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**Volunteers for Execution:
Directions for Further Research
into Grief, Culpability, and
Legal Structures**

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VOLUNTEERS FOR EXECUTION: DIRECTIONS FOR FURTHER RESEARCH INTO GRIEF, CULPABILITY, AND LEGAL STRUCTURES

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I. INTRODUCTION

About 11% of those executed in the United States are death-sentenced prisoners who sought their own execution.¹ These prisoners are commonly called “volunteers,”² and they succeed in hastening execution by waiving their right to appeal their conviction and sentence. The same number of volunteers (143) have been executed as death-sentenced prisoners have been exonerated (143).³ While the exonerated have prompted scrutiny and condemnations of the legal processes leading to their death sentences, the fact that volunteers bypass legal procedures designed to ensure that only the “worst of the worst”⁴ are executed has attracted considerably less attention and effort at legal reform. This may stem from our uncertainty about how to interpret volunteers.

Certain interpretations dominate. Those who oppose a condemned prisoner’s request for execution often cite the prisoner’s history of mental instability and frame the prisoner’s decision as a product of suicidal depression.⁵ Related to this narrative is one that links death row conditions to the prisoner’s decision to hasten death. Conditions, in this account, contribute to the decision to abandon appeals by wearing the prisoner down to the point that he loses the will to live, or by contributing to “death row syndrome,”⁶ an evolving (and

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¹ Meredith Martin Rountree, “I’ll Make Them Shoot Me”: *Accounts of Death-Sentenced Prisoners Advocating for Execution*, 46 *Law & Soc’y Rev.* 589, 590 (2012) [hereinafter *Accounts*].

² John H. Blume, *Killing the Willing: ‘Volunteers,’ Suicide and Competency*, 103 *MICH. L. REV.* 939, 940 (2005); Ari Brisman, ‘Docile Bodies’ or *Rebellious Spirits?: Issues of Time and Power in the Waiver and Withdrawal of Death Penalty Appeals*, 43 *VAL. U. L. REV.* 459, 462 (2009). I use this term reluctantly because of the connotations of free will and civic-mindedness associated with the word “volunteer,” but use it nonetheless to situate the research within the larger scholarly context.

³ *Searchable Execution Database*, DEATH PENALTY INFO. CENTER (last visited Jan. 28, 2014), <http://www.deathpenaltyinfo.org/information-defendants-who-were-executed-1976-and-designated-volunteers>; *The Innocence List*, DEATH PENALTY INFORMATION CENTER (last visited Jan. 28, 2014), <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row>.

⁴ *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting on other grounds).

⁵ See, e.g., Amnesty International, *USA: Prisoner-Assisted Homicide—More “Volunteer” Executions Loom* (May 17, 2007), <http://www.amnesty.org/en/library/info/AMR51/087/2007> (last visited March 30, 2012).

⁶ Amy Smith, *Not ‘Waiving’ But Drowning: The Anatomy Of Death Row Syndrome And Volunteering For Execution*, 17 *B.U. PUB. INT. L.J.* 237, 238 (2008). See also Susan R. Schmeiser, *Waiving from Death Row*, in *WHO DESERVES TO DIE?: CONSTRUCTING THE EXECUTABLE SUBJECT* 98, 98 (Austin Sarat & Karl Shoemaker eds., 2011); Melvin Urofsky, *A Right to Die: Termination*

controversial) psychiatric diagnosis describing a mental condition that some prisoners develop as a result of living under a death sentence in highly socially isolating and stark conditions of confinement.⁷ Other narratives focus on ideas of rational choice and personal autonomy. This account emphasizes prisoners' desire to control their own destiny and the civic virtue of respecting autonomy and choice, even for the least among us.⁸

The empirical support for these explanations is sparse, and this article emerges from a larger effort to test the hypothesis that prisoners who seek execution resemble those who take their own lives in prison. The prison suicide literature has identified certain characteristics—such as race, sex, age, mental illness, and prison conditions—as increasing the risk of suicide behind bars.⁹ My research on Texas volunteers generally suggests many, but not all, of those traits characterize that volunteer population as well.¹⁰ This article focuses on findings that point to areas for future research not only on volunteers but also on larger questions of processes of hopelessness and culpability among criminal offenders, and how the criminal justice system may influence life-ending decisions.

Part I of this article describes the legal landscape in which volunteers in this study were situated. Part II provides an overview of the research this study builds upon, as well as a description of the study itself.¹¹ Part III combines a discussion of findings from the Texas study with suggestions for future research.

of Appeal for Condemned Prisoners, 75 J. CRIM. L. & CRIMINOLOGY 553, 553 (1984).

⁷ Harold I. Schwartz, *Death Row Syndrome and Demoralization: Psychiatric Means to Social Policy Ends*, 33 J. AM. ACAD. PSYCHIATRY L. 153, 153-155 (2005).

⁸ See Kathleen L. Johnson, *The Death Row Right to Die: Suicide or Intimate Decision?*, 54 S. CAL. L. REV. 575, 601 (1981); Julie Levinsohn Milner, *Dignity or Death Row: Are Death Row Rights to Die Diminished? A Comparison of the Right to Die for the Terminally Ill and the Terminally Sentenced*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 279, 282 (1998); Glenn W. Muschert et al., *Elected Executions in the U.S. Print News Media*, 22 CRIM. J. STUD. 345, 345 (2009); Smith, *supra* note 6.

⁹ See, e.g., Jacques Baillargeon et al., *Psychiatric Disorders and Suicide in the Nation's Largest State Prison System*, 37 J. OF THE AM. ACAD. OF PSYCHIATRY L. 188, 190 (2009); DAVID A. CRIGHTON & GRAHAM J. TOWL, *PSYCHOLOGY IN PRISONS*, (2nd ed. 2008); DAVID LESTER & BRUCE L. DANTO, *SUICIDE BEHIND BARS: PREDICTION AND PREVENTION* (1993); CHRISTINE TARTARO & DAVID LESTER, *SUICIDE AND SELF-HARM IN PRISONS AND JAILS* 13-18 (2008); B. Jaye Anno, *Patterns of Suicide in the Texas Department of Corrections 1980-1985*, 5 *J. of Prison & Jail Health* 82, 84 (1985); Jo Borrill, *Self-inflicted Deaths of Prisoners Serving Life Sentences 1988-2001*, 4 THE BRIT. J. OF FORENSIC PRAC. 30 (2002); Seena Fazel et al., *Suicide in Prisoners: A Systematic Review of Risk Factors*, 69 *J. of Clin. Psychiatry* 1721 (2008); Alison Liebling, *Prison Suicide and Prisoner Coping*, in PRISONS 292, (Michael Tonry and Joan Petersilia eds., 1999).

¹⁰ Meredith Martin Rountree, "The Things that Death Will Buy": A Sociolegal Examination of Texas Death-Sentenced Prisoners Who Sought Execution (May 2012) (unpublished Ph.D. dissertation, The University of Texas at Austin) (on file with author) [hereinafter Rountree Dissertation].

¹¹ Appendices provide more detailed information regarding the study's data and method.

II. LEGAL STANDARD FOR VOLUNTEERING FOR EXECUTION

A. The Three Appeals Available to Prisoners Sentenced to Death

A death-sentenced prisoner can hasten execution by abandoning his¹² appeals, usually by discharging counsel and electing not to file any pleadings on his own behalf. Prisoners typically have three essentially sequential avenues of appeals. The first appeal is called a “direct appeal,” in which the prisoner typically argues to the state’s highest criminal court that the trial judge made erroneous legal rulings in the course of the trial.

The degree to which capital cases are routinely subjected to appellate review may be overstated because of the prevalence of statutory provisions characterizing the direct appeal as “automatic.”¹³ The availability of the appellate mechanism does not necessarily mean that it cannot be waived. A few states prohibit waiver of direct review,¹⁴ but others permit death-sentenced prisoners to forgo direct appeal at least in part. These states may permit the death-sentenced prisoner to waive his “personal” right to appeal¹⁵ but still require, *e.g.*, a review dictated by statute. Washington state requires its Supreme Court to consider whether “there are not sufficient mitigating circumstances to merit leniency,” “the sentence . . . is excessive or disproportionate to the penalty imposed in similar cases,” and “the sentence . . . was brought about through passion or prejudice.”¹⁶ Texas ostensibly requires a direct appeal, but since 1994,

¹² Deborah Fins, *Death Row U.S.A.*, Winter 2012 Crim. Just. Project of the NAACP Legal Def. & Educ. Fund, Inc., at 1. While women have been subjected to the death penalty, they constitute only a fraction of death row. As of January 1, 2012, 62 women were on death row in the United States. Twelve have been executed. By contrast, 3,127 men are on death row, and 1,265 have been executed. DEATH PENALTY INFO. CENTER, *supra* note 2 (reporting that 141 death-sentenced men and three women successfully sought execution. For simplicity, I use the masculine pronoun throughout this article.).

¹³ See Johnson, *supra* note 8, at 578; Milner, *supra* note 8, at 284-85.

¹⁴ State v. Brewer, 826 P.2d 783, 789 (Ariz. 1992); State v. Robbins, 5 S.W.3d 51, 54 (Ark. 1999); People v. Stanworth, 457 P.2d 889, 898 (Cal. 1969); Goode v. State, 365 So.2d 381, 384 (Fla. 1978); Commonwealth v. McKenna, 383 A.2d 174, 180 (Pa. 1978).

¹⁵ Newman v. State, 84 S.W.3d 443, 444 (Ark. 2002).

¹⁶ State v. Motts, 707 S.E.2d 804, 811 (S.C. 2011) (“Although Motts is entitled to waive his personal right to a direct appeal, we hold that he cannot waive this Court’s statutorily-imposed duty to review his capital sentence”). See also Pennell v. State, 604 A.2d 1368, 1375 (Del. 1992) (Holding that complete waiver precluded by state statutory mandate); State v. Bordelon, 33 So.3d 842, 850-51 (La. 2009) (The Louisiana state constitution requires the appellate court to review death sentences for “excessiveness.” “Excessiveness” is decided based on the influence of “arbitrary factors,” and “whether the evidence supports the jury’s finding of at least one aggravating circumstance.” This “safeguard[s] a defendant’s right not to suffer cruel and unusual punishment, and by protecting society’s fundamental interest in ensuring that the coercive power of the State is not employed in a manner that shocks the community’s conscience or undermines the integrity of our criminal justice system.”) (internal punctuation and citation omitted); Patterson v. Commonwealth, 551 S.E.2d 332, 333 (Va. 2001) (“Although Patterson has waived his right of appeal, Code § 17.1–313 mandates that we review the imposition of the death sentence. We must consider and determine whether the sentence of death was imposed “under the influence of passion,

in situations where the volunteer waives direct appeal and discharges counsel, the appellate court conducts its own review of the record without benefit of briefing in determining whether “fundamental error” marred the trial.¹⁷

The second appeal—variously called a “collateral attack,” “post-conviction appeal,” or “state habeas proceeding”—typically provides the prisoner an opportunity to argue to the state court that he was deprived of a fair adjudication of his case by events outside the trial, such as ineffective assistance of counsel or prosecutorial suppression of material exculpatory evidence. Only New Jersey prevented prisoners from waiving post-conviction appeals in capital cases.¹⁸ The New Jersey Supreme Court explained and cited the public’s “interest in the reliability and integrity of a death sentencing decision that transcends the preferences of individual defendants.”¹⁹

The final avenue of appeal essentially combines all federal constitutional claims raised on direct appeal and state habeas. These claims are presented to the federal district court in a petition for writ of habeas corpus.²⁰ An adverse adjudication by the federal district court may under certain circumstances be appealed to the federal appellate court.²¹ In federal court, the Ninth Circuit at one point suggested that its interest in ensuring the just administration of the death penalty could permit a court to reject a prisoner’s effort to waive appeals,²² but it subsequently stepped away from that position.²³ Generally the federal courts simply focus on whether the prisoner has met the legal criteria for waiving.²⁴

B. Legal Criteria for Hastening Execution²⁵

Courts evaluate decisions to abandon appeals according to four criteria: the prisoner must make a knowing, voluntary, and intelligent waiver of his rights

prejudice or any other arbitrary factor,” and whether the sentence is “excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.” Code § 17.1–313(C)(1) and (C)(2)).

¹⁷ See *infra* Part F.

¹⁸ See *Pike v. State*, 164 S.W.3d 257, 265 (Tenn. 2005) (listing opinions permitting waiver of post-conviction review in capital cases).

¹⁹ *State v. Martini*, 677 A.2d 1106, 1107 (N.J. 1996).

²⁰ 28 U.S.C. § 2254.

²¹ 28 U.S.C. § 2253.

²² *Comer v. Schriro*, 463 F.3d 934, 950 (9th Cir. 2006) (“To allow a defendant to choose his own sentence introduces unconscionable arbitrariness into the capital punishment system.”)

²³ *Comer v. Schriro*, 480 F.3d 960, 964 (9th Cir. 2007) (“If Comer is competent to waive further proceedings, then we need not, and indeed cannot, decide whether any of Comer’s claims have merit or are procedurally barred because there is no dispute remaining between the parties.”) The Ninth Circuit does, however, grant standing to the prisoner’s counsel to contest the district court’s findings of competency to waive appeals. See *United States v. Duncan*, 643 F.3d 1242 (9th Cir. 2011); *Mason ex rel. Marson v. Vasquez*, 5 F.3d 1220 (9th Cir. 1993).

²⁴ See, e.g., *Dennis ex rel. Butko v. Budge*, 378 F.3d 880 (9th Cir. 2004); *Smith ex rel. Missouri Public Defender Com’n v. Armontrout*, 812 F.2d 1050 (8th Cir. 1987).

²⁵ A version of this Section previously appeared in Meredith Martin Rountree’s *Accounts*, *supra* note 1, at 591-96.

to appeal and must be mentally competent.²⁶ These criteria are commonly applied in other parts of the criminal justice system. In accepting a guilty plea, for example, the court engages in a (usually stock) colloquy with the defendant designed to elicit the defendant's agreement that he understands that by pleading guilty, he abandons certain constitutional trial rights (the "knowing" criterion), that he has not been coerced into giving up these rights (the "voluntary" requirement), and this decision reflects that the defendant, having been advised by counsel, understands of the charges against him and the consequences of his plea (the "intelligent" waiver).²⁷

The competency determination is the crux of the legal life of the volunteer.²⁸ Only if the prisoner is found incompetent can others—such as parents—move to intervene as a "next friend" to continue the appeals.²⁹ In the context of death-sentenced prisoners waiving appeals, courts generally cite the Supreme Court's 1966 decision in *Rees v. Peyton*, which asked whether the prisoner had the "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises."³⁰

In *Rumbaugh v. Procnier*, the Court of Appeals for the Fifth Circuit confronted a tension inherent in this standard as mental health professionals testified that Rumbaugh grasped the logical consequences of his decision, but his decision was substantially affected by a mental disease, namely severe depression.³¹ The Fifth Circuit then refined its interpretation of *Rees* by

²⁶ *Godinez v. Moran*, 509 U.S. 389, 393-94 (1993); *see also Rees v. Peyton*, 384 U.S. 312 (1966).

²⁷ *See Brady v. United States*, 397 U.S. 742 (1970).

²⁸ A few courts have suggested that conditions of incarceration could make a waiver involuntary. *See, e.g., Comer v. Stewart*, 215 F.3d 910, 917 (9th Cir. 2000); *Armontrout*, 812 F.2d at 1050; *Groseclose ex rel. Harries v. Dutton*, 594 F. Supp. 949, 961 (M.D.Tenn.1984) (court granted next friend standing based on prison conditions' effect on voluntariness); *Tabler v. Thaler*, No. 6:10-cv-00034-WSS (W.D. Tex., Aug. 18, 2011) (order granting Administrative Reinstatement and reopening case) (court concluded "there are forces acting upon Petitioner which prevent his waiver from being a voluntary choice."). Mr. Tabler's institutional misconduct suggests the possibility of retaliatory and coercive conditions of incarceration. Vince Beiser, *Deadly Weapon*, WIRED, at 132 (June 2009).

²⁹ *Baal v. Demosthenes*, 495 U.S. 731, 736 (1990); *Whitmore v. Arkansas*, 495 U.S. 149, 162 (1990); *Gilmore v. Utah*, 429 U.S. 1012, 1012 (1976). The issues of surrogate decision-making in death penalty cases and in cases involving the incompetent, severely ill person are quite different. For the execution-hastener, the surrogate simply opts to continue the litigation. *See, e.g., Cockrum v. Director, Texas Department of Criminal Justice*, No. 6:93-cv-00230-WWJ (Aug. 25, 1994) ("ORDER that [named attorney] be appointed "Next Friend" of applicant, John Cockrum for the purposes of pursuing the writ of habeas corpus before this court, and to act in the best interest of the applicant in directing the habeas corpus proceedings before this court" and setting briefing schedule for habeas litigation). In the context of medical intervention, courts try to discern whether the surrogate is asking for what the patient would have wanted. ALAN MEISEL & KATHY L. CERMINARA, *THE RIGHT TO DIE: THE LAW OF END-OF-LIFE DECISIONMAKING* (3rd ed. 2008).

³⁰ *Rees*, 384 U.S. at 314.

³¹ *Rumbaugh v. Procnier*, 753 F.2d 395, 395 (5th Cir. 1985).

restricting the judicial determination of competence to whether the prisoner's decision was "the product of a reasonable assessment of the legal and medical facts and a reasoned thought process."³² That this "rational decision-making process" took place within a severe depression that "contribute[d] to his invitation of death" was legally irrelevant so long as he was aware of his situation and his options.³³ In other words, the court need only "inquire about the discrete capacity to understand and make rational decisions concerning the proceedings at issue, and the presence or absence of mental illness or brain disorder is not dispositive."³⁴

After the Fifth Circuit's decision in *Rumbaugh*, the Supreme Court considered the case of *Godinez v. Moran*, where it had to decide whether certain types of waivers required different types of mental competencies. Similar to *Rumbaugh*, *Moran* had a prior suicide attempt, "deep depression," and took psychiatric medication.³⁵ Harmonious with *Rumbaugh*'s holding, the Supreme Court ruled that the Constitution required only a single type of mental competency, namely that the prisoner have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and have "a rational as well as factual understanding of the proceedings against him."³⁶ The *Moran* dissenters protested: "the majority upholds the death sentence for a person whose decision to discharge counsel, plead guilty, and present no defense well may have been the product of medication or mental illness."³⁷ The majority opinion noted, "[r]equiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel."³⁸

As *Moran* and *Rumbaugh* make clear, mental competence is not a high bar to cross. Even as it adopted a more nuanced view of the effects of serious mental illness, the Supreme Court in *Indiana v. Edwards*³⁹ recognized that this standard permits even severely mentally ill defendants to be found competent to waive trial rights. I have argued elsewhere that this legal standard meshes poorly with the complex sociolegal issues surrounding adjudications of volunteer competency.⁴⁰ This article discusses the psychosocial context of volunteers that is not captured by the legal inquiry into mental competency and outlines areas warranting additional research.

³² *Id.* at 402.

³³ *Id.* The test articulated in *Rumbaugh* has been cited in other jurisdictions. *See, e.g.*, *Comer v. Schiro*, 480 F.3d 960, 970 n.4 (9th Cir. 2007); *Lonchar v. Zant*, 978 F.2d 637, 641 (11th Cir.1993).

³⁴ *Mata v. Johnson*, 210 F.3d 324, 329 n.2 (5th Cir. 2000).

³⁵ *Godinez v. Moran*, 509 U.S. 389, 409-11 (1993).

³⁶ *Id.* at 396-97.

³⁷ *Id.* at 409.

³⁸ *Id.* at 402.

³⁹ 554 U.S. 164, 178 (2008).

⁴⁰ *Accounts, supra* note 1, at 593-94.

III. RESEARCH ON VOLUNTEERS AND THE TEXAS VOLUNTEER STUDY

The study from which this article emerges examined Texas prisoners who abandoned their appeals and were executed in the modern era of the American death penalty, *i.e.*, after the death penalty was reinstated in 1976.⁴¹ The study used court files, prison documents, media reports, and interviews with people who had known the volunteer.⁴² To be included in the study, the prisoner must have succeeded in abandoning the legal appeals conventionally pursued by death row prisoners, namely direct appeal to the Texas Court of Criminal Appeals (TCCA), state habeas, and federal habeas proceedings. Not included in this study were death-sentenced prisoners who waived appeals and then managed to resume them in part (usually with dramatically limited legal claims because of stringent procedural rules mandating full presentation of legal claims at previous proceedings⁴³). Prisoners who expressed a desire to waive appeals to courts, the media, or others but who did not act on this desire were also not included.⁴⁴ These criteria generated a population of 31 prisoners who had been executed by the State of Texas after abandoning their appeals.

Comparing volunteers to similarly situated death-sentenced prisoners who had been executed not as a result of abandoning their appeals was central to the project. A comparison group was created comprised of a sample of Texas death-sentenced prisoners (Matched Sample 1 (MS1) (n = 73)) who had entered Texas's death row within six months of the individual subjects. Two to four men who were closest in age and of the same race as recorded by the Texas prison system selected for each subject. (One volunteer, Christopher Jay Swift, had no one of the same race entering death row within six months of his arrival. Therefore no match was selected for him.) Where there were multiple possible matches, those convicted from counties similar in geographic location or urban development to those of the subject were included. Each MS1 member's prior criminal history, experience of incarceration, and characteristics of the capital crime were recorded, among other things.

In addition, a subgroup was created to permit a more fine-grained comparison. This group—Matched Sample 2 (MS2) (n=38)—was composed of at least one of each group of matches associated with each volunteer in MS1. MS2 members were selected with particular attention to characteristics that

⁴¹ *Gregg v. Georgia*, 428 U.S. 153, 154-55 (1976).

⁴² For greater detail regarding data collection, please see the Methodological Appendix. *See infra* APPENDIX A.

⁴³ *See* 28 USC § 2254(b) (2013).

⁴⁴ These requirements obviously generate a very conservative estimate of desires to hasten death among condemned prisoners. A review of the files of the comparison subgroup MS2 that, as discussed below, was admittedly selected to include prisoners believed to have expressed at some point desires to waive appeals, as long as they met the other sample criteria, revealed that almost a quarter of that group took some formal action to waive appeals.

appeared to recur in the volunteers' files, including whether they had ever sought to waive appeals and/or had any history of depression and/or suicide. Information on MS2 members was gleaned from media coverage and parts of the court files examined for the study population. Based on the research discussed below, information regarding prior criminal history, experiences with incarceration, characteristics of the capital offense, along with any information regarding mental illness (including depression), suicidality, childhood neglect or trauma, juvenile delinquency, and any efforts to waive appeals was recorded.

By comparing volunteers with similarly situated death row prisoners who did not hasten their executions by volunteering, this study sought to overcome some of the limitations of previous empirical studies of volunteers. John Blume asked whether volunteers nationally resembled the non-incarcerated, or "free-world," American suicide population.⁴⁵ After collecting questionnaire responses from legal team members in cases involving volunteers and attempted volunteers, Blume reviewed the literature on free-world suicide. He concluded that important similarities existed between free-world suicides and death row execution-hastenings. In addition to being a predominantly white male phenomenon, both groups have significant histories of mental illness and substance abuse.⁴⁶

The primary limitation of Blume's study is the absence of a comparison group of non-execution-hastening death row prisoners. As Cunningham and Vigen have pointed out, mental illness and substance abuse and addiction are prevalent among the death row population.⁴⁷ Clearly, however, not all volunteer for execution.

Vandiver, Giacomassi, and Turner overcame the comparison group limitation in part by comparing all volunteers nationally to all executed non-volunteers. Their study provided a statistical profile of volunteers and proposed a "tentative typology" of volunteers based on "reviews of academic studies, newspaper interviews of volunteers, published accounts of volunteers' backgrounds and crimes, final statements given by volunteers before their executions, discussions with defense lawyers and mitigation specialists, and the experience of one of the authors in several cases"⁴⁸

While using a comparison group, this study is limited because, as with the Blume study, it analyzed volunteers executed nationally, which could conceal important state-level variation. Some counties—like Harris County, Texas, for example—are responsible for more executions than several states combined.⁴⁹ Some states such as Nevada (eleven out of twelve), Oregon (two out of two), and

⁴⁵ Blume, *supra* note 2, at 942.

⁴⁶ *Id.*

⁴⁷ Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 BEHAV. SCI. & L. 191, 200-01 (2002).

⁴⁸ Margaret Vandiver, David J. Giacomassi, & K. B. Turner, "Let's Do it!": *An Analysis of Consensual Executions*, in THE DEATH PENALTY TODAY 188, 195 (Robert M. Bohm ed., 2008).

⁴⁹ DEATH PENALTY INFO. CENTER EXECUTION DATABASE, <http://www.deathpenaltyinfo.org/texas-1> (last visited Sept. 20, 2013).

Washington (three out of five) have executed almost exclusively volunteers.⁵⁰ Some states execute so few that a prisoner might expect to live decades on death row before facing execution.⁵¹ Death row conditions also vary across states. If any of these factors matter, it is reasonable to believe that the dynamics in hastening execution could be very different in different places. Comparing all volunteers with all those executed in the modern era would erase these differences.

In addition, Vandiver and her colleagues relied on the database created by the Death Penalty Information Center (DPIC). While invaluable in many ways, some of DPIC's coding decisions regarding who constituted a "volunteer" risked overlooking important information. For example, DPIC lists one Texas prisoner as a "volunteer" because he declined the opportunity to pursue a second round of appeals, *i.e.*, so-called "successor" litigation, which is not routinely advanced by Texas death-sentenced prisoners.⁵² In fact, most prisoners do not have counsel at this stage as counsel will generally not be appointed by any court. Therefore, the considerations for forfeiting that opportunity likely vary considerably. At the same time, DPIC does not include anyone who changed his mind. The Texas study includes two who changed their minds repeatedly as they approached execution.⁵³ In the heat of execution-eve litigation, what they really wanted was not clear. In addition, two Texas prisoners who abandoned their appeals were simply not listed as volunteers in the DPIC execution database.⁵⁴

This study contributes to the limited empirical basis for the popular debates about volunteers, and extends Blume's and Vandiver, Giacomassi, and Turner's findings by overcoming some of the limitations of their research. It conducted the first comparison of execution-hastenings with a group of similarly situated non-volunteer death row prisoners. It traded the national view for the specificity of Texas and condemned prisoners' common experiences of its death penalty system and death row. It also did not rely on a single source for identifying volunteers, instead conducting an original investigation into who abandoned appeals. In addition, this study broadened the analysis beyond mental illness to include a larger number of characteristics linked to suicide, and characteristics particular to prisoner suicide. It also deconstructed some of the variables believed to be associated with prisoner suicide to try to understand what aspects of those variables may make them significant. For example, recognizing that prisoners convicted of violent crimes are generally at a higher risk of suicide, the Texas study considered whether certain features of the capital crime may be significant in distinguishing who among capital murderers may be more likely to seek to hasten execution. Finally, this study represented the only effort I am

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See *infra* APPENDIX A, Peter Miniell.

⁵³ See *infra* APPENDIX B, Robert Streetman and Danielle Simpson.

⁵⁴ See *infra* APPENDIX A, Richard Foster and Robert Anderson.

aware of to examine how the criminal justice system may shape decisions to hasten death.

All that said, while increasing our understanding of the volunteer phenomenon by overcoming the limitations of previous studies, this study has its own limitations. First and most obviously, the study involves a relatively small population. Second, the data sources each suffer from various imperfections. With the passage of time, interviewees not surprisingly forgot detail that can bring out important nuances. Contemporaneous documents—namely court files and news articles—offered more detail, but they too suffered from unreliability. One news story reported that a man confessed to committing a terrible murder because he sought to return to prison. A subsequent psychiatric interview with the man revealed that he had been hallucinating at the time of the crime, but realized after the fact that he would return to prison because of what he had done, an important difference. Documents in court files, while in many ways the best sources of information, varied in their richness depending on the quality of counsel and the legal issues salient at the time of the litigation. For example, before Texas jurors were permitted to consider evidence of mental impairments for any purpose other than future dangerousness, defense lawyers had few incentives to investigate and develop evidence of mental dysfunction.

IV. FINDINGS FROM TEXAS AND DIRECTIONS FOR FUTURE RESEARCH

The Texas study's findings regarding mental dysfunction, criminological characteristics, and the criminal justice system point to the need for a more complex understanding of the operation of mental distress and mental illness among those on death row, as well as ways in which the criminal justice system may promote decisions to end life.

A. Hopelessness and Mental Illness to Desires to Die

Researchers looking into desires to hasten death have found that hopelessness plays a crucial role in mediating the relationship between suffering and the desire to die.⁵⁵ Texas volunteers frequently suggested hopelessness,

⁵⁵ Alexander L. Chapman, Matthew W. Specht, and Tony Cellucci, *Factors Associated with Suicide Attempts in Female Inmates: The Hegemony of Hopelessness*, 35 SUICIDE & LIFE-THREATENING BEH. 558 (2005); Matthew K. Nock, Guilherme Borges, Evelyn J. Bromet, Christine B. Cha, Ronald C. Kessler, and Sing Lee, *Suicide and Suicidal Behavior*, 30 EPIDEMIOLOGIC REV. 133, 145 (2008); Rinat Nissim, Lucia Gagliese, and Gary Rodin, *The Desire for Hastened Death in Individuals with Advanced Cancer: A Longitudinal Qualitative Study*, 69 SOC. SCI. & MED. 165, 166 (2009); Janice M. Plahuta, B. Jan McCulloch, Edward J. Kasarskis, Mark A. Ross, Rhoda A. Walter, and Evelyn R. McDonald, *Amyotrophic Lateral Sclerosis and Hopelessness: Psychosocial Factors*, 55 SOC. SCI. AND MED. 2131 (2002). Hopelessness may play a greater role in premeditated rather than impulsive efforts to end life. Amy Wenzel, Gregory K. Brown, and Aaron T. Beck, *Characteristics of Individuals Who Make Impulsive Suicide Attempts*, 136 J. AFFECTIVE DISORDERS

which resonates with Blume's report that 39% of his respondents cited hopelessness as a factor in the volunteers' decision to abandon appeals.⁵⁶ However, not even in Texas, an enthusiastic user of the death penalty, are all death row appeals hopeless. Since the return of the death penalty in 1977, only 44% of those sentenced to death in Texas have been executed, with almost 22% winning reversals or commutations.⁵⁷ Many, however, were hopeless about the possibility of creating a meaningful life in prison. As one volunteer put it, "I don't feel like sitting the rest of my life in the Texas Department of Corrections."⁵⁸ Some interviewees thought the volunteer believed appeals to be futile, which, combined with his sense that incarceration was pointless, led him to abandon appeals:

He was just, fuck it, they're going to kill me, let's get it over with. It doesn't make any difference what you do. They're going to kill me. And you know what, I want to die. There was no desire to being reunited with his lord or anything like that. It was just fuck it. Even if they give me life, I don't want to live in that box. That's no life. Might as well just kill me.⁵⁹

Where some sounded angry, others seemed resigned. One prisoner felt that if his appeals would lead to his release, he would be interested in pursuing them. "But if it's just one of these, give me a new sentencing hearing and I have to stay in jail for the next however many years, forget it."⁶⁰ Another speculated about another volunteer:

But him looking around and seeing . . . other people that have been on death row for thirty some odd years, he just said fuck it. I'll let them kill my ass rather than just sit around being miserable with not much of any expectation for release. That was the read I got.⁶¹

Jerome Butler also echoed another relatively common complaint: even if he won a life sentence, he would be too old to restart life when released. "I'm 57 now, and I'd be in my 70s when I got out. What am I supposed to do? Go live under a bridge?"⁶² James Porter wrote the TCCA:

To be honest I would wrather [sic] be executed than spend my life in prison with no chance of ever getting out. (IF) I had the chance of

1121, 1123-24 (2012). Given the legal procedures required for waiving execution, volunteering for execution plainly falls on the premeditated side of the scale.

⁵⁶ Blume, *supra* note 2, at 963.

⁵⁷ Tracy L. Snell, CAPITAL PUNISHMENT, 2010 – STATISTICAL TABLES, 19 tbl.15 (2011), available at <http://www.bjs.gov/content/pub/pdf/cp10st.pdf>).

⁵⁸ *Ex parte* Jeffrey Allen Barney, No. 351487-A (Harris Cty, Tex.), March 11, 1986 hearing at 17.

⁵⁹ Interview with Texas Volunteer Study Informant 23 at 4.

⁶⁰ Interview with Texas Volunteer Study Informant 16 at 4.

⁶¹ Interview with Texas Volunteer Study Informant 2 at 3.

⁶² Kathy Fair, *Cabbie's Murderer is Executed*, HOUS. CHRON., April 21, 1990, at Sec. A, p. 23.

getting out one day while still young enough to enjoy life, getting the right help to become a productive member of society, (but) I don't see and want [won't?] see this [sic] happen in the state of Texas prison system.⁶³

Complementing this anecdotal (and non-comparative) evidence of hopelessness are findings suggesting that mental illness alone does not clearly distinguish the volunteer from the non-volunteer. Cunningham and Vigen's critical review of the literature on death row prisoners, mentioned above, noted that eleven out of thirteen clinical studies of death row prisoners found "a high incidence of psychological symptoms and disorder, ranging from maladaptive defenses to pervasive depression, mood lability, and diminished mental acuity to episodic and chronic psychosis."⁶⁴ Death row prisoners also "appear to have a disproportionate rate of serious psychological disorders relative to a general prison population."⁶⁵ Neurological abnormalities and neuropsychological impairments are "frequently observed," as are histories of substance abuse and intoxication, and childhood family dysfunction.⁶⁶

The Texas study confirmed that death row prisoners in Texas generally had a high incidence of both bad childhood experiences and adult mental dysfunction. The study coded as "1" any individual whom court records revealed had childhood experiences with adjudications of delinquency, time in juvenile detention, foster care, early drug use, and/or chaotic childhood environments. Within MS2, 47.4% had some indicator of this kind of vulnerability; of the volunteers, 43.8% did.⁶⁷ The fact that non-volunteers fought their sentences could explain why litigation documents revealed these experiences, but we are nonetheless left with the fact that almost half of the non-volunteer death row population suffered some kind of childhood trauma and dislocation.

Again using court records, in both groups, the Texas study coded whether the prisoner had ever been believed to have been depressed or suicidal. Proportionately more volunteers experienced depression, suicidal ideation, and/or attempt at some point during their lives, but, given the small number of cases, we should be cautious about inferring too much from this difference.

⁶³ *State v. James Scott Porter*, No. 74095 (Tex. Crim. App), March 2, 2003 Porter "Motion for Apology to CCA" at 2.

⁶⁴ Cunningham & Vigen, *supra* note 47, at 200-02.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Obviously, this coding noted only the presence of these factors, not their severity, a significantly more complex assessment and one which would be apparent in the court documents only if counsel had the skill, resources, and incentive to develop this evidence.

Table I.
History of Suicidality and/or Depression

	Volunteers (N=31)	MS2 (n=38)
Effort to waive?	100% (31)	23.7% (9)
Prior suicide attempt or ideation	51.6% (16)	42.1% (16)
Depression	54.8% (17)	42.1% (16)
Suicidal ideation or attempt + depression + waiver attempt		21% (8)
Suicidal attempt or ideation + depression without waiver attempt		15.8% (6)

Other forms of mental illness, as Blume noted, can also elevate the risk of suicide.⁶⁸ Indeed, bipolar disorder increases the risk of suicide far more than major depressive disorder.⁶⁹ With respect to other kinds of mental illness, members of MS2 also score high, with 26.3% (n=10)⁷⁰ reportedly diagnosed with a mental illness or having a history of psychiatric hospitalization. This is higher than the prevalence of mental illness other than depression among the volunteers—19.4% (N=6).⁷¹

Certainly, because they needed to demonstrate mental competence to be granted permission to waive their appeals, many of the volunteers were motivated to suppress information regarding mental illness.⁷² The court records may therefore understate the prevalence of mental disorder. Court records are also problematic sources of information because their quality depends in large

⁶⁸ Blume, *supra* note 2, at 957.

⁶⁹ TIA A. HOFFER & JOY LYNN E. SHELTON, *SUICIDE AMONG CHILD SEX OFFENDERS* 4-5 (2012).

⁷⁰ Robert Black, James Colburn, James Collier, Kenneth McDuff, John Moody, Paul Nuncio, Michael Perry, Lamont Reese, Angel Maturino Resendiz, Larry Robison.

⁷¹ Five (Swift, Hayes, Porter, Foster, and Beavers) had been diagnosed with a mental illness and/or been psychiatrically hospitalized. In addition, one (James Smith) had previously had a criminal charge dismissed based on insanity.

⁷² *Accounts*, *supra* note 1, at 613.

part on defense counsel's diligence in obtaining historical information about the client, having the resources required to conduct a comprehensive investigation, and counsel's strategic decisions about what information to elicit.

These data, however, support the general proposition that death row prisoners on the whole are a psychologically vulnerable group. The connection between these vulnerabilities and hastening execution is less clear and points to the need for further research, including whether, e.g., other conditions or experiences create particular vulnerabilities, including hopelessness.

B. The Social Construction of Self-Blame

Volunteers frequently expressed their belief in the justness of their sentences as a reason for abandoning their appeals.⁷³ As I have discussed elsewhere, these statements are consistent with efforts to normalize to others their desire to die.⁷⁴ At the same time, these statements may also reflect the social construction of self-blame. While shame—a sense of having dishonored oneself through one's actions—is understood to play a role in some suicides,⁷⁵ research on the social construction of blame—the attribution of responsibility for bad actions—also raises questions about self-blame in the context of the Texas study's findings about the criminological features of the volunteers' criminal history and characteristics of their capital offenses.

Certainly, prior convictions can increase the likelihood of conviction,⁷⁶ as characteristics of a capital offense can increase the possibility of a death sentence,⁷⁷ i.e., the jury's assessment of blameworthiness. Janice Nadler expanded this research beyond the impact of criminal convictions to examine whether the offender's moral character more generally influenced assessments of his blameworthiness.⁷⁸ She tested whether bad moral character might, among other things, affect attributions of intentionality. Where the offender with good moral character engaged in identical behavior, she asked whether “a person with a flawed moral character is blamed more for causing harm than a person who is otherwise virtuous.”⁷⁹ Using vignettes, Nadler found that survey respondents were more likely to find that the offender with bad moral character was “more overall responsible” for his bad act than the offender with good moral character, that he had “acted more intentionally,” and deserved more severe punishment. When the offenders acted recklessly, the death resulting from the acts of the

⁷³ *Id.* at 614.

⁷⁴ *Id.*

⁷⁵ See, e.g., HOFFER & SHELTON, *supra* note 61, at 5, 10, 17.

⁷⁶ See generally Janice Nadler, *Blaming as a Social Process: The Influence of Character and Moral Emotion on Blame*, 75 LAW & CONTEMP. PROBS. 1, 2-3 nn. 3-5 and accompanying text (2012).

⁷⁷ David C. Baldus et al., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 575-77 (1990) (discussing “salient factors scale” in death sentencing).

⁷⁸ Nadler, *supra* note 76.

⁷⁹ *Id.* at 2.

offender with bad moral character was perceived as “more foreseeable” by respondents.⁸⁰

As discussed below, this work raises questions about self-blame in light of findings that Texas volunteers—with the intriguing exception of those committing capital murder in the course of a dispute with an intimate partner—were generally more likely to have been previously convicted of a crime, to have been convicted of a crime against another person, to have been incarcerated, to have committed their capital offenses alone, and to have committed the capital offense with a gun.

1. Volunteers Were More Likely to Have had Greater Involvement in Crime and Violent Crime Prior to Capital Murder

Prisoners who commit suicide have slightly more prior convictions than those who do not commit suicide,⁸¹ and tend to have committed crimes against people, with those committing homicides having the highest rates of suicide.⁸² Because, by definition, death row prisoners have been convicted of homicide,⁸³ the Texas study examined multiple aspects of the prisoners’ involvement in crime and in violent crime, defined simply as a crime against a person (CAP).

Table II.
Criminal History Comparison

	Volunteers (N=31)	MS1 (n = 73)	MS2
No prior convictions	19.4% (6)	34.2% (25)	34.2% (13)
No prior CAP convictions	48.4% (15)	68.5% (50)	60.5% (23)

⁸⁰ *Id.* at 19, 20-23.

⁸¹ Liebling, *supra* note 9.

⁸² *See, e.g.*, Anno, *supra* note 9; Borrill, *supra* note 9; Crighton and Towl, *supra* note 9; Lester and Danto, *supra* note 9; *but see* Liebling, *supra* note 9, at 297, citing contradictory findings.

⁸³ *E.g.*, Kennedy v. Louisiana, 554 U.S. 407 (2008) (death penalty unconstitutional punishment for rape of a child); Coker v. Virginia, 433 U.S. 584 (1977) (death penalty unconstitutional punishment for rape of adult); Tison v. Arizona, 481 U.S. 137 (1987) (death penalty constitutional punishment for co-participant in felony-murder only where defendant was a major participant in the underlying felony and exhibited a reckless indifference to human life).

The study found that the volunteers were more likely to have been convicted of a crime and to have been convicted of a crime against a person. Indeed, MS2, a group specifically selected from MS1 to include individuals believed to have wanted to waive appeals, also had a somewhat higher incidence of crimes against persons than the matched sample as a whole.

Another story is possibly hidden by these overall volunteer numbers, however. Separating those volunteers who committed a capital murder in connection with an intimate partner dispute reveals that their path to waiving appeals may be somewhat different. Those who kill their intimate partners are at higher risk for suicide,⁸⁴ and those who committed their capital crime in the midst of a domestic crisis appear overrepresented in Texas executions. While 25.8% (8)⁸⁵ of the Texas volunteer population committed an offense related to a domestic dispute, only 7.4% (33) of the 444 non-consensual Texas executions of men had committed similar crimes.

This category includes not only those who murdered their intimate partners, but also those who committed murder ostensibly because of a domestic crisis. For instance, when Eliseo Moreno's brother-in-law refused to disclose the whereabouts of Moreno's wife, Moreno murdered the brother-in-law, sister-in-law, and four others.⁸⁶ Robert Anderson attributed his murder of a child to an argument he had had that day with his wife over her infidelity.⁸⁷ She had told him that he needed to leave their house before she returned home.⁸⁸ George Lott is believed to have opened fire in a courtroom because he was upset with its handling of his divorce and child custody proceedings (and perhaps his stress over an upcoming trial on charges that he had sexually abused his child).⁸⁹

The intimate partner dispute group's ("IPD-volunteers") criminal experience was lower than the other volunteers, whether measured by their prior convictions, crimes against persons, or time in prison.

⁸⁴ See, e.g., Anno, *supra* note 9, at 867; Liebling, *supra* note 9, at 301-02.

⁸⁵ Robert Anderson, Larry Hayes, George Lott, David Martinez, Eliseo Moreno, Steven Renfro, Benjamin Stone, and Christopher Jay Swift.

⁸⁶ Based on a review of the trial transcript and media reports. Rountree Dissertation, *supra* note 10, at 56.

⁸⁷ Michael Graczyk, *Killer of 5-year-old in Amarillo Volunteering to Die Thursday*, Associated Press, July 20, 2006, available at <http://web.archive.org/web/20070929104500/http://www.mysanantonio.com/sharedcontent/APStories/stories/D8IVIVJ86.html>.

⁸⁸ *Id.*

⁸⁹ Kathy Walt, *Courthouse Rampage's Scars Slow to Heal/Killer's execution set Tonight in '92 Tarrant County Case*, HOUS. CHRON., Sept. 19, 1994, at A9.

Table III.
Volunteers' Criminal Experience Breakdown

	Volunteers (N=31)	Non-IPD volunteer (N=23)	IPD-volunteers (N=8)
No prior convictions	19.4% (6)	17.4% (4)	25% (2)
No prior CAP convictions	48.4% (15)	47.8% (11)	62.5% (5)
No prior prison	38.7% (12)	30.4% (7)	62.5% (5)

In other words, the IPD-volunteers were less criminally involved than the non-IPD volunteers. In addition, they tend to be older than the non-IPD volunteers.⁹⁰ In these ways, they resemble conventional murder-suicides.⁹¹ These findings suggest a possible continuum between conventional murder-suicides: those who take their lives while in custody for a family-related homicide, and the IPD-volunteer.

2. Volunteers are More Likely to Have Acted Alone and to Have Used a Gun in the Capital Murder

The Texas study also examined how the capital crime was committed, given the greater risk of suicide run by those in custody for a violent crime. It separated gun deaths from non-gun deaths, since the amount of effort required to kill someone with a gun is usually less than with other lethal instruments. If it is the experience of inflicting violence that contributes to hastening decisions to hasten death, distinguishing between those who fire a gun and those who, *e.g.*, use their bare hands or blunt instruments to kill, could be useful.⁹² The study also examined whether the volunteer acted alone.

⁹⁰ Rountree Dissertation, *supra* note 10, at 48. The average age at which non-IPD volunteers took action to waive their appeals was 33.9, whereas for IPD-volunteers, it was 38.5.

⁹¹ Scott Eliason, *Murder-Suicide: A Review of the Recent Literature*, 37 THE J. OF THE ACAD. OF PSYCHIATRY & THE LAW 371, 374-75 (2009); Marieke Liem, Michiel Hengeveld, and Frans Koenraadt, *Domestic Homicide Followed by Parasuicide: A Comparison with Homicide and Parasuicide*, 53 INTERNAT'L J. OF OFFENDER THERAPY & COMP. CRIMINOLOGY 497, 504 (2009); Marieke Liem, Marieke Postulart, and Paul Nieuwbeerta, *Homicide-Suicide in the Netherlands: An Epidemiology*, 13 HOMICIDE STUDIES 99, 115 (2009); Steven Stack, *Homicide Followed by Suicide: An Analysis of Chicago Data*, 35 CRIMINOLOGY 435, 442 (1997); Andrew Starzomski and David Nussbaum, *The Self and the Psychology of Domestic Homicide-Suicide*, 44 INTERNAT'L J. OF OFFENDER THERAPY & COMP. CRIMINOLOGY 468, 470 (2000).

⁹² None of the cases involved less violent lethal methods such as poisoning.

Compared to MS1, the volunteers were more likely to have used a gun in the murder and less likely to have committed the crime with another person.⁹³ This difference remains even after the IPD-volunteers' offenses are excluded. (all of the IPD-volunteers acted alone; half used a firearm.)⁹⁴

Table V.
Offense Characteristics

Offense	Volunteers (N=31)	MSI (N=73)
Involved firearm	61.3% (19)	49.3% (36)
Involved co-participant	29% (9)	49.3% (36)

These results are striking in light of important differences in group and individual offending. Acting in groups may encourage offending by diffusing responsibility.⁹⁵ Conversely, solo offending may concentrate a sense of greater

⁹³ Rountree Dissertation, *supra* note 10, at 57. Some offenses involved multiple weapons. The Texas study coded simply whether a gun was fired at the victim(s)

⁹⁴ *Id.* Vandiver, *supra* note 48, at 193, found a statistically significant relationship between the number of homicide victims in the capital offense and the likelihood of dropping appeals. Texas volunteers also appear to have this relationship. Rountree Dissertation, *supra* note 10, at 58-59.

Table IV.
Percent Volunteer Nationally and in Texas of Volunteers and Number of Victims

	United States	Texas
One victim	9.6% (78)	5.7% (23)
Two victims	17.7% (36)	10.9% (5)
Three or more victims	23.7% (9)	16.7% (3)

There are two problems with these measures, however. First, Vandiver and her colleagues looked at the number of "victims for whom the death sentence was imposed." *Id.* At least in Texas, the actual number of homicide victims may exceed the number for whom the death sentences was imposed. For example, Eliseo Moreno killed six people in the course of a single (if protracted) crime spree. However, he was tried and sentenced only for the murder of the police officer who was killed during this string of homicides. While including him in those volunteers with three or more victims increases the apparent significance of this statistic (largely because the numbers are so small), at the same time it highlights that we do not know the actual number of victims of the others executed. They too may have been convicted on the case for which it was easiest to obtain the death penalty, rather than the number of homicide victims related to the capital offense. In addition, other dynamics may be at work. For example, seven of the eight volunteers who killed more than one person in the course of committing their capital offense were IPD-volunteers. What appears to be an association between number of victims and a desire to hasten execution may reflect (in whole or in part) the uxoricide trajectory described above.

⁹⁵ Leanne Fiftal Alarida, Velmer S. Burton Jr., and Andy L. Hochstetler, *Group and solo robberies: Do accomplices shape criminal form?*, 37 J. CRIM. JUST. JUSTICE 1,1 (2009).

responsibility in the individual actor, both in the eyes of the actor and those around him. This greater responsibility may be linked to a conclusion that the individual offended for dispositional rather than situational reasons.⁹⁶ These prisoners may feel that they are more culpable for their crime than those who are able to diffuse responsibility onto another. Shame and guilt have been linked to an increased risk of suicide. These offenders may feel that they deserve their punishment and so ask for execution.⁹⁷

The finding about gun use is also provocative because it suggests processes of responsibility that are different from those predicted, namely that hastening execution would be connected to crimes that involved greater interpersonal violence. Instead, this finding suggests the possibility that the prevalence of gun deaths reflects more impulsive or intoxicated acts. Steven Morin told a friend that he did not intend to kill his victim—he had been in the middle of stealing her car when she confronted him—but “something came over him and the gun went off.”⁹⁸ Richard Foster described his gun homicide as an “accident” and “not intentional.”⁹⁹ This could construct greater regret and remorse.

At the same time, research on the social construction of blame also raises a host of questions. If an official imprimatur of bad character, i.e., the criminal conviction, informs individual self-assessment differently than simple knowledge of having engaged in illegal (but not officially punished) acts, then Nadler’s research suggests the possibility that individuals may attribute to themselves a greater intentionality if they see themselves as having poor moral character. Some may feel they were more reckless, more responsible, or deserved more punishment because of their bad character, as certified by the State.

C. Legal Structuring of Decisions to Hasten Execution

Prison suicide has temporal pattern, with a “very robust finding . . . that the early stages of custody show the highest rates of self-inflicted deaths in prisons.”¹⁰⁰ Only after about two months in detention does the risk of suicide subside.¹⁰¹ A British study of prisoners serving life sentences found that about half of suicides occurred within a year of conviction.¹⁰²

The Texas study found that executed volunteers generally expressed their desire for execution very early in the criminal process. The fact that many

⁹⁶ Robert S. Feldman and Fred P. Rosen, *Diffusion of Responsibility in Crime, Punishment, and Other Adversity*, 2 J. LAW & HUM. BEHAV. HUMAN BEHAVIOR 313, 318 (1978).

⁹⁷ See *Accounts*, *supra* note 1. Volunteers express a strong belief in the justice of their execution.

⁹⁸ Juan Ignacio Blanco, *Stephen Peter MORIN*, MURDERPEDIA, <http://murderpedia.org/male.M/ml/morin-stephen-peter.htm> (last visited Dec. 19, 2013).

⁹⁹ Rountree Dissertation, *supra* note 10, at 86; March 14, 2000 Order, at 3; David Carson, *Richard Foster*, TEXAS EXECUTION INFO. CENTER (Mar. 21, 2002), <http://txexecutions.org/reports/216.asp>.

¹⁰⁰ See Crighton, *supra* note 9, at 188.

¹⁰¹ *Id.* at 192.

¹⁰² See Borrill, *supra* note 9, at 33.7.

volunteers take crucial steps to hasten their execution before they even get to death row raises the concern that they are underestimating their ability to create a life worth living on death row. Psychological research on affective forecasting “consistently shows that people are poor predictors of their future well-being. Specifically, people overestimate the impact and duration of negative emotions in response to loss.”¹⁰³ This may explain why, at least in Texas, volunteers generally sought execution at trial or soon after conviction.

The law may intersect dangerously with this phenomenon by promoting early decisions to hasten execution. Legal changes in the mid-1990s coincide with dramatic changes in the length of death row incarceration for volunteers.

1. Beginning in 1994, Texas Permits Waiver of Initial Appeal

Prior to 1994, lawyers, courts, and clients generally believed that the direct appeal—the first appeal after trial—could not be waived. This changed when the TCCA considered George Lott’s case.

[Lott was accused of killing two and seriously wounding three others.] Police reports from the scene said the father was sitting quietly in the spectator section of a fourth floor courtroom when he suddenly stood up, drew a black, 9-milimeter handgun and began randomly firing at judges on the bench. When the shooting ended, the man had killed a Tarrant County prosecutor and a Dallas attorney, and seriously wounded another prosecutor and two judges before slipping down a back stairwell and fleeing the building.¹⁰⁴

A former attorney, Lott represented himself at trial. He contested his guilt, presenting a case that the eyewitnesses testifying against him were mistaken and that his inculpatory post-crime television interview simply represented an opportunistic effort to air his many quarrels with the judicial system by falsely taking responsibility for the crime. Unpersuaded, the jury convicted him and then sentenced him to death.¹⁰⁵

At the conclusion of trial, Lott indicated he would continue to represent

¹⁰³ Jodi Halpern and Robert M. Arnold, *Affective Forecasting: An Unrecognized Challenge in Making Serious Health Decisions*, 23 J. GEN. INT. MED. 1708, 1708 (2008). See generally William E. Haley et al., *Family Issues in End-of-life Decision Making and End-of-life Care*, 46 AM. BEH. SCIENTIST 284 (2002) (discussing expected coping durations for negative emotions resulting from losing a family member.) See also Jeremy A. Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L. J. 155, 192-201 (2005) (citing evidence of death-sentenced prisoners’ adaptation to death row). Of course, the fact that many volunteers had previously been incarcerated also raises questions whether that prior experience made them particularly pessimistic about their ability to create a life worth living on death row.

¹⁰⁴ *A Killer in the Lobby*, SCRIBD.COM, <http://www.scribd.com/doc/13994385/A-Killer-in-the-Lobby> (last visited September 20, 2013).

¹⁰⁵ See generally, *State v. George Lott*, No. 0481523D (Tarrant Cnty. Ct.); Juan Ignacio Blanco, *George Douglas LOTT*, MURDERPEDIA, <http://murderpedia.org/male.L/11/lott-george-douglas.htm> (last visited Dec. 20, 2013).

himself on appeal. The TCCA explained the subsequent sequence of events:

On June 1, 1993, appellant filed a motion for an extension of time to file the statement of facts and requisite affidavit. Appellant's motion was granted on June 4, 1993, and the [transcript of the trial testimony] was filed on July 15, 1993. Appellant's brief was due to be filed on or before August 16, 1993. On September 10, 1993, we advised appellant that his brief had been due on August 16, and directed him to either file his brief or seek an extension of time. Having received neither a brief nor a request for an extension of time, on October 4, 1993, we ordered appellant to file his brief on or before January 14, 1994. We also informed appellant that no request for an extension of time beyond that date would be entertained, and that in the event no brief was filed on or before that date, the cause would be submitted for summary decision without the benefit of briefs. Appellant has never filed a brief.¹⁰⁶

In other words, Lott indicated he wanted to appeal and took the necessary preparatory steps. However, he failed to file a brief, even after the TCCA ordered him to file a brief. The TCCA did not hold a hearing to find out why he had not filed any briefs, reasoning that had Lott been represented by counsel, a hearing would have been required.¹⁰⁷ Since he represented himself, none was.

The TCCA then found that:

Appellant has not filed a brief on his behalf in this appeal. We therefore submitted the case without the benefit of briefs and, in the interest of justice, reviewed the entire record. Having found no unassigned fundamental error, we affirm the judgment of the trial court.¹⁰⁸

¹⁰⁶ Lott v. State, 874 S.W.2d 687, 688 n.1 (Tex. Crim. App. 1994).

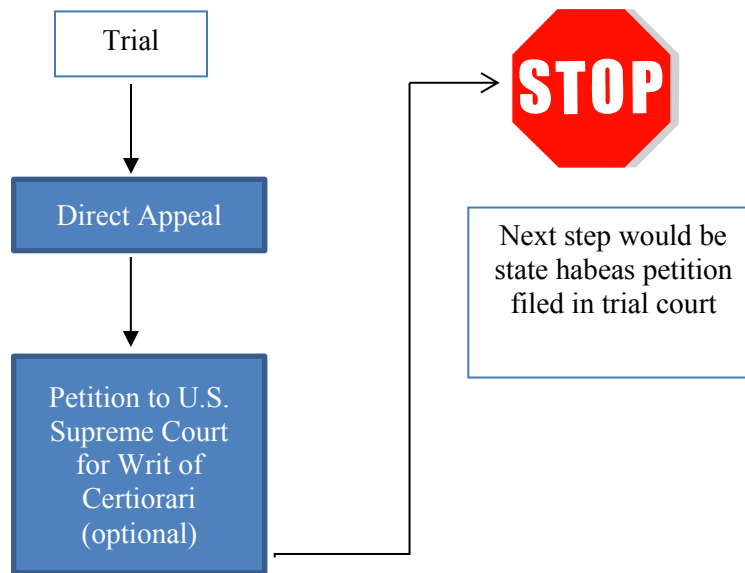
¹⁰⁷ *Id.* at 688 n.2.

¹⁰⁸ *Id.* at 688 (footnotes omitted). The TCCA's resolution of Lott's situation was noteworthy in at least three respects. First, the TCCA invented a new legal category—"fundamental error"—that is undefined and used in no other legal context. Therefore, it is not clear what the TCCA is looking for as it reviews the trial record for error. Second, it created a new category of non-adversarial legal review. The law already provided for a quasi-non-adversarial mechanism to review direct appeal cases that appear to have no viable legal claims. *See Anders v. California*, 386 U.S. 738, 744 (1967). In those cases, a brief must be filed that identifies possible legal errors, and provides legal argument why the law is clear that those errors do not undermine the reliability of the verdict. The appellate court considers this briefing in deciding whether to affirm the conviction and sentence. In Lott's case, the TCCA did not even have the benefit of this minimal briefing. Finally, and perhaps most disturbingly, by not requiring Lott to account for his failure to file a brief, the TCCA had no way—at least reflected in its court files—to know whether Lott may have been either mentally or physically incapable of filing an appeal. The TCCA file contains no indication that Lott wanted to drop his appeals other than his non-responsiveness to the Court's correspondence. On the contrary, it documents his efforts to prepare the record for an appeal.

Before *Lott*, attorneys and prisoners believed that where the Texas statute said that direct appeal was “automatic” it meant that that briefing at that stage could not be waived. After *Lott* it was clear that was not the case.¹⁰⁹

After the TCCA permitted George Lott to waive all adversarial testing of this, convictions, sentences, and patterns of volunteering changed. Previously, appeals generally followed this sequence:

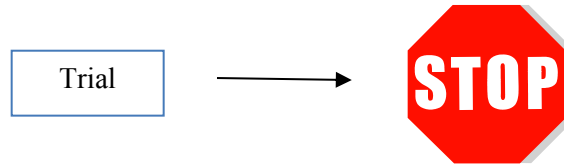
Figure 1.
Pre-*Lott* Appeals Process



¹⁰⁹ If there were any doubts of the TCCA’s willingness to decide death penalty cases without the benefit of briefing, they were dispelled in Christopher Jay Swift’s case. During the sentencing phase of his trial, Swift refused to permit his lawyers to present mitigating evidence, i.e., information intended to persuade the jury to sentence him to life rather than death. Swift explained to the court he wanted the death penalty because voices in his head “haunt me daily, and I feel that, you know, death is going to be the only thing that takes them away.” Transcript of Record at 35:34, *State v. Swift* (2006) (No. F-2003-1720-C). Swift’s direct appeal lawyer filed a substantial brief arguing that imposing the death penalty under these circumstances violated the Constitution. After Swift was granted the right to proceed pro se, the TCCA “unfiled” or removed from the record of the case the brief filed by counsel, and did not consider it in affirming Swift’s conviction and sentence. *Swift v. State*, 2006 WL 2696266 (Tex. Crim. App. 2006). See Rountree Dissertation, *supra* note 10, at 31-32.

After *Lott*, adversarial proceedings could end at trial.

Figure 2.
Post-*Lott* Appeals Process



Prior to *Lott*, the overwhelming majority of volunteers waived their state habeas review, but after *Lott*, volunteers acted much earlier at every legal juncture.

Table VI.
Stage at Which Volunteers Waived Adversarial Review Pre- and Post-*Lott*

First non-adversarial legal stage	Pre-<i>Lott</i>	Post-<i>Lott</i>
Trial	0	2
Direct appeal	0	5
State habeas	12	5
Federal habeas (district court)	1	2
Federal habeas (5th Circuit Court of Appeals)	2	1

Because more volunteers waived earlier in the process, fewer convictions and sentences were subjected to adversarial scrutiny. While *Lott* does not necessarily account for the substantial increase in defendants who took some step to increase the possibility of execution at trial, it introduced more post-trial variation on when volunteers act and possibly on when they desire to hasten execution.¹¹⁰ In addition, it enabled fewer adversarial proceedings. These

¹¹⁰ The differences in trial-level desire for the death penalty may be an artifact of the formalization of the legal process. Lawyers may now be putting this information on the record where they previously did so informally.

figures suggest that when they are allowed to, some volunteers will waive even a single legal review of their trial.

The dramatic difference in the time spent on death row also suggests the impact of *Lott*, at least in part.

Figure 3.
Time on Death Row for Volunteers Convicted Prior to *Lott*.

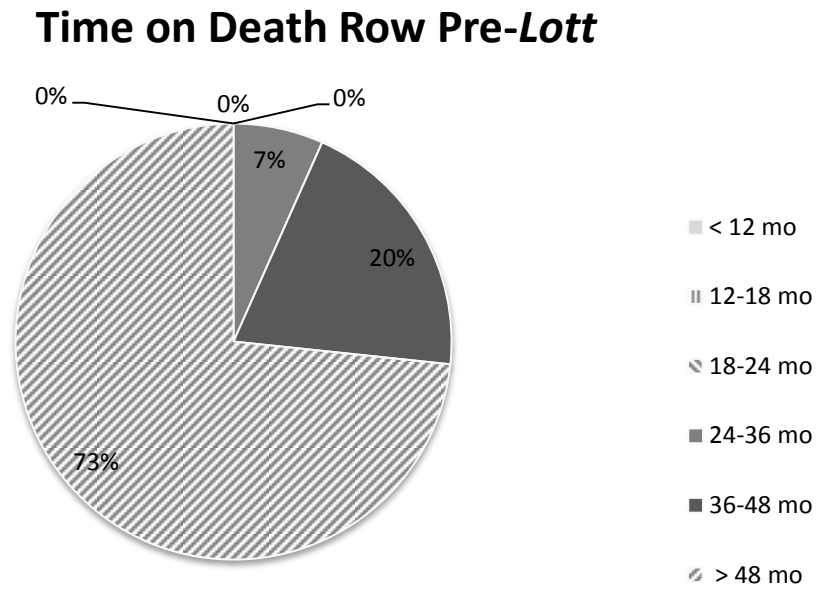
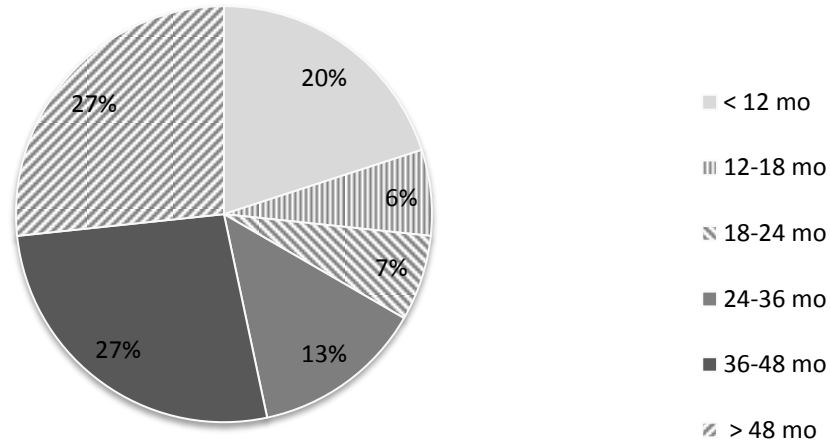


Figure 4
Time on Death Row for Volunteers Convicted After *Lott*

Time on Death Row Post-*Lott*



These figures show that the proportion of time on death row has essentially been reversed. Where 75% of volunteers prior to *Lott* spent more than 48 months on death row, after *Lott*, only 27% did.

2. Introduction in 1995 of Formal Decisions to Waive Counsel Immediately After Trial

In addition to the impact of the *Lott* decision, changes in when and how prisoners decide whether to waive habeas proceedings may also affect how soon after sentencing volunteers may be executed. Prior to 1995, Texas death-sentenced prisoners were not entitled to appointed counsel in state habeas proceedings. When state judges set an execution date after the TCCA affirmed the prisoner's conviction and sentence, volunteers could simply accept the post-direct appeal execution date and decline further proceedings.

In overhauling the statutory regime governing state habeas litigation in 1995, Texas both provided counsel to indigent death-sentenced prisoners in state habeas and created a formal juncture where the decision to be represented by counsel (and impliedly pursue appeals) is made. The Texas Code of Criminal Procedure Article 11.071, which governs only state habeas proceedings, provides in relevant part:

If a defendant is sentenced to death the convicting court, **immediately after judgment is entered** under Article 42.01, shall determine if the defendant is indigent and, if so, whether the defendant desires

appointment of counsel for the purpose of a writ of habeas corpus.¹¹¹

In other words, Art. 11.071 established a formal mechanism to ascertain whether the prisoner desired to represent themselves and proceed *pro se*. Further, prisoners are asked whether they desire representation immediately after judgment is formally entered. If they do not, they are permitted to represent themselves and then take no further action on their own behalf.

This has both social psychological and legal implications. Among those living with terminal illness, researchers have found that desires to hasten death are transitory.¹¹² In addition, they are often occasioned by particularly discouraging events.¹¹³

We saw that in MS2, almost a quarter made formal efforts to end their appeals at some point. While the evidence of wavering among volunteers is not clear, many condemned prisoners plainly struggle with this decision—and decide to continue living. Dismantling structural obstacles to desires to hasten death may increase the possibility that some who experience transitory desires to hasten death, which is characteristic of desires to hasten death among those with terminal illness, will have fewer opportunities to change their mind. Given how early these prisoners took steps to waive their appeals—Aaron Foust arrived on death row on May 19, 1998, and by June 10, 1999, he had asked to abandon his appeal¹¹⁴—giving them time to acclimate to death row before they make final decisions to hasten execution may decrease execution-hastening.

Of course, this raises the question whether there is anything wrong with facilitating executions of the apparently willing. I suggest that there is. Setting aside moral concerns about the death penalty, it is troubling that the current state of the law permits the execution of an individual without any meaningful (i.e., adversarial) appellate review. This concern is particularly weighty when

¹¹¹ Tex. Code Crim. Proc. Ann. art. 11.071 §2(b) (emphasis added).

¹¹² Peter L. Hudson et al., *Desire for Hastened Death in Patients with Advanced Disease and the Evidence Base of Clinical Guidelines: A Systematic Review*, 20 PALLIATIVE MED. 693, 694 (2006). See also Kenneth E. Covinsky et al., *Communication and Decision-Making in Seriously Ill Patients: Findings of the SUPPORT Project*, 48 J. AM. GERIATRICS SOC. S187, S187-93 (2000) (reporting transient wishes to decline CPR among those with serious illness).

¹¹³ Sissel Johansen, Jacob Chr. Hølen, Stein Kaasa, Stein Kaasa, Jon Håvard Loge, and Lars Johan Materstvedt, *Attitudes Towards, and Wishes for, Euthanasia in Advanced Cancer Patients at a Palliative Medicine Unit*, 19 PALLIATIVE MED. 454, 457 (2005); Rinat Nissim, Lucia Gagliese, and Gary Rodin, *The Desire for Hastened Death in Individuals with Advanced Cancer: A Longitudinal Qualitative Study*, 69 SOC. SCI. AND MED. 165, 169 (2009). Some patients report that their desire to hasten death “was most profound at the time of diagnosis. For others, it was triggered by waiting for medical appointments, by receiving disappointing test results, or by the exacerbation of physical symptoms.” Nissim, Gagliese & Rodin at 169. This is consistent with suicide research findings that stressful life events increase risk of decisions to hasten death. Matthew K. Nock, Guilherme Borges, Evelyn J. Bromet, Christine B. Cha, Ronald C. Kessler, and Sing Lee, *Suicide and Suicidal Behavior*, 30 EPIDEMIOLOGIC REVIEWS 133, 145 (2008).

¹¹⁴ Letter from Aaron C. Foust to James K. Walker, Judge (undated, filed June 10, 1998), State v. Aaron Christopher Foust, (Tarrant Cnty. Ct. 1998) (No. 73130); *Offender Information: Foust, Aaron Christopher*, TEXAS DEPARTMENT OF CRIMINAL JUST. (last visited Jan. 29, 2014), http://www.tdcj.state.tx.us/stat/dr_info/foustaaron.html.

evidence presented during the putatively adversarial proceeding—the trial—is limited by someone actively seeking the death penalty for himself. This calls into question whether the death penalty is in fact being meted out to the “worst of the worst.”

3. The Impact of Prison Conditions

The relative brevity of time on death row complicates our understanding of the role of prison conditions in driving desires for expedited execution. That said, Texas offers a natural experiment on the effect of prison conditions and volunteering. Until 1999, the men’s death row was housed at the Ellis Unit in Huntsville, Texas, one of the oldest prisons operated by the Texas Department of Criminal Justice (TDCJ). After a Thanksgiving 1998 escape attempt by a small group of death row prisoners, TDCJ decided to move¹¹⁵ the men’s death row to Polunsky,¹¹⁶ a newer facility in Livingston, Texas. Over the course of 1999 TDCJ moved death row to Polunsky to a building in the Polunsky complex that was designed to hold difficult or dangerous prisoners (such as gang members).

The architecture does much of the work of controlling the prisoners as they live in conditions of what is generally called “administrative segregation,” the contemporary version of solitary confinement.¹¹⁷ All prisoners are housed in single cells with solid doors. The only time a prisoner leaves the pod is to meet outside visitors in a neighboring building. While they can communicate to prisoners in nearby cells by yelling or passing notes and small items on a string slid from cell to cell, they are otherwise isolated from other prisoners in every aspect of their lives. They eat alone, recreate alone, and worship alone. Depending on their disciplinary record, they are permitted from three to twelve hours per week of solitary out-of-cell time in larger recreation cell and can have from two to eight hours per month of non-contact social visits with people from outside the prison. They have no access to television, and only the best behaved prisoners can own a radio. Since moving to administrative segregation, death row prisoners participate in no educational, work, or other structured activities of any kind. This is a stark contrast to the conditions at Ellis, where death row prisoners engaged in a range of activities, including working in the garment

¹¹⁵ TDCJ denies the escape attempt precipitated the move, citing instead the fact that the death row population was growing larger than Ellis’s death row could house. *Death Row Move Planned*, VICTORIA ADVOCATE, May 18, 1999, at 4A, available at http://news.google.com/newspapers?nid=ZysSsiWj_g4C&dat=19990518&printsec=frontpage&hl=en (last visited Dec. 16, 2013, 11:52 P12:26 M).

¹¹⁶ This facility was originally named Terrell, but was subsequently renamed Polunsky after Charles Terrell objected to having a death row on a prison bearing his name. Jim Yardley, *Of All Places: Texas Wavering on Death Penalty*, N.Y. TIMES, August 19, 2001, <http://www.nytimes.com/2001/08/19/weekinreview/the-nation-of-all-places-texas-wavering-on-death-penalty.html?pagewanted=all&src=pm>.

¹¹⁷ CORR. INSTS DIV., TEX. DEP’T. OF CRIMINAL JUSTICE, DEATH ROW PLAN (2004), available at <http://www.fordarlieroutier.org/RelatedLinks/DRplan2004.pdf>.

factory, making handicrafts, group recreation, and congregate activities like religious worship and Bible study.¹¹⁸

Certainly more volunteers and death row prisoners generally complain about the daily stress of life on death row at Polunsky as compared to Ellis. While my data are insufficient to distinguish between volunteers and non-volunteers with respect to prison stressors, the literature suggests that change in institution toward a more highly segregated environment could contribute to higher rates of volunteering.¹¹⁹

Based on annual tallies of Texas's death row population,¹²⁰ the Texas Volunteer Study found that, starting in 1982—the year of the first volunteer—1.06% of those executed while at Ellis were volunteers. Of those arriving at Ellis between January 1, 1982 and January 1, 1999, 3.28% were volunteers. Measuring the Polunsky period as beginning on January 1, 2000, of those executed between January 1, 2000 and January 1, 2011, 3.6% were volunteers. Of those arriving at Polunsky between January 1, 2000 and January 1, 2011, 4.39% were volunteers. Not included in the Polunsky statistics are the three prisoners (D. Martinez, Foster, and Anderson) who had lived on Ellis but decided to hasten execution after the move to Polunsky.

Table VII.
Comparison of Percentage of Volunteers of Those Executed and Received While at Ellis and Polunsky

	Percent Volunteer of those executed at Facility	Percent Volunteer of those received at Facility
Ellis	1.06%	3.28%
Polunsky	3.6%	4.39%

In other words, there is some support for the hypothesis that increased segregation has increased the proportion of prisoners seeking to hasten execution.

¹¹⁸ The author learned of these conditions by talking to prisoners on death row. See, e.g., ROBERT PERKINSON, *TEXAS TOUGH: THE RISE OF AMERICA'S PRISON EMPIRE* (1st ed. 2010).

¹¹⁹ Prisoners housed in more secure, segregated, or single cells have higher rates of suicide. See, e.g., Fazel, *supra* note 9, at 1724; Lester, *supra* note 9; Liebling, *supra* note 9, at 325; Tartaro, *supra* note 9, at 31-32. The administrative segregation conditions in which Texas death row prisoners now live have been linked to heightened anxiety and paranoia, hallucinations, self-mutilation, suicidal ideation and suicide attempts, hopelessness, and aggression. Craig Haney, *Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement*, 49 *CRIME & DELINQUENCY* 124, 130 (2003). In addition, people with certain psychological disorders, particularly those related to impulse control problems, brain damage, and personality disorders, appear to be at particular risk. *Madrid v. Gomez*, 889 F. Supp. 1146, 1216 N.D. Cal. (1995). These are among the problems Cunningham and Vigen, *supra*, note 47, identified death row prisoners as having.

¹²⁰ David Carson, *Year-by-Year Death Row Statistics*, TEXAS EXECUTION INFO. CENTER, <http://www.txexecutions.org/stats.asp> (last visited Sept. 22, 2013). Unfortunately for comparison purposes, these data include the approximately 17 women sentenced to death. These women live on a separate death row in Gatesville, Texas.

The significance of this statistic, however, should not be overstated as other factors could confound this finding. As noted above, Texas law changed to permit earlier waivers and create an earlier point at which prisoners decided whether to abandon appeals. In addition, while happening prior to the move to Polunsky, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) threatened to sharply curtail federal court review of the prisoners' state convictions.¹²¹ While not all commentators agree that the AEDPA has in fact had such a dramatic impact,¹²² at the time the AEDPA passed many thought it would. Further, Texas was particularly active in executing prisoners in the late 1990s, peaking in 2000.¹²³ Even though executions peaked prior to or around the time of the move to Polunsky in 1999, prisoners may well have been reacting to these increases in executions, whether because they had no reason to believe rates of execution would drop or because they had only a generalized sense that more people were being executed.

Qualitative data further points to a complex interaction between prison conditions and desires for execution. One interviewee discussed the stigma and physical threat risked by those who talked about waiving their appeals. The volunteer may become at best socially marginalized on death row, and at worst, victimized since he is seen as "weak" and therefore "prey."¹²⁴ While this may discourage other prisoners from pursuing the same path, prisoners who enter prison committed to hastening execution may not be able to integrate into death row because of the stigma associated with their desire to abandon appeals.¹²⁵ At the same time, Polunsky's segregation could increase rates of hastening execution since the cost of marginalization decreases with the diminished opportunities to interact socially and segregation lowers the chances of victimization.

Texas's men's death row has enough of a group culture to create and enforce norms about hastening execution. This culture may also moderate some of the effects of living in administrative segregation. Unlike some administrative segregation regimes, they do have some ability to communicate with one another by shouting cell to cell or from the dayroom to a facing cell. Correctional

¹²¹ Cornell Univ. Law Sch., *Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)*, LEGAL INFORMATION INSTITUTE, http://www.law.cornell.edu/wex/antiterrorism_and_effective_death_penalty_act_of_1996_aedpa.

¹²² John H. Blume, *AEDPA: The 'Hype' and the 'Bite'*, 91 CORNELL L. REV. 259, 297 (2006).

¹²³ Between 1989-1994, Texas executed 56 prisoners; between 1995-2000, 154 prisoners, and between 2001-2006, 140 prisoners. Carson, *supra* note 120; *see also Executed Offenders*, TEXAS DEPARTMENT OF CRIMINAL JUST. (Jan. 23, 2014), http://www.tdcj.state.tx.us/stat/dr_executed_offenders.html [hereinafter *Executed Offenders*]. Executions hit a high watermark of 40 in one year in 2000. Carson, *supra* note 120.

¹²⁴ Interview with Informant 93 at 3, 8.

¹²⁵ Alexander Martinez referred obliquely to the social risk of hastening execution in his final statement: "And thanks for the friends at the Polunsky Unit that helped me get through this that didn't agree with my decision—and still gave me their friendship." Texas Department of Criminal Justice, Death Row Information and Statistics, Offender Information, http://www.tdcj.state.tx.us/stat/dr_info/martinezalexanderlast.html (last accessed Sept. 22, 2013).

officers would sometimes carry legal materials from one cell to another, and the prison has conjoined legal visit cages that keep two prisoners separate but permit them to discuss their legal cases.¹²⁶

Informant 93 acknowledged the new prison imposed limits on social interaction, but prisoners still eke out some meaningful group activity:

Polunsky, it was hard to do a lot of things together. But what we would try to do, we would read a book. A couple of us would talk about it. Just to try to get a better understanding. We liked history. We tried to pay attention to politics down there. We used to love listening to Amy Goodman on Democracy Now. And we would go out and talk about it. We'd try to come together. Those type of things. Talk about the death penalty, any changes in the death penalty.¹²⁷

In addition, the men's death row engaged in some group protest activities.

Conditions were just so bad, you feel like, they made you come together. Because the condition was just that bad. You have people come together, want to protest. What we would do as a protest, we would not go to rec. Everybody would decide, we're not going to rec. That's what the opposite like, [inaudible] have to do the work. But still, this was our way of showing solidarity. We might refuse a tray. We're not going eat off the food cart. Just trying to show some solidarity. When someone gets executed, we give a moment of silence. We don't eat off the food cart that day, we don't talk. We try to remember the person that was being executed. Those are moments of solidarity for us.¹²⁸

Restrictions on core concerns like visits or food created opportunities for demonstrations of solidarity that overrode racist and other group affiliations.

Q: You said too that everybody was aware that there are different cliques and groups, but when there is a serious moment, everyone comes together to get what needs to be done.

A: Yes. For example, if the food comes on the wing and it's dehydrated. Just sitting there and plugged up with all this heat on it. By the time you get it, everything is dried out. No matter who's on the wing, no one wanted that food. And we knew by the rules that they were not allowed to serve us that. So we would all refuse the tray. It might start with me. And I might say, this food is dehydrated. Don't take those trays. Make them take it back. And it doesn't make a difference if it's AB [Aryan Brotherhood] over there or whatever clique

¹²⁶ Interview with Informant 93 at 17.

¹²⁷ *Id.*

¹²⁸ *Id.*

it is. Once they hear that, we don't want that, take that back, bring us something else. Then that's when we come together.¹²⁹

While the literature on isolation confinement suggests a connection to elevated suicide risk, the Texas data do not draw a strong connection between conditions of confinement and hastening execution. This is consistent with Blume's finding.¹³⁰ While the percent hastening execution increased slightly at the Polunsky Unit, the strength of this finding is tempered by changes in the law and increases in executions overall. Interview data explain how prison culture could act as a brake on hastening execution by stigmatizing desires to hasten death. At the same time, it suggests isolation confinement could increase the possibility of hastening execution through dynamics other than increased suicidality. Because prisoners have less interaction with each other, taking actions that mark the volunteer as "weak" carry less risk. It may also inhibit a contagion effect because people have less contact with each other and, therefore, have less opportunity to talk about waiving appeals.

The very early point at which most volunteers articulate and often act upon their desire to hasten execution recasts the role of prison conditions. Conditions may not play as prominent a role in initiating desires to hasten execution, though they may harden prisoners' desire to stay the course in waiving appeals.

V. CONCLUSION

The law, with its focus on mental competence to understand the consequences of decisions to waive appeals, and policy-oriented arguments regarding mental illness, prison conditions, and autonomy simplify the complex issues that emerged in the Texas Volunteer Study. The mix of a range of psychological and social processes including those relating to hopelessness, shame, and blame are not readily captured in the mental illness paradigm. At the same time, the autonomy arguments do not acknowledge the difficulty in identifying free action for individuals facing death and immersed in these complicated psychosocial dynamics, nor do they acknowledge the State's interest in fair and constitutional death sentences, something only ensured through adversarial testing of the conviction and sentence.¹³¹ The Texas Volunteer Study

¹²⁹ *Id.* at 18.

¹³⁰ Blume, *supra* note 2, at 964-67.

¹³¹ Those living with terminal illness, by contrast, are highly restricted in their ability to obtain assistance in ending their lives. The Supreme Court in *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997), held the State had legitimate interests in prohibiting assistance to those with terminal illness. The Death With Dignity Acts passed in Oregon and Washington restrict the availability of physician-assisted suicide solely to individuals who, two doctors attest, have "an incurable and irreversible disease that has been medically confirmed and will, within reasonable medical judgment, produce death within six months." OR. REV. STAT. § 127.800 § 1.01(12) (2013), § 127.805 § 2.01 (2013); WASH. REV. CODE § 70.245.010(13) (2013), § 70.245.020 (2009). Few of

also reveals a dismaying possibility that the legal system itself may be discouraging scrutiny of these cases by creating opportunities to waive appeals early in the process when prisoners may be most vulnerable to desires to die. While this paper addresses the volunteer and proposes directions for research, the findings regarding dynamics of hopelessness and culpability, and the influence criminal justice system structures, may well be relevant to the experiences of the non-death-sentenced prisoner and should be integrated into research regarding suicide in custody.

the volunteers in the Texas Volunteer Study would have faced execution within six months absent of their appeal waivers. In addition, these states prohibit assistance to any terminally ill individual who suffers from “a psychiatric or psychological disorder or depression causing impaired judgment.” OR. REV. STAT. 127.825 § 3.03 (2013); WASH. REV. CODE § 70.245.060 (2009). This is a higher standard for mental competence than used in the case of volunteers.

APPENDIX A. METHODOLOGICAL APPENDIX

Identifying the subjects of this study was an unexpected challenge. I first searched the Death Penalty Information Center (DPIC) Executions Database¹³² for prisoners executed by the State of Texas whom DPIC coded as “volunteers.” DPIC codes as “volunteers” those prisoners who waive available legal appeals. It excludes, therefore, prisoners who pursue legal remedies, but do not seek clemency. It also excludes those prisoners who abandoned their appeals at one point, but then changed their minds, regardless of whether the courts permitted them to resume their appeals.¹³³

I then reviewed court files and consulted with longtime Texas death penalty attorneys to confirm these individuals indeed met my criteria for volunteers. I also asked informants whether they were aware of any other condemned prisoners who sought to waive their appeals. A few identified some who had mentioned it or who had waived one stage of proceedings, only to pick them up later. Newspaper reports sometimes provided leads. In covering the execution of one volunteer, they might mention others as historical background. Case citations would sometimes signal a prisoner’s decision to abandon appeals. In general, however, legal database searches of court opinions in Texas were poor sources of information regarding volunteers. As discussed in greater detail below, many abandoned their appeals in state habeas proceedings. Any orders from the trial-level courts interacting with the prisoner would generally not be included in Westlaw, the legal database I used. Until 1995, these decisions were not even reviewed by the TCCA. Even now, when the TCCA does review these decisions, it issues one or two page orders affirming the trial court’s factual findings and legal conclusions about the waiver of appeals. Neither these orders nor the trial courts’ rulings are generally reported in Westlaw. Further, whether a prisoner forfeited a stage of review and then managed to resume his appeals may not be explicitly noted in any opinion or order submitted to electronic legal research databases.

Based on my criteria—that the prisoner succeeded in waiving his conventional course of appeals and was executed without resuming those appeals—I eliminated one prisoner listed by DPIC (Peter Miniell) because, as mentioned above, this man decided against “successor” litigation, which is not routinely pursued by Texas death-sentenced prisoners. I ultimately included two individuals, Danielle Simpson and Robert Streetman, apparently excluded by DPIC because they tried at some juncture to reinstate their appeals. I considered it appropriate to include them in this study because their wavering appears to have occurred only after last minute intervention of new lawyers specialized in

¹³² DEATH PENALTY INFO. CENTER, <http://deathpenaltyinfo.org/executions> (last visited Dec. 19, 2013).

¹³³ Vandiver et al., *supra* note 48.

death penalty litigation. These lawyers are generally taught to oppose client efforts to waive appeals.¹³⁴ In addition, what the prisoners ultimately wanted is hard to discern in the heat of litigation under the pressure of an execution date.

Through the NAACP Legal Defense Fund publication “Death Row USA” and professional networks, I also identified two other prisoners (Richard Foster and Robert Anderson) who abandoned their appeals, but were not listed as “volunteers” in the DPIC execution database. A complete list of my subject population, as well as of my comparison groups, is provided in the Appendix. Based on this research, I concluded 31 prisoners had been executed by the State of Texas after abandoning their appeals.

Once I identified the prisoner as a subject, I requested the file from either the Texas State Library and Archives Commission (Archives) or the TCCA. Those files had to be reviewed on-site. This is not a perfect system. At least two cases appear not to have been recorded, making them unfindable. In Jeffrey Barney’s case, the TCCA listed a cause number for a habeas action, but appears to have no file associated with it. (I ultimately examined Mr. Barney’s file in the trial court.) According to a federal court opinion, Charles Rumbaugh filed a habeas action to stave off next-friend litigation, but the TCCA had no record of it. James Smith’s file appears to have been lost. (I was able to piece together the file from the Texas Resource Center documents at the Dolph Briscoe Center for American History and next friend’s counsel’s file.) Fortunately, the more recent case files are more systematically maintained.

In reviewing the files, I took detailed, often verbatim, notes. Depending on the complexity of the case (often associated with the age of the case), my summaries ranged from three to forty-four single-spaced pages. Occasionally, I made copies of particular proceedings. I did not read carefully every document in every file, but I looked at every loose page in the file. In addition, I read certain documents that regularly yielded useful information. If any of those documents suggested anything of interest in another part of the file, I would read that other part of the file.

More specifically, in examining the court file, I read five basic sets of documents. I reviewed the docket sheet that logs all trial events. This document alerted me to unusual events, as well as the pedestrian. Through docket sheets, I learned of James Smith’s suicide and escape attempts during trial and that “Defendant [Robert Atworth] sentenced to Death at 7:10 pm. Defendant laughed during sentencing”.¹³⁵ I was particularly attentive to any remarks involving the defendant. Notes that the defendant testified or made requests in the courtroom sometimes reflected efforts by the defendant to, e.g., proceed pro se or circumscribe the presentation of evidence.

Another critical source of information was the “Clerk’s Record,” a compilation of all the official court documents filed at trial. In addition to containing the docket sheets, the Clerk’s Record (CR) includes all the motions

¹³⁴ Interview with Texas Volunteer Study Informant 20 at 4.

¹³⁵ Clerk Rec. at 7.

filed in the court and the court's orders. Sometimes the CR contains mental health reports. I took very careful notes on these reports not only to gain some appreciation of how the defendant appeared to a mental health evaluator at the time, but also to get a more general sense of what the defendant was like outside the more constraining court proceedings. The CR would also sometimes contain handwritten motions and letters from the defendant. These could provide some clues about the defendant and what he wanted out of the trial. I would also review the index of documents in the CR to have some sense of how aggressively litigated the case was. I ultimately decided not to code for this, concluding that the fact that a case was not aggressively litigated did not reliably indicate that the defendant did not want an aggressive defense. It might have simply reflected poor performance by counsel.

I also looked at the appellate briefs to get a sense of the type of crime that had been committed and any unusual events at trial. In addition, I used the State's brief to corroborate my understanding of the defendant's criminal history since that was usually an important part of its statement of facts of the case.

I scanned transcripts of court proceedings (the "Reporter's Record" or RR) for instances when the defendant spoke or testified. I would read more closely pretrial proceedings because, as these are not conducted in the presence of the jury, judges seemed more likely to address the defendant directly, if only to ask, e.g., whether he had any complaints about his representation. Defendants would sometimes use this time to raise grievances with or make requests to the judge. In addition, I read mental health testimony in both the guilt/innocence and punishment phases of the case, as well as the punishment phase case, particularly any testimony from close friends or family members. I scanned trial exhibits to see whether they contained any writings by the defendant. If the file contained documents regarding mental competence at any stage, I read those documents closely.

A surprisingly rich source of data came from a manila folder contained in almost every file. The folder would have the case number handwritten vertically on the front flap. This folder contained correspondence between the court reporters, lawyers, and the court regarding extensions of time. I often found correspondence from volunteers in this file asking for appeals to be halted. (Christopher Jay Swift was sufficiently prolific to have an entire manila folder for his correspondence.)

In addition to noting the substantively interesting contents of the documents, I created a timeline of the case based on these documents. This timeline included information such as the date of the offense, the date of trial, the periods of jury deliberations, filing of appellate briefs and opinions, court orders, correspondence from the prisoner, any competency or waiver court proceedings, execution date, etc. I also noted the names of individuals who might have information about the prisoner.

Where I had reason to believe the Archives or TCCA files did not reflect all the litigation surrounding the waiver,¹³⁶ I examined files maintained by the trial court and accessible to me, but I did not review all trial court records in each case. When I learned, *e.g.*, that Richard Beavers had undergone some kind of competency evaluation, I went to Harris County to review that file. (I would learn of these events through interviews and/or media coverage.)

I reviewed portions of the court files for MS2, following a protocol substantially similar to that followed with the subject population. The main difference in the comparison is that I generally did not review trial transcripts for MS2. Since I had identified the main variables of interest and since information on those did not generally require reviewing the trial transcript, I did not think that was necessary. Also, since these individuals had gone through more appeals, more information from their trials was available in the appellate briefs and post-conviction habeas petitions. Therefore, for this group, I reviewed the docket sheet, the CR, the appellate briefs, state post-conviction petitions, the manila court correspondence file, and all loose documents in the file. In these documents, I was looking for information on prior criminal history, experiences with incarceration, descriptions of the offense, any information regarding mental illness (including depression), suicidality, childhood neglect or trauma, juvenile delinquency, and any efforts to waive appeals.

My access to federal court files was considerably more limited because of the relative inaccessibility in the federal archives.¹³⁷ For federal court proceedings surrounding volunteers, I either obtained transcripts of the federal court hearing, reviewed the court orders disposing of the prisoners' request, or read media coverage.

For each member of the subject population, I also conducted LEXIS-NEXIS news searches usually with their names and "Texas" and sometimes "murder" and/or "capital," depending on the results. In addition, for both the subject population and the comparison group, I conducted Google searches by the prisoner's name and "Texas Death Row" and "Texas execution." I relied heavily on two sites that routinely aggregated TDCJ information, news stories and press releases from the Attorney General's Office—txexecutions.org¹³⁸ and clarkprosecutor.org.¹³⁹ In addition, I used TDCJ's website on "Executed Offenders"¹⁴⁰ and Bill Crawford's *Texas Death Row*,¹⁴¹ which compiles certain public information on executed Texas prisoners. Most of Crawford's information repeats the information available on the TDCJ website, but it fills

¹³⁶ Prior to 1995, for example, records regarding waiving appeals would not necessarily be in the TCCA files.

¹³⁷ Fortunately for this project, and as discussed below, the overwhelming majority of these prisoners sought to hasten their executions while in state court.

¹³⁸ TEXAS EXECUTION INFO. CENTER, <http://txexecutions.org/> (last visited Dec. 19, 2013).

¹³⁹ PROSECUTING ATTORNEY: CLARK COUNTY INDIANA – FOURTH JUDICIAL CIRCUIT, <http://clarkprosecutor.org/> (last visited Dec. 19, 2013).

¹⁴⁰ *Executed Offenders*, *supra* note 123.

¹⁴¹ BILL CRAWFORD, *TEXAS DEATH ROW: EXECUTIONS IN THE MODERN ERA* (2006).

certain gaps, including, for example, written final statements. The TDCJ site and Crawford's book, which is based on TDCJ information, is not without mistakes and omissions. If the sources disagreed, I used information from the court files. Through open records requests to TDCJ, I obtained lists of execution witnesses for the volunteers and information regarding whether they were buried in the prison cemetery.

I also conducted thirty semi-structured interviews with individuals who knew one of my subjects and had briefer conversations with three others in lieu of an interview. I was not able to interview someone in connection with each subject. The interviews averaged a little over sixty-two minutes and were conducted in person at a location of the interviewee's choosing or by phone. I obtained an informed consent from each informant pursuant to the terms of the University of Texas's Institutional Review Board Protocol Number 2010-04-0068.

**APPENDIX B.
STUDY POPULATION AND SAMPLES**

Volunteers

Morin, Stephen	Renfro, Steven
Rumbaugh, Charles	Foust, Aaron
Barney, Jeffrey	Tuttle, Charles
Hernandez, Ramon	Smith, Richard
Moreno, Elisio	Atworth, Robert
Streetman, Robert	Foster, Richard
Butler, Jerome	Hayes, Larry
Smith, James	Matthews, Ynobe
Cook, Anthony	Porter, James
Beavers, Richard	Martinez, Alexander
Lott, George	Anderson, Robert
Banda, Esequel	Swift, Christopher
Jenkins, Leo	Rodriguez Michael
Gonzales, Joe Jr.	Martinez, David
Brimage, Richard Jr.	Simpson, Danielle
Stone, Benjamin	

Matched Sample 1

Markum Duff-Smith	Michael McBride
James Bridle	John Moody
Joseph Jernigan	Gary Johnson
Henry Porter	Kenneth McDuff
Billy Joe Woods	Larry Robison
Mikel Derrick	Dennis Dowthitt
Johnny Pyles	John Elliott
Noble Mays	Jessie Joe Patrick
Jerry Hogue	Kevin Zimmerman
Robert Drew	John Amador
Joe Trevino	Humberto Leal
Johnny Anderson	Eric Nenno
Robert West	Ricky Blackmon
James Moreland	Alvin Crane
Robert Black	Roy Pippin
David Holland	Michael Griffith
Ronald Allridge	James Collier
Tommy Jackson	Robert Morrow
Mario Marquez	Douglas Roberts
Anthony Westley	Ryan Dickson
Norman Green	Gregory Wright
Michael Lockhart	Rex Mays

James Colburn
 Jeffery Doughtie
 Bobby Cook
 Robert Henry
 Dennis Bagwell
 Jonathan Moore
 James Knox
 Randall Hafdahl
 Angel Maturino Resendiz
 Billy Galloway
 Kevin Varga
 Clifford Kimmel
 Lamont Reese
 Reginald Blanton

Samuel Bustamente
 Yosvanis Valle
 Heliberto Chi
 William Berkley
 Michael Perry
 Patrick Knight
 James Clark
 James Martinez
 Frank Garcia
 Mark Stroman
 Paul Nuncio
 Jesus Aguilar
 Milton Mathis
 Kenneth Parr

Matched Sample 2

Markum Duff-Smith
 Billy Joe Woods
 Mikel Derrick
 Jerry Hogue
 Robert Drew
 Joe Trevino
 James Moreland
 Robert Black
 Tommy Jackson
 Anthony Westley
 Michael Lockhart
 John Moody
 Kenneth McDuff
 Larry Robison
 John Elliott
 Jessie Joe Patrick
 John Amador
 Ricky Blackmon
 Michael Griffith

James Collier
 Robert Morrow
 Douglas Roberts
 Gregory Wright
 Rex Mays
 James Colburn
 Jeffery Doughtie
 Dennis Bagwell
 Randall Hafdahl
 Angel Maturino Resendiz
 Kevin Varga
 Lamont Reese
 Yosvanis Valle
 Heliberto Chi
 Michael Perry
 Patrick Knight
 James Martinez
 Paul Nuncio
 Kenneth Parr

