) (mem.) (stay of execution denied).

dence. The three-judge panel that heard the case did take notice of Bishop's previous felony convictions, as well as the aggravating circumstances in the case, and sentenced him to death.

Bishop then allowed the Clark County Public Defenders office, his "standby counsel," to take an appeal to the Nevada Supreme Court. But after the papers had been filed and before argument, Bishop sought to dismiss the appeal of his conviction, and asked review only of the sentencing phase. The court ignored his request and reviewed the entire case, finding no reversible error.¹⁶ Under *Faretta v. California*,¹⁷ Bishop had the right to represent himself, and throughout the trial he had the assistance of standby counsel if he wished to use them. "When a defendant knowingly and voluntarily waives his right to counsel, as here, his refusal to present a defense does not negate his *pro per* election."¹⁸

Following the decision of the Nevada Supreme Court, the trial court relieved the public defenders of any further responsibility for Bishop. But, as Justice Marshall put it, "referring to their moral and ethical obligations, they filed [a] federal habeas corpus petition against Bishop's wishes."¹⁹ In the district court, Bishop appeared in person and stated that he did not wish to pursue further litigation. When that court denied the writ, holding that Bishop had made a valid waiver,²⁰ his former counsel nonetheless appealed to the Ninth Circuit, which affirmed.²¹ In a concurring opinion, Judge Joseph T. Sneed, although applauding the efforts of the public defenders "to avoid what they perceive to be a miscarriage of justice," denied them standing to carry an appeal.²² He concluded:

I am convinced that Bishop is sane and that he has made a knowing and intelligent choice to forego his federal remedies. It is difficult for me to imagine that I would make a similar choice were I in his position. What I might do, however, is not the test. Bishop is an individual who, for reasons I can fathom only slightly, has chosen to forego his federal remedies. Assuming his competence, which on this record I must, he should be free to so choose. To deny him that would be to incarcerate the spirit—the one thing that remains free and which the

¹⁶ Bishop v. State, 95 Nev. 511, 518, 597 P.2d 273, 277 (1979).

¹⁷ 422 U.S. 806 (1975) (defendant in state criminal trial has constitutional right to self-representation if he so desires).

¹⁸ Bishop v. State, 95 Nev. at 517, 597 P.2d at 276.

¹⁹ Lenhard *ex rel.* Bishop v. Wolff, 444 U.S. at 810 (Marshall, J., dissenting from denial of stay of execution).

²⁰ Lenhard *ex rel.* Bishop v. Wolff, 603 F.2d 91 (9th Cir. 1979), *stay of execution denied*, 444 U.S. 807 (1979) (mem.).

²¹ *Id.* at 93.

²² *Id.* at 94 (Sneed, J., concurring).

state need not and should not imprison.²³

This time, the Supreme Court denied the public defenders' petition for a stay of execution without comment,²⁴ which in turn elicited a protest from Justice Marshall. Bishop, according to Justice Marshall, had no right to waive a challenge to his execution. "Society's independent stake in enforcement of the Eighth Amendment's prohibition against cruel and unusual punishment cannot be overridden by a defendant's purported waiver. By refusing to pursue his Eighth Amendment claim, Bishop has, in effect, sought the State's assistance in committing suicide."²⁵

A year and a half passed between Bishop's execution on October 22, 1979, and the next execution in this country, that of Steven T. Judy, who also successfully waived his appeal. Judy had been convicted in February 1980 for the murder of a woman and her three children. At the sentencing phase of the bifurcated proceedings, Judy ordered his court-appointed attorneys not to present any evidence of mitigating circumstances to the jury. In fact, Judy told the jury that he would advise them to give him the death sentence, "because he had no doubt that he would kill again if he had an opportunity, and some of the people he might kill in the future might be members of the jury."²⁶

Following the imposition of the death penalty, Judy's lawyers filed an appeal to the Indiana Supreme Court, but he then instructed them to drop the appeal because he wished to waive his rights and terminate the proceedings. Indiana, however, required an automatic review of all capital sentences, and the lawyers petitioned the court to resolve the conflict between their client's wishes and the dictates of the state's penal code, a conflict they termed an "insoluble professional and ethical problem."²⁷

Judy personally appeared before the court, and "very freely and openly discussed his situation with the members of this Court. It was obvious . . . that Judy well understood his situation and the results that could be expected from our acceptance of his waiver."²⁸ He also freely admitted his guilt, and went on: "I thought I was treated fair, more than fair. I was provided with good counsel and I

²³ *Id.* (Sneed, J., concurring).

²⁴ *Lenhard ex rel. Bishop v. Wolff*, 444 U.S. 807, 807 (1979) (mem.) (stay of execution denied).

²⁵ *Id.* at 811-12 (Marshall, J., dissenting).

²⁶ *Judy v. State*, 275 Ind. 145, 155, 416 N.E.2d 95, 100 (1981).

²⁷ *Id.* at 149, 416 N.E.2d at 97.

²⁸ *Id.* at 155, 416 N.E.2d at 100.

lost. There's no sense going on with this."²⁹ Relying upon psychiatric reports as well as their personal observation of Judy at the hearing, the judges found him competent to waive his rights of appeal.³⁰

The court also found, however, that Judy did not have an unlimited right to waiver, in that state law mandated a review of all cases in which the death penalty had been imposed.³¹ This initial review for error served not only the interests of the defendant, but of society as well, to make sure justice had been done. The court examined the trial proceedings, and found no error.³² Judy was then free to terminate the appeals process, which he did. No further appeals were carried to either state or federal courts, and he was executed on March 9, 1981.

The fourth voluntary execution came in Virginia a year later, and led some abolitionists to charge that the United States Supreme Court had acted with undue haste to kill a man. Frank J. Coppola had been convicted of killing a woman during a robbery of her home by beating her head against the floor in order to elicit information about where money was hidden. A former policeman and seminarian, Coppola insisted he was innocent, but after the state's highest court found no error in his trial³³ and the Supreme Court denied certiorari,³⁴ he decided to drop his appeal. He was ready to die, he said, "to preserve his dignity and spare his family further agony."³⁵

Coppola fired his attorney, J. Gray Lawrence, Jr., but Lawrence refused to accept the decision. He believed that Virginia's capital punishment statute, which had never been tested in federal courts, might be unconstitutional, and no one should be executed until its validity had been confirmed. Other civil liberties lawyers contended that Coppola's wish to be executed was irrational.³⁶

Less than thirty-six hours before the scheduled execution, Lawrence petitioned for a stay of execution in federal district court. At the hearing before Judge D. Dortch Warriner, Coppola, his head already shaved, declared: "I adamantly stand by my decision to seek

²⁹ *Id.* at 157, 416 N.E.2d at 101.

³⁰ *Id.* at 157, 416 N.E.2d at 101.

³¹ *Id.* at 157-58, 416 N.E.2d at 102.

³² *Id.* at 173, 416 N.E.2d at 111.

³³ *Coppola v. Commonwealth*, 220 Va. 243, 257 S.E.2d 797 (1979), *cert. denied*, 444 U.S. 1103 (1980).

³⁴ *Coppola v. Virginia*, 444 U.S. 1103 (1980) (denial of certiorari).

³⁵ *San Francisco Chronicle*, Aug. 11, 1982.

³⁶ *Los Angeles Times*, Aug. 11, 1982, p.4.

execution, and it is my sincere wish that it be carried out."³⁷ Judge Warriner, rejecting the petition, compared the efforts to keep Coppola alive to attempts to keep terminally ill patients from dying. "We are performing the legal equivalent of inserting tubes . . . into him so that we can satisfy the quite appropriate urge to save his life, not so much for the good it does the client but for the good it does us."³⁸

One day later, however, Lawrence secured a stay of execution from the Court of Appeals for the Fourth Circuit, with Judge John D. Butzner noting possible questions about the constitutionality of the state statute.³⁹ Lawyers from the Virginia Attorney General's office immediately flew to Washington to seek review by Chief Justice Burger, who had jurisdiction over the Fourth Circuit. They carried with them a handwritten plea from Coppola asking that he be allowed to die. Chief Justice Burger then arranged a telephone conference call with seven of his fellow Justices (Justice O'Connor was out of the country). Only Justices Brennan, Marshall, and Stevens objected to lifting the stay. Chief Justice Burger reinstated the sentence at 10:26 p.m. on August 10, 1982; one hour later, Coppola was dead.⁴⁰

Eight months later, the State of Alabama executed John Louis Evans III. Although he fought his sentence immediately prior to his execution, his case originally reached the Supreme Court at a time when he wanted to terminate his appeal. Evans had been convicted of murder in the course of an armed robbery, an aggravating circumstance that led the jury to impose the death penalty. The conviction and sentence were reviewed and upheld by both the Alabama Court of Criminal Appeals⁴¹ and the Alabama Supreme Court.⁴² After a petition for certiorari had been filed with the United States Supreme Court, Evans instructed his counsel to drop the appeal. The Supreme Court denied both the petition for with-

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Mitchell v. Lawrence*, 458 U.S. 1123 (1982) (stay of execution vacated). Jack Greenberg, head of the NAACP Legal Defense Fund and an opponent of capital punishment, charged that "Burger acted egregiously because the entire thing deserved some consideration. An ordinary small claims court case gets more careful consideration." Defenders of the Court's action, however, noted that Coppola's sentence already had been reviewed by state and federal courts eleven times. *Los Angeles Daily Journal*, Sept. 3, 1982.

⁴¹ *Evans v. State*, 361 So. 2d 654 (Ala. Crim. App.), *aff'd*, 361 So. 2d 666 (Ala. 1977), *cert. denied*, 440 U.S. 930 (1979).

⁴² 361 So. 2d 666 (Ala. 1977), *cert. denied*, 440 U.S. 930 (1979).

drawal and the one for certiorari.⁴³ Execution was then scheduled for April 6, 1979.

Just four days before sentence was to be carried out, Evans' mother filed a next friend petition for habeas corpus in federal district court, claiming among other things that her son was incompetent to pursue his own appeal. For evidence, she presented a sworn affidavit of a psychiatrist who had neither personally interviewed nor examined Evans, but who nonetheless concluded from conversations with other individuals that Evans was "not able to deal rationally with his situation and . . . probably need[s] someone else to make legal decisions affecting his life for him."⁴⁴ The reason the psychiatrist had been unable to interview Evans was that Evans had refused to be examined; he had admitted his guilt and chosen not to pursue any further appeals. As District Judge Hand concluded:

The fact that Evans has elected not to pursue post-conviction remedies that would serve to forestall the impending execution is not controlling, since it may well be, as the media has advertised, that John Evans has confronted his option of life imprisonment or death by execution and has elected to place his bets on a new existence in some world beyond this. The Court finds no evidence of irrationality in this; indeed, in view of the allegations . . . [of] the death row conditions of confinement case presently pending in this Court, it may well be that John Evans has made the more rational choice.⁴⁵

The court went on to rule that Betty Evans had no standing absent proof of incompetency of her son; in fact, Judge Hand noted acerbically that Evans' "biggest quarrel at this time seems to be with those, such as the petitioner herein, who would interfere with his ordered execution."⁴⁶ The writ of habeas corpus is not available for "intruders or uninvited meddlers, styling themselves next friends."⁴⁷

Two days later, however, Betty Evans secured a temporary stay of execution from Justice Rehnquist acting in chambers in the absence of Justice Powell, who normally would have had jurisdiction.⁴⁸ Were he acting in full Court, Justice Rehnquist noted, he would vote to deny the stay because the issues had been fully litigated below. "There must come a time, even when so irreversible a penalty as that of death has been imposed upon a particular defendant, when the legal issues in the case have been sufficiently litigated and reliti-

⁴³ *Evans v. Alabama*, 440 U.S. 930 (1979) (denial of certiorari).

⁴⁴ *Evans v. Bennett*, 467 F. Supp. 1108, 1110 (S.D. Ala. 1979).

⁴⁵ *Id.*

⁴⁶ *Id.* at 1111.

⁴⁷ *Id.* (quoting *Wilson v. Dixon*, 256 F.2d 536, 538 (9th Cir. 1958)).

⁴⁸ *Evans v. Bennett*, 440 U.S. 1301 (1979) (Rehnquist, J., as Circuit Justice).

gated that the law must be allowed to run its course.”⁴⁹ He too castigated the petitioner. “It is not Betty Evans, the applicant, who has been sentenced to death, but her son, and the fact that her son refuses to see a psychiatrist and has expressed a preference for electrocution rather than serving the remainder of his life in a penitentiary cannot confer standing upon her as ‘next friend’. . . .”⁵⁰ But because he was acting only as a surrogate for his brethren, and because of the “obviously irreversible nature of the death penalty,” Justice Rehnquist granted a stay pending a full hearing by the Court one week later.⁵¹

In that one week, Betty Evans evidently convinced her son to pick up his appeal, and on April 11, John Evans signed and verified a petition for habeas. As a result, when the full Court met on April 13, it denied the previous petition because Alabama had not set a new execution date, and the appeal, now properly filed, could be evaluated by the lower courts.⁵² That process took four years, and in the end, all of Evans’ appeals failed. He was executed on April 22, 1983.⁵³

The following year, the Court permitted William Jack Hammett, convicted of murder in Texas, to withdraw his petition for certiorari, noting in its per curiam opinion that this did not preclude him from pursuing other avenues of collateral relief.⁵⁴ Justice Marshall dissented strongly because in his view, the Texas procedure of using psychiatric examinations at the penalty stage to determine whether the defendant would be dangerous in the future violated the fifth amendment bar against self-incrimination.⁵⁵ Hammett, like other inmates on death row in Texas, is still alive, as courts review broad attacks on the state’s capital punishment statute.

There are several cases in the lower courts dealing with the right of condemned prisoners to terminate appeals, and in general, that right has been upheld, although all of the defendants are still awaiting execution. Appeals of other prisoners attacking various provisions of capital punishment statutes effectively block nearly all executions until the validity of the procedure is established. For the most part, these cases hold that where automatic review is provided for in the statute, the defendant does not have a right to waive that

⁴⁹ *Id.* at 1303 (Rehnquist, J., as Circuit Justice).

⁵⁰ *Id.* at 1305 (Rehnquist, J., as Circuit Justice).

⁵¹ *Id.* at 1306 (Rehnquist, J., as Circuit Justice).

⁵² *Evans v. Bennett*, 440 U.S. 987 (1979) (mem.).

⁵³ For details of the final review, see Death Penalty Update No. 94, Apr. 24, 1983, pp. 1-2.

⁵⁴ *Hammett v. Texas*, 448 U.S. 725 (1980) (per curiam).

⁵⁵ *Id.* at 732 (Marshall, J., dissenting).

appeal because the interests of society require assurance that trial and sentencing have been carried out justly.⁵⁶

As Justice Pomeroy of the Pennsylvania Supreme Court put it, "an appellate court must consider the interests of society as a whole in seeing to it that justice is done, regardless of what might otherwise be the normal procedure."⁵⁷ Even when the prisoner "prefers death to spending the remainder of his life in prison . . . the waiver concept was never intended as a means of allowing a criminal defendant to choose his own sentence. Especially is this so where, as here, to do so would result in state aided suicide."⁵⁸ But where the mandated review has taken place and no reversible error has been found, and where the prisoner was competent and knowingly chose to waive his rights, he or she should be allowed to do so without interference from third parties who lack standing.⁵⁹

II. WAIVER OF APPEAL: LEGAL JUSTIFICATION

Although the death sentence is "qualitatively different from a sentence of imprisonment,"⁶⁰ as the Supreme Court has recognized, the doctrine of waiver in this area is derived substantially from general rules of waiver in criminal cases. Under early common law doctrine, an accused could not waive any rights intended for his protection. Later, he was allowed to waive those personal to himself, but not those in which the state maintained an interest.⁶¹ Currently, if there is no constitutional or statutory prohibition, or any public policy involved, an accused may waive any privilege.⁶² The ability to waive a particular right, however, does not give the defendant a right to insist upon another procedure; for example, waiver of a right to a jury trial does not imply a right to insist upon a

⁵⁶ See, e.g., *People v. Stanworth*, 71 Cal. 2d 820, 457 P.2d 889, 80 Cal. Rptr. 49 (1969).

⁵⁷ *Commonwealth v. McKenna*, 476 Pa. 428, 439, 383 A.2d 174, 180 (1978).

⁵⁸ *Id.* at 441, 383 A.2d at 181. See also *Massie v. Sumner*, 624 F.2d 72 (9th Cir. 1980) (unable to waive automatic appeal to California Supreme Court of imposition of death penalty), *cert. denied*, 449 U.S. 1103 (1981).

⁵⁹ See *Potts v. Zant*, 638 F.2d 727 (5th Cir. 1981); *Rumbaugh v. Estelle*, 558 F. Supp. 651 (N.D. Tex. 1983), *remanded on other grounds sub nom. Rumbaugh v. McKaskle*, 730 F.2d 291 (5th Cir. 1984); *Clark v. Blackburn*, 524 F. Supp. 1248 (M.D. La. 1981) (defendant's mother not allowed to intervene because she did not prove son was mentally incompetent); *Goode v. State*, 365 So. 2d 381 (Fla. 1978), *cert. denied*, 441 U.S. 967 (1979). See also 24A C.J.S. *Criminal Law* § 1821 (1962).

⁶⁰ *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion).

⁶¹ See 21A AM. JUR. 2D, *Criminal Law* § 633 (1981).

⁶² See *Schick v. United States*, 195 U.S. 65, 71 (1904).

bench trial.⁶³

A waiver of rights cannot be inferred from a defendant's silence; in fact, every reasonable presumption will be made against waiver of fundamental constitutional rights by an accused.⁶⁴ "The determination of whether there has been an intelligent waiver of the right . . . must depend, in each case, upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused."⁶⁵

If an accused insists upon waiving a right, the court must determine if he or she is competent, and if not, the court will refuse to allow a petitioner to withdraw an appeal. The Supreme Court first addressed this issue in 1966, when counsel for Melvin Rees, who had been convicted of murder in Virginia, persuaded Rees to be examined by a psychiatrist, who concluded that Rees was mentally incompetent. The Court unanimously held that filing the original petition for certiorari properly brought the case before the Court, and it refused Rees leave to withdraw the appeal.⁶⁶ The Court retained jurisdiction, but ordered the district court to conduct "suitable hearings" on Rees' competency.⁶⁷ Despite strenuous efforts to terminate his appeal, Harry Anderson, convicted of murder in Kentucky, similarly was adjudged incompetent, and the case remanded for further hearings.⁶⁸ In neither case did the Court issue more than a brief per curiam order, and it failed to provide any guidelines, evidently relying on the lower courts to evaluate each case individually.⁶⁹

Once competence is established, the waiver must be voluntary, undertaken knowingly, and with an understanding of the likely consequences. In a confession case, where the issue was whether the accused had freely confessed to the crime, the Court explained:

The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the

⁶³ *Singer v. United States*, 380 U.S. 24 (1965). See also *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) (right to a public trial does not confer right to a private trial).

⁶⁴ See *Brookhart v. Janis*, 384 U.S. 1 (1966) (counsel cannot waive client's constitutional right to plead not guilty without client's consent); *Carnley v. Cochran*, 369 U.S. 506 (1962) (defendant can in some circumstances waive right to counsel by silence).

⁶⁵ *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

⁶⁶ *Rees v. Peyton*, 384 U.S. 312, 313 (1966).

⁶⁷ *Id.* at 314.

⁶⁸ *Anderson v. Kentucky*, 376 U.S. 940, 940 (1964) (mem.).

⁶⁹ See Note, *Execution of the Presently Incompetent*, *supra* note 4, at 772, 818.

use of his confession offends due process.⁷⁰

Whether a waiver is voluntary is a "question of fact to be determined from the totality of all the circumstances."⁷¹ Beyond that, it is the responsibility of the court to determine if the defendant knows what he is doing, what he is giving up, and what the consequences may be. The mere failure to appeal cannot be taken as a knowing waiver of rights, and therefore habeas relief always has remained available.⁷² Once the accused intelligently chooses to exercise a waiver, he or she must bear the consequences. Thus, if a defendant chooses not to utilize counsel but insists on self-representation, there can be no appeal afterwards based on lack of counsel.⁷³

As noted above, the right to terminate appeals in death sentence cases is partially circumscribed. The interests of the state in ensuring that so severe a penalty is not imposed arbitrarily or unjustly prevents waiver of any mandated automatic appeal. Beyond that, should a condemned prisoner change his or her mind after initially waiving appeal, collateral attack remains open. "Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."⁷⁴

In all cases, whether one believes that the issue ultimately was decided correctly by the courts or not, there is no doubt that judges do pay close attention to the requirements of competency, voluntariness, and knowledge of rights and consequences on the part of the accused. In *Rumbaugh v. Estelle*,⁷⁵ the district court included an examination of the following testimony by Charles Rumbaugh, who was protesting efforts by his parents to pursue an appeal on his behalf:

Q. Is there anything that you would like to tell us . . . about the testimony of the doctors relating specifically to the depression that they believe you're experiencing now. [sic]

A. Well, I don't feel I'm depressed right now. I haven't been taking any medication for approximately thirty days. I was taking medication, an antipsychotic drug, and I haven't experienced any problems since I

⁷⁰ *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961). Although enunciated in the context of a confession case, the *Culombe* Court's language regarding voluntariness is nevertheless useful in analyzing voluntariness in waiver situations.

⁷¹ *Schneekloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

⁷² See *Fay v. Noia*, 372 U.S. 391, 438 (1963) (writ of habeas corpus should be dismissed for failure to raise claim in state courts only when applicant deliberately bypassed orderly procedure of state courts).

⁷³ See *Faretta v. California*, 422 U.S. 806 (1975).

⁷⁴ *Sanders v. United States*, 373 U.S. 1, 8 (1963).

⁷⁵ 558 F. Supp. 651 (N.D. Tex. 1983), *remanded on other grounds sub nom.* *Rumbaugh v. McKaskle*, 730 F.2d 291 (5th Cir. 1984).

quit taking it. And I think I understand my situation very well and I believe my decision is a logical and rational one

Q. Are you anxious for some kind of a resolution of this case one way or the other?

A. Yes. There has to be an end to it. You know, it's gone on and on for eight years and that's long enough.

Q. And is it your desire at this time to waive your further appeals available to you?

A. Yes, it is.

Q. And are you fully aware that if you decline to pursue your appeal and the Court finds that you are competent to do so, that you will be executed by the State of Texas?

A. I'm aware of that.

Q. Is this a decision that you've come to over a lengthy period of time?

A. Yes it is.⁷⁶

The court concluded: "After considering all of the evidence the Court finds that Charles Rumbaugh has a realistic understanding of his present position and of the choices available to him, and that he is mentally competent to make a rational choice with respect to continuing or abandoning further litigation."⁷⁷

In cases where competency was in doubt or the court did not believe that the prisoner fully understood the consequences of waiver, termination of appeal was denied. In *People v. Stanworth*,⁷⁸ the California Supreme Court believed that the "defendant's refusal to act to extricate himself from the threat of death must be deemed equivalent of an *inability* to do so," and it refused to allow him to discharge counsel in his effort to block further appeals.⁷⁹ In another case arising in California, the failure of the state to hold hearings on the defendant's competency led the federal appellate court to block his efforts at waiver.⁸⁰ For the most part, however, courts have not taken a defendant's desire to terminate appeals as *prima facie* evidence of either incompetency or lack of understanding.⁸¹

III. WAIVER OF APPEAL: THE ABOLITIONIST RESPONSE

If it is agreed that current law allows condemned prisoners to terminate their appeals, it must nonetheless be noted that opponents of capital punishment believe that they should not be allowed

⁷⁶ *Id.* at 653.

⁷⁷ *Id.* at 654. *Cf.* *Potts v. Zant*, 638 F.2d 727, 732-33 (5th Cir. 1981) (examining transcript of defendant's testimony).

⁷⁸ 71 Cal. 2d 820, 457 P.2d 889, 80 Cal. Rptr. 49 (1969).

⁷⁹ *Id.* at 835, 457 P.2d at 899, 80 Cal. Rptr. at 59 (emphasis in original).

⁸⁰ *Massie v. Sumner*, 624 F.2d 72 (9th Cir. 1980), *cert. denied*, 449 U.S. 1103 (1981).

⁸¹ *Clark v. Blackburn*, 524 F. Supp. 1248 (M.D. La. 1981).

to do so. The most common argument is that acquiescence in the sentence amounts to state-abetted suicide. In his dissent in *Bishop*, Justice Marshall, who has consistently argued, albeit unsuccessfully so far, that the death sentence is unconstitutional under the eighth amendment, charged that "the Court has permitted the State's mechanism of execution to be triggered by an entirely arbitrary factor: the defendant's decision to acquiesce in his own death. In my view, the procedure the Court approves today amounts to nothing less than state-administered suicide."⁸² For abolitionists, the death penalty is "no less [barbarous] on those occasions when a murderer welcomes his own legal execution"⁸³ than when the prisoner involuntarily goes to death.

Hugo A. Bedau, one of the leading abolitionist spokesmen, has set out four arguments against permitting condemned prisoners to terminate their appeals, and thus bring on their executions.⁸⁴ First, by terminating his or her own appeal, a prisoner may be jeopardizing the lives of other death row inmates because it might trigger a "national avalanche of legal slaughter."⁸⁵ Second, this "death wish" should be considered "*prima facie* evidence of mental disturbance and, therefore, that others have a duty of care to intervene."⁸⁶ Bedau's third argument is that even if a condemned prisoner had a right to take his or her own life, "it would not follow that he had the right to compel the state to take it for him in the name of punishment."⁸⁷ Finally, although Bedau grudgingly concedes a right to die for those who are incurably ill, he denies a comparable right to those on death row because he does not consider them as "terminal" in the same sense.⁸⁸

These arguments do not, however, rely either on legal authority or on any consistent philosophy regarding individual autonomy. Rather, they are a deeply felt instinctive response to a situation potentially intolerable for the abolitionists, namely, that if they condone cases of voluntary execution, then their entire argument against capital punishment fails: one cannot selectively condone murder.⁸⁹ For an abolitionist, there is apparently no middle ground; any execution by the state must be resisted.

⁸² Lenhard *ex rel.* Bishop v. Wolff, 444 U.S. 807, 815 (1979) (Marshall, J., dissenting from denial of stay of execution).

⁸³ H. BEDAU, *supra* note 5, at 122.

⁸⁴ *See id.* at 121-25.

⁸⁵ *Id.* at 122.

⁸⁶ *Id.*

⁸⁷ *Id.* at 123.

⁸⁸ *Id.* at 122.

⁸⁹ *See id.*

If one looks more closely at these arguments and examines them in the light of both legal and ethical considerations, their surface logic fails. First, ever since Gary Gilmore ended a ten-year moratorium on executions in this country, each new execution has brought dire warnings of an impending national bloodbath. Certainly with nearly thirteen hundred persons on death row and a net addition of approximately one hundred each year,⁹⁰ the nation would have to execute ten persons a week for three years just to catch up with the backlog. But the facts show that despite indications of a growing dissatisfaction with endless appeals, the courts continue to insist on individualized evaluations of each case. Even Bedau concedes that the "avalanche" has failed to materialize.⁹¹ Unless and until firm evidence is presented that voluntary termination of appeal does in fact affect the rights of other prisoners, there should be no restrictions on these persons that prevent them from exercising their rights.⁹²

The second argument, that the "death wish" is *prima facie* evidence of mental incompetence, has appeared in some judicial opinions,⁹³ but only rarely, and it too has little factual or legal basis. As will be discussed below, current writings in biomedical ethics do not equate all desires to end one's life with mental disturbance.⁹⁴ For the abolitionists, however, if suicidal inclination can be labeled as incompetence, then the would-be "victims" could be foreclosed from dropping their appeals. Lester Maddox, while governor of Georgia, favored abolition of the death penalty and found a reason to commute one prisoner's sentence to life imprisonment after hearing that the man, William Clark, had said he wanted to die. "He must be nuts," concluded Maddox. "Even animals want to live. I don't believe any person who has any sense at all would want to die."⁹⁵ But as the Supreme Court has noted, "the empirical relationship between mental illness and . . . a suicide attempt need not always signal an inability to perceive reality accurately"⁹⁶

Even if one granted condemned prisoners a right to take their own lives, Bedau argues that condemned prisoners cannot compel the state to do it for them in the name of punishment.⁹⁷ Bedau wrote in obvious anger at the Gilmore case, with the press making

⁹⁰ See Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 936 (1982).

⁹¹ H. BEDAU, *supra* note 5, at 122.

⁹² See *infra* notes 126-163 and accompanying text.

⁹³ See *supra* note 78 and accompanying text.

⁹⁴ See *infra* notes 144-150 and accompanying text.

⁹⁵ B. WOLFE, *PILEUP ON DEATH ROW* 29-30 (1973).

⁹⁶ *Drope v. Missouri*, 420 U.S. 162, 181 n.16 (1975).

⁹⁷ See H. BEDAU, *supra* note 5, at 122.

Gilmore into a modern antihero, and he properly condemns as “ludicrous”⁹⁸ Thomas Szasz’s claim that Gilmore was trying to force Utah to live up to its “contract” with him, i.e., by virtue of his crime, Gilmore had bargained with Utah to provide a death penalty.⁹⁹ It is true that no one can “force” a state to execute someone, but if there is going to be the system of capital punishment, then it would seem that the condemned prisoner, the state, and the public all have a right to expect that the system will act in some rational and consistent manner. As will be discussed below, the irregularity and unreliability of the current system may well create an environment so degrading that all the inmate wants is to have the situation resolved, even if that resolution means death.¹⁰⁰

Bedau’s fourth argument seems most at odds with the general abolitionist view of granting human dignity to prisoners. If, as the abolitionists argue, capital punishment is an inhumane deprivation of rights as well as a degradation of the individual, then why should not death row inmates be allowed—if they themselves so choose—to accept their punishment with dignity. It is certainly ironic that in the Gilmore case, the American Civil Liberties Union passionately fought to prevent the execution of a convicted murderer who wished to die, claiming that Gilmore had no right to do so. It then turned around and argued that a right to die existed for Karen Ann Quinlan, who was unable to express her wishes one way or the other.¹⁰¹ One might infer from Bedau that although society may not exact retribution from convicted murderers by taking their lives through execution, they may punish them by locking them away for life and denying them a right to die, no matter how terrible the conditions of imprisonment. For, as will now be examined, it is the death row environment that is a crucial issue in the whole debate.

IV. LIFE ON DEATH ROW

The simple reason most condemned prisoners want to terminate their appeals is that they find conditions on death row intolerable.

⁹⁸ *Id.* at 123.

⁹⁹ Szasz, *The Right to Die*, THE NEW REPUBLIC, Dec. 11, 1976, at 8.

¹⁰⁰ One possible response to Bedau’s argument, but one that it is doubtful he would accept, has been put forward by Martin Gardner. Gardner suggests that condemned prisoners be permitted the option of taking their own lives, perhaps by means of a lethal overdose. Gardner is not being facetious; he favors such an option as more humane than current modes of execution and as consistent with the prisoner’s human dignity and freedom of choice. See Gardner, *Execution and Indignities—An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment*, 39 OHIO ST. L.J. 96, 110-11 (1978).

¹⁰¹ See W. BERNS, FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY 9 (1979).

ble.¹⁰² Doris Ann Foster, one of eleven women currently awaiting execution, put it bluntly: "Death is my only route to freedom."¹⁰³ She presently is confined to a small cell in the Maryland Correctional Institution for Women for stabbing a seventy-one-year-old woman to death with a screwdriver during a robbery. She has written to both the Maryland Court of Appeals and the United States Supreme Court asking them to ignore the efforts of her public defender lawyers to reduce her sentence to life, and she dreads the prospect of a long, drawn out appeal. "If the court says you're guilty and you're going to die, why spend all this money to fight it? Let them carry it out. They will be satisfied, and I will have peace."¹⁰⁴ Continuing in a legal limbo while confined "is ruining my body and eventually would ruin my mind. . . . I have no desire to continue on in such an inhumane existence."¹⁰⁵

Foster's attitude is not uncommon among condemned prisoners. Robert Lee Massie pleaded guilty to first degree murder committed during a 1965 robbery and received the death sentence. Four times execution dates were set, and four times lawyers for the NAACP, acting without Massie's consent, managed to secure stays, claiming that he was mentally incompetent. For Massie, this on-again, off-again condition was worse than death, and in a widely-noted article he asked:

Would [Christ] condemn me to a four-by-ten cell year after year, giving me dates of execution, and bringing me back from the brink of death each time the sentence was about to be executed? Would He subject me to this kind of mental torment? Since we all know He would not participate in these atrocities, then how are Christians able to justify the laws which permit such inhumanity to man? If you are adherents to the Mosaic law, which advocates "an eye for an eye and a tooth for a tooth," then my question is: Would Moses subject me to years of mental torment before putting me to death? I did not confine my victim for years in prison under the constant threat of death before killing him, so why is it being done unto me?¹⁰⁶

Following *Furman v. Georgia*,¹⁰⁷ which temporarily held all state death penalties as unconstitutional, Massie received another re-

¹⁰² The abolitionist response to this argument is to do away with the death penalty entirely, and thus do away with death rows. This Article is premised upon the belief that this country will not, in the foreseeable future, do away with capital punishment. If that penalty remains, and prisoners are still warehoused on death rows, we should be aware of the stress this imposes and examine ways to reduce it. Under such conditions, a form of suicide is not irrational.

¹⁰³ *An Eye for an Eye*, TIME, Jan. 24, 1983, at 32.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Massie, *Death by Degrees*, ESQUIRE, Apr. 1971, at 179.

¹⁰⁷ 408 U.S. 238 (1972) (per curiam).

prieve and was eventually paroled, only to commit another robbery and murder, for which he received the death penalty in 1979. Once again, he asked the court to decide upon his punishment and make an end to it. He "has no desire to be executed and does not object to spending the rest of his life incarcerated; he, however, finds execution preferable to spending a lengthy period on death row."¹⁰⁸ Once again, however, issues of incompetency have been raised, and Massie's case remains unresolved.

The long-time warden of Sing Sing prison, Clarence Duffy, acknowledged that by their nature, conditions on death row had to be horrible: "The men of death row live in fear and hopelessness, and their thoughts are never off the glass-walled enclosure that waits for them six floors below. This is not justice but torture, and no court in the land will deliberately sentence a defendant to that."¹⁰⁹ Before the *Furman* decision, one commentator detailed some of the conditions in various state prisons, and concluded that confinement on death row produced mental suffering that violated the eighth amendment's ban against cruel and unusual punishment.¹¹⁰ So atrocious were some of these prisons (not just the death rows) that various state and lower federal courts ordered immediate remediation.¹¹¹ Although it is unlikely that courts will find confinement awaiting execution to be per se unconstitutional (especially because the long wait usually is due to prisoner appeals), there is no doubt that the very conditions inherent on death row can cause extreme mental anguish.

In recent years, there have been several studies of these conditions,¹¹² all documenting the stress faced by prisoners awaiting death and not knowing when or if it will come.¹¹³ A few samples from these studies will give an idea of the environment these men and women face, week after week, month after month, year after year. Moreover, because of the special security requirements, death row prisoners rarely mix with other inmates and are often unable

¹⁰⁸ *Massie v. Sumner*, 624 F.2d 72, 73 (9th Cir. 1980), *cert. denied*, 449 U.S. 1103 (1981).

¹⁰⁹ C. DUFFY, 88 MEN AND 2 WOMEN 254 (1962).

¹¹⁰ See Note, *Mental Suffering under Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814, 815 n.5 (1972).

¹¹¹ For a brief review of court involvement in reforming prison conditions, see Comment, *Federal Intervention in State Prisons: The Modern Prison-Conditions Case*, 19 HOUS. L. REV. 931 (1982).

¹¹² See, e.g., S. GETTINGER, *SENTENCED TO DIE: THE PEOPLE, THE CRIMES, AND THE CONTROVERSY* (1979); B. JACKSON & D. CHRISTIAN, *DEATH ROW* (1980); R. JOHNSON, *CONDEMNED TO DIE: LIFE UNDER SENTENCE OF DEATH* (1981).

¹¹³ See Bluestone & McGahee, *Reaction to Extreme Stress: Impending Death by Execution*, 119 AM. J. PSYCHIATRY 393 (1962).

even to socialize with each other. Their only company consists of prison officials, their lawyers, and occasional visitors.

Some people go crazy on the Row, and there is even less help for that. Perhaps it is reasonable to go crazy, living under such confined conditions for so many years. In August 1979, 42 men on the Row had been there more than three years. Further, some people were pretty much crazy when they got there. Everyone on the Row thought the man who beat his skull against the steel bunk was seriously disturbed. The Row was divided about the man who talked and screamed all night; some felt he was quite mad, others felt he was putting on a bothersome performance. It's a tough audience on the Row, and if one is faking, one had best be very good at it.¹¹⁴

Death Row is a prison within a prison, physically and socially isolated from the prison community and the outside world. Condemned prisoners live twenty-three and one-half hours alone in their cells, punctuated by thirty minutes devoted to private exercise in a closely guarded outdoor cage designated for high security risk inmates. Only passive recreation is available to the prisoners on death row. The inmates try to fill empty time with exercise, reading, reverie, television, or conversation with their neighbors. Strategies vary. For some men, a tightly patterned sequence of private activities and accomplishments is required to reduce anxiety and maintain self-control.¹¹⁵

As an example of how prisoners in Alabama pass their time, Johnson reports the following exchange:

PRISONER: I have got so bored at times, I used to hook cockroaches together, sort of like they was a team of mules, to drag a matchbox around on the floor to pass time. I mean that may sound weird to you or somebody else, and it might be. Matter fact I just flushed a little frog down the shit jack the other day that I had back there. It came up through the shit jack. I kept him back there a couple of weeks and I kicked roaches and things to feed him. Just any little old thing.

INTERVIEWER: Just to keep you busy.

PRISONER: To more or less keep your mind off the damned chair and the things that you're seeing around you. Anything to occupy your mind.¹¹⁶

Given such conditions, which are apparently endemic to all death rows, it becomes more understandable for a California inmate to say: "I would rather go downstairs to that gas chamber than have to spend the rest of my life here. Being free is being alive. If a person goes down to the gas chamber he's escaped. It is going to cost him his life, but he's escaped."¹¹⁷

¹¹⁴ B. JACKSON & D. CHRISTIAN, *supra* note 112, at 175 (Texas death row).

¹¹⁵ R. JOHNSON, *supra* note 112, at 47 (Alabama death row).

¹¹⁶ *Id.* at 48.

¹¹⁷ S. GETTINGER, *supra* note 112, at 96.

Over twenty years ago, Jacques Barzun, one of the most perceptive social critics of our time, wrote a controversial article in favor of capital punishment.¹¹⁸ One key argument that he put forward suggested that life in prison might well be a fate worse than death. To abolitionists who held a life sentence better than execution, he responded:

They read without a qualm, indeed they read with rejoicing, the hideous irony of "Killer Gets Life"; they sigh with relief instead of horror. They do not see and suffer the cell, the drill, the clothes, the stench, the food; they do not feel the sexual racking of young and old bodies, the hateful promiscuity, the insane monotony, the mass degradation, the impotent hatred. They do not remember . . . that Joan of Arc, when offered "life," preferred burning at the stake

. . . For my part, I would choose death without hesitation. If that option is abolished, a demand will one day be heard to claim it as a privilege in the name of human dignity.¹¹⁹

This does not mean that all, or even a majority, of death row inmates would elect death over long-term imprisonment. But it would temper the abolitionists' blithe assumption that life is always preferable to death if they kept the reality and the quality of that life in mind. As Barzun concluded: "I shall believe in the abolitionist's present views only after he has emerged from twelve months in a convict cell."¹²⁰

Death row is by nature nothing more than a warehousing operation, storing condemned prisoners until the appeals process has either freed them from the threat of death or run its course and delivered them to the death room. One need not go so far as Robert Johnson, who argues that "a death sentence amounts to death with torture,"¹²¹ to recognize the depressing and degrading conditions in these units. Nor should one forget that these people stand convicted of murder, some of which involved horrid torture, mutilation, and degradation of their victims. Perhaps locking them away in such an environment is fitting retribution, more terrible in its severity than the finality of death. But that is not the choice of punishment society supposedly has made. So long as imposition of the death sentence is permitted, prisoners should not be denied the option of asking the state to implement its justice. Gary Gilmore's lawyer summed up this attitude when he wrote:

Mr. Gilmore had sufficient experience of prison life to estimate . . . what it would be like for him to languish in prison. Historical, reli-

¹¹⁸ Barzun, *In Favor of Capital Punishment*, 31 *AM. SCHOLAR* 181 (1962).

¹¹⁹ *Id.* at 188-89.

¹²⁰ *Id.* at 189.

¹²¹ *Los Angeles Times*, Aug. 20, 1982, §2, at 11.

gious, and existential treatises suggest that for some persons at some times, it is rational not to avoid physical death at all costs. Indeed the spark of humanity can maximize its essence by choosing an alternative that preserves the greatest dignity and some tranquility of mind.¹²²

The Supreme Court has never addressed the issue of suffering attached to the death sentence aside from the actual mode of execution, and that case came down in 1890 when the Court approved the use of the electric chair.¹²³ Punishments are cruel, held the Court, "when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies something inhuman and barbarous, something more than the mere extinguishment of life."¹²⁴ Not until 1958, in a non-death penalty case, did the Court hold that a person's humanity must be respected regardless of guilt or crime.¹²⁵ Abolitionists consider capital punishment in itself violative of the eighth amendment, but even those who favor the death penalty ought to concede that months or years on death row is certainly "more than the mere extinguishment of life." 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 either improve death row conditions, or permit those who wish to terminate that existence through execution of sentence the right to do so.

V. SUICIDE AND THE RIGHT TO DIE

For some prisoners, the atmosphere on death row has proven more than they could bear, and they have bypassed the system by taking their own lives. In the last ten years, thirteen condemned persons have committed suicide, and others, like Gary Gilmore, have tried to do so. The reasons for suicide vary from person to person. Millard Farmer of the Atlanta Team Defense Project believes that living conditions on death row are so onerous that they "could cause the most stable person not to cope."¹²⁶ There are some who cannot take it anymore; some who are trying to get attention; and for a third group, suicide is their final act of defiance.

A short time before he overdosed on antidepressant pills that he had been hoarding, Alexander Bowling, a condemned murderer

¹²² N. MAILER, *supra* note 7, at 706 (quoting William Barret's brief to the Supreme Court for the Utah Attorney General's office).

¹²³ See *In re Kemmler*, 136 U.S. 436 (1890).

¹²⁴ *Id.* at 447.

¹²⁵ See *Trop v. Dulles*, 356 U.S. 86, 102 (1958) (unconstitutional to punish person by denaturalization).

¹²⁶ Los Angeles Daily Journal, July 19, 1982.

on Kentucky's death row, wrote to his attorneys: "Being alive means nothing if there's nothing in your life to do. You have to have something in your life to look forward to each day."¹²⁷ In his study of Alabama's condemned population, Robert Johnson found this imagery pervasive, with many prisoners characterizing their existence as a living death, and themselves as the living dead.¹²⁸ Even a reprieve with commutation to life is not always attractive because it usually would not include a chance of parole. "If it's either living in prison or dying in that chair, I'm going to go ahead and be exterminated. There ain't no way I'm going to die in a penitentiary, unless they execute me."¹²⁹ Even if they retain a chance at parole, many current inmates would be fifty or sixty years old before they get out of prison. "Don't make no sense to get out then. What you gonna be able to do to make a livin'? Might want to kill myself then anyway It's better off all the way around to get it over with than it is to go out there."¹³⁰

Suicide has to be examined not just in the context of the capital punishment debate, but as part of the larger discussion in biomedical ethics of the limits of control over one's own life to which one is entitled, and whether these limits include the right to terminate that life. In the past decade, this has become a particularly fruitful and relevant issue, both for law and ethics, although the primary focus to date has been on whether terminally ill patients may choose to stop life-sustaining therapy.¹³¹

English common law traditionally opposed suicide, and under an act of Parliament, suicide was considered a felony; the property of the *felo de se* was forfeited to the Crown, and " 'he was ignominiously buried in the public highway and a stake driven through his body.' "¹³² English law thus reflected Judeo-Christian opposition to the taking of one's own life. With the exception of martyrs who chose to die *kiddush ha-Shem* (for the sanctification of God's Name), the rabbinic teachers agreed that suicide was forbidden.¹³³ The church fathers also condemned suicide. Augustine held that the commandment "Thou shalt not kill" refers "to the killing of a man;

¹²⁷ Fitzgerald, *The Loss of a Client*, THE ADVOCATE, Oct. 1982, at 1.

¹²⁸ R. JOHNSON, *supra* note 112, at 110 (quoting unidentified prisoner).

¹²⁹ *Id.* (quoting an Alabama inmate).

¹³⁰ *Id.* at 111-12. See also B. JACKSON & D. CHRISTIAN, *supra* note 112, at 264-65.

¹³¹ See Annot., 93 A.L.R.3d 67 (1979). For a particularly useful article exploring the issue, see Cantor, *A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity versus the Preservation of Life*, 26 RUTGERS L. REV. 228 (1973).

¹³² Comment, *The Right to Die*, 7 Hous. L. REV. 654, 655 (1970) (quoting *State v. Campbell*, 217 Iowa 848, 850, 251 N.W. 717, 718 (1933)).

¹³³ TALMUD, *Baba Kamma* 91b; A. COHEN, *EVERYMAN'S TALMUD* 75 (1949).

not another man; therefore, not even thyself." For Thomas Aquinas, life was "God's gift to man . . . [therefore] whoever takes his own life sins against God."¹³⁴

At the same time, there is an equally ancient tradition upholding the right to end one's own life. The Stoics, for example, did not consider suicide prejudicial to one's character, nor did the Romans condemn the practice. Many people of the upper classes in Rome, according to historians, resorted to suicide when they felt their lives were no longer worthwhile.¹³⁵ Following the rise of the Catholic Church and canon law, this view went into eclipse, but in 1777, David Hume, the noted Scottish philosopher, published an essay defending suicide. He argued that if God is the creator of the world, then His will must be expressed in *all* events, and therefore suicide cannot be a departure from that will. Hume also rejected the contention that suicide harmed society in all instances; in some cases, suicide might benefit society and be the best way to fulfill one's duty to oneself and to others.¹³⁶

Contemporary thought on suicide is extremely diverse, ranging from opposition on religious, philosophical, or humanitarian grounds to the belief that individual autonomy includes the right to end one's life. American common law never adopted the harsher English view, and in no state today is there a law prohibiting suicide; in three states, however, Oklahoma, South Dakota, and Washington, it is against the law to attempt suicide, but not to succeed in the attempt.¹³⁷ The most prevalent form that the issue has taken in modern law concerns the refusal of patients to accept or continue treatment that might save or at least prolong their lives.

Up until the latter part of this century, the question arose only rarely because medicine lacked the technical ability to prolong life in the face of massive infection, advanced disease, or the failure of bodily organs. Although courts generally acknowledged Judge Cardozo's language that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body,"¹³⁸ courts did so only in terminal cases and, in fact, "developed a wide variety of formulations that inhibit[ed] realization of

¹³⁴ ETHICAL ISSUES IN DEATH AND DYING 102-03 (T. Beauchamp & S. Perlin eds. 1978).

¹³⁵ See Comment, *supra* note 132, at 655.

¹³⁶ D. Hume, *On Suicide*, in ETHICAL ISSUES IN DEATH AND DYING, *supra* note 134, at 105-10.

¹³⁷ See Comment, *supra* note 132, at 656.

¹³⁸ *Schoendorff v. Society of New York Hosp.*, 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914), *overruled on other grounds*, *Bing v. Thunig*, 2 N.Y.2d 656, 143 N.E.2d 3 (1957).

ultimate control by the patient."¹³⁹ The issue gained national attention in the Karen Ann Quinlan case,¹⁴⁰ when it became obvious that science had the means to keep a person's essential organs functioning, even if that person were, by normal criteria, dead. Did people have the right to refuse such heroic measures, if continued living meant nothing but prolonged physical pain and mental distress, both for the patients and for those they loved?

Much of the case law on this subject has centered on religious freedom, with members of certain groups refusing blood transfusions, operations, or other types of therapy because of their religious beliefs.¹⁴¹ There is a growing body of legal and religious opinion that heroic efforts to sustain life when the person's body can no longer do so by itself may be terminated by the patient, or by the family or attending physician if the patient is no longer able to make a decision.¹⁴² Pope Pius XII, in 1957, declared that a physician may not refuse or stop ordinary treatment because that omission might cause death, but extraordinary measures, such as employing a respirator when the patient's own circulatory system had failed, could be terminated because death in such a case would be the result of injury or illness.¹⁴³

The broader issue involves the right to die not only when a person is terminally ill and wants to forego 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. Despondency, hopelessness, guilt, or shame may all make someone's life so unbearable that death appears as a release from an intolerable situation. The question in these instances is whether an individual has such a right encompassed within the notion of personal autonomy, and if such a right exists, whether society may impose obligations that limit personal autonomy and mitigate the right to die.

Students of biomedical ethics have suggested certain criteria that should be considered in determining whether or not a particular suicide is "moral."¹⁴⁴ The three principles that Beauchamp and

¹³⁹ Note, *Informed Consent and the Dying Patient*, 83 YALE L.J. 1632, 1634 (1974).

¹⁴⁰ *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, cert. denied, 429 U.S. 922 (1976).

¹⁴¹ See generally Annot., *supra* note 131.

¹⁴² *Id.* See generally Brown & Truitt, *Euthanasia and the Right to Die*, 3 OHIO N.U.L. REV. 615 (1976); Cantor, *supra* note 131.

¹⁴³ See Comment, *supra* note 113, at 660.

¹⁴⁴ I am not concerned here with technical nomenclature distinguishing between "active suicide," in which a person takes positive steps such as shooting oneself, and "passive suicide," also known as "antidysthanasia," in which one either allows death to come without resistance or refuses to accept life-prolonging therapy. "Euthanasia," or mercy killings of terminally ill patients, is for the most part legally considered murder,

Childress put forward are:

1. *Autonomy*. If one truly believes in the autonomy of each individual, it would "be a showing of disrespect to deny autonomous persons the right to commit suicide when, in their considered judgment, they ought to do so."¹⁴⁵ Legally, this ties in to the developing theory of a "right to privacy," which, absent overriding concerns of the state, holds that individuals ought to be free in making those judgments most personal to themselves. Chief Justice Burger, while on the Court of Appeals for the District of Columbia Circuit, pointed out that this right does not give society the power to decide what is best for the individual:

Mr. Justice Brandeis, whose views have inspired much of the "right to be let alone" philosophy, said: "The makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." Nothing in this utterance suggests that Justice Brandeis thought an individual possessed these rights only as to *sensible* beliefs, *valid* thoughts, *reasonable* emotions, or *well-founded* sensations. I suggest he intended to include a great many foolish, unreasonable and even absurd ideas which do not conform, such as refusing medical treatment even at great risk.¹⁴⁶

2. *Human worth*, also termed "sanctity of human life." Is human life so intrinsically valuable that its destruction is an act of murder and therefore wrong? Opponents of suicide may allow someone to die instead of applying heroic medical efforts, but deny that one may *kill* a person, even himself, because this is an irrevocable act of destruction. This view, in its strongest form, would oppose all manner of imposed death, including abortion, execution by the state, murder, or even by one's own hand. A weaker version of the principle would hold that although human life always has intrinsic value, this by itself is not the overriding consideration, but only one factor to take into account.¹⁴⁷

3. *Utility*. With respect to this principle, one looks at the impact of suicide upon the interests of all concerned, not only of the individual, but of the family and society as well. If a person has no family, no dependents, and no debts or obligations to others, a utili-

although not capital murder. For death row inmates, termination of appeal is considered antidysthanasia on technical grounds. See Note, *Death Row Right to Die*, *supra* note 4, at 604 n.199.

¹⁴⁵ T. BEAUCHAMP & J. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 87 (1979).

¹⁴⁶ *In re* President of Georgetown College, 331 F.2d 1000, 1015 (D.C. Cir. 1964) (Burger, J., dissenting) (emphasis in original) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

¹⁴⁷ T. BEAUCHAMP & J. CHILDRESS, *supra* note 145, at 87-88.

tarian calculus would provide no negative items to balance the person's desire to end pain, suffering, or any other condition that favors the suicide. If, on the other hand, a person has a family that loves and is dependent upon him or her, or if the person has talents the absence of which would deprive society, then this would go into the balance against suicide.¹⁴⁸ In its starkest form, the "utilitarian demand [is] that the greatest possible amount of value or at least the smallest amount of disvalue be brought about by the person's actions."¹⁴⁹

Beauchamp and Childress further argue that each of these three principles is *prima facie* binding, that is, they assert primary duties that cannot be ignored, either by the person contemplating suicide or by those who would intervene:

[T]o the extent the principle of autonomy or one of the other principles just mentioned is relevant, and does not come into conflict with other principles, it is our duty to observe the principle. Thus, if a suicide were genuinely autonomous and there were no powerful utilitarian reasons or reasons of human worth and dignity standing in the way, then we ought to allow the person to commit suicide, because we would otherwise be violating the person's autonomy. A similar analysis could be given for instances falling under each of the principles. This indicates that whether suicide is right or wrong is never a simple or absolute matter. The morality of suicide cannot be determined in abstraction from the facts of a person's own situation.¹⁵⁰

Not all defenders of a right to suicide agree with this outline; some consider the issue of personal autonomy to be the only consideration.¹⁵¹ But the outline does provide a useful framework in which to examine decisions made on death row.

1. *Autonomy*. For the prisoner, convicted and condemned by society and restrained in a tiny cell with practically no freedom, the

¹⁴⁸ Several cases have followed the rule that where minor children are dependent upon the individual, his or her obligation to them precludes a right to refuse treatment, even on religious grounds. See, e.g., *Holmes v. Silver Cross Hosp.*, 340 F. Supp. 125 (N.D. Ill. 1972); *Satz v. Perlmutter*, 362 So. 2d 160 (Fla. Dist. Ct. App. 1978). Cf. *Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson*, 42 N.J. 421, 201 A.2d 537 (transfusion ordered for pregnant woman to preserve life of unborn child), *cert. denied*, 377 U.S. 985 (1964). Where the patient is not responsible for others, however, the courts generally have ruled that individual wishes should be respected. See, e.g., *In re Brooks' Estate*, 32 Ill. 2d 361, 205 N.E.2d 435 (1965). There have, however, been cases in which courts have deferred to medical opinion despite the expressed wishes of the patient. See, e.g., *In re President of Georgetown College*, 331 F.2d 1000 (D.C. Cir. 1964); *John F. Kennedy Memorial Hosp. v. Heston*, 58 N.J. 576, 279 A.2d 670 (1971). In addition, the courts must be assured that the patient is competent to make the decision; if not, the state, as *parens patriae*, will act to save the person's life.

¹⁴⁹ T. BEAUCHAMP & J. CHILDRESS, *supra* note 145, at 89.

¹⁵⁰ *Id.*

¹⁵¹ See, e.g., Szasz, *The Ethics of Suicide*, 31 ANTIOCH REV. 7 (1971).

option of terminating appeals and being executed may represent the only opportunity to exercise any personal choice in order to affect his or her fate. For the abolitionists, this may be the most difficult aspect of the problem, for granting the condemned person the right to bring on death affronts their belief in the sanctity of human life. But what must be remembered at all times is that the life involved is that of the prisoner; it is his or her life at stake, his or her personal autonomy, and not that of the abolitionist. The only argument that can be made is that a murderer, by taking the life of another person and denying the victim's autonomy, has invited retribution through the loss of his or her autonomy. Yet the abolitionists deny that such "an eye for an eye" rationale is consistent with the values of a progressive society or with the goals of punishment.

2. *Human worth.* For the condemned, the quality of life on death row has depreciated to nothing or little better than nothing. If we grant to the terminally ill the right to die, it is because we recognize the distinction between merely being alive and living as free and autonomous individuals. We recognize that pain and suffering may reach a point where death brings release. How often have we heard it said that the death of a cancer victim, for example, was a "blessing"?

Yet for the abolitionists, human life is so sacred that none should be extinguished needlessly, and this principle outweighs any other, even that of personal autonomy.¹⁵² One certainly can sympathize with the ethical problems confronting lawyers, for example, who are faced with the express wish of their clients that the appeals be dropped so they can meet their deaths, and with the attorneys' own commitment to humanizing the law and preserving life.¹⁵³ In some instances, there may be legitimate reasons to question whether the prisoner is mentally competent to exercise autonomy, and for counsel to properly bring the facts to the attention of the court in order to secure a psychiatric examination to determine

¹⁵² Some abolitionists base their belief in this area on religious justification, and note that Judaism and Christianity both forbid suicide. Yet under the first amendment, prisoners also must be allowed freedom for *their* religious beliefs. In the landmark case of *In re Brooks' Estate*, 32 Ill. 2d 361, 372, 205 N.E.2d 435, 442 (1965), religious principles were held to outweigh the desires of third parties to save a person's life. If abolitionists insist upon treating condemned prisoners as individuals who still retain certain fundamental rights—as they ought to do—then one of these rights must be religious freedom, with the individual free to place a value on his or her own life within his or her religious framework, not in the value system of a third party.

¹⁵³ "Counsel have determined that their obligation to their client, as well as to the Court and society, would not be satisfactorily fulfilled if they were to take no action at all on the basis of their client's instructions." Statement of Counsel, *In re Joseph M. Giarratano*, No. 118475, (Cir. Ct. Norfolk, Va. 1981).

competency. One should, however, beware equating a suicide wish with incompetence. Glanville Williams has charged that "[p]sychiatrists are too ready to assume that an attempt to commit suicide is the act of a mentally sick person,"¹⁵⁴ and abolitionists often may commit the same error.¹⁵⁵ If the value of his or her life is of little value to the prisoner, does a third party, no matter how dedicated to the sacredness of life, have a right to intervene?

Suicide intervention is commonly acknowledged as a legitimate intrusion by third parties, but only up to a limit. The would-be suicide must be made aware of options and must recognize the finality of the act; he or she also must recognize that other people value his or her life, and would be saddened by its ending; psychiatric help should be provided if necessary. But beyond that, third-party intervention displaces the individual's autonomy and essentially places him or her under the control of another, contrary to the individual's wishes. No doubt counsel of condemned prisoners often develop close emotional ties to their clients, yet the courts have time and again refused to allow uninvited third parties, even parents, to displace the autonomy of prisoners.¹⁵⁶ Those who believe strongly in the sacredness of life may not agree, but here too the ultimate balancing of values must remain in the hands of the individual involved.

3. *Utility.* Unlike the other two areas, the desires of the individual may be balanced against the interests of others, including society, family, and persons affected by the decision. Yet according to some studies of death row, it is concern for these other people that often motivates prisoners to seek death. Frank Coppola, for example, sought execution to end the shame and embarrassment he believed his family suffered because of his trial and subsequent incarceration.¹⁵⁷ Some prisoners also may believe that they should accept their punishment in order to pay their debt to society and obtain absolution and forgiveness of sins.¹⁵⁸

¹⁵⁴ G. Williams, *Euthanasia*, 41 MEDICO-LEGAL J. 27 (1973).

¹⁵⁵ See, e.g., H. BEDAU, *supra* note 5, at 122.

¹⁵⁶ See *Rosenberg v. United States*, 346 U.S. 273, 291-92 (1953) (Jackson, J., concurring); see also *supra* notes 44-47, accompanying text, and cases cited therein.

¹⁵⁷ Los Angeles Times, Aug. 20, 1982, § 2, at 11.

¹⁵⁸ Richard Hager, an Oklahoma inmate seeking execution, told a reporter in 1977: I believe in Jesus Christ. In the last two, two and a half months, I've found something that's beyond words. It's brought a real peace to me. And it's brought a lot of peace to the other four men on Death Row. We've had something really fantastic happen back there. We're all pretty well behind it now. I tell you, Jesus Christ walked Death Row.

For Hager and others, the walk to the electric chair is "the road to Glory Row." S. GETTINGER, *supra* note 112, at 70.

Yet there is no doubt that the state has an interest here that overrides that of the individual. Above all, when imposing a capital sentence, there is a need to be sure that no mistakes have been made in either the guilt or sentencing stages so that public confidence may be maintained in the criminal justice system. This requires, on one level, a standardization of the process so that similar criteria are applied to all persons accused of capital murder, and on the other level, the individualization of the process to ensure that each defendant's mitigating as well as aggravating circumstances are taken into account. As Chief Justice Burger has noted: "The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases."¹⁵⁹

Insofar as appeals are concerned, there need be no contradiction between standardization and individualization in order to meet the interests of the prisoner and of the state. Capital punishment statutes can spell out clearly the standard requirements for imposing the death penalty, and automatic reviews by appellate courts can ensure that these standards have been met in terms of fairness across all cases as well as in each particular instance. Collateral attack still can be pursued as a further safeguard on the process, and thus serve the common interests of prisoner and society. Whenever it appears that a prisoner may be incompetent, the court should order psychiatric evaluation; if the prisoner is adjudged incompetent, then a guardian *ad litem* may be appointed to protect his or her interests in securing proper treatment, continuing appeals, and other matters. For those who wish to appeal or are unable to determine the issue for themselves, it is in the best interests of both the state and the individual to ensure that all legal challenges to a death sentence have been exhausted before the sentence is carried out.

But once review has taken place, thus meeting the Supreme Court's minimal procedural safeguards,¹⁶⁰ then the state may well claim that it has met its obligations. If a prisoner wishes, further appeals then may be taken; if not, respect for individual autonomy requires that the choice of the condemned be respected. This also should include limiting third-party intervention absent some showing of incompetence on the part of the defendant, and a wish to end

¹⁵⁹ *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion).

¹⁶⁰ The Supreme Court in *Jurek v. Texas*, 428 U.S. 262, 276 (1978) (plurality opinion), upheld a Texas statutory scheme providing for expedited appeal in capital murder cases, indicating that mandatory review is not necessary for due process provided that an appeal is immediately available.

the appeals process should not be taken as evidence of incompetence.

There is, of course, the ultimate argument of the abolitionists that the death penalty might be imposed by mistake, and an innocent person executed for a crime he or she did not commit.¹⁶¹ What if such a person, believing there is no hope for rectifying the error and confronted by the hopelessness of prison life, elects to terminate the appeal and accept death? Jack Potts, convicted of capital murder, had determined not to pursue his appeals and was less than thirteen hours from death when his girlfriend convinced him to change his mind. Two years later, a federal judge ruled that the sentencing phase of the trial was invalid.¹⁶² Although the ruling upheld the guilt determination so that one cannot argue Potts' innocence, it may turn out that imposition of death in this case was wrong. Abolitionists would argue that even one mistake such as this undermines the integrity of the entire judicial system and the only means to rectify it is to abolish the death sentence completely; failing that, every prisoner should, voluntarily or involuntarily, take the appeals to the ultimate limit to defeat the death sentence.

The abolitionist position ignores the fact that no system is completely foolproof; errors always will creep in no matter how we try to avoid them. What must be balanced is not the possibility of error as against all other values, but as one of several values that must be weighed. Sanctity of life is one value, but so is the need of society to impose punishment on those who break the social contract and deprive others of their lives. Avoidance of error is important, but not as great as individual autonomy. After the State takes all possible precautions to avoid error and at the same time protect the interests of society, the final decision on whether to pursue or terminate appeals should be left to one person—that person whose life is at stake. Society has stripped that individual of nearly all the rights that free persons enjoy; to take this decision away would, as Judge Sneed pointed out, “incarcerate the spirit—the one thing that remains free and which the state need not and should not imprison.”¹⁶³

¹⁶¹ See C. BLACK, *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* (2d ed. 1981).

¹⁶² Atlanta Constitution, Jan. 14, 1983, at D1. See *Potts v. Austin*, 429 F. Supp. 326 (N.D. Ga. 1980).

¹⁶³ *Lenhard ex rel. Bishop v. Wolff*, 603 F.2d 91, 94 (1979) (Sneed, J., concurring), *stay of execution denied*, 444 U.S. 807 (1979) (mem.).