"I AM WORTHY OF DEATH": The Uses and Abuses of Dignitary Arguments

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Abstract

Since the U.S. Supreme Court in *Gregg v. Georgia* reinstated the death penalty in 1976, approximately ten percent of those executed in the United States have been "volunteers." Volunteers are death-sentenced individuals who waive their right to appellate review and post-conviction relief to seek prompt "voluntary" execution. Fewer than one in six death sentences result in execution. Volunteers distort this statistic. Many states continue to accede to volunteers' death wishes, often citing the individual's "dignity" as a reason for granting them execution. Volunteers similarly argue that their "worth" and "dignity" depend on the state executing them. This is the volunteer paradox: Death-sentenced individuals waive dignity-enhancing procedures (like appellate review) to enhance their dignity. This Article lays out the dignitary interests at stake, consciously juxtaposing death row volunteerism against physician-assisted suicide. Whether states have a constitutional obligation to prevent volunteering would be a case of first impression for the U.S. Supreme Court. This Article argues that when the volunteering dilemma reaches the Court, volunteering must be declared unconstitutional based on both dignitary and legal considerations.

Death row is a crucible of dignity clashes. Death row volunteerism thus presents a unique and extreme paradigm to wade into the larger "dignity in the law" debate. On one side of the debate are dignity skeptics who believe dignity can only be thematic dicta in jurisprudence because dignity is too fragile and subjective of a concept to be operational in the law. On the other side are dignity proponents who argue dignity can and should be part of a judge's assessment. This Article ultimately advances the use of dignity in the law, providing normative arguments for prioritizing certain conceptions of dignity over others and outlining the kinds of dignitary arguments judges should embrace, as well as those they should reject.

About the Author

J.D. Candidate, University of Virginia School of Law (expected 2026), B.A. Amherst College 2023. The author thanks Professor Rachel Bayefsky, whose thought-provoking seminar *Dignity Law* inspired this Article. Since this piece was written, two more death-sentenced individuals have waived appeals and volunteered for state execution: Derrick Dearman in Alabama (October 17, 2024) and Travis Mullis in Texas (September 24, 2024). The author hopes to shed light on these injustices.

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Introduction

In 2021, death row prisoner David Neal Cox told the Mississippi State Supreme Court, "I am worthy of death and I do not wish to challenge the State."[1] Cox drew on his dignity—as honor, autonomy, and inherent worth—to compel the state to execute him. His appeal to dignity worked: He was granted execution. In affirming Cox's death wish, Mississippi stamped its view of Cox as "worthy of death." Cox joined the list of so-called "volunteers": individuals on death row who waive their right to appeal and "volunteer" for execution. Since David Neal Cox, three more individuals have volunteered for state

1. Cox v. State, 327 So. 3d 100, 103 (Miss. 2021).

execution: James Barnes in Florida, Travis Mullis in Texas, and most recently, Derrick Dearman in Alabama, who was executed on October 17, 2024.[2] The persistence of volunteerism on death row[3] and the lack of consensus between states on whether states must uphold a volunteer's waiver make volunteering an unresolved issue. Whether states have a constitutional obligation to prevent volunteering would be a case of first impression for the U.S. Supreme Court.[4] Although current jurisprudence insists that the death penalty is constitutional,[5] it does not necessarily follow that volunteering is also constitutional.

Volunteering for state execution cannot be a remedy to the injury and indignity of being sentenced to death. The question then is, how do we remedy the indignities of being on death row? Procedural delays from direct and collateral review are objectively undignifying. Courts must either (1) abolish the death penalty, which would cure the volunteering dilemma; (2) continue to accept the paradox that dignity-enhancing procedures inevitably lead to some indignities (including long wait-time on death row); (3) improve death row conditions; (4) set a statute of limitations for time on death row whereupon an individual becomes integrated into regular prison for a life sentence; and/or (5) issue damages/reparations as expressive outrage to vindicate a death row prisoner's dignity.

This Article argues that when the volunteering dilemma reaches the Court, volunteering should be declared unconstitutional based on both dignitary and legal considerations. The dignity of the nation, the legal profession, and death row prisoners rests on ending the death penalty. Part I of this Article provides a summary of the capital punishment landscape and the origins of death row volunteering. Part II explores four dignitary interests at stake: (A) the dignity of the death-sentenced individual, (B) the dignity of the state to prescribe its own criminal punishments, (C) the dignity of attorneys, and (D) the collective dignity of humanity. Part III offers practical solutions to the volunteer dilemma and is broken into two subsections: (A) theories underlying why volunteering is undignifying and unconstitutional, and (B) a framework for courts to identify "good" and "bad" ideas of dignity . Both Parts II and III also provide normative arguments for prioritizing certain conceptions of dignity over others.

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2. *Execution Volunteers*, Death Penalty Info. Ctr. (Oct. 24, 2024), [https://perma.cc/ME7Y-QTKR].
3. *Id.* (indicating that in 2024, two death row prisoners volunteered for execution: Derrick Dearman in Alabama and Travis Mullis in Texas); Amy Smith, *Not "Waiving" But Drowning: The Anatomy of Death Row Syndrome and Volunteering for Execution*, 17 B.U. Pub. Int. L.J. 237, 252–53 (2008).
4. Kristen M. Dama, Comment, *Redefining a Final Act: The Fourteenth Amendment and States' Obligation to Prevent Death Row Inmates from Volunteering to be Put to Death*, 9 U. Pa. J. Const. L. 1083, 1083–84 (2007) ("[L]egal scholars have not reached a consensus as to whether states have a constitutional obligation to prevent defendants from volunteering to be put to death, and the U.S. Supreme Court has never ruled on that specific issue.").
5. *See* Gregg v. Georgia, 428 U.S. 153 (1976) (upholding the death penalty as constitutional).

I. The Death Row Volunteerism Phenomenon

In *Furman v. Georgia*, Justice Brennan held the death penalty unconstitutional because it was "uniquely degrading to human dignity."[6] The court in *Gregg v. Georgia* overturned *Furman* four years later and brought back the death penalty, based on textualist and originalist reasoning.[7] Dignity went by the wayside. After the court in *Gregg v. Georgia*[8] upheld the constitutionality of the death penalty, four of the first five prisoners executed were volunteers.[9] Additionally, in Connecticut, New Mexico, Oregon, and Pennsylvania, the only prisoners executed have been volunteers.[10] Today, approximately ten percent of executions are "voluntary."[11]

While individual dignity has lost traction since capital punishment was reinstated, courts and legislatures have tried to carve out degrees of autonomy to preserve death row prisoners' dignitary interests. For example, death row prisoners can have religious advisors with them during execution.[12] Some states even allow death-sentenced individuals to choose their execution method.[13] Other small dignitary comforts include choice of last meal and last words.[14] Each dignitary concession is a step closer to recognizing a death row prisoner's inherent worth and right to dignity.

Volunteering on death row boils down to waiving procedural safeguards, such as the right to present mitigating evidence at the penalty phase of a capital trial, the right to direct appeal from trial court to state appellate court, and the right to direct appeal from state appellate court to state supreme court. Other procedural safeguards include collateral review; that is, state post-conviction relief from state supreme court[15] and federal habeas review of state

6. Furman v. Georgia, 408 U.S. 238, 291 (1972) (Brennan, J., concurring).
7. Gregg, 428 U.S. at 177, 183 ("It is apparent from the text of the Constitution itself that . . . capital punishment was accepted by the Framers.").
8. *Id.* at 153.
9. *Execution Volunteers*, *supra* note 2; *Execution 'Volunteer' First to be Put to Death in Mississippi in Nine Years*, Death Penalty Info. Ctr. (Sept. 25, 2024), [https://perma.cc/HN73-C4ZB].
10. *Execution Volunteers*, *supra* note 2.
11. *Id.*
12. *See* Dunn v. Smith, 141 S. Ct. 725 (2021) (denying a motion to vacate the Eleventh Circuit's holding that Alabama could not execute Willie Smith without his pastor present); Murphy v. Collier, 587 U.S. 901 (2019) (granting a stay of execution on the grounds that Texas could not execute Patrick Murphy without his Buddhist advisor present).
13. *See* Nance v. Ward, 597 U.S. 159 (2022).
14. Meghan J. Ryan, *Death and Rehabilitation*, 46 U.C. Davis L. Rev. 1231, 1236 (2013) (citing Richard J. Bonne, Panetti v. Quarterman*: Mental Illness, the Death Penalty, and Human Dignity*, 5 Ohio St. J. Crim. L. 257, 277 (2007)).
15. Montgomery v. Louisiana, 577 U.S. 190, 217, 232 (2016) (Scalia, J., dissenting) (noting that while all states have state post-conviction relief, this type of collateral review is not constitutionally compelled: "Any relief a prisoner might receive in a state court after finality is a matter of grace, not constitutional prescription . . . .Throughout our history, postconviction relief for alleged constitutional defects in a conviction or sentence was available as a matter of legislative grace, not constitutional command").

convictions.[16] These procedural safeguards delay or mitigate the possibility of execution, resulting in life imprisonment instead or even the reversal of conviction.

An individual facing the death penalty can waive their rights during (1) the pleading stage via a guilty plea,[17] (2) the sentencing/penalty phase of a bifurcated capital trial via waiving the right to present mitigating evidence,[18] (3) the appellate review stage via waiving the right to direct appeal,[19] and (4) the post-conviction/habeas stage via waiving the option[20] of collateral review in either state habeas or federal habeas court.[21]

But not every death row prisoner can waive away their rights. The Due Process Clause imposes limits: Individuals must meet competency standards to waive their right to appeal and volunteer for execution.[22] Some argue that states should not allow volunteering under the logic that it is so irrational, it is "*per se* evidence of incompetence."[23] Thus, no prisoner is "competent" to volunteer for death. The Fifth Circuit plainly rejects any per se rule that waiving appeals on death row amounts to per se evidence of incompetence.[24] Judgments about the rationality of volunteering are important, but the legality/constitutionality of volunteering must also be considered.[25]

16. *See* Edwards v. Vannoy, 593 U.S. 255, 277–80 (2021) (Thomas, J., concurring) (describing the history of federal habeas relief through the writ of habeas corpus).
17. *See, e.g.*, Godinez v. Moran, 509 U.S. 389 (1993) (holding that defendant could plead guilty after the State announced its intention to seek the death penalty and that the competency standard for pleading guilty or waiving the right to counsel is the same as the competency standard for standing trial).
18. Anthony 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, 76–77 (2002).
19. *See, e.g.*, Juan A. Lozano & Michael Graczyk, *Texas Man Who Waived His Right to Appeal Death Sentence is Executed for Killing Infant Son*, Associated Press (Sept. 24, 2024, 5:59 PM) (https://apnews.com/article/texas-execution-travis-mullis-son-c3494917334d5f8a94382ab9e98106cb).
20. Collateral review is not a right, but rather a privilege. *See Montgomery*, 577 U.S. at 217 (2016) (Scalia, J., dissenting) ("Any relief a prisoner might receive in a state court after finality is a matter of grace, not constitutional prescription.").
21. Casey, *supra* note 18, at 77.
22. Godinez, 509 U.S. 389 (holding that a waiver must be knowing, voluntary, and intelligent); Rees v. Peyton, 384 U.S. 312 (1966) (holding that a defendant waiving his right to appeal must be "mentally competen[t]").
23. Meredith Martin Rountree, *"I'll Make Them Shoot Me": Accounts of Death Row Prisoners Advocating for Execution*, 46 Law & Soc'y Rev. 589, 591 (2012) (disagreeing with those who argue that volunteering for death should be per se evidence of incompetence).
24. State v. Lawson, 179 N.E.3d 1216, 1230–31 (Ohio 2021) (citing Roberts v. Dretke, 381 F.3d 491, 498 (5th Cir. 2004)) ("[W]e decline to adopt a per se rule that, as a matter of law, a trial court must doubt a capital punishment defendant's competency . . . simply because it is obvious to the court that the defendant is causing his trial to be conducted in a manner most likely to result in a conviction and the imposition of the death penalty.").
25. John H. Blume, *Killing the Willing*: *"Volunteers," Suicide and Competency*, 103 Mich. L. Rev. 939, 941 (2005) ("The question is not the rationality of a volunteer's choice—or its wisdom or morality. Instead, the question is whether laws relating to suicide apply . . . .").

Volunteering is ultimately a unique paradigm for understanding dignitary interests. In the now-overturned landmark opinion *Planned Parenthood v. Casey*, the U.S. Supreme Court held that dignity included autonomy, the power to morally self-define, and the right to one's own cosmology and worldview.[26] Such a broad notion of dignity is arguably overinclusive of dignitary interests, letting "bad" ideas of dignity become justifications for why certain groups might "deserve" certain treatment. Professor Leslie Meltzer Henry offers a more specific definition of dignity to include "institutional status as dignity, equality as dignity, liberty as dignity, personal integrity as dignity, and collective virtue as dignity."[27] The Framers also had certain notions of dignity, frequently invoking the dignity of their countrymen and dignity of the government they envisioned.[28] Volunteering on death row raises the specter of these dignity interests and the dangerous implications of accepting one conception of dignity over another.

The U.S. Supreme Court has skirted the substantive volunteering issue by ruling on procedural technicalities, such as ruling that next friends have no standing to challenge a volunteer's death wish.[29] The Court has yet to rule on the constitutionality of volunteering on the merits. Must states uphold an execution volunteer's decision? Can states without automatic appellate review suddenly force appellate review on a volunteer? Can states force collateral review—state post-conviction relief—on a volunteer, since "death is different?"[30] In the following section, I lay out the dignitary interests involved when a death-sentenced individual volunteers for state execution.

II. Dignitary Interests in the Volunteer Paradigm

A. *Dignity of the Death-Sentenced Individual*

Death-sentenced individuals who invoke their dignity to justify why they ought to be killed by the state appeal to three types of dignity: (1) a Kantian, natural right notion of dignity as inherent human worth; (2) a *Casey* notion of

26. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (associating dignity with "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

27. Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. Pa. L. Rev. 169, 177 (2011) (emphasis omitted).

28. The Federalist Nos. 1 ("your liberty, your dignity, and your happiness"), 6 ("our national dignity"), 15, 17 ("the dignity . . . of the national government"), 30, 67, 69, 70 ("equal dignity"), 71, 78, 81 (Alexander Hamilton); No. 19 (Alexander Hamilton & James Madison); No. 45 ("certain dignities . . . of sovereignty"), 58 (James Madison).

29. *See, e.g.,* Gilmore v. Utah, 429 U.S. 1012 (1976) (mother of death row prisoner had no standing); Lenhard v. Wolff, 444 U.S. 807 (1979) (public defenders had no standing); Whitmore v. Arkansas, 495 U.S. 149 (1990) ("next friends" had no standing when death row prisoner was competent). But these cases are different from the State itself (not merely a third party) challenging the validity of a death sentence imposed on an execution volunteer who waived his right to appeal.

30. *See* Woodson v. North Carolina, 428 U.S. 280, 322–23 (1976) (Rehnquist, J., dissenting) (discussing the idea that "death is different" from other forms of punishment).

dignity as the right to define one's own concept of existence; and (3) an Eighth Amendment notion of dignity as freedom from cruelty. For these prisoners, volunteering for death is "dignifying." This is what I call the volunteer paradox: Death-sentenced individuals waive dignity *enhancing* procedures (like appellate review) *to enhance* their dignity.

Death row volunteers will often argue that volunteering for death is dignifying. For example, David Cox believed he deserved execution and that his dignity depended on the court finding him "worthy of death."[31] Ronnie Deere argued that offering mitigation evidence at trial and going through appeals would result in "losing the last vestige of *dignity* he ha[d]" because he "kn[ew] that he d[id] not deserve mercy."[32] Deere conceptualized his dignity as autonomy and freedom from humiliation.

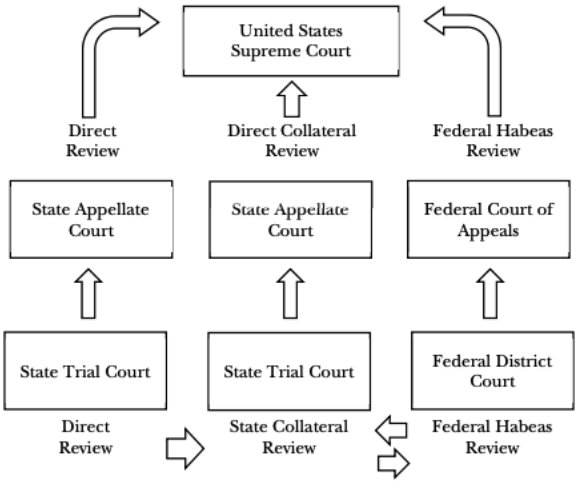
Similarly, judges have held that respecting an individual's dignity requires respecting their decision to waive appeals and speed up execution. In *Chapman v. Commonwealth*, Justice John D. Minton Jr., writing for the Supreme Court of Kentucky, upheld a volunteer's waiver on the grounds that "[a]dhering to a defendant's choice to seek the death penalty honors the last vestiges of personal *dignity* available to such a defendant."[33] I n *Robertson v. State*, Justice Charles T. Canady of the Supreme Court of Florida made a similar dignitary argument arguing that recognizing a death-sentenced individual's right to waive constituted "respect for the individual *dignity* of the defendant."[34] Death row prisoners assert a death wish based on a personal sense of "dignity"—as autonomy and as freedom from anguish and humiliation. Judges who accept a prisoner's death wish disingenuously parrot the prisoner's dignitary argument back, under the guise of honoring that individual's "dignity." But in granting the prisoner's death wish, does the judge affirm that individual's "dignity"? What we get instead is a broken telephone[35] conception of dignity. The volunteer pleas for recognition of their dignity, and the judge issues an *indignity* in exchange: state execution. True dignity gets lost in translation.

Volunteers justify their desires for execution by arguing (1) long delays in capital cases are an indignity that can only be solved by hastening death [Eighth Amendment dignity as freedom from cruelty] or (2) death is honorable [Kantian dignity and *Casey* dignity]. Volunteering under the first category is a sort of "terror management" defense mechanism to reduce anxiety on death row.[36] A death row prisoner has an interest in finality, and long delays from the appeals process amount to undue exposure. Respect for a defendant's dignity

31. Cox, 327 So. 3d at 103.
32. People v. Deere, 710 P.2d 925, 936 (Cal. 1985) (Lucas, J., concurring in part and dissenting in part) (emphasis added).
33. Chapman v. Com., 265 S.W.3d 156, 175–76 (Ky. 2007) (emphasis added).
34. Robertson v. State, 143. So. 3d 907, 914–15 (Fla. 2014) (Canady, J., dissenting) (emphasis added).
35. Broken telephone is a game where a story or idea gets whispered and passed down from person to person. When the chain ends, the receiver divulges what they heard—usually a distortion of the original message.
36. *See* Smith, *supra* note 3, at 250–51.

means protecting them from this undue exposure[37]—protecting them from the prolonged existential threat of execution and sub-human death row conditions. In *Hall v. State*, death row prisoner Justen Hall did not want to appeal his capital conviction, but his attorneys nonetheless appealed from the trial court on his behalf.[38] During a colloquy in court, the trial judge told Hall that his attorneys "just want[ed] to save [his] life."[39] Hall nonetheless responded, "You know, the jury sentenced me to death, and I'm ready for that punishment to be carried out."[40] Hall saw his right to appeal as merely a "stall tactic,"[41] rather than a genuine opportunity to change a death sentence into a potential life sentence.

The types of appeals and petitions in a capital case are numerous and complicated. Professor Payvand Ahdout presents an illuminating illustration of the process.[42]



While the appeals process is meant to preserve individual dignity and mitigate the potential for death, this intricate appeals process also perpetuates an acute indignity: uncertainty for the death-sentenced individual. Appellate review and collateral review take years, sometimes even decades. Volunteering may be considered a way of preserving the self so that an individual dies as they are in the immediate moment, rather than later as a shell of a human. The snail's pace and inertia of appeals and petitions for habeas can wreak psychological havoc, as death row prisoners feel bound to the arbitrary whims and timelines of the justice system. For example, Raymond Riles, the

37. *See* Rachel Bayefsky, *Remedies and Respect: Rethinking the Role of Federal Judicial Relief*, 109 Geo. L.J. 1263, 1315 (2021) (discussing that respect for dignity entails "the recognition that a person matters, fully belongs to a relevant community, and is entitled to avoid undue exposure").
38. Hall v. State 569 S.W.3d 646, 654 (Tex. Crim. App. 2019).
39. *Id.*
40. *Id.*
41. *Id.*
42. Z. Payvand Ahdout, *Direct Collateral Review*, 121 Colum. L. Rev. 159, 167 fig. 1 (2021).

nation's longest serving death row prisoner, spent 35 years on death row in "legal limbo" before being resentenced to life.[43] Volunteering for execution is a way of protecting oneself from this long and uncertain process. Execution volunteering can thus resemble a "personal integrity as dignity" conception that Professor Leslie Meltzer Henry advances.[44]

Volunteering under the second category—arguing death is honorable—is a way to reclaim agency, and thus dignity, where there is little to none on death row. Here, volunteers over-rely on the *Casey* conception of dignity as the "right to define one's own concept of existence;"[45] volunteers see their dignity as the right to decide if they themselves *should exist*. Volunteers also over-rely on Kantian dignity. For Kant, the best way to recognize a murderer's dignity is to kill him or *let* him be killed, since "a man of honor would choose death."[46] Kant also argued that even if society were on the verge of collapse, the last murderer in prison should be put to death because only execution could dignify both the murderer and the rest of society—for society's collective virtue would be sullied if it did not exact death for death.[47] Kant would have considered volunteers men of honor, ideal subjects. Yet, Kant also believed that human dignity meant inherent worth and that suicide violated the categorical imperative.[48] Volunteers who seek dignity as honor negate their dignity as inherent worth, thus exposing an aporia in their own masochistic dignitary logic.

Meanwhile, many would argue that volunteering for death is antithetical to a death row prisoner's dignity because waiving the right to appeal reinforces the very indignity to be avoided: death by one's own government. One way to define dignity is "the absence of domination,"[49] and because state-sponsored execution is a form of domination, state execution—whether voluntary or not—imposes undeniable dignitary harm. In *Godinez v. Moran*, Justice Blackmun in his dissent criticized the majority for allowing Richard Moran to volunteer

43. Raymond Riles, T*he Nation's Longest Serving Death-Row Prisoner, is Resentenced to Life*, Death Penalty Info. Ctr. (Mar. 14, 2025), [https://perma.cc/4YDJ-B5K6].
44. Henry, *supra* note 27, at 190 (suggesting that "personal integrity as dignity" functions as a means to judicially "safeguard people's reputations and bodies from disgraceful or humiliating intrusions").
45. Casey, 505 U.S. at 851.
46. Immanuel Kant, Groundwork of the Metaphysics of Morals 142, (Mary Gregor trans., Cambridge Univ. Press 1991) (1797).
47. *Id.* ("Even if a civil society were to be dissolved by the consent of all its members [e.g., if a people inhabiting an island decided to separate and disperse throughout the world], the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having instituted upon this punishment; for otherwise the people can be regarded as collaborators in this public violation of justice . . . . [T]he man of honor would choose death").
48. Christine M. Korsgaard, Introduction to Immanuel Kant, Groundwork of the Metaphysics of Morals at 36, n. 9 (Mary Gregor trans., Cambridge University Press 1991) (1797) ("[O]ne of the duties Kant uses as an example here - the duty not to commit suicide in order to avoid misery - is one of those apparently identified in the later work as a perfect duty of wide obligation.").
49. Rachel Bayefsky, Dignity and Judicial Authority 1, 27 (2024).

for execution.[50] Blackmun lamented the state-sanctioned indignity imposed on Moran: "To try, convict, and punish one so helpless to defend himself contravenes fundamental principles of fairness and impugns the integrity of our criminal justice system. I cannot condone the [Court's] decision to accept . . . the self-destructive 'choice' of a person."[51]

States that accept death row volunteering add salt to a gaping wound, doubling dignitary harm to a prisoner by reinforcing that individual's internalized notion that they are inferior and unworthy of life. In *Hall v. State*, death row prisoner Justen Hall wrote a letter to the judge saying, "I do not like the person I have become, and I need to be put down like the rabid dog that I am."[52] By approving Hall's death wish, the court effectively validated and reinforced Hall's view of himself: as an inferior "rabid dog" deserving of death. The state's judgment on Hall's worth—as less than human—raises dignitary concerns.

Moreover, the "choice" to volunteer for execution is neither autonomous nor dignifying because it is exacted from an ultra-constrained position: from death row. The fact that fewer than one in six death sentences result in execution means a death sentence has high survival rates.[53] Death row prisoners are not "terminal" in the way that someone dying from a terminal disease is.[54] Thus, volunteering for state execution is incomparable to terminally ill patients seeking physician-assisted suicide. Waiving the right to appeal is not about any sort of fundamental "right to be let alone"[55] but rather a right to be entitled to affirmative action by the state. When death is not imminent, the prisoner's acceptance of the state's view of its subject—as worthy of death—perpetuates the indignity of the death penalty. The death row volunteer (by contrast to the terminally ill patient seeking euthanasia) is somehow "legally privileged" to seek death, but this legal privileging and more expansive right to die furthers his status as a member of an inferior class.[56] This "special" right to die perpetuates the death-sentenced individual's inferiority.[57] And this badge of inferiority amounts to a great indignity—violating the notion of dignity as an equally high rank.[58]

50. Godinez v. Moran, 509 U.S. 389, 417 (1993) (Blackmun, J., dissenting).
51. *Id.*
52. Hall, 569 S.W.3d at 653 (Tex. Crim. App. 2019).
53. Death Penalty Info. Ctr., *Death Penalty Census: Key Findings*, [https://perma.cc/RC9H-5ST5] (last visited Dec. 17, 2024).
54. *Id.*
55. *See* Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting) (citing Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).
56. Meredith Martin Rountree, *Criminals Get All the Rights: The Sociolegal Construction of Different Rights to Die*, 105 J. Crim. L. & Criminology 149, 152 (2015).
57. *Id.* ("In this case, the *death row* prisoner is legally privileged as compared to the terminally ill patient. Paradoxically, however, the more expansive right held by the *death row* prisoner reflects and furthers his social marginalization.") (emphasis added).
58. *See* Jeremy Waldron, *Lecture I: Dignity and Rank, in* The Tanner Lectures on Human Values 208, 225 (2009) (defining dignity as high equal rank).

B. *Dignity of the State/Criminal Justice Process: Procedural Dignities*

The difference between a life sentence and a death sentence often has nothing to do with the offense and everything to do with aspects external to the defendant, such as prosecutorial misconduct, new DNA testing, or ineffective counsel.[59] As Professor Stephen Bright once famously said, "[T]he death penalty [is] imposed, not upon those who commit the worst crimes, but upon those who have the misfortune to be assigned the worst lawyers."[60] The death penalty is applied arbitrarily. Volunteering adds an additional degree of arbitrariness to the imposition of capital punishment. In *Lenhard v. Wolff*, Justice Marshall wrote, "[T]he 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."[61] Because volunteers trigger their own death, the volunteer puts the state in a tough position: accept the individual's death wish and chafe under the discomfort of killing a "willing participant,"[62] or reject the individual's death wish and chafe under the discomfort of being a hypocrite that cannot follow through on the punishment imposed. Neither option generates good optics. Rather, both options put the legitimacy of state justice systems into question. Only abolishing the death penalty would cure this dilemma.

Moreover, the criminal justice system is designed to be adversarial. When both defense and prosecution advocate for a defendant's competency to waive appeals and volunteer for death, the adversary system crumbles. In effect, "the prisoner's dignity stands against the dignity of the law."[63] The breakdown of the adversarial system in volunteer cases threatens the legitimacy of the death sentence, and thus the law more broadly.

Furthermore, the habeas corpus process is thick with procedure to ensure death is imposed on only the mentally competent,[64] the intellectually abled,[65] and the guilty.[66] These procedures include (1) bifurcated trial in state court

59. *See* Shinn v. Ramirez, 596 U.S. 366, 399 (Sotomayor, J., dissenting) (discussing the types of external factors that can constitute "cause" for habeas relief and thus trigger a different outcome for someone sentenced to death).
60. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyers*, 103 Yale L.J. 1835, 1883 (1994).
61. Lenhard v. Wolff, 444 U.S. 807, 815 (1979) (Marshall, J., dissenting).
62. For more discussion on this notion of a "willing participant" and a comprehensive study on death row volunteerism, *see* Blume, *supra* note 25, at 941.
63. Richard J. Bonnie, *The Dignity of The Condemned*, 74 Va. L. Rev. 1363, 1377 (1988).
64. *See* Ford v. Wainwright, 477 U.S. 399, 401(1986) (prohibiting the execution of the insane).
65. *See* Atkins v. Virginia, 536 U.S. 304 (2002) (prohibiting the execution of people with intellectual disabilities under the Eighth Amendment's ban on cruel and unusual punishments); *see also* Hall v. Florida, 572 U.S. 701, 724 (2014) (holding that Florida's statute mandating a 70-point IQ threshold for execution was unconstitutional because it presented an unacceptable risk that defendants with intellectual disabilities—here Freddie Hall had an IQ of 71, just one point above the unconstitutional line—would be executed).
66. *See* Kennedy v. Louisiana, 554 U.S. 407 (2009) (prohibiting the execution of

(guilt phase and penalty phase); (2) direct appeal to state appellate court; (3) certiorari to state supreme court; (4) state post-conviction relief; (5) review of state post-conviction; (6) certiorari to federal habeas court; (7) federal habeas; (8) federal appeal; and (9) certiorari at the U.S. Supreme Court.[67] Each procedure tinkers with the machinery of death and finetunes the chance of execution. While these procedures were undoubtedly built for defendants, they were also built for states to ensure the death penalty would not be imposed unconstitutionally.[68]

Although volunteering is ostensibly more efficient, it short-circuits procedures and cripples the state's ability to achieve certainty that the executed is 100% competent and 100% guilty. As Judge Goldberg put it, "The state's interest in swift and efficient punishment need not eviscerate its interest in maximal certainty of application."[69] We have procedures for the interest in accuracy. But procedures like appellate review do not merely protect an interest in accuracy; there are non-truth-furthering interests that procedures are meant to protect as well.[70] Dignity is one of those interests. Sloppy procedure, even if it does not change a finding of guilt, is still worth fussing about because sloppy procedure harms the integrity of the criminal justice process and the dignity of the defendant.

In *Trop v. Dulles*, the U.S. Supreme Court held: "The basic concept underlying the Eighth Amendment is nothing less than the *dignity* of man."[71] Eighth Amendment procedures are meant to be dignifying by giving defendants the benefit of the doubt. By this logic, to waive an Eighth Amendment procedural right is to waive the right to dignity. Can such a jettisoning of personhood and self-worth be allowed? Because dignity and worth should be normatively unwaivable, dignity-enhancing procedures in capital cases should also be unwaivable.

Volunteering subverts expectations about what our procedures stand for. According to Carl Raffa, "The dignity of the procedure is all about keeping up appearances, shaping perceptions, and satisfying expectations."[72] In other words, we have procedures not only for the defendant, but also for society

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individuals whose crimes did not involve the intentional death of a victim or whose crimes did not involve the death of a victim at all).

67. I thank my former colleagues Emily Olson, Christina Mathieson, Laura Berg, and Taylor Smith at the American Bar Association's Death Penalty Representation Project for explaining the intricacies of the capital habeas process.

68. Rumbaugh v. Procunier, 753 F.2d 395, 414 (5th Cir. 1985) (Goldberg, J., dissenting) ("In capital cases . . . the defendant's is not the only interest at stake—the state as well has an interest in ensuring that the death penalty is not imposed unconstitutionally. When this irrevocable measure is improperly invoked, not only the individual but society as a whole suffers.").

69. *Id.* at 403.

70. Justin Murray, *A Contextual Approach to Harmless Error Review*, 130 Harv. L. Rev. 1791, 1795–96, 1812 (2017).

71. Trop v. Dulles, 356 U.S. 86, 100 (1958) (emphasis added).

72. Carl Raffa, *Defining Dignity by What Preserves Dignity: Why Preserving a Death Row Inmate's Eighth Amendment Rights Before Execution Means Preserving Their Dignity During Confinement*, 12 Alb. Gov't L. Rev. 86, 105 (2019).

because procedures promote public respect for the criminal justice process. Dignity of the procedure is ultimately a proxy for collective dignity and virtue.[73] We have an interest in making the inner workings of the criminal justice system transparent to the public. Moreover, we have an interest in making sure the procedure is applied fairly and uniformly (regardless of guilt) because this protection of non-truth-furthering interests most comports with our collective virtue as a society and our criminal system's broader ethical vision.[74]

C. *Dignity of Lawyers*

Volunteering also implicates the dignity of attorneys. Capital defense attorneys have a double-edged obligation to honor their client's wishes and preserve their client's dignity while also keeping their client whole and taking all appropriate steps to secure a stay of execution. Professor Richard Bonnie argues that going against a client's death wish violates an attorney's duty to the client and disrespects the client's dignity—as a competent individual capable and deserving of a right to die.[75] Not advocating for a waiver violates the lawyer's duty to be their client's zealous advocate. But advocating for a death row prisoner's waiver also violates the lawyer's duty to keep their client whole.

ABA Guidelines assert that it is ineffective assistance of counsel for an attorney to acquiesce to a client's desire to waive the presentation of mitigating evidence or waive appellate review.[76] Notably, "dignity" or any variant is absent from the Guidelines. At first glance, these Guidelines seem paternalistic, apathetic to the dignity and autonomy of death row prisoners. Yet, attorneys must tolerate some degree of paternalism and prevent their client from volunteering. The dignity of the legal profession and of death row prisoners rests on having a unitary, inviolable goal: stopping the death penalty. The next section on "dignity as collective virtue" further affirms the necessity of paternalism to prevent execution volunteering—the necessity of denying someone's choice for the greater good.

D. *Collective Dignity*

Another potent conception of dignity is "collective virtue."[77] This dignitary interest ought to have a heavy thumb on the scale. When it comes to the death penalty, not enough attention is paid to the lives proximately touched. Some family members of murder victims argue they are not treated with dignity

73. *Id.* at 104 (citing Kristen Loveland, *Death and its Dignities*, 91 N.Y.U. L. Rev. 1279, 1283 (2016)).
74. Murray, *supra* note 70, at 1795.
75. Bonnie, *supra* note 63, at 1368 (arguing that going against a client's desire for execution is "fundamentally incompatible not only with traditional concepts of an attorney's duty to respect the autonomy of a competent client, but also with prevailing preferences for judicial restraint").
76. American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 1009–1010 (2003) ("Some clients will initially insist that they want to be executed . . . It is ineffective assistance for counsel to simply acquiesce to such wishes").
77. Henry, *supra* note 27, at 177.

when the legal system pushes for execution against their wishes.[78] Additionally, volunteering threatens the dignity of other death-sentenced individuals because suicide and volunteering on death row are "contagious."[79] Execution of a volunteer jeopardizes others on death row, making it "easier for such executions to become routine."[80] The volunteer's death wish thus threatens the dignitary interests of family members (of both the victim and offender), other death row prisoners, and the community as a whole.

Allowing death row volunteering also reflects poorly on the public, rendering the collective less virtuous, and thus less dignified. Many want to support the death row prisoner's suicidal mission under the guise of respecting that individual's dignity. However, pitying the death-sentenced individual should not be conflated with respecting their dignity—especially when the state is ultimately doing the killing. Between 1980 to 2010, 104 executions were botched, "botched" being defined as involving "unnecessary agony for the prisoner" or reflecting "gross incompetence of the executioner."[81] Given the number of botched executions, states are clearly conducting undignified killings.[82] The high risk of a botched execution further highlights the indignity of volunteering for state execution.

The dignitary interests at stake posed by volunteering in many ways mirror those posed by the infamous dwarf-tossing case. In 2002, the Conseil d'État banned dwarf-tossing in France on the grounds that it was an affront to human dignity.[83] Manuel Wackenheim, a dwarf who made a living from being tossed at pubs, challenged the ban on the basis that dwarf-tossing was dignifying for him "since dignity consists in having a job."[84] The court ultimately held that using humans as projectiles "violated an overriding sense of human dignity."[85] In other words, the court weighed the larger collective dignity over Wackenheim's individual dignity claim. Similarly, execution volunteering should be banned because it violates an overriding sense of human dignity and collective virtue. The subjective and idiosyncratic dignitary interests of both Manuel Wackenheim and the execution volunteer are not strong enough to justify exceptional treatment or such a departure from human decency.

78. Bharat Malkani, *Dignity and the Death Penalty in the United States Supreme Court*, 44 Hastings Const. L.Q. 145, 178 (2017).
79. Blume, *supra* note 25, at 964; *see also Execution Volunteers*, *supra* note 2.
80. *See* Dama, *supra* note 4, at 1102.
81. Austin Sarat, Gruesome Spectacles: Botched Executions and America's Death Penalty 6 (2014).
82. *See* Press Release, United Nations, UN Experts Horrified by Kenneth Smith's Execution by Nitrogen in Alabama (January 30, 2024), https://www.ohchr.org/en/press-releases/2024/01/united-states-un-experts-horrified-kenneth-smiths-execution-nitrogen-alabama; *see also* Glossip v. Chandler, No. CIV-14–0665-F, 2022 WL 1997194 (W.D. Okla. June 6, 2022) (discussing how a lethal injection protocol causes pulmonary edema/fluid-filled lungs, producing sensations of "panic, terror, drowning" during execution).
83. Wackenheim v. France, Communication No. 854/1999, U.N. Doc. CCPR/C/75/D/854/1999 (Hum. Rts. Comm. July 2002) at para. 2.5.
84. *Id.* at para. 3.
85. Henry, *supra* note 27, at 177 (citing Wackenheim, *supra* note 83).

III. Practical Resolutions: What Does a Judge Getting or Making a Dignity Argument Do?

Waiving dignity enhancing procedures like appeals and post-conviction relief leads to a diminishment of dignity. Volunteering for state-imposed execution is thus a waiver of dignity, not an affirmation of dignity. The logical incoherence of the volunteer paradox leads to one conclusion: the death penalty cannot stand. If, however, we must work with the premise that the death penalty is constitutional, as current jurisprudence insists, we must find that volunteering is unconstitutional, based on legal and dignitary considerations. Below I lay out different theories for finding volunteering undignifying and unconstitutional.

A. *Volunteering Should be Found Undignifying and Unconstitutional.*

1. Theory #1: Nulla poena sine lege

Nulla poena sine lege roughly translates to no punishment without law.[86] Death row prisoners who volunteer for execution seek to prescribe their own punishment without law—without legal procedures like appellate review. This poses a threat to the *nulla poena sine lege* principle implicit in our Constitution. The principle of *nulla poena sine lege* is usually applied to ex post facto penalization to protect against retroactive applications of penal laws.[87] However, it should apply to volunteering as well. The principle that only the law can define and prescribe a penalty leads to the logical conclusion that only a circumscribed set of legal actors can prescribe (and alter) an individual's punishment. In Federalist Paper 15, Alexander Hamilton affirmed this conclusion: "It is essential to the idea of a law, that it be attended with . . . a penalty or punishment for disobedience . . . . This penalty . . . can only be inflicted in two ways: by the agency of the courts and ministers of justice, or by military force."[88] Clearly, our legal framework was founded on only the courts and the military imposing punishment; prisoners were not included in the list of actors who had a say over criminal punishment. Volunteering—where punishment is decided by death-sentenced individuals—thus threatens the rule of law.

Additionally, in death penalty jurisprudence, only a small set of actors can prescribe or alter a death-sentenced individual's punishment. These actors include prosecutors,[89] juries, trial judges, appellate judges, supreme court justices, state governors,[90] state legislatures, and the President.[91] Between

86. *See* Jerome Hall, *Nulla Poena Sine Lege*, 47 Yale L.J. 165, 165–66 (1937).
87. *Id.* at 170–71.
88. The Federalist No.15 (Alexander Hamilton).
89. *See* Lee Kovarsky, *Suffering Before Execution*, 109 Va. L. Rev. 1429, 1437–38 (2023) ("Local district attorneys can veto executions in states that require prosecutors to move for execution dates.").
90. *See* Haugen v. Kitzhaber, 353 Or. 715 (Or. 2013) (affirming the governor's ability to grant a reprieve to a death-sentenced individual).
91. *See* Biddle v. Perovich, 274 U.S. 480 (1927) (holding that the President had the power to grant pardons—commute an individual's sentence from death to life imprisonment—and this pardon did not require the prisoner's consent).

these actors is a delicate dynamic, where conversations decide life and death. Volunteering for execution threatens this dynamic, shrinking the space by which legal actors get a say in the death sentence.

Courts have held that death row prisoners cannot reject a governor's grant of clemency[92] or a President's pardon.[93] For example, the U.S. Supreme Court in *Biddle v. Perovich* held that where a President had commuted a prisoner's sentence from death to life imprisonment, the prisoner's consent did not matter.[94] The Court held: "[j]ust as the original punishment would be imposed without regard to the prisoner's consent . . . the public welfare, not his consent, determines what shall be done."[95] The U.S. Supreme Court has historically emphasized that prisoners do not have a say in who may alter their death sentence.[96] Finding a voluntary constitutional is tantamount to finding that a death row prisoner can decide their own sentence. By engaging in masochistic self-help, execution volunteers negate the state's punishment to assert their own instead. Volunteers in effect give themselves the law and usurp the state's power to decide punishment, violating a sort of nondelegation principle. The prisoner compels the state to do their bidding.

2. Theory #2: Fourteenth Amendment

The Fourteenth Amendment posits that no state shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[97] Volunteering violates both the procedural Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.

Some claim death row volunteering is constitutional under the Fourteenth Amendment on the grounds that volunteering is akin to physician-assisted suicide,[98] and since the U.S. Supreme Court does not prohibit states from allowing physician-assisted suicide,[99] the Court should not prohibit states from allowing death row volunteerism.[100] This conclusion is faulty because the analogy of volunteers to terminally ill patients is faulty. Death row prisoners are not terminal in the way that terminally ill patients are.[101] High reversal rates

92. *See Haugen*, 353 Or. at 717 (holding that a death row prisoner who waived his appeals—thus volunteering for death—could not reject the Oregon Governor's clemency power and grant of reprieve).
93. *See Biddle*, 274 U.S. 480; *see also* U.S. Const. art. II, § 2, cl. 1 ("The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of impeachment.").
94. *Id.* at 480.
95. *Id.* at 485.
96. *Id.*
97. U.S. Const. amend. XIV, § 1.
98. Dama, *supra* note 4, at 1098 ("[P]hysician-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.").
99. Washington v. Glucksberg, 521 U.S. 702, 735 (1997) (holding that while states can ban physician-assisted suicide, the debate over physician-assisted suicide is permitted to continue).
100. Dama, *supra* note 4, at 1096.
101. Melvin I. Urofsky, *A Right to Die: Termination of Appeal for Condemned Prisoners*,

and commutations make death row highly survivable: Fewer than one in six death-sentenced individuals will die by execution.[102] Thus, I disagree with those who argue volunteerism "hastens" death.[103] Volunteerism *causes* death; an individual's waiver of appellate review or post-conviction relief is active causation. Volunteerism thus violates the Due Process Clause as states deprive death-sentenced individuals of life without procedural due process, like appellate review and post-conviction relief.

Volunteerism also violates the Equal Protection Clause because a state's acceptance of volunteering is a sort of unequal privileging. Certain individuals only get the "privilege" of voluntary death if the state finds them "competent" and agrees with their reasoning. Because not all states allow volunteering, this poses an equal protection issue and violates the notion of dignity as equality. Additionally, voluntary execution is not a "privilege" afforded to individuals with life sentences or life without the possibility of parole.[104] Different people having different rights to die violates the Fourteenth Amendment.[105] States that prohibit physician-assisted suicide (medical aid in dying), but allow volunteering, violate the Equal Protection Clause by not granting equal rights to die.[106] Under this argument, Oregon, Montana, and California are currently violating the Equal Protection Clause.[107]

In *Lackey v. State*, death row prisoner Andrew Lackey waived his right to appeal because he did not want to face the possibility of being sentenced to life without the possibility of parole; to him, death was better.[108] In allowing Lackey to volunteer for death, Alabama's Criminal Appeals Court privileged Lackey's ability to choose his fate. Those sentenced to life without parole are not afforded the same "privilege" to choose their fate.

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75 J. Crim. L. & Criminology 553, 556 (1984) (citing Hugo A. Bedau, *The Courts, The Constitution, and Capital Punishment* 121, 122 (1977) (arguing that comparing volunteers to the terminally ill is a bad analogy)).

102. Death Penalty Info. Ctr., *Death Penalty Census: Key Findings*, https://perma.cc/RC9H-5ST5 (last visited Dec. 17, 2024) ("The single most likely outcome of a capital case once a death sentence is imposed is that the conviction or death sentence will be overturned and the defendant will not be resentenced to death. Fewer than 1 in 6 death sentences result in an execution.").
103. Dama, *supra* note 4, at 1092 ("[T]hey just seek to greet imminent and unavoidable death on their own terms. 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.").
104. Casey, *supra* note 18, at 99 ("[N]o one has yet suggested that inmates serving a life term have a right to request state administered death rather than serve their term.").
105. *Id.* at 98–99 ("Does a death-row inmate have a special right to being freed from torture that other prisoners do not?").
106. I see no equal protection issue with states that allow physician-assisted suicide but do not allow execution volunteering because of these distinctions that make execution volunteering patently wrong: (1) the death penalty is imposed by the state/representatives of the state, (2) being on death row is highly survivable unlike a terminal or incurable disease, and (3) volunteering on death violates the rule of law by eschewing procedures like direct appellate and collateral review.
107. Chris Haring, *Medical Aid in Dying as an End-of-Life Options Offers Death with Dignity*, Death With Dignity, (Mar. 29, 2023), [https://perma.cc/AY6G-WJU8*]*.
108. Stanley v. State, 143 So.3d 230, 245 (Ala. Crim. App. 2011).

3. Theory #3: Taking Volunteerism Further—Finding Volunteering as Contempt

Should lawyers who advocate for their client's desire to die by the state be liable for ineffective assistance of counsel? Should volunteering be deemed contempt of the court? Contempt is "an act of willful disobedience, 'calculated to embarrass, hinder, or obstruct the court in the administration of justice.'"[109] Waiving procedural rights to seek execution is arguably "calculated to embarrass" the state, the criminal justice system, and the community that must bear witness. In waiving their right to appeal, death-sentenced individuals bite the hand that feeds them. A volunteer's desire *not* to resist execution becomes a form of resistance in and of itself—the volunteer achieves revenge by affirming the state's image as cruel and murderous, and shaming the public for its complicity.

4. How Judges Should Address the Indignity of Procedural Delays

Volunteering cannot be a remedy to the injury and indignity of being sentenced to death. The question then is, how do we remedy the indignities of being on death row? Procedural delays are objectively undignifying. Courts must either (1) abolish the death penalty, (2) continue to accept the paradox that dignifying-enhancing procedure inevitably leads to some indignities (including long wait-time on death row), (3) improve death row conditions, (4) set a statute of limitations for time on death row whereupon an individual becomes integrated into regular prison for a life sentence, and/or (5) issue damages/reparations as expressive outrage to vindicate a death row prisoner's dignity.

In the final section of this Article, I lay out the ways in which courts should prevent "bad" ideas of dignity from gaining traction in the legal system.

B. *Courts Must Prevent "Bad" Ideas of Dignity*

For those who question whether it is the judiciary's job to be weighing dignity in its adjudicatory calculus, courts have and will inevitably continue to engage in interest balancing, even if they do not explicitly acknowledge it.[110] Dignity is an interest that goes into this balancing calculus, whether consciously or unconsciously. Not to mention, dignity has already entered American jurisprudence in cases like United States v. Windsor[111] and Obergefell v. Hodges.[112] Thus, the judiciary has already taken a bite of the forbidden fruit: the slippery concept of dignity. It is therefore on the courts to use the concept of dignity in a responsible way and prevent the easy manipulation and weaponization of dignity in the law.

109. Paul V. Evans, *The Power to Punish Summarily for "Direct" Contempt of Court: An Unnecessary Exception to Due Process*, 5 Duke Bar J. 155, n.1 (1956) (citing Ex parte Holbrook, 133 Me. 276, 280 (1935)).

110. Bayefsky, *supra* note 49, at 30–31 (arguing against the idea that dignity should only be considered by the legislative branch).

111. United States v. Windsor, 570 U.S. 744, 768 (2013) (citing "[d]ignitary wounds").

112. Obergefell v. Hodges, 576 U.S. 644, 681 (2015) ("They ask for equal dignity in the eyes of the law. The Constitution grants them that right.").

Death row is a crucible of dignity clashes. Courts must prevent volunteering not only for constitutional reasons but also on the grounds of preventing "bad" ideas of dignity. By "bad," I mean overly subjective and idiosyncratic. Volunteers, who argue their worth depends on being executed by the state, misappropriate dignity and damage the concept's legal bite. For example, David Cox's idea of dignity—as being "worthy" of state execution—is a bad idea of dignity because it reeks of self-abasement and affirms the state's diminished regard for human worth.[113] Dignity will cease to be a useful concept in the law if courts allow the misuse and abuse of it. Dignity skeptics already believe dignity is a useless concept[114] or even a dangerous concept if not reined in.[115] State courts that continue to allow volunteering reinforce "bad" ideas of both individual and collective dignity. As Professor Rachel Bayefsky highlights, if subjective and idiosyncratic notions of dignity flooded lawsuits, "[m]ost likely, legal institutions would stop listening to people's claims about dignity, and this would diminish the capacity of dignity to play a useful role in the legal system."[116]

In *Obergefell*, the U.S. Supreme Court held that the Constitution grants the right to equal dignity in the eyes of the law.[117] When a death-sentenced individual makes the dignitary argument that they must be executed to be dignified, either their dignitary argument must be seen as a "bad" idea of dignity or not an idea of dignity at all. Death row prisoners invoke their dignity to seek death, sometimes even seeking death to elicit an elevation in status—to martyr status. For example, after Paul Jennings Hill was sentenced to death for murdering a physician who performed abortions, Hill volunteered for death and told the press that the Court was making him into a "martyr" for the pro-life movement.[118] By volunteering for death, Hill asked to be singled out and apotheosized. This is a "bad" idea of dignity because dignity should be about *equal* high-rank treatment, a *uniform* leveling up—as Professor Jeremy Waldron posits[119]—not martyrdom, exceptional treatment, or mistreatment.

The question then is how courts can prevent "bad" ideas of dignity? Preventing these "bad" ideas of dignity is critical to maintaining the integrity of

113. *See* Cox v. State, 327 So. 3d 100, 103 (Miss. 2021) ("I am worthy of death").
114. Ruth Macklin, *Dignity is a Useless Concept*, 327 Brit. Med. J. 1419 (2003); *see also* Obergefell, 576 U.S. 644, 735 (Thomas, J., dissenting) ("[T]he Constitution contains no 'dignity' Clause, and even if it did, the government would be incapable of bestowing dignity.")
115. Jeffrey Rosen, *The Dangers of a Constitutional Right to Dignity*, Atlantic (April 29, 2015), [https://perma.cc/CS94–2FVL] (arguing that allowing the concept of dignity in the law "empowers judges to decide whose 'dignity' they wish to prioritize").
116. Bayefsky, *supra* note 49, at 35.
117. Obergefell, 576 U.S. at 681 ("They ask for equal dignity in the eyes of the law. The Constitution grants them that right").
118. Tom Kuntz, *From Thought to Deed: In the Mind of a Killer Who Says He Served God*, N.Y. Times (Sept. 24, 1995), [https://perma.cc/J9QK-3TZX] ("If I am in fact killed, I think you could justifiably call me a martyr . . . [T]here's no question that God has used people who are willing to die . . . to save human life, and I'm certainly willing to do that").
119. Waldron, *supra* note 58.

dignity as a concept in the law. Many scholars criticize the use of dignity in the law because dignity is ostensibly too complicated to define and thus runs the risk of being overinclusive.[120] Dignity can mean autonomy, inherent worth, privacy, or freedom from humiliation; where does dignity end? Instead of abdicating that dignity is too complicated to be integrated into the law, dignity *can* become part of a judge's assessment—if the outer limits of dignity are circumscribed. Dignity can be operational, not merely thematic dicta. The Framers cared about dignitary interests: Federalist Paper 1 suggests Hamilton valued the individual dignity of his countrymen just as much as their liberty and happiness.[121] Courts must care about dignity too.

First, courts receiving dignitary arguments should look to the typicality of a dignity argument and engage in aggregation: aggregating feelings of indignity felt by many rather than those felt by an idiosyncratic and unrepresentative individual. An execution volunteer makes an unusual dignity argument: that their subjective sense of "dignity" can only be vindicated by state execution. Because such an argument is rare, it should be given less weight. Such an argument also undermines and insults the resistance efforts of other death row prisoners who would not fathom letting the state execute them.

Second, courts should engage in a balancing test between collective and individual dignity, giving more weight to collective dignity—an overriding sense of human dignity—as France did in considering the legality of a dwarf-tossing ban.[122] Courts must recognize that autonomy is not in and of itself dignity because merely *choosing* conduct does not necessarily make that conduct dignified.[123] Courts should be wary of "dignity as autonomy" arguments. Volunteering for execution is not dignifying merely because it is an individual's ostensible "choice." Execution by the state perpetuates three indignities: (A) that you are unworthy of life, (B) that the government whose job is to protect your life seeks your death, and (C) that your death will likely be an undignifying, botched spectacle that leaves you in pain, exposed to unwanted witnesses, even media reporters.[124] Courts must use an overriding sense of human dignity to supersede the volunteer's wish to die by the

120. *See* Kenneth S. Abraham & G. Edward White, *The Puzzle of the Dignitary Torts*, 104 Cornell L. Rev. 317, 331–32, 380 (2019) (arguing that dignity lacks "substantive content" and "philosophical integrity," that dignity just serves as a "placeholder" and "does not in itself confer concrete rights and cannot decide cases," and so "dignity, as a legal concept . . . is unlikely to become integrated into any area of American law"); *see also* Jeffrey Rosen, *The Dangers of a Constitutional Right to Dignity*, Atlantic (April 29, 2015), [https://perma.cc/CS94–2FVL].

121. The Federalist No. 1 (Alexander Hamilton) ("Yes, my countrymen . . . I am convinced that this is the safest course for your liberty, your dignity, and your happiness."); *see also* Nos. 6, 15, 17, 30, 67, 69, 70, 71, 78, 81 (Alexander Hamilton); No. 19 (Alexander Hamilton & James Madison); Nos. 45, 58 (James Madison) for mentions of dignity.

122. *See generally* Wackenheim, *supra* note 83.

123. Malkani, *supra* note 78, at 185 ("The mere fact that a person or persons choose to do something does not in and of itself make that conduct dignified or compatible with human dignity.").

124. *See, e.g.*, Ala. Code . § 15–18–83; Okla. Stat. tit. 22 § 1015 (describing current execution protocols and witnesses allowed).

state. Granted, adopting an objective communitarian-centered view of what constitutes a breach of dignity seems patronizing,[125] but some paternalism is necessary to achieve collective virtue and prevent society from being complicit collaborators in this great injustice: capital punishment.

Third, courts should consider dignity—specifically dignity as equal high rank, as collective virtue, as the absence of domination, and as social recognition of moral status/inherent worth—in all Eighth and Fourteenth Amendment analyses. One way to bring collective dignity into the courtroom is by relaxing standing doctrine. Standing doctrine forces courts to exercise judicial restraint by limiting complainants' access to federal courts. Standing doctrine thus preserves judicial resources from "ideological" lawsuits and the proverbial "floodgates of litigation." Article III standing requires three elements for a lawsuit: injury, traceability, and redressability. Petitioning a court to prevent a death row prisoner from volunteering for execution runs into standing issues because the petitioner lacks an ostensible stake or "injury" to sue. The petitioner instead seeks to vindicate the "injury" of their friend: the death row prisoner seeking execution. But standing doctrine should not impede the vindication of human dignity. In his dissent in *Whitmore*, Justice Marshall advocated for relaxing next-friend standing requirements to make it easier for third parties to challenge death row volunteering.[126] Marshall asserted that society had a "collective right as a civilized people not to have cruel and unusual punishment inflicted in our name."[127] Moreover, as Professor Bayefsky notes, federal courts can recognize dignitary harm as injury in fact without violating separation of powers or bursting open litigation floodgates, by looking to history and tradition to narrowly define cognizable harm, as well as looking to Congress to define other forms of dignitary harms.[128] The ball is in Congress's court to pass legislation that would relax standing doctrine and allow next-friend standing to petition an execution volunteer's death wish.

Fourth, courts cannot dismiss dignitary arguments; they must engage with them when presented. In doing so, courts must be self-conscious, asking whether they are pitying individuals in a demeaning way or respecting an individual's inherent worth. In the volunteering paradigm, society's stake in ensuring the integrity of a death sentence (and preventing it as much as possible) should outweigh any "pity" for a death row prisoner's self-deprecation. Faith in the rule of law deteriorates if procedures like appellate review are waivable.

Fifth, courts must interrogate their dignitary ceremonies. For example, one type of dignitary ceremony before capital punishment is the competency hearing. During competency hearings, courts decide whether a prisoner is "competent" that is, whether they are knowing, intelligent, and mentally sane enough to be killed by the state. The state cannot kill someone who is intellectually disabled or suffering from a severe mental illness.[129] Volunteering

125. Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 European J. Int'l L. 655, 706 (2008).
126. Whitmore v. Arkansas, 495 U.S. 149, 167 (1990) (Marshall, J., dissenting).
127. *Id.* at 172 (quoting Franz v. Lockhart, 700 F. Supp. 1005, 1024 (E.D. Ark. 1988)).
128. Bayefsky, *supra* note 49, at 65–72.
129. *See* Ford v. Wainright, 477 U.S. 399, 401 (1986) (prohibiting the execution of the

perverts competency hearings because it enables the idea that only certain individuals get to be worthy and deserving of state execution. The purpose of competency hearings is to weed out individuals from the stream of executions. But for execution volunteers, competency hearings will more likely place individuals in the stream of execution, rather than weed them out. When a death row prisoner volunteers for execution, competency hearings will often lead to a finding of competence and thus a speeding up of execution. Thus, from a purposivist approach, competency hearings on execution volunteers belie the procedure's original purpose: to mitigate the chances of capital punishment being imposed. Competency hearings for execution volunteers are, therefore, dignitary ceremonies worth eliminating because they insult rather than affirm dignity. When a state allows a prisoner to volunteer through a finding that they are "competent" for execution, that state engages in an illusory, disingenuous dignitary ceremony that is extremely *un*dignifying not just for the individual, but for the larger community. By contrast, appellate review and post-conviction relief are dignitary ceremonies worth preserving because they have proven tangible benefits in staunching the frequency of executions.

Additionally, courts must come up with a better method for deciding when litigants should not be able to waive their constitutional rights. Perhaps the best solution is for Eighth Amendment safeguards to be unwaivable as a matter of law.[130] Courts should follow Professor Jason Mazzone's four-pronged balancing test to assess the acceptability of a waiver: (1) whether the right protects a substantial public value or mostly protects the interests of a private individual, (2) whether the circumstances of the waiver are unusual, (3) whether waiver of a right will undermine public values protected by other constitutional rights, and (4) whether the procedures in waiving the right sufficiently protect any public values at stake.[131] Courts should use this framework to find that waivers in capital proceedings are unacceptable. First, the right to appellate review has substantial public value, not merely protecting the interests of private individuals. Second, waivers on death row are unusual and atypical. Third, an individual's waiver of appellate review and post-conviction relief threatens the utility of those procedures. Appellate review and post-conviction relief become empty formalisms, sham dignitary ceremonies if death-sentenced individuals can easily jettison or waive them. If individuals stop believing in the value of appeals, those processes lose value. Fourth, procedures currently in place to protect against unfair application of the death penalty clearly work: Fewer than one in six death-sentenced individuals are executed thanks to appeals and post-conviction relief.[132] Waivers in capital

insane); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (prohibiting the execution of people with intellectual disabilities).

130. *See* Gilmore v. Utah, 429 U.S. 1012, 1018–20 (1976) (White, J., dissenting) (suggesting that a defendant should be unable as a matter of law to waive his right to state appellate review).

131. Jason Mazzone, *The Waiver Paradox*, 97 Nw. U. L. Rev. 801 (2002).

132. Death Penalty Info. Ctr., *Death Penalty Census: Key Findings*, [https://perma.cc/RC9H-5ST5] (last visited Dec. 17, 2024).

cases fail on all prongs, thus affirming that death row individuals should not be able to exercise waivers to waive their rights or dignity away.

Conclusion

Supporting the abolition of the death penalty *and* execution volunteerism is philosophically and legally incoherent. Both cannot be dignifying. In *Furman v. Georgia*, Justice Brennan held that the death penalty was unconstitutional because it was "uniquely degrading to human dignity."[133] Because volunteering for execution is consequentially the same as the death penalty, volunteering must also be "uniquely degrading to human dignity," and thus unconstitutional. While judges, like Justice John Minton and Justice Charles Canady, advocate for volunteering under the guise of respecting a death row prisoner's "dignity,"[134] these judges end up perpetuating more indignities than any "dignity" they think they have judicially conferred or recognized.

Professor Bayefsky argues that expressing respect for an individual's dignity is a legitimate remedial task for judges, and so, not assigning enough weight to dignity challenges judicial legitimacy.[135] Taking these premises one step further, assigning weight to the *wrong* ideas of dignity—what I call "bad" ideas of dignity—also challenges judicial legitimacy. Courts that allow volunteering commit constitutional violations and dignitary harm. To discern which dignitary interests are worth recognizing—which dignitary arguments are *good*, courts must also recognize those that are *bad*. This Article posits that a volunteer's idea of dignity as state execution is an objectively bad idea of dignity.

Michel Foucault prophetically warned, "[P]ower is decreasingly the power of the right to take life, and increasingly the right to intervene to make live."[136] If the U.S. Supreme Court were to find volunteering unconstitutional, this could reinforce the state's power to "make live," a power augmented by *Dobbs*[137] and *Vacco*.[138] "Making live" ostensibly cuts into an individual's dignitary interest in autonomy. However, prohibiting death row prisoners from seeking their own executions (that is, making them live) can easily be reframed as not letting these individuals die an undignified death by the state.[139] Because

133. Furman, 408 U.S. 238, 291 (1972) (Brennan, J., concurring).
134. Chapman v. Commonwealth, 265 S.W.3d 156, 175–76 (Ky. 2007) (Minton, J., majority) ("[A]dhering to a defendant's choice to seek the death penalty honors the last vestiges of personal dignity available to such a defendant"); Robertson v. State, 143. So. 3d 907, 914–15 (Fla. 2014) (Canady, J., dissenting) ("Respect for the individual dignity of the defendant requires respect for his decision of whether to pursue an appeal.").
135. Bayefsky, *supra* note 37, at 1304–05.
136. Michel Foucault, *Right of Death and Power Over Life* in 1 *History of Sexuality*, in Biopolitics: A Reader 68 (Timothy C. Campbell & Adam Sitze eds., Duke Univ. Press 2013) (1976).
137. Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022).
138. Vacco v. Quill, 521 U.S. 793 (1997) (holding no constitutional "right to die" in assisted suicide context).
139. This Article does not argue against death row prisoners having a right to die through physician-assisted suicide if they have a terminal illness; it merely argues against

of the state's active role in performing the killing, volunteering for state execution must be siloed from "make live" discussions.

Ultimately, finding volunteering undignifying and unconstitutional would help dismantle the machinery of death by exposing the inherent paradoxes and hypocrisies underlying capital punishment. Finding volunteering undignifying and unconstitutional would also help the Court return to its posture in *Furman*: finding the death penalty unconstitutional *because* it is "uniquely degrading to human dignity."[140]

voluntary *state* execution.

140. *Furman*, 408 U.S. at 291 (Brennan, J., concurring).