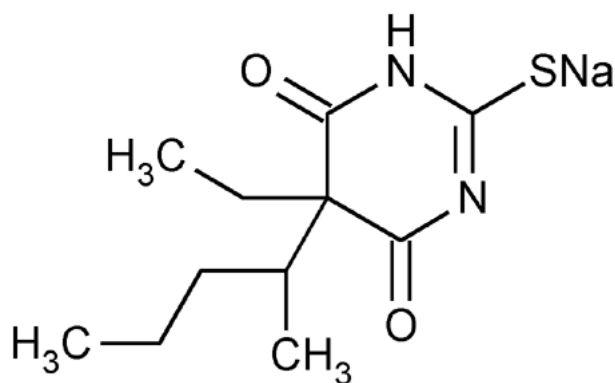


YOUR LETHAL INJECTION BILL: A FIGHT TO THE DEATH OVER AN EXPENSIVE YELLOW JACKET

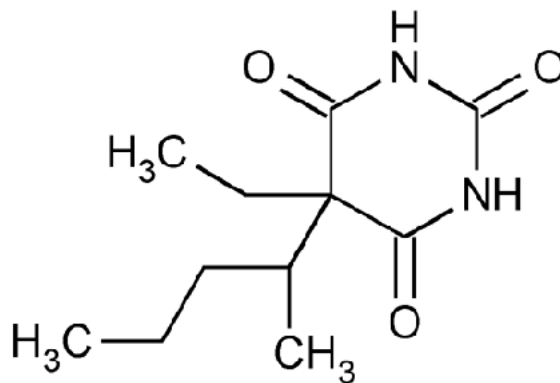
WOODY R. CLERMONT*

ABSTRACT

This article reviews in detail the history of capital punishment, and the United States' constitutional proscription of "cruel and unusual" punishment. Examined are the Magna Carta of 1215, English Bill of Rights of 1689, and various bills of rights of the early American colonies, as they were critical to the Drafters' enlightened understanding of corporal punishment, which eschewed the barbaric and inhumane and culminated in the Eighth Amendment's prohibition of "cruel and unusual" punishment. Included, also, is an examination of the early cases alleging Eighth Amendment violations, for they developed the judiciary's determination of whether certain methods of capital punishment, such as the firing squad and the electric chair, were *too* "cruel" or "unusual" to pass constitutional muster. This article further exposes the great societal costs engendered by the United States' enlightened approach to capital punishment. Specifically discussed are the enormous expenses beget by the death penalty process, and how these expenses deplete local state economies, distort economic decisions, and render capital punishment anti-productive. This article then particularly examines the litigation concerning lethal injections, and the recent inclusion of pentobarbital into the death-producing cocktail. The ultimate question posed is thus: considering the recent turn of economic events, can the United States continue to maintain the death penalty when life imprisonment without parole may prove to be more cost-efficient?



Sodium Thiopental



Pentobarbital

* Woody R. Clermont is an Assistant General Counsel with the Office of the General Counsel for the Eleventh Judicial Circuit of Florida. He received his J.D. from the University of Miami, his B.A. from Binghamton University, and his A.S. from the State University of New York at Empire State College. The author would like to thank Kionne L. McGhee for his invaluable advice and assistance, and Professor D. Marvin Jones of the University of Miami School of Law for giving him the tools to critically analyze and reason through this difficult area of law. He would also like to thank Seth Barrett Tillman, Professor at the National University of Ireland, Maynooth, for his incredibly helpful insight. The author takes full responsibility for any errors or misstatements. The view expressed is solely his own and not those of anyone else, including any employers.

Fig. 1. The chemical structure of two barbiturates used in the lethal injection process: sodium thiopental (a barbiturate no longer available), and pentobarbital (the current substitute barbiturate).

Litigation on behalf of death row inmates has exposed problems at every step of the process, including the mixing of the drugs; the setting of the IV lines; the administration of the drugs; and the monitoring of their effectiveness. At each step, discovery has revealed untrained and unreliable personnel working with inadequate equipment under poorly designed conditions.¹

Lethal injection as a mode of execution can be expected, in most instances, to result in painless death. Rare though errors may be, the consequences of a mistake about the condemned inmate's consciousness are horrendous and effectively undetectable after injection of the second drug. Given the opposing tugs of the degree of risk and magnitude of pain, the critical question here, as I see it, is whether a feasible alternative exists. Proof of "a slightly or marginally safer alternative" is, as the plurality notes, insufficient. But if readily available measures can materially increase the likelihood that the protocol will cause no pain, a [s]tate fails to adhere to contemporary standards of decency if it declines to employ those measures.²

I. INTRODUCTION

It has been posited that the use of pancuronium bromide (or vecuronium bromide) in the three-drug execution protocol used by many states to execute death row inmates is inhumane because it does not affect consciousness or sensation.³ The three-drug execution protocol usually consists of the sequential administration of a barbiturate (either sodium thiopental or pentobarbital), followed by the injection of a paralyzing agent (either pancuronium bromide or vecuronium bromide) and a heart-attack-inducing drug (potassium chloride).⁴ Yet, the validity of this method is implicated by riveting tales of death-row inmates who awoke during surgical operations. They were trapped in an unmoving state of pain, because they were unable to react,

¹ Ty Alper, *Anesthetizing the Public Conscience: Lethal Injection and Animal Euthanasia*, 35 FORDHAM URB. L.J. 817, 820 (2008).

² *Baze v. Rees*, 553 U.S. 35, 117 (2008) (Ginsburg, J., dissenting) (citation omitted).

³ Alper, *supra* note 1, at 828–29.

⁴ *E.g.*, *Baze*, 553 U.S. at 44 (plurality opinion) (describing the sequential administration of the three-drug execution protocol); *Lethal Injection*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/lethal-injection-moratorium-executions-ends-after-supreme-court-decision> (last visited Dec. 20, 2011).

but could nonetheless feel pain during the invasive portion of surgery. This shows the depths of what can only be described as the infliction of psychological torture.⁵ There has been further suggestion that prison and corrections officials are drawn to this aspect of the neuromuscular blocking agent, because it makes every execution look peaceful and dignified, regardless of whether that is in fact the case.⁶ One commentator has likened the experience to the prospect of the premature burial, as described by the literary genius of Edgar Allen Poe, analogizing the effects of the paralytic drug as resulting in “isolation in his last excruciating moments [which] surely resembles the doomed hopelessness of those who are buried alive.”⁷ Literally speaking, if this type of end is that gruesome, how is it that we continue a practice we would not in good conscience be able to inflict on a dog, cat, or other domesticated animal?⁸

The pain and torture critics complain only of results when there has been a problem in the actual administration of the barbiturate, the first drug of the three-drug protocol.⁹ Since the administration of the first drug necessarily entails the proper insertion of a needle into the

⁵ See Alper, *supra* note 1, at 828.

⁶ Ty Alper, *What Do Lawyers Know About Lethal Injection?*, 1 HARV. L. & POL’Y REV. 1, 2–3 (2008).

⁷ Robert Batey, *Reflections on the Needle: Poe, Baze, Dead Man Walking*, 44 VAL. U. L. REV. 37, 47 (2009); *see also* Edgar Allen Poe, *The Premature Burial*, in COLLECTED WORKS OF EDGAR ALLEN POE 325 *passim* (Thomas Ollive Mabbott ed., 1978).

⁸ Alper, *supra* note 1, at 850.

In short, the heated controversy over proper procedures for use in human lethal injections is contrasted by a relative lack of such controversy in statehouses across the country when the issue is animal euthanasia. Legislatures appear to have deferred to the long-standing and carefully reviewed practices of the veterinary and animal welfare communities. When those experts have requested that states ban paralyzing agents in the destruction of animals, legislatures have been happy to oblige.

Id.

⁹ See Seema Shah, *How Lethal Injection Reform Constitutes Impermissible Research on Prisoners*, 45 AM. CRIM. L. REV. 1101, 1106 (2008).

Importantly, if the anesthesia is ineffectively delivered or wears off so that the inmate regains awareness, the use of the paralytic agent raises serious concerns because it prevents the inmate from indicating that he is aware or reacting to the pain with physical movements. If an inmate is not sufficiently anesthetized after the administration of the first drug, “the inmate may suffer excruciating suffocation caused by a paralyzing dose of pancuronium bromide *and* the heart attack induced by the potassium chloride,” but because the inmate would be unable to move, he would be unable to communicate the experience of suffering to execution witnesses.

Id.

inmate's veins to set up the intravenous line ("IV") with saline drip, an error here could have horrible repercussions on the rest of the execution.¹⁰ Issues of finding a suitable vein, inserting the needle into the vein properly, and not having the vein collapse during the procedure continue to plague many executions by lethal injection.¹¹ Indeed, "[s]ince 1985, at least thirty lethal injections have been prolonged because executioners had difficulty finding suitable veins in which to inject the cocktail of drugs."¹²

While the Eighth Amendment may have been vague in defining what exactly constitutes cruel and unusual punishment, the United States Supreme Court has indicated that the "Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."¹³ Punishment must not be disproportionate,¹⁴ judgment about punishment as weighed against the Eighth Amendment must be informed by objective factors, and it may not involve the "unnecessary" and "wanton" infliction of pain and suffering.¹⁵ Over time, the Court has essentially articulated six factors that measure the substantive proportionality applied in determining whether a death penalty practice is within the evolving standards of decency: (1) history; (2) judicial precedent; (3) statutes; (4) jury sentencing; (5) penological goals; and (6) international and comparative law.¹⁶

¹⁰ See, e.g., *id.* at 1107 (detailing two incidents of inmates' prolonged suffering due to ineffective needle insertions).

¹¹ E.g., Michael L. Radelet, *Some Examples of Post-Furman Botched Executions*, DEATH PENALTY INFO. CTR. (Oct. 1, 2010), <http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions> (listing thirty-one well-known incidents of botched executions by lethal injection).

¹² Shah, *supra* note 9, at 1106.

¹³ *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

¹⁴ *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) ("[T]he punishment must not be grossly out of proportion to the severity of the crime." (citing *Trop*, 356 U.S. at 100)).

¹⁵ *Id.* ("[T]he punishment must not involve the unnecessary and wanton infliction of pain." (citing *Furman v. Georgia*, 408 U.S. 238, 392–93 (1972) (Burger, C.J., dissenting))); see Woody R. Clermont, *Unshackling the Punishment Clause: A Call for the End of Convict Slavery*, 3 FREEDOM CTR. J. (forthcoming 2011) (manuscript at 16) (on file with author).

¹⁶ Courtney Butler, *Baze v. Rees: Lethal Injection as a Constitutional Method of Execution*, 86 DENV. U. L. REV. 509, 521 n.146 (2009).

To this end, great note has been made of the fact that the creator of the lethal injection procedure was a coroner who freely admitted his expertise was dealing with the dead rather than the living.¹⁷ Due to the reluctance of the medical community to become involved in this effort, very little testing could be done; thus, there has not been a sufficient investigation medically or scientifically on the possible pain that could be caused by the administration of lethal injection drugs on humans.¹⁸ While some doctors and nurses have helped in executions, lethal injections in many states are performed “by paramedics, technicians or other prison employees who do not have special training in anesthesia.”¹⁹ It comes as no surprise that, in 2005, some researchers called into doubt whether the inmates were sufficiently unconscious during their executions.²⁰ “The researchers obtained toxicology reports on blood taken after death from 49 executed prisoners in four states, and found that 43 percent had levels of sodium thiopental so low that they might have suffered during execution.”²¹ A subsequent article from the same medical journal called the research results into doubt altogether, as the authors noted that “[i]t is widely accepted that concentrations of a drug in post-mortem blood might not reflect the concentrations

¹⁷ Shah, *supra* note 9, at 1103–04.

The protocol was developed by two state legislators, State Senator Bill Dawson and House Representative Bill Wiseman. These two politicians approached medical societies for help in devising lethal injection protocols, but their requests for assistance were denied. Wiseman and Dawson then contacted Dr. A. Jay Chapman, Oklahoma’s Chief Medical Examiner, whose initial response was to demur because his expertise was in “dead bodies but not . . . in getting them that way.” Nevertheless, Wiseman and Dawson persuaded Dr. Chapman to give his assistance, and he devised a process that would involve an intravenous saline drip, into which a lethal chemical would be introduced. The lethal chemicals he proposed were an ultra-short-acting barbiturate and a chemical paralytic.

Id. (footnotes omitted).

¹⁸ Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 *FORDHAM L. REV.* 49, 70 (2007).

¹⁹ Denise Grady, *Doctors See Way to Cut Suffering in Executions*, *N.Y. TIMES* (June 23, 2006), www.nytimes.com/2006/06/23/us/23inject.html.

²⁰ Leonidas G. Koniaris et al., *Inadequate Anesthesia in Lethal Injection for Execution*, 365 *LANCET* 1412, 1413–14 (2005).

²¹ Grady, *supra* note 19.

present at the time of death because of post-mortem drug redistribution—*i.e.*, site-dependent and time-dependent changes in drug concentration that occur after death.”²²

Thus, many states have resisted any efforts to attack the three-drug protocol on the basis of a failure with the administration of the initial barbiturate as an anesthetic.²³ As one anesthesiologist has opined,

for that argument to be valid in any way, you must ignore the [first] drug in the process—sodium pentothal—that (1) renders the inmate to be completely unconscious, (2) has been used for decades to induce anesthesia in surgical patients and (3) is given in doses far exceeding what is needed to keep the inmate from being aware or feeling anything.²⁴

Still, it is hard to ignore that most states have implemented a barbiturate overdose amount with the first drug; a typical “[b]arbiturate overdose is characterized by the induction of [a barbiturate] coma, respiratory arrest, cardiovascular failure, and death.”²⁵ Oregon’s Eighth Annual Report on Oregon’s Death with Dignity Act observed:

During 1998-2004, secobarbital was the lethal medication prescribed for 101 of the 208 patients (49%). *During 2005, as during previous years, all lethal medications prescribed under the provisions of the DWDA were barbiturates.* In 2005, 34 patients (89%) used pentobarbital and 4 patients (11%) used secobarbital. Since the DWDA was implemented, 56% of the PAS patients used pentobarbital, 43% used secobarbital, and 2% used other medications. (Three used secobarbital/amobarbital, and one used secobarbital and morphine).²⁶

²² Mark J.S. Heath et al., *Inadequate Anesthesia in Lethal Injection for Execution*, 366 LANCET 1073, 1073–74 (2005), available at <http://www.thelancet.com/journals/lancet/article/PIIS0140673605674119/fulltext>.

²³ See Alison J. Nathan & Douglas A. Berman, *Debate, Baze-d and Confused: What’s the Deal with Lethal Injection?*, 156 U. PA. L. REV. 312, 330 (2008) (“I emphasize these realities neither to justify nor excuse many states’ troubling responses to the mounting evidence of problems in the administration of the traditional three-drug lethal injection protocol.”).

²⁴ Kyle Janek, *Attack on Texas’ Lethal Injections is Bogus*, HOUS. CHRON. (Feb. 1, 2004), available at <http://www.cjlf.org/deathpenalty/TXInjection.htm>.

²⁵ BENJAMIN J. SADOCK ET AL., KAPLAN & SADOCK’S SYNOPSIS OF PSYCHIATRY: BEHAVIORAL SCIENCES/CLINICAL PSYCHIATRY 459 (10th ed. 2007).

²⁶ OR. DEP’T OF HUMAN SERVS., OFFICE OF DISEASE PREVENTION AND EPIDEMIOLOGY, EIGHTH ANNUAL REPORT ON OREGON’S DEATH WITH DIGNITY ACT 13 (Mar. 9, 2006) (emphasis added), available at <http://euthanasia.procon.org/sourcefiles/8thAnnualORDeathwithDignityRpt.pdf>

Medically, the lethal dose to regularly effective dose ratio can range from 3:1 to 30:1.²⁷ Thus, in theory, barbiturates are used in human euthanasia to end life with as little suffering as possible, though some have questioned the ethical slippery slope created by the relative ease of physician-assisted suicides through intravenous induction of barbiturates.²⁸ The State of Ohio has abandoned the three-drug protocol and now uses a single barbiturate, albeit in an amount mirroring the amounts used by other states in the three-drug protocol, to execute its condemned inmates.²⁹

Ohio's move came on the heels of a shortage of the barbiturate of choice commonly used in most states.³⁰ Although initially the shortage had been blamed on "problems obtaining its active ingredient, which is supplied by another company[,]"³¹ problems were later cited indicating that manufacturer's move to permanently cease production arose due to legal pressure from lawmakers of a European country, Italy, that did not support the death penalty.³² This development is hardly surprising in light of Europe's position as a whole against executing criminals except in the most extreme of circumstances, and its attempts to use tremendous

²⁷ SADOCK ET AL., *supra* note 25, at 459 (discussing the "lethal dose" versus the "regularly effective dose").

²⁸ See Michael Tietelman, *Not in the House: Arguments for a Policy of Excluding Physician-Assisted Suicide from the Practice of Hospital Medicine*, in PHYSICIAN ASSISTED SUICIDE: EXPANDING THE DEBATE 203, 212 (Margaret P. Battin et al. eds., 1998) (noting the benefits of the intravenous intake of barbiturates).

²⁹ See Rob Stein, *Ohio Executes Inmate Using New, Single-Drug Method for Death Penalty*, WASH. POST (Mar. 11, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/10/AR2011031006250.html> (stating Ohio's execution of an inmate via "a single dose of drug used to euthanize animals" was "the first execution of its kind in United States"); see also OHIO DEP'T OF REHAB. AND CORR., DRC – POLICIES (EXECUTION) (Apr. 11, 2011), available at http://www.drc.ohio.gov/web/drc_policies/documents/01-COM-11.pdf.

³⁰ See Kevin Sack, *Shortage of Widely Used Anesthetics is Delaying Executions in Some States*, N.Y. TIMES (Sept. 29, 2010), <http://www.nytimes.com/2010/09/30/us/30drug.html?ref=anesthesiaandanesthetics> ("Several states have postponed executions and others may soon do so because of the scarcity of the thiopental sodium, a barbiturate that is central to the lethal injection process in most of the 35 states with the death penalty.").

³¹ *Id.*

³² Bruce Japsen, *Hospira Ceases Production of Anesthetic Used in Executions*, CHI. TRIBUNE (Jan. 21, 2011), http://articles.chicagotribune.com/2011-01-21/business/ct-biz-0122-execution-drug-20110121_1_hospira-executions-capital-punishment ("Hospira said it was unwilling to take on the liability risk after government officials in Italy demanded the company 'control the product all the way to the ultimate end user to prevent use in capital punishment.'").

international pressure against the United States to abandon the death penalty.³³ Subsequently the Drug Enforcement Administration (“DEA”) seized stores of sodium thiopental from Georgia, Kentucky, Tennessee, and Arkansas in response to legal questions about whether those states circumvented the law to get the drug after its official market withdrawal.³⁴

Opponents of the death penalty regularly point out flaws in the current execution methods of all states, and it is rare that they would ever put forth achievable legislative reforms that would allow the death penalty to work with the intended efficiency.³⁵ “Notably, death penalty opponents spotlight tales of wrongful convictions and botched executions primarily to boost their

³³ E.U. Memorandum on the Death Penalty, <http://www.eurunion.org/legislat/deathpenalty/eumemorandum.htm> (last visited Dec. 20, 2011). The European Union’s Memorandum on the Death Penalty states, in relevant part, as follows:

The European Union (EU) is opposed to the death penalty in all cases and has consistently espoused its universal abolition, working towards this goal. In countries that maintain the death penalty, the EU aims at the progressive restriction of its scope and respect for the strict conditions, set forth in several international human rights instruments, under which the capital punishment may be used, as well as at the establishment of a moratorium on executions so as to completely eliminate the death penalty.

The EU is deeply concerned about the increasing number of executions in the United States of America (USA), all the more since the great majority of executions since reinstatement of the death penalty in 1976 have been carried out in the 1990s. Furthermore, it is permitted to sentence to death and execute young offenders aged under 18 at the time of the commission of the crime, in clear infringement of internationally-recognised human rights norms.

At the dawn of a new millennium the EU wishes to share with the USA the principles, experiences, policies and alternative solutions guiding the European abolitionist movement, all the EU Member States having abolished the death penalty. By doing so, the EU hopes that the USA, which has risen upon the principles of freedom, democracy, the rule of law and respect for human rights, considers joining the abolitionist vanguard, including as a first step towards abolition establishing a moratorium in the use of the death penalty, and by this way becoming itself a paradigm for retentionist countries.

Id.

³⁴ Jeannie Nuss, *Arkansas Latest State to Turn Over Execution Drug*, ABCNEWS.COM (July 22, 2011), <http://abcnews.go.com/US/wireStory?id=14131734#.TsQfecPNltM>.

Sodium thiopental is a sedative in the three-drug cocktail used in lethal injections. It has been hard to come by since its sole U.S. manufacturer stopped making it, which promoted Arkansas and at least half a dozen other death-penalty states to turn their attention to suppliers overseas. That shift resulted in legal challenges by attorneys for death-row inmates about whether the states circumvented the law to get the drug and whether the drug would cause an inmate unnecessary pain and suffering. The Drug Enforcement Administration seized Georgia’s entire supply of the drug in March, and DEA agents later took supplies in Kentucky and Tennessee.

Id.

³⁵ Nathan & Berman, *supra* note 23, at 321.

advocacy for the elimination of capital punishment altogether.”³⁶ Ironically, many death penalty abolitionists argued that the three-drug protocol was flawed, and that the second and third drugs were completely banned from usage in animal euthanasia for good reason.³⁷ Now that a state like Ohio has moved to a single drug protocol and uses pentobarbital, the same single drug used in putting animals to sleep, one would have expected to see a drop in Ohio inmate appeals challenging their death warrants; but, that has not happened.³⁸ It is doubtful that will ever happen.³⁹

Part II of this Article outlines a brief history of the death penalty, and the methods of execution; it also generally explores the jurisprudence surrounding the Eighth Amendment, with particular regard to the standards used by the courts regarding this type of punishment.⁴⁰ Part III of this Article delves into the politics and economics of state executions.⁴¹ Finally, Part IV of this Article looks at the application of the *Baze v. Rees* opinion to the latest drug switch, and the controversy involving the use of that drug, pentobarbital.⁴²

³⁶ *Id.*

³⁷ See Alper, *supra* note 1, at 840–44 (highlighting the states that have banned the use of pancuronium bromide in animal euthanasia); see also *Dickens v. Brewer*, No. CV07-1770-PHX-NVW, 2009 WL 1904294, at *13 (D. Ariz. July 1, 2009).

Replacing the three-drug protocol with a one-drug protocol using pentobarbital or sodium thiopental would eliminate the risk of severe pain from pancuronium bromide and potassium chloride. Five grams of sodium thiopental alone will cause death to almost everyone within a number of minutes, but it may take thirty to forty-five minutes for the death to be indicated by a flat line on an EKG. Pentobarbital acts as rapidly as sodium thiopental, and it is eliminated from the brain more slowly than sodium thiopental and causes death more predictably. *When pentobarbital is given intravenously in a large dose (three to four times its anesthetic dose), loss of consciousness, cessation of breathing, and stoppage of the heart occur in less than two minutes.*

Dickens, 2009 WL 1904294, at *13 (emphasis added).

³⁸ See, e.g., *Cooley v. Kasich*, Nos. 2:04–cv–1156, 2:09–cv–242, 2:09–cv–823, 2:10–cv–27, 2011 WL 2681193, at *34 (S.D. Ohio July 8, 2011) (granting a preliminary injunction and staying the execution of an inmate scheduled to be executed via one drug, pentobarbital, because the inmate was likely to succeed on the merits of showing that Ohio corrections officials do not follow their execution protocol).

³⁹ Nathan & Berman, *supra* note 23, at 321 (“Indeed, sophisticated abolitionists realize that a death penalty system made truly more perfect is a death penalty system more likely to garner broad public support and increase the number of state executions of convicted murderers.”).

⁴⁰ See *infra* Part II.

⁴¹ See *infra* Part III.

⁴² See *infra* Part IV.

II. THE MACABRE HISTORY OF STATE-SANCTIONED KILLING

In the United States, a majority of the American public favors the use of the death penalty.⁴³ Of those polled, some say punishment by death is not being used enough.⁴⁴ Additionally, the polls revealed that Republican white males favored usage of the death penalty most strongly; yet, even a majority of nonwhites, women, and Democrats still favor capital punishment far more than those opposed to it.⁴⁵ However, when the question of the death penalty is balanced with an alternative of life imprisonment with absolutely no possibility whatsoever of parole, the split drops to 49% in favor of death and 46% in favor of life imprisonment.⁴⁶ 58% of those polled feel that the death penalty is being applied fairly, despite allegations of arbitrary procedures resulting in inconsistent use, or arguments of its misuse against minorities.⁴⁷ As a whole, the amount of support for the death penalty has risen as high as 80% in 1994, and fallen as low as 42% in 1966.⁴⁸ While not oversimplifying why the numbers have remained in the majority for a large part of the last century, there are some who have maintained that support for the death penalty comes in part from the fact that it is a product of historical tradition.⁴⁹

A. *Ancient History Through the 17th Century in the American Colonies*

⁴³ See Frank Newport, *In U.S., 64% Support Death Penalty in Cases of Murder: Half Say Death Penalty Not Imposed Often Enough*, GALLUP.COM (Nov. 8, 2010), <http://www.gallup.com/poll/144284/Support-Death-Penalty-Cases-Murder.aspx>.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ JOHN F. GALLIHER ET AL., *AMERICA WITHOUT THE DEATH PENALTY: STATES LEADING THE WAY* 208 (2002) (“While it is clear that cultural tradition or sensibilities are related to the decision to execute, death penalty abolition is not so easily explained.”).

Even as far back as the Ancient Laws of China, there was evidence reflecting that the death penalty had been established as a punishment for certain crimes.⁵⁰ In the 18th Century B.C.E., the Babylonian Code of King Hammurabi codified the death penalty for numerous crimes, such as theft, causing loss of liberty by perjury, bringing danger of death by false accusation, dealing in stolen goods, assisting and harboring slaves, and so forth.⁵¹ The first death sentence recorded in writing⁵² took place in 16th Century B.C.E. Egypt where the condemned, a noble, was accused of magic and then subsequently ordered to take his own life.⁵³ In the same century, death was prescribed as a punishment in the Assyrian laws.⁵⁴ In Ancient Greece, around the 6th Century B.C.E., Phalaris, the tyrant of Acragas, commissioned Perillos of Athens to create a new execution device for criminals.⁵⁵ The result was the brazen bull, where a criminal would be shut inside a hollow brass bull sculpture, which would be heated to extreme temperatures to roast the criminal inside.⁵⁶ Being the tyrant that he was, Phalaris tested the bull on Perillos.⁵⁷

1. The Punishment of Death During Ancient Times

In the fourteenth century B.C.E., the Hittite Code also provided for the death penalty.⁵⁸ Seven centuries later, the Draconian Code of Athens provided that every crime committed was punishable by death.⁵⁹ The Code was named after Draco, an Athenian lawmaker, and there were

⁵⁰ See Robert Hardaway, *Beyond a Conceivable Doubt: The Quest for a Fair and Constitutional Standard of Proof in Death Penalty Cases*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 221, 232 (2008).

⁵¹ CHARLES F. HORNE, THE CODE OF HAMMURABI 22 (L.W. King trans., Forgotten Books 2007) (1915).

⁵² Hardaway, *supra* note 50, at 232. It is unknown when the first death sentence was carried out historically, but it is highly unlikely that the first recorded death sentence was the first death sentence. See *id.*

⁵³ GARY P. GERSHMAN, DEATH PENALTY ON TRIAL: A HANDBOOK WITH CASES, LAWS, AND DOCUMENTS 16 (2005).

⁵⁴ MICHAEL KRONENWETTER, CAPITAL PUNISHMENT: A REFERENCE HANDBOOK 107 (2d ed. 2001).

⁵⁵ See JOHN FORD, LOVE'S SACRIFICE 219 n.103 (A.T. Moore ed., Manchester Univ. Press 2002) (1633).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ KRONENWETTER, *supra* note 54, at 107.

⁵⁹ *Id.*

some who commented that, due to its harsh nature, it was written in blood.⁶⁰ Capital punishment historically seemed to be a transfer of a method from handling private vendettas between families and clans in dynastic societies to a power reserved by the sovereign to utilize.⁶¹ The practical reason for the transfer being that the vendettas could last generations, they resulted in great unrest and were enforced by the strong against the weak, which was hardly justice.⁶² Thus, to avoid the lack of impartiality in private methods, capital punishment became primarily the province of the government over the course of time. However, the danger of such a transfer became readily apparent—enemies of the State could be targeted for death for speaking out against the government. In 399 B.C.E., the outspoken Greek philosopher Socrates was tried and convicted of heresy and corruption of youth; and, refusing to renounce his work he was ordered to die by drinking poison, a penalty which he accepted readily for the sake of his beliefs.⁶³

2. The Death Penalty in the Roman Empire

Around 450 B.C.E., the Roman law of the XII Tables codified the death penalty.⁶⁴ Capital punishment required either death or the surrender of Roman citizenship, which included exile and confiscation of property.⁶⁵ Death penalty sentencing was differentiated between defendants based on social status.⁶⁶ Methods of capital punishment varied by the crime committed, such as being hurled from the Tarpeian Rock for giving false witness, or being

⁶⁰ *Draconian Laws Definition*, BRITANNICA.COM, <http://www.britannica.com/EBchecked/topic/170684/Draconian-laws?anchor=ref1109069> (last visited Dec. 11, 2011).

⁶¹ HANS GÖRAN FRANCK, *THE BARBARIC PUNISHMENT: ABOLISHING THE DEATH PENALTY* 45–46 (William Schabas ed., 2003).

⁶² See KRONENWETTER, *supra* note 54, at 9.

⁶³ PLATO, *THE TRIAL AND DEATH OF SOCRATES: BEING THE EUTHYPHRON, APOLOGY, CRITO, AND PHAEDO OF PLATO*, at xxxvi (F. J. Church trans., 1888).

⁶⁴ See DAVID DEMATTEO ET AL., *FORENSIC MENTAL HEALTH ASSESSMENTS IN DEATH PENALTY CASES* 125 (2011).

⁶⁵ CHARLES PHINEAS SHERMAN, *ROMAN LAW IN THE MODERN WORLD* 470–71 (Vol. II 1917).

⁶⁶ See DONALD G. KYLE, *SPECTACLES OF DEATH IN ANCIENT ROME* 96 (Taylor & Francis e-Library, 2001) (1998).

burned at the stake for committing arson with malice aforethought.⁶⁷ Common methods included crucifixion, burning, decapitation, and being thrown to the wild beasts.⁶⁸ The Romans had a unique punishment for murder of a parent: the condemned was sealed in a sack containing an ape, dog, rooster, and viper and then thrown into the river.⁶⁹

Ancient Judaic law embraced the principle of *lex talionis*, or “an eye for an eye.”⁷⁰ In fact, there is evidence that Jews used many different techniques including stoning, burning, strangulation (considered humane), decapitation (following Roman practice), and throwing the criminal from a rock (a later variant of stoning).⁷¹ A drug potion of frankincense was given to ease the pain of the condemned.⁷² The crucifixion of Christ may have occurred in one of three years historically: 29, 30 and 33 C.E.⁷³ There has been historical conflict about whether the Romans killed Jesus Christ outright for their own motives (suppression),⁷⁴ or at the insistence of the Jewish Sanhedrin instead (for blasphemy and heresy).⁷⁵ As to the former theory, it would then be ironic that approximately 300 years later the Christian convert Emperor Constantine “abolished crucifixion and other cruel death penalties in the Roman Empire.”⁷⁶

3. Executions in Britain

⁶⁷ John Steven Kreis, *The Laws of the Twelve Tables, c.450 B.C.*, HIST. GUIDE, <http://www.historyguide.org/ancient/12tables.html> (last modified Aug. 3, 2009).

⁶⁸ MATTHEW BUNSON, ENCYCLOPEDIA OF THE ROMAN EMPIRE 305 (rev. ed. 2002).

⁶⁹ JOHN CALVIN, CALVIN’S COMMENTARY ON SENECA’S DE CLEMENTIA 139 (Ford Lewis Battles & André Malan Hugo eds. & trans., 1969) (1532).

⁷⁰ See MAYER SULZBERGER, THE ANCIENT HEBREW LAW OF HOMICIDE 118 (1915).

⁷¹ Walter Jacob, *Punishment: Its Method and Purpose*, in CRIME AND PUNISHMENT IN JEWISH LAW: ESSAYS AND RESPONSA 45, 51 (Walter Jacob & Moshe Zemer eds., 1999).

⁷² *Id.*

⁷³ PIERRE GUILLERMIER & SERGE KOUTCHMY, TOTAL ECLIPSES: SCIENCE, OBSERVATIONS, MYTHS, AND LEGENDS 88 (Bob Mizon trans., Praxis Publ’g 1999) (1998).

⁷⁴ See RABBI JOSEPH TELUSHKIN, JEWISH LITERACY: THE MOST IMPORTANT THINGS TO KNOW ABOUT THE JEWISH RELIGION, ITS PEOPLE, AND ITS HISTORY 515–16 (HarperCollins rev. ed. 2008) (1991) (“It would appear that Jesus was one of many first-century Jewish political rebels against the Roman conquerors. An estimated 50,000 to 100,000 anti-Roman activists were crucified during the Roman rule over Judea.”).

⁷⁵ See ORACLE INST., THE TRUTH: ABOUT THE FIVE PRIMARY RELIGIONS AND THE SEVEN RULES OF ANY GOOD RELIGION 121–22 (2005).

⁷⁶ Michael H. Reggio, *History of the Death Penalty*, in SOCIETY’S FINAL SOLUTION: A HISTORY AND DISCUSSION OF THE DEATH PENALTY 2, 2 (Laura E. Randa ed., 1997); see also JILL HARRIES, LAW & EMPIRE IN LATE ANTIQUITY 139 (1999).

It can be said that Britain influenced the American colonies more than any other nation; not surprisingly, it too has a noteworthy history of capital punishment.⁷⁷ As early as 450 B.C.E., English capital punishment involved throwing the condemned into a quagmire.⁷⁸ During the time of William the Conqueror, he opposed hanging criminals, but “he allowed criminals to be mutilated for their crimes.”⁷⁹ By the time of Henry I, he decreed that all thieves should be immediately hung without a trial.⁸⁰ Under Henry II, “hanging was fully established as a punishment” for a crime, and the right of “pit and gallows” was granted to manorial lords, as well as ecclesiastical and municipal corporations.⁸¹ In 1241, William Maurice, a nobleman’s son, was “hanged, drawn, and quartered for piracy.”⁸² In 1278, 280 Jews were hanged for “clipping coin;” that is, the act of shaving off a small portion of a coin for profit.⁸³ Clipping coin was a capital offense, and it was also common practice that the estates of the deceased were forfeited in favor of the crown.⁸⁴ Strikingly, however, evidence of the crime was minimal; the Jews had been convicted merely based on possessing shaved coins, not on any proof that they were the ones actually responsible for the alteration.⁸⁵

Under Edward I, two gatekeepers were executed by hanging because they failed to close the city gate, either through negligence or complicity, permitting the escape of an accused

⁷⁷ Reggio, *supra* note 76, at 2.

⁷⁸ JOSEPH HAYDN & BENJAMIN VINCENT, HAYDN’S DICTIONARY OF DATES RELATING TO ALL AGES AND NATIONS: FOR UNIVERSAL REFERENCE 207, 223 (10th ed. 1861).

⁷⁹ Reggio, *supra* note 76, at 2; *see also* THE ENCYCLOPÆDIA BRITANNICA: A DICTIONARY OF ARTS, SCIENCES, LITERATURE AND GENERAL INFORMATION XII, at 917 (11th ed., Univ. Press 1910).

⁸⁰ *See* THE ENCYCLOPÆDIA BRITANNICA, *supra* note 78, at 917.

⁸¹ *Id.* (referring to “pit” as the method of execution by use of a drowning pit).

⁸² HAYDN & VINCENT, *supra* note 78, at 207.

⁸³ JOHN JACOB ANDERSON, A SCHOOL HISTORY OF ENGLAND 116 (rev. ed. 1891); Reggio, *supra* note 76, at 2.

⁸⁴ ANDERSON, *supra* note 83, at 116 (“‘Clipping the coin’ was made a capital offense . . . in the first part of [Edward I’s] reign . . .”); *see also* Kate McGrath, *English Jews as Outlaws or Outcasts: The Ritual Murder of Little St. Hugh of Lincoln in Matthew Paris’s Chronica Majora*, in BRITISH OUTLAWS OF LITERATURE AND HISTORY: ESSAYS ON MEDIEVAL AND EARLY MODERN FIGURES FROM ROBIN HOOD TO TWM SHON CATTY 11, 18 (Alexander L. Kaufman ed. 2011) (describing the continuing aggression towards Jews in thirteenth century England; how Jews were accused of destabilizing the English economy; and the crown’s justification of stripping land and monies from English Jews).

⁸⁵ *See* ANDERSON, *supra* note 83, at 116 (“[T]he sole evidence of [the Jews’] guilt [was] the possession of some of this coin.”).

murderer.⁸⁶ Additionally, after hanging it was not uncommon to draw and quarter the bodies, whether dead or alive.⁸⁷ Nobles were beheaded, as this was considered a more humane and merciful death.⁸⁸ Moreover, “one could be burned for marrying a Jew.”⁸⁹ Use of thumbscrews, starvation, and pressing (the pretrial procedure of torturing a defendant by loading weights on his or her chest) were frequently employed and did not constitute cruel and unusual punishment under the law.⁹⁰ During the reign of Henry VIII, the number of those executed is estimated to have reached 72,000.⁹¹ During the Tudor era, many Protestant and Catholic heretics and traitors were tortured until they confessed; then they were put to death. Thomas More advocated against the death penalty, yet he was executed by Henry VIII for harboring treasonous opinions.⁹²

4. Capital Punishment in the Colonies

The principle of torture was brought to the American colonies with the advent of the Massachusetts Body of Liberties (a colonial Bill of Rights, and the first in the colonies), and it permitted bodily torture to be used if a defendant was involved with other conspirators.⁹³ The first documented execution occurred in 1608 when George Kendall of Virginia was hanged for plotting to betray the British to the Spanish.⁹⁴ In 1622, the first official execution of a criminal, Daniel Frank, occurred in Virginia for the crime of burglary; he was sentenced to hang ““by the neck until he was dead.””⁹⁵ Murder, heresy, rape, and witchcraft were among the many crimes

⁸⁶ Reggio, *supra* note 76, at 2.

⁸⁷ See JOSEPH A. MELUSKY & KEITH ALAN PESTO, CAPITAL PUNISHMENT: HISTORICAL GUIDES TO CONTROVERSIAL ISSUES IN AMERICA 13 (2011). Being hanged, drawn, and quartered was the common method of execution for the crime of treason. *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*; Reggio, *supra* note 76, at 2.

⁹⁰ See MELUSKY & PESTO, *supra* note 87, at 13.

⁹¹ *Id.*

⁹² See *id.* at 15–16.

⁹³ See *id.* at 17.

⁹⁴ RON FRIDELL, CAPITAL PUNISHMENT: OPEN FOR DEBATE 12 (2004).

⁹⁵ FRED ROSEN, THE HISTORICAL ATLAS OF AMERICAN CRIME 7 (2005).

that were punishable by death.⁹⁶ The Salem witch trials took place later in the century, in 1692 Massachusetts, where nineteen people were convicted and hanged.⁹⁷

“During the 1600s, more than fifty separate crimes qualified for capital punishment”⁹⁸ Stealing chickens and counterfeiting money were among those crimes.⁹⁹ Homosexuals could be executed for sodomy, and non-religious types could likewise be put to death for their lack of faith.¹⁰⁰ Sir Thomas Dale became Governor of Virginia in 1611, and he implemented a Draconian Code that provided for the death penalty for the following crimes: “traiterous words,” blasphemy, bartering with Native Americans, not honoring the Sabbath, “stealing roots, herbs, grapes, corn or livestock, perjury, robbery, sodomy, adultery, rape, and murder.”¹⁰¹ The second colonist to hang from the gallows was Richard Cornish in 1624 for bestiality, buggery, and sodomy.¹⁰² The first female execution in the colonies took place in Virginia in 1632 “for the murder of a child born from her adulterous affair.”¹⁰³ In 1633, Margaret Hatch was put to death for the crime of murder.¹⁰⁴ Whether a white male or female, the death penalty was harshly enforced to maintain law and order in the colonies; however, the southern colonies began to develop more capital crimes relating to property and some crimes that applied uniquely to African slaves.¹⁰⁵

⁹⁶ FRIDELL, *supra* note 94, at 12.

⁹⁷ *Id.*

⁹⁸ *Id.* at 13.

⁹⁹ *See id.*

¹⁰⁰ DAVID B. WOLCOTT & TOM HEAD, CRIME AND PUNISHMENT IN AMERICA 9 (2010).

¹⁰¹ TODD C. PEPPERS & LAURA TREVVETT ANDERSON, ANATOMY OF AN EXECUTION: THE LIFE AND DEATH OF DOUGLAS CHRISTOPHER THOMAS 66 (2009).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *See id.*

¹⁰⁵ *See id.* at 66–67.

From the time of the colonies through the present day in the states, it is estimated that the number of executions in America is between 19,000 and 22,000 people.¹⁰⁶ Yet, during colonial America, it is estimated that there were not more than twenty executions a year.¹⁰⁷ Even though “Duke’s Laws, enacted in New York colony in 1665, made striking one’s parents or denying the one ‘true God’” capital offenses, such punishments were rarely utilized, and some colonies were less willing to invoke the death penalty as frequently as others.¹⁰⁸ Thus, in theory, the death penalty was a form of control that the colonies depended on, but it was supposed to be a measure of last resort.¹⁰⁹ “The first stirrings of opposition to capital punishment came” from the writings of Cesare Beccaria in 1767 in his essay *On Crimes and Punishment*, which “influenced a number of American intellectuals, including some signatories to the Declaration of Independence.”¹¹⁰ However, rather than moving towards abolition, the states would come to use the death penalty for less crimes than their colonial counterparts, but increasing the frequency of its use as the country’s population grew.¹¹¹

B. Capital Punishment in the States

The system of federalism in the United States has allowed the states to be relatively free in developing their own individual policies regarding capital punishment.¹¹² Many states initially followed the English common law system of providing for capital punishment for all felonies.¹¹³ However, the system of mandatory death sentences has dwindled in the states with

¹⁰⁶ *Id.* at 65 (estimating the number of executions between 1607 and 2009).

¹⁰⁷ DAVID MCKAY ET AL., *CONTROVERSIES IN AMERICAN POLITICS AND SOCIETY* 139 (2002).

¹⁰⁸ *Id.*

¹⁰⁹ *See id.*

¹¹⁰ *Id.* at 140.

¹¹¹ *See id.* at 140–41.

¹¹² *Id.*

¹¹³ LOUIS J. PALMER, JR., *THE DEATH PENALTY: AN AMERICAN CITIZEN’S GUIDE TO UNDERSTANDING FEDERAL AND STATE LAWS* 18 (1998).

time and came to be rejected as too rigid and harsh.¹¹⁴ Between 1930 and 1968, 3,859 executions took place, 3,334 of which were for homicide, 455 for rape, and 70 for crimes neither murder nor rape.¹¹⁵ Thus, while America initially punished defendants for non-homicide crimes (not involving the death of a victim), much as Britain did, this practice likewise began to dwindle with time.¹¹⁶ Execution methods such as boiling alive and drawing and quartering did exist in the states initially, though they were eventually rejected as too barbaric.¹¹⁷ Still though, hanging continued to enjoy a great degree of popularity in America.¹¹⁸ Other methods have included the firing squad, electrocution, the gas chamber, and lethal injection.¹¹⁹

1. Hanging

It is estimated that since Daniel Frank's death in 1622, some 16,000 people were executed by the gallows in America.¹²⁰ Amongst the methods of execution, "[h]anging remained the most popular form of execution throughout the eighteenth century and early nineteenth century."¹²¹ During the colonial era, in 1723, twenty-six convicted pirates were executed by hanging in Newport, Rhode Island, one of the largest public executions in U.S. history.¹²²

Some of the Founders of the United States, such as James Madison, George Washington, Alexander Hamilton, Thomas Jefferson, and Dr. Benjamin Rush, believed capital punishment was retributive and inherently good, and were unconcerned with any alleged lack of

¹¹⁴ Woodson v. North Carolina, 428 U.S. 280, 292–93 (1976).

¹¹⁵ PALMER, *supra* note 113, at 18.

¹¹⁶ *See id.* "A principal alteration of capital punishment [in the U.S.] has been the drastic reduction in the number of crimes that are punishable as capital offenses." *Id.* at 21.

¹¹⁷ *See* LARRY K. GAINES & ROGER LEROY MILLER, CRIMINAL JUSTICE IN ACTION: THE CORE 268 (6th ed. 2011).

¹¹⁸ MITCHEL P. ROTH, CRIME AND PUNISHMENT: A HISTORY OF THE CRIMINAL JUSTICE SYSTEM 68 (2d ed. 2011) ("[H]anging enjoyed popularity in America from the colonial era to the nineteenth century . . .").

¹¹⁹ *Id.* at 337 (noting these types of executions were popular between 1977 and 1994).

¹²⁰ Robert J. Sech, Note, *Hang 'Em High: A Proposal for Thoroughly Evaluating the Constitutionality of Execution Methods*, 30 VAL. U. L. REV. 381, 391 n.54 (1995) (citing NEGLEY K. TEETERS, HANG BY THE NECK 4–7 (1967)).

¹²¹ *Id.* at 391.

¹²² SYLVESTER JUDD, HISTORY OF HADLEY, INCLUDING THE EARLY HISTORY OF HATFIELD, SOUTH HADLEY, AMHERST AND GRANBY, MASSACHUSETTS 344 (H.R. Huntting & Co. 1905) (1863).

deterrence.¹²³ The 1790 Crimes Act, the first federal criminal statute, provided for hanging and additional dissection of the corpses at the discretion of the court.¹²⁴ While there were some who opposed the added dissection provision, James Madison defended the practice, arguing punishment should be proportional; he also argued that the more heinous the crime, the more gruesome the punishment.¹²⁵ Jefferson proposed additional measures to Virginia’s state laws; for men guilty of rape, he suggested castration, and for women guilty of sodomy, he suggested “drilling a hole at least a half-inch in diameter through the[ir] noses.”¹²⁶

As for the Scottish Enlightenment, and its effects on the Founders, Adam Smith was quoted as saying that “mercy to the guilty is cruelty to the innocent”¹²⁷ Smith noted that we use capital punishment as a necessary means to stop those who would disturb the peace from continuing on their criminal spree.¹²⁸ For Smith, deterrence was an argument for the death penalty, because others can become terrified and refuse to follow a criminal’s example once they have learned of his fate.¹²⁹ However, Smith questioned some of that deterrence, when discussing thieves and highwaymen accustomed to the lot of the gibbet, *i.e.*, a gallows-like hanging structure used for hanging executions.¹³⁰ Smith felt that death caused greater suffering for the truly innocent who are wrongly blamed, more so than common criminals who merely consider themselves to be unlucky to be facing the noose, but accepted this as an unfortunate side effect of

¹²³ MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWES: THE POLITICS OF MASS INCARCERATION IN AMERICA* 47 (2006).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ ADAM SMITH, *THE THEORY OF MORAL SETTLEMENTS* 109 (Filibarian Publ’g 2007) (1759).

¹²⁸ *See id.* at 108–09 (“Hence it is, they say, that he often approves of the enforcement of the laws of justice even by the capital punishment of those who violate them.”).

¹²⁹ *See id.* at 109 (“The disturber of the public peace is hereby removed out of the world, and others are terrified by his fate from imitating his example.”).

¹³⁰ *Id.* at 155.

even a well administered criminal justice system.¹³¹ Considering the many safeguards in place (crime must be proved beyond a reasonable doubt, right to confront adverse witnesses, right to fair trial, right to jury trial, right to due process), it would seem that our Founders shared the same concerns held by Smith, but that this served as no bar to the use of the death penalty.¹³²

The first known federal execution was carried out by U.S. Marshal Henry Dearborn of Maine on June 25, 1790.¹³³ Dearborn served as the executioner for Thomas Bird for the crime of murder on the high seas.¹³⁴ A federal judge, the Honorable Isaac Parker of the Western District of Arkansas, ordered 160 executions, “of which 79 were actually carried out after the appeals and commutation process” and earned him the nickname of the “Hanging Judge.”¹³⁵ The largest single execution in U.S. history was the hanging of thirty-eight Native Americans convicted of war crimes during the brutal U.S.-Dakota War of 1862.¹³⁶ They were executed simultaneously on December 26, 1862, in Mankato, Minnesota.¹³⁷ A single blow from an axe cut the rope that held the scaffold, releasing them to their deaths.¹³⁸ The second largest mass execution—that of thirteen African American soldiers for taking part in the Houston Riot in 1917—was also a hanging.¹³⁹

¹³¹ *Id.*

¹³² See *Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O’Connor, J., concurring) (“I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution.”); *id.* at 420 (“Our society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent.”).

¹³³ *Historical Federal Executions*, JUSTICE.GOV, <http://www.justice.gov/marshals/history/executions.htm> (last visited Dec. 20, 2011).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *U.S.-Dakota War of 1892*, MINN. HIST. SOC’Y, <http://www.historicfortsnelling.org/history/us-dakota-war> (last visited Dec. 20, 2011).

¹³⁷ *Id.* (noting the thirty-eight Native Americans, all Dakota men, were “hanged”).

¹³⁸ Theodore E. Potter, *Recollections of Minnesota Experiences*, in MINNESOTA HISTORY BULLETIN, VOLUME I, 1915–1916, at 448, 469 (Solon J. Buck ed., 1916).

¹³⁹ WILLIAM T. BOWERS, WILLIAM M. HAMMOND & GEORGE L. MACGARRIGLE, *BLACK SOLDIER, WHITE ARMY: THE 24TH INFANTRY REGIMENT IN KOREA* 14 (1996).

Englishman John Lee is a legend “in the annals of hanging,” because of the difficulty in carrying out his execution.¹⁴⁰ Three attempts to hang him had failed, much to the chagrin of his executioner James Berry.¹⁴¹ John Lee lived to a ripe old age.¹⁴² In one of the more famous hangings in the U.S., Mary Surratt, Lewis Powell, David Herold, and George Atzerodt were executed on July 7, 1865.¹⁴³ They were four of eight conspirators involved in the assassination of President Abraham Lincoln.¹⁴⁴ The last U.S. public hanging occurred some seven decades later on August 14, 1936, in Owensboro, Kentucky.¹⁴⁵ Rainey Bethea was executed for the rape and murder of seventy-year-old Lischa Edwards, and the executioner was a female sheriff, which drew added attention to the event—a crowd of 20,000 people.¹⁴⁶ The subsequent news coverage led to great embarrassment, and as a result, public executions were subsequently outlawed.¹⁴⁷ As most states moved toward other methods of execution, the use of hanging declined, and the last hangings of note in the U.S. were of Westley Allan Dodd in Washington in 1993, and Billy Bailey in Delaware in 1996, who declined to be killed by lethal injection.¹⁴⁸ Nonetheless, it has been suggested that a least one politician has called for a revival of hanging executions.¹⁴⁹

2. The Firing Squad

¹⁴⁰ See CHARLES DUFF, *A HANDBOOK ON HANGING* 13 (N.Y. Review of Books 2001) (1928).

¹⁴¹ *Id.* at 14.

¹⁴² *Id.* at 15.

¹⁴³ Edward C. Goodman, *Lincoln Conspirators' Hanging*, in *ABRAHAM LINCOLN: THE PRAIRIE YEARS AND THE WAR YEARS* 450 (Edward C. Goodman ed., Sterling Publ'g Co. illustrated ed. 2007).

¹⁴⁴ *Id.*

¹⁴⁵ See WILLIAM VAN METER, *BLUEGRASS: A TRUE STORY OF MURDER IN KENTUCKY* 178 (2009).

¹⁴⁶ See *id.* at 179 (discussing the details of Bethea's crime and the publicity surrounding his execution).

¹⁴⁷ *Id.*

¹⁴⁸ See ROBERT JAY LIFTON & GREG MITCHELL, *WHO OWNS DEATH? CAPITAL PUNISHMENT, THE AMERICAN CONSCIENCE, AND THE END OF EXECUTIONS* 45 (2002) (describing the executions of Westley Allan Dodd and Billy Bailey).

¹⁴⁹ *Id.* A leading Democrat, running for Congress in Illinois in 1998, declared that “we should go back to hanging killers on the very spot the murder took place.” *Id.*

Since George Kendall's execution in 1608, 143 people have been put to death by firing squads as of the year 2002.¹⁵⁰ Other accounts of execution by firing squad in America have also come from California and Louisiana during the time when they were controlled by foreign nations.¹⁵¹ The procedure likewise has been widely used in the military.¹⁵² For years, Utah, Idaho, and Oklahoma maintained the firing squad method of execution, but Idaho and Oklahoma used it as a secondary method if lethal injection was unavailable.¹⁵³ Utah used the firing squad as a method a prisoner may choose if he or she did not wish to die by lethal injection.¹⁵⁴ Although Utah previously included hanging and beheading as methods in the past, no one has ever been beheaded in Utah, and beheading was dropped from the books in 1888.¹⁵⁵ Between 1912 and 1920, Nevada offered a firing squad option and Andrija Mirkovitch elected to die in this fashion¹⁵⁶ Finding no volunteers to work on the firing squad, Nevada constructed a "firing squad machine" which executed Mirkovitch without a hitch, but the option was repealed thereafter.¹⁵⁷

John Deering's execution in Utah in 1938 was also a bizarre event.¹⁵⁸ Convicted and sentenced to death for first-degree murder in a carjacking of a businessman, he agreed to have his heartbeat recorded by an electrocardiograph during the execution.¹⁵⁹ The intent was to

¹⁵⁰ Christopher Q. Cutler, *Nothing Less than the Dignity of Man: Evolving Standards, Botched Executions, and Utah's Controversial Use of the Firing Squad*, 50 CLEV. ST. L. REV. 335, 337 (2003) (discussing George Kendall's execution by firing squad in 1608, which was America's first recorded execution).

¹⁵¹ *Id.* at 398.

¹⁵² *See, e.g., id.*

¹⁵³ *Id.* at 337.

¹⁵⁴ *Id.* at 389.

¹⁵⁵ L. KAY GILLESPIE, *THE UNFORGIVEN: UTAH'S EXECUTED MEN* 13 (1997) (noting Utah removed beheading as an execution option in 1888); Cutler, *supra* note 150, at 342 n.29.

¹⁵⁶ Cutler, *supra* note 150, at 400; *No One to Shoot Murderer*, N.Y. TIMES, Aug. 12, 1912, available at <http://query.nytimes.com/mem/archive-free/pdf?res=F0061FFD3D5417738DDDAB0994D0405B828DF1D3>.

¹⁵⁷ Cutler, *supra* note 150, at 400.

¹⁵⁸ ALEX BOESE, *ELEPHANTS ON ACID: AND OTHER BIZARRE EXPERIMENTS* 246-49 (2007). Deering agreed to participate in an experiment which allowed a doctor to monitor his heart rate as he was being executed by a firing squad. *Id.*

¹⁵⁹ *Id.* at 247.

provide medical information about the effect of fear on the human heartbeat in the moments prior to, and during execution.¹⁶⁰ Even though his face betrayed no emotion, his heartbeat rose dramatically in his final moments, reaching as high as 180 beats per minute—after the sheriff gave the order to shoot.¹⁶¹ Despite his tough as nails exterior, it was clear that Deering was frightened out of his mind at the prospect of death, and scientists now had some evidence that facing a firing squad can elevate the human heartbeat.¹⁶²

Only three executions by firing squad that have taken place since the Court in *Gregg v. Georgia*¹⁶³ reinstated the death penalty in the United States, with all three taking place in Utah.¹⁶⁴ The three executed in this fashion were Gary Gilmore in 1977, John Albert Taylor in 1996, and Ronnie Lee Gardner in 2010.¹⁶⁵ In 2004, the firing squad option was eliminated from Utah law, but it was not retroactive—meaning that those on death row prior to the change could still elect it.¹⁶⁶ Prior to this, Utah had used firing squads in forty-one of its fifty executions in the last 160 years.¹⁶⁷ Idaho has eliminated the firing squad as an option, by the passage of a bill bringing a change in its law in 2009.¹⁶⁸ Currently, the only state remaining that has this option is Oklahoma.¹⁶⁹

3. Electrocution

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 248.

¹⁶² *Id.* at 249.

¹⁶³ 428 U.S. 153 (1976).

¹⁶⁴ Ed Pilkington, *Utah Prisoner Faces Death by Firing Squad*, THE GUARDIAN, Jun. 16, 2010, <http://www.guardian.co.uk/world/2010/jun/16/utah-prisoner-death-firing-squad>.

¹⁶⁵ *Id.*

¹⁶⁶ Ray Sanchez, *Ronnie Lee Gardner Executed by Firing Squad in Utah*, ABC GOOD MORNING AMERICA, Jun. 18, 2010, <http://abcnews.go.com/GMA/Broadcast/convicted-killer-ronnie-lee-gardner-executed-utah/story?id=10949786&page=1>.

¹⁶⁷ *Id.*

¹⁶⁸ H.B. 107, 16th Leg., 1st Sess. (Idaho 2009), available at <http://www.legislature.idaho.gov/legislation/2009/H0107Bookmark.htm>.

¹⁶⁹ CHRISTOPHER E. SMITH ET AL., LAW & CRIMINAL JUSTICE: EMERGING ISSUES IN THE TWENTY-FIRST CENTURY 90 (2005).

Testifying at a hearing concerning the use of the electric chair, as an expert witness on the effects of electricity, Thomas Edison opined in 1889 that it would take 1,000 volts of electrical energy to kill a human being.¹⁷⁰ When asked how he arrived at that conclusion, he testified that he had killed horses and dogs with electrocution.¹⁷¹ At that time, New York had abolished hanging and proscribed execution by the electric chair, and Edison opined that using electricity on a human in the prescribed amount would produce an instant painless death.¹⁷² What was puzzling about his testimony, was that in 1887, Edison said he would support abolition of the death penalty altogether.¹⁷³ The issue boiled down to this: Edison’s financial stakes were in solely direct current (“DC”) technology, and his rival George Westinghouse, Jr. had staked his claim upon alternating current (“AC”) technology.¹⁷⁴ Although Edison may have been genuinely concerned about the dangers of AC—he nevertheless embarked on a campaign to show the dangers of AC by showing how AC could end lives and kill humans—thus pushing for the use of AC in executions by electric chair.¹⁷⁵ Consequently, Edison’s mouthpiece Harold P. Brown, would later have the dominant hand in designing New York’s first electric chair.¹⁷⁶

Within a few years, William Kemmler, a vegetable peddler sentenced to die in the electric chair for the murder of his mistress, would make history.¹⁷⁷ His electrocution was horrifying because he did not die from a single charge of 1,000 volts.¹⁷⁸ Kemmler’s chest heaved, and as the smell of burned clothes and charred flesh filled the air, he pressed at his straps

¹⁷⁰ MARK ESSIG, *EDISON AND THE ELECTRIC CHAIR: A STORY OF LIGHT AND DEATH 2* (2003).

¹⁷¹ *Id.*

¹⁷² *Id.* at 2–3.

¹⁷³ *Id.*

¹⁷⁴ CRAIG BRANDON, *THE ELECTRIC CHAIR: AN UNNATURAL AMERICAN HISTORY* 68–72 (1999).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 86–88.

¹⁷⁷ *Id.* at 89.

¹⁷⁸ GEOFFREY ABBOTT, *THE EXECUTIONER ALWAYS CHOPS TWICE: GHASTLY BLUNDERS ON THE SCAFFOLD* 73 (2002).

after the initial administration; with a startled cry, he requested the switch be turned on again.¹⁷⁹ The second administration of 1,030 volts flowed through his body for four minutes and ultimately ceased when his body went limp.¹⁸⁰

Despite questions about the cruelty of Kemmler's electrocution, one immediate response defended the practice, countering the accounts from numerous reporters by stating:

The grave question as to what we shall do with our murderers is not to be settled by windy editorial writers trying to work up a temporary sensation. Nor can the same authorities be allowed to decide between hanging and electrocution. The question must be looked at calmly and honestly. The heat of public opinion must be allowed to cool. The public's second thought is always better than its first. The former is an explosion of temporary feeling, the latter is its matured and thoughtful conclusion. The Kemmler execution has not settled the question as to whether electrocution is better or worse than hanging. Let us give the system a fair trial. In spite of what the correspondents have told us, the first experiment in electrocution was not so horrible as many hangings have been. The horror was largely in the minds of the witnesses, to whom the unusual must perforce seem more cruel than the usual. Custom rules us all. Even the witnesses acknowledge that Kemmler probably was made unconscious if not killed instantaneously. As to the question of the entire abolition of capital punishment, we must go slow. We must take a broad outlook, we must look at the subject from all sides. Unreasoning humanitarianism may be cruelty to the race. As we have already pointed out, criminals are removed from society because they are dangerous, not only directly but indirectly. From out of the grave itself they stretch out cruel hands to injure our posterity. Is imprisonment for life sufficient? To pen them up at the expense of the State is to add a burden on the tax-payers. Shall our decent and honorable laboring classes be deprived of a portion of their hard-won earnings to support in idleness the criminals who are a continual menace to the happiness of the State? That is a question not lightly to be answered.¹⁸¹

It then came as no surprise that "more than half of the states which authorized the death penalty were using electrocution as their method of execution by the end of the 1920s."¹⁸²

At Sing Sing prison, the electric chair became known as "Gruesome Gertie," one of three chairs in New York.¹⁸³ Such nicknames were not uncommon; in other states, the electric chair

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 74.

¹⁸¹ *Capital Punishment*, in 3 THE ILLUSTRATED AMERICAN 324 (Illustrated American Publ'g Co., New York 1890).

¹⁸² Sech, *supra* note 120, at 393.

became known by the differing titles of “Old Sparky,” and the “Hot Seat.”¹⁸⁴ Edison seemed to have succeeded in his efforts of associating the process with Westinghouse—as one New York attorney suggested that condemned inmates had been “Westinghoused.”¹⁸⁵ The first woman executed by the chair in New York was Martha Place, who had killed her stepdaughter and endeavored to kill her husband.¹⁸⁶ At this point in time, electrocution had succeeded in displacing hanging in popularity, and it became the dominant method of execution from the early 1900s to the late 1980s.¹⁸⁷ Through 2010, more than forty-four hundred condemned inmates have been put to death by electrocution, including the infamous Ted Bundy.¹⁸⁸

4. The Gas Chamber

First constructed in 1924 in Nevada, the American gas chamber was to be used on Gee Jon, a Chinese immigrant who had been convicted of murdering another Chinese immigrant.¹⁸⁹ The gaseous asphyxiation method was intended to be a more painless and humane substitute for the electric chair.¹⁹⁰ Like the electric chair, the prisoner was strapped to a chair to render him or her immobile.¹⁹¹ The inmate was trapped in a small room; for example, in Mississippi’s gas chamber the room was four square feet in area and ten feet high, with waist high windows for viewing and a steel 300 pound door rimmed with a rubber gasket to keep gas from escaping.¹⁹² Sulfuric acid was pumped into a basin beneath the chair, and cyanide salts are released into the

¹⁸³ L. KAY GILLESPIE, EXECUTED WOMEN OF THE 20TH AND 21ST CENTURIES 22 (2009).

¹⁸⁴ ROBERT K. ELDER, LAST WORDS OF THE EXECUTED 127 (2010).

¹⁸⁵ GILLESPIE, *supra* note 183, at 23.

¹⁸⁶ *Id.* at 22-23.

¹⁸⁷ ELDER, *supra* note 184, at 127.

¹⁸⁸ FRIDELL, *supra* note 94, at 41; Karen Voyles, *UF professor writes book about his most famous case*, GAINESVILLE SUN, July 17, 2011, available at <http://www.gainesville.com/article/20110717/ARTICLES/110719832/1007/NEWS?p=2&tc=pg> (last modified July 13, 2011) (“He died in Florida’s electric chair at 7:13 a.m. on Jan. 24, 1989.”).

¹⁸⁹ SCOTT CHRISTIANSON, THE LAST GASP: THE RISE AND FALL OF THE AMERICAN GAS CHAMBER 1 (2010).

¹⁹⁰ *Id.* at 1–2.

¹⁹¹ FRIDELL, *supra* note 94, at 41.

¹⁹² *Id.*

basin thereafter to produce hydrogen cyanide gas.¹⁹³ A fan sucked the poison gas into the room evenly, and the process was supposed to take only ten minutes.¹⁹⁴

In 1983, Jimmie Lee Gray, sent to Mississippi's gas chamber for the killing of a three-year old, took forty-seven minutes to be killed by this method.¹⁹⁵ Gray foamed at the mouth, and banged his head against a metal pole, which was attached to the back of the chair he was strapped to.¹⁹⁶ For a period of time, the gas chamber became the execution method of choice of Arizona, California, Colorado, Maryland, Mississippi, Missouri, Nevada, New Mexico, North Carolina, Oregon, Rhode Island, and Wyoming—totaling twelve states.¹⁹⁷ Used between 1924 and 1999, North Carolina led the way with one hundred and ninety-seven executions, followed by California with one hundred and ninety-six executions.¹⁹⁸ Yet this piece of technology, developed by America would become a method of mass extermination in Germany, as the Nazis used gas chambers with a unique brand of hydrocyanic acid for mass extermination of six million Jews.¹⁹⁹ For the Nazis, it was a quick and easy way to bring about death as they would gas the condemned and cremate them quickly thereafter.²⁰⁰

However dark the commentary surrounding the gas chamber experience in Germany might be in relation to its American use, there are significant differences.²⁰¹ First, those killed in Germany committed no crimes, nor did they receive due process of law.²⁰² The victims of Nazi Germany's gas chambers were killed en masse with no safety protocols in place as they were

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 41–42.

¹⁹⁵ *Id.* at 42.

¹⁹⁶ *Id.*

¹⁹⁷ CHRISTIANSON, *supra* note 189, at 3.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 7–8.

²⁰¹ See STEWART CLEGG ET AL, POWER AND ORGANIZATIONS 157–58 (2006) (illustrating the appalling gas chamber process that was adopted in Auschwitz).

²⁰² See *id.* at 159.

gathered in packs into the rooms and mobile gas wagons and killed in secrecy.²⁰³ The moral reprehensibility of hate-based systematic genocide cannot and is not to be understated.²⁰⁴ Still though, it is strange that very few at the time ever attempted to draw any parallels between the two experiences, specifically those illustrating the American gas chamber use for execution of convicted murderers versus the German gas chamber use to facilitate genocide of the innocent.²⁰⁵ The bottom line is, when a convicted cold-blooded killer is executed, the theory of justice behind the decision is “he had it coming.”²⁰⁶

5. Lethal Injection

The first lethal injection to ever take place in the U.S. was administered to Charles Brooks on December, 7, 1982.²⁰⁷ Brooks had been strapped to a gurney with IV lines running into both arms.²⁰⁸ Saline solution flowed through each set of tubes that ran back to an IV stand and drip bag concealed behind a mirror.²⁰⁹ Although Brooks appeared to be moving his head around during the procedure and saying “No” and then “Ahlllll” and then “Ummmmm” with fingers trembling and stomach heaving, some observers attributed this to the “agony of anticipation” rather than actual suffering.²¹⁰ Other observers pointed to the peaceful impression

²⁰³ *See id.* at 157.

²⁰⁴ *Id.* (discussing how the Nazis recycled parts of the deceased victims, such as skin, teeth, hair, dentures, and so forth, turning large scale death into profitable industry).

²⁰⁵ *See* CHRISTIANSON, *supra* note 189, at 131–33 (discussing how Americans used Zyklon B on Mexicans by placing their clothes and personal effects in delousing chambers in El Paso, Texas and how the Nazis developed the idea of disinfecting Jews in a similar fashion as well as treating them like criminals). *See generally* EDWIN BLACK, *IBM AND THE HOLOCAUST: THE STRATEGIC ALLIANCE BETWEEN NAZI GERMANY AND AMERICA'S MOST POWERFUL CORPORATION* (2002) (drawing a connection between the American corporation IBM and its foreign-based subsidiary Dehomag and the use of punch card technology in Germany which enabled the Nazis to identify Jews and collect them for confinement and execution).

²⁰⁶ Jonathan Wallace, *The Death Penalty Legend*, <http://www.spectacle.org/0700/death.html> (last visited Aug. 15, 2011) (discussing how the author would receive indignant mail for comparing innocent Jews to horrific murderers).

²⁰⁷ JONATHAN ROGER SORENSEN & ROCKY LEANN PILGRIM, *LETHAL INJECTION: CAPITAL PUNISHMENT IN TEXAS DURING THE MODERN ERA* 12 (2006).

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 12–13.

²¹⁰ *Id.* at 13.

of lethal injection as indicative of its humane nature.²¹¹ That did not mean things would go as peacefully as planned. Behind the scenes—apparently rather than introducing the three drugs consecutively—they were mixed together, initially coagulating into a jelly-like substance that was difficult to administer.²¹² On another occasion, the lethal injection line accidentally dislodged from the inmate’s arm and sprayed witnesses; another hitch occurred when executioners needed to use more than the usual dosage of drugs to execute an inmate, because they initially inadvertently used an insufficient concentration of drugs.²¹³

Two years prior to Brooks’ execution, several death row inmates in Texas and Oklahoma “filed suit in the District Court seeking to compel [the] [Food and Drug Administration] (“FDA”) to fulfill its statutory obligation to investigate and to regulate the unapproved use of approved drugs in human execution systems.”²¹⁴ The condemned inmates alleged that the use of the first two lethal injection drugs (the barbiturate and the paralytic) violated both the “new drug” and the “misbranding” provisions of the Food, Drug, and Cosmetics Act.²¹⁵ The FDA took the position that it was not responsible for regulating drugs which are used for executions.²¹⁶ The district court granted summary judgment in favor of the FDA; the court of appeals vacated the district court’s ruling and found that the FDA’s failure to fulfill its regulatory responsibility could result in an Eighth Amendment violation.²¹⁷ Justice Antonin Scalia, a circuit court of appeals judge at the time of the opinion in 1983, wrote a dissent criticizing the majority opinion for accepting judicial review when the FDA had executive agency discretion to not get involved in regulation

²¹¹ *Id.*

²¹² *Id.* at 15.

²¹³ SORENSEN & PILGRIM, *supra* note 207, at 15.

²¹⁴ *Chaney v. Heckler*, 718 F.2d 1174, 1178 (D.C. Cir. 1983) (alteration in original).

²¹⁵ *Id.* at 1177.

²¹⁶ *Id.* at 1178.

²¹⁷ *Id.* at 1178–79, 1191–92.

of these types of drugs.²¹⁸ This would result in reviewing a decision that should not be judicially reviewable, violating the separation of powers and encroaching upon another branch of government.²¹⁹ In 1985, the Supreme Court reversed the D.C. Circuit’s decision, fully agreeing with Justice Scalia’s dissent where Justice Rehnquist issued the majority opinion and Justices Brennan and Marshall wrote concurring opinions.²²⁰

Finding veins suitable for injection has proven challenging with lethal injection executions.²²¹ The use of cut-down procedures is not uncommon; Tennessee’s protocol, as an example provides:

Cut-down procedure. If the IV team cannot locate a usable vein during an execution (due for example to drug use by the inmate) . . . Tennessee uses a cut-down procedure—which means that a physician makes an incision in order to obtain IV access. After reviewing the cut-down procedure and its alternatives “with several experts,” the State concluded that “cut-down procedures are not particularly difficult for physicians to perform,” and therefore decided to keep the procedure as its contingency plan during the lethal-injection process.²²²

²¹⁸ *Id.* at 1192.

²¹⁹ *See id.* at 1192.

²²⁰ *Heckler v. Chaney*, 470 U.S. 824, 837–38 (1985). The Court held:

We therefore conclude that the presumption that agency decisions not to institute proceedings are unreviewable under 5 U.S.C. § 701(a) (2) is not overcome by the enforcement provisions of the FDCA. The FDA’s decision not to take the enforcement actions requested by respondents is therefore not subject to judicial review under the APA. The general exception to reviewability provided by § 701(a) (2) for action “committed to agency discretion” remains a narrow one, . . . , but within that exception are included agency refusals to institute investigative or enforcement proceedings, unless Congress has indicated otherwise. In so holding, we essentially leave to Congress, and not to the courts, the decision as to whether an agency’s refusal to institute proceedings should be judicially reviewable. No colorable claim is made in this case that the agency’s refusal to institute proceedings violated any constitutional rights of respondents, and we do not address the issue that would be raised in such a case. . . . The fact that the drugs involved in this case are ultimately to be used in imposing the death penalty must not lead this Court or other courts to import profound differences of opinion over the meaning of the Eighth Amendment to the United States Constitution into the domain of administrative law.

Id. at 837–38 (citations omitted).

²²¹ *See Workman v. Bredesen*, 486 F.3d 896, 909 (6th Cir. 2007) (“For another, the State has a doctor on hand to address any problems if the trained employee cannot start the IV. A physician must ‘be present at the precise time of execution’ and ‘perform the cut-down procedure should the IV Team be unable to find a vein adequate to insert the catheter’”) (citations omitted).

²²² *Id.* at 903.

In response to inmate attacks on the use of cut-down procedures, the Supreme Court has taken a cautious approach by requiring that a state show that such a procedure is actually necessary to gain venous access.²²³ In remanding the issue for further determination, the Court opined:

If as a legal matter the cut-down were a statutorily mandated part of the lethal injection protocol, or if as a factual matter petitioner were unable or unwilling to concede acceptable alternatives for gaining venous access, respondents might have a stronger argument that success on the merits, coupled with injunctive relief, would call into question the death sentence itself. But petitioner has been careful throughout these proceedings, in his complaint and at oral argument, to assert that the cut-down, as well as the warden's refusal to provide reliable information regarding the cut-down protocol, are wholly unnecessary to gaining venous access. Petitioner has alleged alternatives that, if they had been used, would have allowed the State to proceed with the execution as scheduled. No Alabama statute requires use of the cut-down, and respondents have offered no duly-promulgated regulations to the contrary.

If on remand and after an evidentiary hearing the District Court concludes that use of the cut-down procedure as described in the complaint is necessary for administering the lethal injection, the District Court will need to address the broader question, left open here, of how to treat method-of-execution claims generally. An evidentiary hearing will in all likelihood be unnecessary, however, as the State now seems willing to implement petitioner's proposed alternatives.²²⁴

In light of the difficulty of such cases, it is surprising that states have not recommended administering the injection directly into the heart.²²⁵ However, during the Second World War some Jews exterminated by the Nazis were executed in this fashion, usually by a phenol injection.²²⁶

This method was considered the quickest as the prisoners were angled in such a way to make the heart easily accessible,²²⁷ and many “fell dead almost immediately” while others took

²²³ See *Nelson v. Campbell*, 541 U.S. 637, 645–46 (2004).

²²⁴ *Id.* at 646 (citations omitted) (quoting oral arguments stating that there was no disagreement that the percutaneous central placement as the preferred method and that a cut-down procedure would only be used if actually necessary).

²²⁵ See EUGÈNE ARONEANU, *INSIDE THE CONCENTRATION CAMPS: EYEWITNESS ACCOUNTS OF LIFE IN HITLER'S DEATH CAMPS* 75 (Thomas Whissen trans., 1996).

²²⁶ Franciszek Piper, *Auschwitz Concentration Camp: How It Was Used in the Nazi System of Terror and Genocide and in the Economy of the Third Reich*, in *THE HOLOCAUST AND HISTORY: THE KNOWN, THE UNKNOWN, THE DISPUTED AND THE RE-EXAMINED* 372 (Michael Berenbaum & Abraham J. Peck eds., 1998).

²²⁷ *Id.*

an average of two minutes and twenty seconds.²²⁸ Critics of the death penalty such as University of California, Berkeley's, Ty Alper, argued that when Ohio moved to a single-drug protocol eliminating the bromide paralytic and painful potassium chloride, that the move was not enough because "Ohio still hasn't solved the problem of IV access, and given Ohio's difficulty in accessing inmates' veins that remains a serious concern. Our main concern is that if they can't establish IV access then they have to use the back up plan which is a complete unknown."²²⁹ Recently, a challenge premised on poor compliance with procedures concerning some of these issues was successful in the Southern District Court of Ohio.²³⁰

Ohio is the same state that botched the execution of Romell Broom, eventually giving up on trying to execute him after searching two hours for veins.²³¹ In 2006, Florida had its own share of trouble, with the botched execution of Angel Diaz, due to the needle passing through his vein.²³² As a result, the coroner and doctors studying the autopsy results opined that because the drugs were injected into soft tissues, the anesthetic was not effective, and he likely died a slow painful death that had taken more than half an hour.²³³ As a result, the Florida Governor suspended all executions in the state and appointed a commission to consider the humanity and

²²⁸ ROBERT JAY LIFTON, *THE NAZI DOCTORS: MEDICAL KILLING AND THE PSYCHOLOGY OF GENOCIDE* 259 (1986).

²²⁹ Ariane De Vogue & Dennis Powell, *Ohio Killer Executed in First Use of Single-Drug Lethal Injection*, ABCNEWS.COM Dec. 8, 2009, <http://abcnews.go.com/Politics/lethal-injection-ohio-perform-execution-single-drug/story?id=9277599>.

²³⁰ *Cooley v. Kasich*, Nos. 2:04-cv-1156, 2:09-cv-242 2:09-cv-823, 2:10-cv-27, 2011 WL 2681193, at *34 (S.D. Ohio July 8, 2011) (granting a temporary injunction and stay of execution of Kenneth Smith based on serious concerns about administration of Ohio's execution protocol).

Ohio also fails to follow formalized procedures designed to ensure adequate preparation for the administration of drugs by IV, rendering possible that the state will proceed without sufficient assessment of the inmate and that the state might attempt an execution by Plan A when it should proceed directly to Plan B. Section VI.B.4.b of the written protocol provides for multiple vein assessments, including a pre-9:00 a.m. assessment on the morning of the execution.

Id. at *22.

²³¹ Brian Evans, *Injection Errors Expose Death Penalty Truth*, COLUMBIA DAILY TRIBUNE, Aug. 14, 2011, <http://www.columbiatribune.com/news/2011/aug/14/injection-errors-expose-death-penalty-truth/>.

²³² John Agnew, *Florida Might Eventually Give Execution a Bad Name* (Aug. 19, 2011), <http://disc.yourwebapps.com/discussion.cgi?disc=219621;article=55066>.

²³³ Adam Liptak & Terry Aguayo, *Bush's Brother Suspends Florida Death Penalty After Botched Execution*, N.Y. TIMES, Dec. 16, 2006, <http://www.nytimes.com/2006/12/16/world/americas/16iht-web.1216death.3921915.html>.

constitutionality of lethal injections.²³⁴ The very same day, a court in the Northern District of California had ruled that California's lethal injection procedures were unconstitutional.²³⁵

Although lethal injections would resume shortly thereafter and moved forward in thirty-four states, the switch from sodium thiopental to pentobarbital brought on a new wave of attacks.²³⁶ There was a claim that in 2011, the execution of Roy Blankenship in Georgia was botched due to the use of pentobarbital as an anesthetic.²³⁷ However, unlike the failed execution of Broom and the botched execution of Diaz, there was no way to tell whether Blankenship had a painful reaction to the drugs, whether it was an involuntary muscle response involving no real pain, or whether he was just faking it.²³⁸ Still nonetheless, the lethal injection process in the states continues to march forward and shows no signs of abating.²³⁹ Perhaps in light of the many current challenges, the heart injection method should remain a possibility to be investigated and explored.

C. The Death Penalty and Eighth Amendment Jurisprudence

1. Early Ruminations of Decency

The concept of proportionality in punishment began with section twenty of the Magna Carta, in England, which provided:

For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to

²³⁴ *Id.*

²³⁵ *Morales v. Tilton*, 465 F. Supp. 2d 972, 974 (N.D. Cal. 2006) (finding serious but correctable deficiencies in the implementation of California's lethal injection protocol and urging California's executive branch to address the implementation problems).

²³⁶ Erik Eckholm & Katie Zezima, *States Face Shortage of Key Lethal Injection Drug*, N.Y. TIMES (Jan. 21, 2011), <http://www.nytimes.com/2011/01/22/us/22lethal.html>.

²³⁷ Greg Bluestein, *Ga. Execution Is Fodder for Challenges to New Drug*, ABC NEWS (Jun. 28, 2011), <http://abcnews.go.com/US/wireStory?id=13949476>.

²³⁸ *Id.*

²³⁹ *See Va. Executes Man who Raped, Killed Elderly Widow*, CBS NEWS (Aug. 18, 2011), http://www.cbsnews.com/2102-201_162-20094407.html?tag=contentMain;contentBody. A Virginia man who raped and suffocated an 88-year-old widow has become the state's first inmate executed using a new drug cocktail. *Id.* Thirty-year-old Jerry Terrell Jackson was executed by lethal injection at 9:14 p.m. Thursday at Greensville Correctional Center in Jarratt. *Id.*

deprive him of his livelihood. In the same way, a merchant shall be spared his merchandise, and a husbandman the implements of his husbandry, if they fall upon the mercy of a royal court. None of these fines shall be imposed except by the assessment on oath of reputable men of the neighborhood [sic].²⁴⁰

Another iteration of this legal principle found its way into the English Bill of Rights of 1689, “[t]hat excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”²⁴¹ The colonial 1641 Massachusetts Body of Liberties included a prohibition against punishments that are “barbarous and inhumane.”²⁴² Likewise the Bill of Rights of the first five states had provisions forbidding excessive bail or fines and prohibited cruel and unusual punishment.²⁴³ Article Two of the Northwest Ordinance of 1787 likewise outlawed cruel and unusual punishment,²⁴⁴ and it became a critical addition to the Constitution by way of the Bill of Rights stating: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”²⁴⁵

However, what was considered cruel and unusual was reflective of the times—the British jurist William Blackstone observed the following historical practices concerning the death penalty:

When sentence of death, the most terrible and highest judgment in the laws of England, is pronounced, the immediate inseparable consequence by the common law is attainder. *For when it is now clear beyond all dispute, that the criminal is*

²⁴⁰ *The Text of the Magna Carta*, FORDHAM UNIV., <http://www.fordham.edu/halsall/source/magnacarta.asp> (last visited Aug. 18, 2011).

²⁴¹ *The Bill of Rights, 1689*, FORDHAM UNIV., <http://www.fordham.edu/halsall/mod/1689billofrights.asp> (last visited Aug. 18, 2011).

²⁴² THE COLONIAL LAWS OF MASSACHUSETTS, THE CITY COUNCIL OF BOSTON 43 (W. H. Whitmore, ed., Boston 1890). The Council stated:

No man shall be forced by Torture to confesse [sic] any Crime against himselfe [sic] nor any other unlesse [sic] it be in some Capitall [sic] case where he is first sullie [sic] convicted by cleare [sic] and sufficient evidence to be guilty, After which if the cause be of that nature, That it is very apparent there be other conspiratours [sic], or confederates with him, Then he may be tortured, yet not with such Tortures as be Barbarous and inhumane. For bodilie [sic] punishments we allow amongst us none that are inhumane Barbarous or cruel.

Id.

²⁴³ DAVID FELLMAN, DEFENDANTS RIGHTS 384 (1976).

²⁴⁴ *Id.*; see also *Menard v. Aspasia*, 30 U.S. 505, 512, 514–15 (1831).

²⁴⁵ U.S. CONST. amend. VIII.

*no longer fit to live upon the earth, but is to be exterminated as a monster and a bane to human society, the law sets a note of infamy upon him, puts him out of it's protection, and takes no farther care of him than barely to see him executed. He is then called attaint, attinctus, stained, or blackened. He is no longer of any credit or reputation; he cannot be a witness in any court; neither is he capable of performing the functions of another man: for, by an anticipation of his punishment, he is already dead in law. This is after judgment: for there is great difference between a man convicted, and attainted; though they are frequently through inaccuracy confounded together. After conviction only, a man is liable to none of these disabilities: for there is still in contemplation of law a possibility of his innocence. Something may be offered in arrest of judgment: the indictment may be erroneous, which will render his guilt uncertain, and thereupon the present conviction may be quashed: he may obtain a pardon, or be allowed the benefit of clergy; both which suppose some latent sparks of merit, which plead in extenuation of his fault. But when judgment is once pronounced, both law and fact conspire to prove him completely guilty; and there is not the remotest possibility left of anything to be said in his favour. Upon judgment therefore of death, and not before, the attainder of a criminal commences: or upon such circumstances as are equivalent to judgment of death; as judgment of outlawry on a capital crime, pronounced for absconding or fleeing from justice, which tacitly confesses the guilt. And therefore either upon judgment of outlawry, or of death, for treason or felony, a man shall be said to be attainted.*²⁴⁶

Subsequently, pain was not in issue, since a person condemned to death was already as good as dead and lacked rights; however once again keeping punishment proportional, the Constitution provided that this disability of being attainted did not extend to the close family and heirs of one attainted for treason, after death.²⁴⁷

The legal concept of what was barbaric seemed destined to change. Justice Thomas Cooley of the Michigan Supreme Court wrote in a treatise that the references to “cruel and unusual punishment” adopted in many state constitutions (which had been modeled after the Eighth Amendment) were not fixed, but could change with time as punishments became obsolete

²⁴⁶ 2 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 381 (Callaghan & Co., 1899) (emphasis added).

²⁴⁷ See U.S. CONST. art. III, §3, cl. 2 (“The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.”).

and even extinct, believing that what was forbidden could evolve over time.²⁴⁸ However, the Supreme Court had no real basis to intervene in state matters at the time of the writing of the treatise, because the Fourteenth Amendment had yet to be adopted.²⁴⁹ Subsequently, there was little Supreme Court jurisprudence on the issue until the late nineteenth century.²⁵⁰

In *Wilkerson v. Utah*,²⁵¹ the Supreme Court was faced with a Utah capital punishment statute which provided for three punishments: death by firing squad, hanging, or decapitation.²⁵² The Court in *Wilkerson* sentenced the defendant to death by firing squad.²⁵³ In commenting on the historical methods of execution, the Court suggested that dissection, burning alive, and disemboweling would be cruel and unusual, but held that death by firing squad was constitutional as the Court observed:

Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the eighth amendment. Soldiers convicted of desertion or other capital military offences are in the great majority of cases sentenced to be shot, and the ceremony for such occasions is given in great fullness by the writers upon the subject of courts-martial.

Where the conviction is in the civil tribunals, the rule of the common law was that the sentence or judgment must be pronounced or rendered by the court in which the prisoner was tried or finally condemned, and the rule was universal that it must be such as is annexed to the crime by law. Of these, says Blackstone, some are capital, which extend to the life of the offender, and consist generally in being hanged by the neck till dead.

Such is the general statement of that commentator, but he admits that in very atrocious crimes other circumstances of terror, pain, or disgrace were sometimes superadded. Cases mentioned by the author are, where the prisoner was drawn or dragged to the place of execution, in treason; or where he was emboweled alive,

²⁴⁸ MELUSKY & PESTO, *supra* note 87, at 77 (suggesting that Justice Cooley believed that certain forms of punishment that had become obsolete could be classified as cruel and unusual, and therefore beyond revival).

²⁴⁹ *Id.* The Fourteenth Amendment was ratified on July 9, 1868. U.S. CONST. amend. XIV.

²⁵⁰ *Id.* (describing how Supreme Court jurisprudence on cruel and unusual punishments was limited until well after the Fourteenth Amendment was ratified).

²⁵¹ See *Wilkerson v. Utah*, 99 U.S. 130, 130 (1878) (affirming lower court's determination that a convicted murderer be executed by firing squad).

²⁵² *Id.*

²⁵³ *Id.* at 131.

beheaded, and quartered, in high treason. Mention is also made of public dissection in murder, and burning alive in treason committed by a female. History confirms the truth of these atrocities, but the commentator states that the humanity of the nation by tacit consent allowed the mitigation of such parts of those judgments as savored of torture or cruelty, and he states that they were seldom strictly carried into effect.²⁵⁴

In effect, the Court's opinion resulted in further evolution of the country's understanding of the death penalty and observed that there was nothing to suggest that the use of a firing squad was not an acceptable death penalty considering the repeated use of it in military executions.²⁵⁵ The Court's measuring of a standard against current practice was somewhat similar to the approach advocated by Justice Cooley.²⁵⁶

Thus the country had moved away from the beliefs of the nation's Founders like Thomas Jefferson and George Mason—that crimes like capital murder should be punished more harshly.²⁵⁷ After all, the Crimes Act of 1790 specifically provided that the execution of one convicted of treason must include dissection of the corpse.²⁵⁸ In the late eighteenth century, branding, mutilation, and the severing of an ear were common punishments for criminals and not considered unusual.²⁵⁹ Yet here, nearly a century later, the Court held that “it is safe to affirm that punishments of torture, such as those mentioned by [Blackstone] . . . , and all others in the same line of unnecessary cruelty, are forbidden by that emendment [sic] to the Constitution.”²⁶⁰ Perhaps one explanation is that there are some commentators such as Justice Story who have

²⁵⁴ *Id.* at 134–35 (citations omitted).

²⁵⁵ *Id.* (referring to various authorities that have commented on the customary use of firing squads to punish capital offenders).

²⁵⁶ *See id.* (discussing the common use of firing squads in executions to dispel the notion that it qualified as cruel and unusual punishment).

²⁵⁷ *See* MELUSKY & PESTO, *supra* note 87, at 69–70.

²⁵⁸ *See* ACT FOR THE PUNISHMENT OF CERTAIN CRIMES AGAINST THE UNITED STATES, ch. 9, 1 Stat. 112 (1790); *see also* *First Federal Congress*, PUNISHMENT OF CRIMES ACT, http://www.gwu.edu/~ffcp/exhibit/p6/p6_7.html (last visited Aug. 23, 2011). Congress embraced the rule not merely just to provide bodies for medical study, but also to punish certain crimes in a more severe way than other crimes. STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 77–78 (2002).

²⁵⁹ LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 40 (1993).

²⁶⁰ *Wilkerson v. Utah*, 99 U.S. 130, 135–136 (1879).

suggested that the Eighth Amendment was unnecessary altogether and hastily adopted without foresight of the consequences because, in America, the power resided within the state legislature and there was little fear that the branch directly elected by the people would adopt a barbarous punishment by statutes that the people found repulsive; whereas it was adopted in England as a check on the judiciary because of their great power under common law.²⁶¹

2. Beyond *Wilkinson v. Utah*: Accidents Do Happen

Shortly after *Wilkinson*, William Kemmler's execution by Edison's electric chair would become the next "cruel and unusual" constitutionality challenge to be addressed by the Court.²⁶²

Observing that the punishment might be unusual due to its novel nature but not cruel stating:

"Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life."²⁶³

The Court ultimately held that this type of electrocution was not a violation of the Eighth Amendment or Fourteenth Amendment.²⁶⁴ The Court held that "this act was passed in the effort to devise a more humane method" of executing criminals, and that there was nothing unconstitutional about the New York law as written.²⁶⁵

²⁶¹ MELUSKY & PESTO, *supra* note 87, at 72–73. It is also worth noting that minimum mandatory sentences are a very old concept historically, and were available as early as 1790 in the United States, and that by the nineteenth century, the state legislatures had used them to take away sentencing discretion from the judiciary. See JOEL SAMAHA, CRIMINAL PROCEDURE 481 (2011). Though undoubtedly many Founders were aware of the story of Titus Oates in England; although not executed, he endured 2,000 lashes while being flogged from Adlgate to Newgate to Tyburn, and had survived being pilloried twice. IRENE THOMPSON, THE A-Z OF PUNISHMENT AND TORTURE 79 (2008).

²⁶² *In Re Kimmler*, 136 U.S. 436 (1890).

²⁶³ *Id.* at 447.

²⁶⁴ *Id.* at 447–49.

²⁶⁵ *Id.* at 447.

In *Weems v. United States*, the Supreme Court exercised judicial review to overturn a criminal sentence as cruel and unusual.²⁶⁶ The punishment was not a form of execution—but was called *cadena temporal*—which involved shackling, hard painful labor, and permanent civil disabilities.²⁶⁷ The Court observed that there were degrees of homicide crimes, not punished so harshly.²⁶⁸ The Court was mindful of the history behind the Eighth Amendment.²⁶⁹ In a sense, the case can be seen as helping to establish a principle of proportionality under the Eighth Amendment—in considering whether twelve years hard labor was proper punishment for falsifying records.²⁷⁰ Yet in *Rummel v. Estelle*, the Court noted that “[Weems’] finding of disproportionality cannot be wrenched from the facts of that case.”²⁷¹ However, the issue troubling the Court in *Rummel*, was whether in the absence of torture or death, a lengthy sentence of imprisonment without more, was constitutionally appropriate for a nonviolent crime.²⁷²

In *Malloy v. South Carolina*, the Court was called upon to decide whether electrocution was cruel and unusual, compared to hanging.²⁷³ “Influenced by the results in New York [after *Kimmler*], eleven other states have adopted the same mode for inflicting death in capital cases;

²⁶⁶ *Weems v. United States*, 217 U.S. 349, 382 (1910).

²⁶⁷ *Id.* at 380–81.

²⁶⁸ *Id.* at 380.

²⁶⁹ *Id.* at 371–73. The Court takes time to mention the position of Founders Patrick Henry and James Wilson, particularly Henry’s distrust and desire to have the Bill of Rights. *Id.* The Court takes additional note of the brutality and cruelty of the tyrannical Stuarts in England. *Id.*

²⁷⁰ *Id.* at 371 (quoting *O’Neil v. Vermont*, 144 U.S. 323, 339–440 (1892) (Field, J., dissenting)) (observing that the Eighth Amendment also prohibited “all punishments which, by their excessive length or severity, are greatly disproportioned to the offenses charged.”).

²⁷¹ *Rummel v. Estelle*, 445 U.S. 263, 273 (1980); see also Herbert L. Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1075 (1964).

²⁷² See *Solem v. Helm*, 463 U.S. 277, 286 (1983) (“The constitutional principle of proportionality has been recognized explicitly in this Court for almost a century.”). But see *Howard v. Fleming*, 191 U.S. 126 (1903) (holding that being sentenced to ten years prison for conspiracy to defraud, did not violate the cruel and unusual punishment clause of the Eighth Amendment). Even to this day, a minority of the Court still does not believe in proportionality as a concept within the Eighth Amendment. *E.g.* *Graham v. Florida*, 130 S. Ct. 2011 (2010) (Thomas, J., dissenting) (“As has been described elsewhere at length, there is virtually no indication that the Cruel and Unusual Punishments Clause originally was understood to require proportionality in sentencing.”). Justice Thomas suggests that the evolving standard of decency. *Id.*

²⁷³ 237 U.S. 180 (1915)

and, as is commonly known, this result is the consequence of a well-grounded belief that electrocution is less painful and more humane than hanging.”²⁷⁴ Subsequently, the Court reasoned that the penalty had not increased, but rather remained the same—death.²⁷⁵ The change was considered to be “nonessential details in respect of surroundings” and the “odious features incident to the old method were abated.”²⁷⁶ There having been no increase in severity, the Court affirmed the sentence of death.²⁷⁷

A few decades later, there was the case of seventeen year old African-American Willie Francis, who survived an electric chair execution.²⁷⁸ Due to mechanical failure, he had not died, but there were many questions about whether he suffered, and whether a second attempt at execution would result in further unconstitutional cruelty.²⁷⁹ Many and numerous applications addressed to the Supreme Court of Louisiana “were filed for writs of certiorari, mandamus, prohibition and habeas corpus, directed to the appropriate officials in the state.”²⁸⁰ The legal arguments rested on claims of double jeopardy under the Fifth Amendment, due process under the Fourteenth Amendment, and cruel and unusual punishment under the Eighth Amendment.²⁸¹ The Supreme Court of Louisiana denied all applications and claims.²⁸²

²⁷⁴ *Id.* at 185.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ AUSTIN SARAT & THOMAS KEARNS, *THE FATE OF LAW* 213–14 (1993); *see also* ARTHUR S. MILLER & JEFFREY H. BOWMAN, *DEATH BY INSTALLMENTS: THE ORDEAL OF WILLIE FRANCIS* 65 (1988). As a minor, it is disconcerting that by modern standards, he would have been put to death at all. In *Stanford v. Kentucky*, the Supreme Court upheld the death penalty for juvenile offenders. *Stanford v. Kentucky*, 492 U.S. 361 (1989) (plurality opinion). However, sixteen years later, noting that the national consensus had changed, the Court retreated from that position, and found that execution of juveniles did constitute cruel and unusual punishment violating the Eighth Amendment. *Roper v. Simmons*, 543 U.S. 551 (2005) (plurality opinion).

²⁷⁹ SARAT & KEARNS, *supra* note 278, at 213–15.

²⁸⁰ *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 461 (1947) (plurality opinion).

²⁸¹ *Id.*

²⁸² *Id.*

The U.S. Supreme Court granted certiorari and agreed to review the matter.²⁸³ The Court began with the premise that “[a]ccidents happen for which no man is to blame.”²⁸⁴ Affirming the state supreme court, and likewise rejecting all of the arguments, the Court held:

Petitioner’s suggestion is that because he once underwent the psychological strain of preparation for electrocution, now to require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment. Even the fact that petitioner has already been subjected to a current of electricity does not make his subsequent execution any more cruel in the constitutional sense than any other execution. The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. *There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution.* The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block. We cannot agree that the hardship imposed upon the petitioner rises to that level of hardship denounced as denial of due process because of cruelty.²⁸⁵

The reasoning was critical to the extent, that the Court in effect held that isolated mishaps alone do not constitute cruel and unusual punishment, rather, it is the nature of the punishment itself that would be questioned.²⁸⁶ The unusual level of cruelty must exist in the *proposition* (method), not in the *performance* (execution).²⁸⁷

Executing a condemned inmate has a level of cruelty inherently intertwined, which cannot be considered cruel and unusual within the constitutional proscription; the Court “must and do[es] assume that the state officials carr[y] out their duties under the death warrant in a

²⁸³ *Id.* at 460.

²⁸⁴ *Id.* at 462.

²⁸⁵ *Id.* at 464 (emphasis added).

²⁸⁶ *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) (plurality opinion).

²⁸⁷ *Id.* at 463 n.4 (quoting *In re Kemmler*, 136 U.S. 436, 446 (1890)). “So that, if the punishment prescribed for an offense against the laws of the State *were manifestly cruel and unusual* as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition.” *Id.* (emphasis added).

careful and humane manner.”²⁸⁸ Being a 5-4 decision, there was a bitter dissenting opinion.²⁸⁹ Justice Burton observed that there was “no statutory or judicial precedent upholding a delayed process of electrocution.”²⁹⁰ Justice Burton cited to *In re Kimmler* that there had been assurances of a quick and painless death through electrocution, and that the *Kimmler* decision indicated that “a lingering death” would be considered cruel.²⁹¹ The following was offered by Justice Burton to show what the relator Francis endured:

The statements refer to what happened after the relator had been strapped into the electric chair and a hood placed before his eyes.

‘Then the electrocutioner turned on the switch and when he did Willie Francis’ lips puffed out and he groaned and jumped so that the chair came off the floor. Apparently the switch was turned on twice and then the condemned man yelled: “Take it off. Let me breath[e].” Affidavit of official witness Harold Resweber, dated May 23, 1946.

‘I saw the electrocutioner turn on the switch and I saw his lips puff out and swell, his body tensed and stretched. I heard the one in charge yell to the man outside for more juice when he saw that Willie Francis was not dying and the one on the outside yelled back he was giving him all he had. Then Willie Francis cried out “Take it off. Let me breath[e].” Then they took the hood from his eyes and unstrapped him.’

‘This boy really got a shock when they turned that machine on.’ Affidavit of official witness Ignace Doucet, dated May 30, 1946.

‘After he was strapped to the chair the Sheriff of St. Martin Parish asked him if he had anything to say about anything and he said nothing. Then the hood was placed before his eyes. Then the officials in charge of the electrocution were adjusting the mechanisms and when the needle of the meter registered to a certain point on the dial, the electrocutioner pulled down on the switch and at the same time said: “Goodby Willie.” At that very moment, Willie Francis’ lips puffer out and his body squirmed and tensed and he jumped so that the chair rocked on the floor. Then the condemned man said: “Take it off. Let me breath[e].” Then the switch was turned off. Then some of the men left and a few minutes after the Sheriff of St. Martin Parish, Mr. E. L. Resweber, came in and announced that the governor had granted the condemned man a reprieve.’ Affidavit of official chaplain Reverend Maurice L. Rousseve, dated May 25, 1946.²⁹²

²⁸⁸ *Resweber*, 329 U.S. at 462 (5-4 decision) (plurality opinion).

²⁸⁹ *Id.* at 472 (Burton, J., dissenting).

²⁹⁰ *Id.* at 475.

²⁹¹ *Id.* at 476 (quoting *In re Kemmler*, 136 U.S. at 447).

²⁹² *Resweber*, 329 U.S. at 480, n.2 (plurality opinion) (Burton, J. dissenting).

The dissent squarely imposed the obligation on the executioner to produce death after one flow of current, and where that did not occur, the failing result would be considered cruel and unusual, precluding a second opportunity to try.²⁹³ Notwithstanding the dissent's position, Willie Francis was executed at 12:05 PM on May 9, 1947.²⁹⁴ The matter of whether an execution could be considered cruel and unusual would not be seriously revisited again until the landmark decision of *Furman v. Georgia*.²⁹⁵

1. From *Furman v. Georgia* to the *July 2 Cases*

Prior to *Furman*, the Court had considered the case of a natural born American who was denationalized by virtue of the Section 401(g) of the Nationality Act of 1940,²⁹⁶ which provided that a conviction for desertion during wartime and the subsequent court-martial would disqualify him of numerous civil rights and cause him to lose citizenship.²⁹⁷ Chief Justice Warren wrote the majority opinion and reasoned that Section 401(g) was a penal law.²⁹⁸ Relying on *Weems*, the Court held that the words of the Eighth Amendment are not “static” and that the “[Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”²⁹⁹

Chief Justice Warren went on to conclude that denationalization met the test for being “cruel” within the prohibition of inhumane treatment, and that it “was never explicitly sanctioned

²⁹³ *Id.* at 479.

²⁹⁴ Elliott Chaze, *Second Trip To Chair-Willie Francis Dies*, ST. PETERSBURG TIMES, May 10, 1947, at 2, available at <http://news.google.com/newspapers?id=rMEKAAAIAIBAJ&sjid=1k4DAAAIAIBAJ&pg=2776,3328274&dq=willie+francis> (“[A]t 12:10 PM [Willie Francis] was pronounced dead.”).

²⁹⁵ See generally *Furman v. Georgia*, 408 U.S. 238 (1972) (5-4 decision) (per curiam) (holding that the imposition and carrying out of death penalty in cases before court would constitute cruel and unusual punishment in violation of Eighth and Fourteenth Amendments).

²⁹⁶ 54 Stat. 1168, 1169 (1940), amended by 8 U.S.C. § 801(g) (1944).

²⁹⁷ *Trop v. Dulles*, 356 U.S. 86, 87–88 (1958) (plurality opinion).

²⁹⁸ *Id.* at 99.

²⁹⁹ *Id.* at 100–01.

by this Government until 1940 and never tested against the Constitution until this day.”³⁰⁰

Reversing the circuit court of appeals and remanding the matter back to the district court, the Court held that the denationalization provision of Section 401(g) was unconstitutional.

Chief Justice Warren wrote in the usual style that typified the audacious manner of the Warren Court:

We are oath-bound to defend the Constitution. This obligation requires that congressional enactments be judged by the standards of the Constitution. The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights. When the Government acts to take away the fundamental right of citizenship, the safeguards of the Constitution should be examined with special diligence.

The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation. They are the rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules. If we do not, the words of the Constitution become little more than good advice.

When it appears that an Act of Congress conflicts with one of these provisions, we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate challenged legislation. We must apply those limits as the Constitution prescribes them, bearing in mind both the broad scope of legislative discretion and the ultimate responsibility of constitutional adjudication. We do well to approach this task cautiously, as all our predecessors have counseled. But the ordeal of judgment cannot be shirked. In some 81 instances since this Court was established it has determined that congressional action exceeded the bounds of the Constitution. It is so in this case.³⁰¹

Though not a death penalty case, the tone of *Trop* set the backdrop for the 5-4 decision in *Furman*.³⁰² Justice Marshall joined the Supreme Court in 1967,³⁰³ but Chief Justice Warren

³⁰⁰ *Id.* at 101 n.32.

³⁰¹ *Id.* at 103–04.

³⁰² *See, e.g.,* *Rudolph v. Alabama*, 375 U.S. 889 (1963) (Goldberg, J., dissenting). In *Rudolph*, which involved a death sentence for a rape, rather than homicide, Justice Goldberg, joined by Justices Douglas and Brennan asked the following questions:

(1) In light of the trend both in this country and throughout the world against punishing rape by death, does the imposition of the death penalty by those States which retain it for rape violate ‘evolving standards of decency that mark the progress of [our] maturing society,’ or ‘standards of decency more or less universally accepted?’

retired in 1969.³⁰⁴ Justice Brennan was a committed part of the Court's liberal wing.³⁰⁵ Chief Justice Warren was succeeded by Chief Justice Burger,³⁰⁶ who would join the dissent in *Furman*. Justice White was a holdover from the Warren Court but could be unpredictable.³⁰⁷ Justice Douglas would become part of the Brennan-Marshall liberal faction.³⁰⁸ Justice Stewart was a moderate centrist, acted at times as a swing vote,³⁰⁹ and voted in *Robinson v. California* in favor of finding unconstitutional a state law which made drug addict status a crime.³¹⁰ The makeup of the Court had changed in interesting ways.³¹¹ Although Marshall, Brennan, White, Douglas, and Stewart voted to find the death penalty unconstitutional in *Furman*, each wrote a separate opinion resulting in a plurality.³¹²

“A penalty . . . should be considered ‘unusually’ imposed if it is administered arbitrarily or discriminatorily.”³¹³ Justice Douglas cited to numerous statistics and examples of the death penalty being disproportionately used on blacks.³¹⁴ Justice Brennan on the other hand looked to

(2) Is the taking of human life to protect a value other than human life consistent with the constitutional proscription against ‘punishments which by their excessive . . . severity are greatly disproportioned to the offenses charged?’

(3) Can the permissible aims of punishment (*e. g.*, deterrence, isolation, rehabilitation) be achieved as effectively by punishing rape less severely than by death (*e. g.*, by life imprisonment); if so, does the imposition of the death penalty for rape constitute ‘unnecessary cruelty?’

Id. at 890–91 (citations omitted).

³⁰³ HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON* 43 (1999).

³⁰⁴ *See id.* at 245.

³⁰⁵ *See id.* at 200.

³⁰⁶ *Id.* at 245, 247.

³⁰⁷ *Id.* at 276.

³⁰⁸ *See generally id.* at 243, 246–47.

³⁰⁹ *See* BERNARD SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE BURGER COURT* 14 (1988).

³¹⁰ *Robinson v. California*, 307 U.S. 660, 667 (1962). *But see* *Powell v. Texas*, 392 U.S. 514, 532–34 (1968) (distinguishing *Robinson* on the grounds that the statute prohibited the actual act of being drunk in public rather than the status of being an alcoholic).

³¹¹ *See e.g.*, *McGautha v. California*, 402 U.S. 183 (1971), *overruled by* *Furman v. Georgia*, 408 U.S. 238 (1972). Compare the composition of justices on the *Furman* Court with the composition of justices on the *McGautha* Court. *Id.*

³¹² *Furman*, 408 U.S. at 240 (1972).

³¹³ *Id.* at 249 (Douglas, J., concurring) (quoting Arthur J. Golberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1790 (1970)).

³¹⁴ *Furman*, 408 U.S. at 249–251 (Douglas, J., concurring).

the intent of the Founders, and examined the historical record.³¹⁵ He concluded that the Founders had intended to use the clause to restrain the legislative power by proscription on the punishments they could devise.³¹⁶ Looking beyond the obvious prohibition against the infliction of pain, and the precedent of prohibiting forced expatriation, Justice Brennan felt that “the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.”³¹⁷ Part of the protection of human dignity is the prohibition against arbitrarily inflicting severe punishment on one set of people, while unnecessarily exempting others.³¹⁸

Additionally the severe punishment “must not be unacceptable to contemporary society”³¹⁹ and must not be disproportionately “excessive.”³²⁰ Ultimately, the Court “almost always treats death cases as a class apart.”³²¹ Justice Marshall’s concurrence examined statistics

³¹⁵ *Id.* at 258–63 (Brennan, J., concurring).

³¹⁶ *Id.* at 262–63 (Brennan, J., concurring).

³¹⁷ *Id.* at 273 (Brennan, J., concurring) (reasoning that the “severity” death penalty was “degrading to the dignity of human beings”). “When we consider why they have been condemned, however, we realize that the pain involved is not the only reason. The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded.” *Id.* at 272–73 (Brennan, J., concurring).

³¹⁸ *Id.* at 274 (Brennan, J., concurring).

³¹⁹ *Id.* at 277 (Brennan, J., concurring) (“Rejection by society, of course, is a strong indication that a severe punishment does not comport with human dignity. In applying this principle, however, we must make certain that the judicial determination is as objective as possible.”).

³²⁰ *Id.* at 279 (Brennan, J., concurring). Justice Brennan opined that:

A punishment is excessive under this principle if it is unnecessary: The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary and therefore excessive.

Id. (Brennan, J., concurring) (citations omitted).

³²¹ *See id.* at 286–87 (Brennan, J., concurring) (“The only explanation for the uniqueness of death is its extreme severity.”). However, Justice Thomas, dissenting in *Graham*, would lament the Court’s decision to find that life without parole for juveniles was cruel and unusual, because this would be lumping death penalty jurisprudence with ordinary determinations of length of incarceration. *Graham v. Florida*, 130 S. Ct. 2011, 2046–47 (Thomas, J., dissenting).

Today’s decision eviscerates that distinction. ‘Death is different’ no longer. The Court now claims not only the power categorically to reserve the ‘most severe punishment’ for those the Court thinks are ‘the most deserving of execution,’ but also to declare that ‘less culpable’ persons are categorically exempt from the ‘second most severe penalty.’ No reliable limiting principle remains to prevent the Court from immunizing any class of offenders from the law’s third, fourth, fifth, or fiftieth most severe penalties as well.

of execution rates, disproportionate impact, and the states that had repealed the death penalty; he concluded that the death penalty was no longer compatible with society's current standards, particularly in the international context.³²² Justice Stewart concluded "that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."³²³ Justice White felt the statutes in question were unconstitutional only because of the way the death penalty was being used; as stated in his concurrence, "what was done in these cases violated the Eighth Amendment."³²⁴

Nonetheless, the *Furman* decision ended the substantive discourse about the death penalty and turned the discussion into a procedural debate.³²⁵ The reason for the death penalty now became more about retribution than deterrence; by declaring every state statute unconstitutional, the case posed a *de facto* moratorium on capital punishment.³²⁶ States then scrambled to write new statutes to resolve the concern of unfettered jury discretion, and the matter came before the Court within four years with the case of *Gregg v. Georgia*.³²⁷ Through

Id. at 2046. (Thomas J., dissenting) (citations omitted).

³²² *Furman*, 408 at 370–74 (Marshall, J., concurring).

In striking down capital punishment, this Court does not malign our system of government. On the contrary, it pays homage to it. Only in a free society could right triumph in difficult times, and could civilization record its magnificent advancement. In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute. We achieve 'a major milestone in the long road up from barbarism' and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment.

Id. at 371 (Marshall, J., concurring). Notwithstanding Justice Marshall's concurring opinion, he had a hard time discounting the current polls, which showed that a majority of Americans still supported capital punishment.

³²³ *Id.* at 310 (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.").

³²⁴ *Id.* at 312–14 (White, J., concurring).

³²⁵ NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW 173 (Harvard Univ. Press 1995).

³²⁶ *Id.* at 172–73.

³²⁷ 428 U.S. 153 (1976); FINKEL, *supra* note 325, at 175–76. The cases decided jointly with *Gregg* were *Proffitt v. Florida*, 428 U.S. 242 (1976), *Jurek v. Texas*, 428 U.S. 262 (1976), *Woodson v. North Carolina*, 428 U.S. 280 (1976), and *Roberts v. Louisiana*, 428 U.S. 325 (1976). See James S. Liebman, *Slow Dancing with Death*, 107 COLUM. L. REV. 1, 29 n.120 (2007).

the *July 2 Cases*,³²⁸ the Court upheld the capital punishment sentencing schemes in Georgia,³²⁹ Florida,³³⁰ and Texas,³³¹ but found Louisiana and North Carolina's schemes to be constitutionally deficient.³³² After *Gregg*, the death penalty went through many refining developments, further ensuring adherence to constitutional safeguards.³³³ With a revised understanding of the procedural requirements from *Furman* and the *July 2 Cases*, death was now different.³³⁴

2. Death after Life

The *July 2 Cases* had been decided six years before the execution of Charles Brooks by lethal injection in 1982. Yet it would take thirty years from *Gregg* for the Supreme Court to begin review of the lethal injection method of execution. In January of 1985, the Court, in *Skillern v. Proconier*,³³⁵ denied an application for stay of execution by an inmate who alleged that the drugs used in Texas's lethal injection process would cause a slow and painful death. Justice Brennan dissented, pointing to the fact that Skillern was one of the plaintiffs in the

³²⁸ See Liebman, *supra* note 327, at 28. Author James S. Liebman has referred to the collective five decisions as the “July 2 Cases,” named after July 2, 1976 – the date all of the cases were decided. See *id.*

³²⁹ See *Gregg*, 428 U.S. at 207.

³³⁰ See *Proffitt*, 428 U.S. at 259–60.

³³¹ See *Jurek*, 428 U.S. at 276–77.

³³² See *Roberts*, 428 U.S. at 335–36; *Woodson*, 428 U.S. at 305.

³³³ See generally *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (prohibiting the execution of the mentally handicapped); *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (guardedly restricting the use of the death penalty in certain cases of felony murder); *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (forbidding the use of the death penalty for rape in a series of cases). The Supreme Court has also removed virtually all limitations on the presentation of mitigating evidence. See *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006); *Lockett v. Ohio*, 438 U.S. 586, 608 (1978). The Court has further required greater precision in the definition of aggravating factors. See *Walton v. Arizona*, 497 U.S. 639, 654–55 (1990); *Godfrey v. Georgia*, 446 U.S. 420, 432–33 (1980). The Court has also decided to require that a jury must ultimately decide whether aggravating factors have been proven beyond a reasonable doubt. See *Ring v. Arizona*, 536 U.S. 584, 609 (2002); see also *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that the Sixth Amendment right to a jury trial, incorporated against the states through the Fourteenth Amendment, prohibited judges from enhancing criminal sentences beyond statutory maximums based on facts other than those decided by the jury).

³³⁴ See *Gregg*, 428 U.S. at 188. In a joint opinion, Justices Stewart, Powell, and Stevens noted that the “penalty of death is different in kind from any other punishment” and emphasized its “uniqueness.” *Id.*

³³⁵ 469 U.S. 1182, 1182–83 (1985).

Heckler v. Chaney case,³³⁶ which was still pending, and that denial of the stay would result in irreparable injury.³³⁷ *Heckler* was decided in March of 1985 and held that the FDA's refusal to regulate lethal injection drugs did not violate any of the inmates' constitutional rights.³³⁸

In April of the same year, Justice Brennan, joined by Justice Marshall, dissented to the denial of a writ of certiorari of an inmate sentenced to die by electrocution.³³⁹ He continued to maintain his opposition to the death penalty altogether, and especially, the cruelty of electrocution. He interestingly reasoned that "there is significant evidence that executions by lethal gas—at least as administered in the gas chamber—and barbiturates—at least as administered through lethal injections—carry their own risks of pain, indignity, and prolonged suffering."³⁴⁰ That opinion was issued a month after *Heckler*, and Justice Brennan cited to *Heckler* for the support that improper administration of the drugs posed a risk of harm.³⁴¹

In 1992, the Court reviewed a writ of habeas corpus filed to stop an execution by California's gas chamber.³⁴² Justice Stevens, in his dissent, noted that the Attorney General of Arizona had made numerous pointed efforts to switch to lethal injection, agreeing with ethical, legal, and medical experts that the procedure was more humane than the gas chamber, hanging,

³³⁶ *Heckler v. Chaney*, 718 F.2d 1174 (D.C. Cir. 1983), *cert. granted*, 467 U.S. 1251, 1251 (1984) (No. 83-1878), *rev'd by* *Heckler v. Chaney*, 470 U.S. 821 (1985).

³³⁷ *See Skillern v. Procnier*, 469 U.S. 1182, 1183–84 (1985) (Brennan, J., dissenting) (stating that irreparable harm will occur from the denial of a stay that is the exact subject matter of a case that is under the Court's review).

³³⁸ *Heckler*, 470 U.S. at 837–38.

The fact that the drugs involved in this case are ultimately to be used in imposing the death penalty must not lead this Court or other courts to import profound differences of opinion over the meaning of the Eighth Amendment to the United States Constitution into the domain of administrative law.

Id.

³³⁹ *Glass v. Louisiana*, 471 U.S. 1080, 1080 (1985).

³⁴⁰ *Id.* at 1094; *see also* *Gray v. Lucas*, 463 U.S. 1237, 1245 (1983) (Brennan, J., dissenting). Justice Brennan had referred to lethal injections as barbaric in his dissent, stating the following:

[P]etitioner directed the court's attention to at least one readily available alternative method of administering the death penalty [the lethal injection] that, though equally barbaric in its effects, involves far less physical pain than the use of cyanide gas; it seems indisputable, therefore, that the lethal-gas method is "unnecessarily cruel."

Gray, 463 U.S. at 1245.

³⁴¹ *Glass*, 471 U.S. at 1094 n.42 (Brennan, J., dissenting).

³⁴² *See Gomez v. U.S. Dist. Court for N. Dist. of Cal.*, 503 U.S. 653, 653–54 (1992).

and electrocution.³⁴³ In 1993, the Supreme Court, in *Herrera v. Collins*, reviewed the case of a defendant who had been sentenced to death in Texas by lethal injection. However, the method of execution was not at issue in the case.³⁴⁴ Instead, the defendant's argument was based on the Eighth Amendment, which he argued prohibited his execution due to his "actual innocence" of the crime. In 1994, the Court denied an application for stay of execution and writ of certiorari for a Washington inmate who was scheduled to die by hanging who argued that hanging was now unconstitutional.³⁴⁵ Justice Blackmun, in his dissent, noted that lethal injection had been available as an alternative, but that the inmate, like many inmates condemned to death, refused to make a selection regarding the method of death.³⁴⁶

In *Callins v. Collins*,³⁴⁷ the Court denied another application for stay involving an execution by lethal injection, and Justice Blackmun again dissented, more boldly opining that "[r]ather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed."³⁴⁸ In sharp reply, Justice Scalia observed in his concurring opinion:

Convictions in opposition to the death penalty are often passionate and deeply held. That would be no excuse for reading them into a Constitution that does not contain them, even if they represented the convictions of a majority of Americans. Much less is there any excuse for using that course to thrust a minority's views upon the people. *Justice BLACKMUN begins his statement by describing with poignancy the death of a convicted murderer by lethal injection. He chooses, as*

³⁴³ *See id.* at 656 (Stevens, J., dissenting) (stating that the cruelty of death by a gas chamber convinced the Arizona Attorney General that the state should abandon the method of execution).

³⁴⁴ *See Herrera v. Collins*, 506 U.S. 390, 393 (1993). The Supreme Court argued that the defendant's execution was prohibited by the Eighth Amendment, which prohibits "cruel and unusual punishment," because he is "actually innocent" of the murder for which he was sentenced to death. *See id.*

³⁴⁵ *See Campbell v. Wood*, 511 U.S. 1119 (1994) (denying petitioner's application for stay of execution).

³⁴⁶ *Compare id.* n.2 (stating that Washington imposes death by hanging for those inmates who do not choose the mode of execution), *with Stewart v. LaGrand*, 526 U.S. 115, 119 (1999) (holding that the defendant's challenge to the execution method was waived once the inmate chose between lethal gas and lethal injection).

³⁴⁷ 510 U.S. 1141 (1994).

³⁴⁸ *Id.* at 1145 (Blackmun, J., dissenting).

*the case in which to make that statement, one of the less brutal of the murders that regularly come before us- the murder of a man ripped by a bullet suddenly and unexpectedly, with no opportunity to prepare himself and his affairs, and left to bleed to death on the floor of a tavern. The death-by-injection which Justice BLACKMUN describes looks pretty desirable next to that. It looks even better next to some of the other cases currently before us which Justice BLACKMUN did not select as the vehicle for his announcement that the death penalty is always unconstitutional-for example, the case of the 11-year-old girl raped by four men and then killed by stuffing her panties down her throat. How enviable a quiet death by lethal injection compared with that! If the people conclude that such more brutal deaths may be deterred by capital punishment; indeed, if they merely conclude that justice requires such brutal deaths to be avenged by capital punishment; the creation of false, untextual, and unhistorical contradictions within “the Court's Eighth Amendment jurisprudence” should not prevent them.*³⁴⁹

In 2004, the Supreme Court addressed the use of a cut-down method protocol to be used for a lethal injection execution in *Nelson v. Campbell*.³⁵⁰ The issue presented to the Court was whether a civil rights action filed under 42 U.S.C. § 1983 was an appropriate vehicle for the petitioner’s Eighth Amendment claim seeking a temporary stay and permanent injunctive relief.³⁵¹ The Court agreed that the filing of a civil rights claim was a permissible method of attack, and proceeded to review the record.³⁵² The claim was characterized as a “deliberate indifference” challenge to the conditions of punishment.³⁵³ The matter was reversed and remanded for further proceedings, but the Court made it clear that the inmate was only attacking the cut-down method, and not presently attacking the actual execution.³⁵⁴ Three years later, the Court granted the writ of certiorari in *Baze v. Rees*.³⁵⁵

³⁴⁹ *Id.* at 1142–43 (Scalia, J., dissenting) (emphasis added). Scalia’s dissent was the judicial equivalent of the previously mentioned argument, “He had it coming.” *See id.*

³⁵⁰ 541 U.S. 637, 639 (2004) (challenging a method of vein access to be used by the executioner as unconstitutional under the Eighth Amendment).

³⁵¹ *Id.*

³⁵² *Id.* at 640–43.

³⁵³ *Id.* at 644–45; *see also* *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

³⁵⁴ *Nelson*, 541 U.S. at 648–51.

³⁵⁵ 217 S.W.3d 207 (Ky. 2006), *cert. granted*, 551 U.S. 1192 (2007) (No. 07-5439).

The Court voted 7-2 in favor of finding Kentucky's lethal injection protocol constitutional.³⁵⁶ Chief Justice Roberts wrote an opinion, which was joined by Justices Kennedy and Alito.³⁵⁷ Justices Alito, Stevens, Scalia, Thomas, and Breyer concurred, but each wrote separate opinions.³⁵⁸ Justice Thomas additionally joined in Justice Scalia's opinion.³⁵⁹ Justice Ginsberg wrote a dissenting opinion, which Justice Souter joined in.³⁶⁰ The resulting decision upholding a state's lethal injection procedure was thus a confusing plurality (probably more so than *Furman*) that later courts would struggle to interpret.³⁶¹

Notwithstanding the confusion, a few things are clear from the *Baze* decision after looking at what the justices agreed on, collectively, on the narrowest grounds.³⁶² The Court agreed that defendants cannot speculate as to whether the execution method might cause harm; there must be evidence that the procedures are sure or are very likely to cause unnecessary

³⁵⁶ *Baze v. Rees*, 553 U.S. 35, 39 (2008), *aff'g* 217 S.W.3d 207 (Ky. 2006).

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ *See* *Cooley v. Strickland*, 610 F. Supp. 2d 853 (S.D. Ohio 2009). The *Cooley* court observed:

In addressing these challenges, the threshold question is what standard or test this Court should apply. Absent a controlling rationale set forth by a majority of the high court, what can be gleaned from the diverse array of opinions in *Baze* is debatable. Some courts construing *Baze*, just as the counsel in this case often did during the hearing, have treated the *Baze* plurality authored by Chief Justice Roberts as presenting a controlling rationale. *See, e.g., Emmett v. Johnson*, 532 F.3d 291, 298 n. 4 (4th Cir. 2008) ("Because it represents the controlling opinion of the Court, all references to *Baze*, unless otherwise noted, are to the plurality opinion authored by the Chief Justice."); *see also* *Jackson v. Danberg*, No. 06-300-SLR, 2009 WL 612469 (D. Del. Mar. 11, 2009) (discussing *Baze* as dispositive without mentioning plurality nature of lead opinion); *Raby v. Johnson*, No. H-05-765, 2008 WL 4763677 (S.D. Tex. Oct. 27, 2008) (same). At least one commentator has inquired into the validity of this approach, cautioning that, "[u]nfortunately, the Supreme Court proved incapable of achieving even minimal majority consensus as to the interplay between the Eighth Amendment and lethal injection procedures." Justin F. Marceau, *Lifting the Haze of Baze: Lethal Injection, the Eighth Amendment, and Plurality Opinions*, 41 ARIZ. ST. L.J. 159 (forthcoming 2009).

Cooley, 610 F. Supp. 2d at 919–20.

³⁶² *See* *Marks v. United States*, 430 U.S. 188 (1977), for authority of the rule of how to interpret plurality opinions, which subsequently has become called the *Marks* Rule. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . .'" *Id.* at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)) (opinion of Stewart, Powell, and Stevens, JJ.) (emphasis added).

suffering.³⁶³ “Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of ‘objectively intolerable risk of harm’ that qualifies as cruel and unusual.”³⁶⁴ Corrections officials will be presumed to be carrying out their duties properly unless it can be shown that there is some substantial risk of serious harm that proves that the corrections officials cannot show they were blameless, for constitutional purposes.³⁶⁵

“Thirty-six States that sanction capital punishment have adopted lethal injection as the preferred method of execution. The Federal Government uses lethal injection as well.”³⁶⁶ The Court, therefore, observed that where lethal injection is the current practice, a defendant will easily fall short of meeting his heavy burden to demonstrate that its use is objectively “intolerable” in the face of such a widespread practice.³⁶⁷ The Court also rejected the use of a single barbiturate as a one-drug protocol.³⁶⁸ An inmate seeking modification of an execution protocol must demonstrate that the change “would ‘*significantly* reduce a *substantial* risk of *severe* pain.’”³⁶⁹ The defendant in *Baze* provided insufficient evidence that would satisfy this exacting standard.³⁷⁰ Like *Wilkerson*, the *Baze* decision reaffirmed the Court’s commitment not to interfere with the state’s use of death for its worst offenders where the state does not purposefully seek to inflict any pain greater than that necessary to produce death.³⁷¹

³⁶³ See *Brewer v. Landrigan*, 131 S. Ct. 445, 445 (2010) (quoting *Baze v. Rees*, 553 U.S. 35, 50 (2008)).

³⁶⁴ *Baze*, 553 U.S. at 50.

³⁶⁵ See *id.*

³⁶⁶ *Id.* at 53.

³⁶⁷ See *id.*

³⁶⁸ See *id.* at 57 (“We need not endorse the accuracy of those conclusions to note simply that the comparative efficacy of a one-drug method of execution is not so well established that Kentucky’s failure to adopt it constitutes a violation of the Eighth Amendment.”).

³⁶⁹ *Id.* at 67 (Alito, J., concurring) (emphasis added).

³⁷⁰ *Baze*, 553 U.S. at 53–54 (majority opinion).

³⁷¹ *Id.* at 48 (“This Court has never invalidated a State’s chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment.”); see *Wilkerson v. Utah*, 99 U.S. 130, 137 (1876) (holding that the mode of execution by firing squad, as prescribed by the State of Utah statute, is not cruel and unusual punishment under the Eighth Amendment of the Constitution).

III. “CAN YOU PUT A PRICE ON JUSTICE?:” ECONOMICS OF THE DEATH PENALTY

A. *The Economics*

The question was once posed: “Is imprisonment for life sufficient? To pen them up at the expense of the State is to add a burden on the tax-payers.”³⁷² Some studies have shown exactly the opposite to be true. There is the proposition that politicians, both Democrat and Republican, run on a pro-death penalty platform in order to win seats or retain seats, regardless of ultimate taxpayer burden or cost.³⁷³ Considering that the United States has been struggling with a recession and its after effects since 2008, it is surprising that this potential economic drain has not been explored with greater vigor.³⁷⁴

1. Dollars and Sense

Phillip J. Cook did a study on the economics of the death penalty in North Carolina between the years of 2005 and 2006 and concluded that the state “would have spent almost \$11 million less each year on criminal justice activities (including imprisonment) without the death penalty.”³⁷⁵ Assuming the involvement of indigent defendants, which would then place the burden on the state, and drawing some from Cook’s work, the obvious “cash costs” as well as “in-kind costs” would be: (1) payments for expert witnesses testifying to rebut aggravating or support mitigating factors; (2) payments for expert witnesses to present evidence of mental

³⁷² *Capital Punishment*, *supra* note 181, at 324.

³⁷³ See RICHARD C. DIETER, *Millions Misspent: What Politicians Don’t Say About the High Costs of the Death Penalty*, in *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 401 (Hugo A. Bedau, ed., 1998).

³⁷⁴ See JOANN BREN GUERNSEY, *DEATH PENALTY: FAIR SOLUTION OR MORAL FAILURE?* 140 (Twenty-First Century Books 2010).

³⁷⁵ Phillip J. Cook, *Potential Savings from the Abolition of the Death Penalty in North Carolina*, 11 *AM. L. & ECON. REV.* 498, 499 (2009).

When a district attorney elects to proceed capitally in a murder case, there are extra costs incurred by the state. These costs can be divided into two categories, referred to here as “cash costs” and “in-kind cost.” The “cash cost” includes such items as payments by IDS for private attorneys retained to represent indigent defendants, payments by IDS for expert witnesses on behalf of the defense, and payments to jurors for cases that go to trial. For each of these cost items, there is a reasonable presumption that if the expenditures for any one case were reduced, the overall state expenditures on criminal justice would be reduced correspondingly.

Id. at 514.

retardation; (3) payment of additional hours for defense attorneys, investigators, clerks and other personnel; (4) payment for a second court-appointed attorney; and (5) payment for courtrooms, judges, and other court resources consumed by the additional hours required.³⁷⁶

Murder cases that proceeded to a capital trial averaged \$116,400 in costs, while murder cases that proceeded to a noncapital trial averaged \$67,800.³⁷⁷ Cook additionally studied the effects of the death penalty encouraging more pleas and whether withdrawal of that option would affect the resolution of noncapital cases that might have previously been capital cases.³⁷⁸ The factored difference was \$43,300 on average, which was still significant. These figures, though high, are very conservative compared to the ones he calculated during his Duke University Study in 1993.³⁷⁹

Consider also the fact that both the California Supreme Court and Florida Supreme Court spend half their time on death penalty cases.³⁸⁰ Consider also that Texas executes inmates at the highest rates in America.³⁸¹ To solve that problem, Texas has nine of its state supreme court justices handle civil cases,³⁸² while another nine judges handle the death penalty cases in a specially created Criminal Court of Appeals, resulting in a total of eighteen judges or justices at the state's highest level.³⁸³ The salary of a Texas Supreme Court Justice and Criminal Court of Appeals Judge is the same \$150,000 as of September 1, 2010.³⁸⁴ That means that Texas pays

³⁷⁶ See *id.* at 515–16.

³⁷⁷ *Id.* at 516–17.

³⁷⁸ See *id.* at 518–19.

³⁷⁹ See PHILLIP J. COOK & DONNA B. SLAWSON, THE COSTS OF PROCESSING MURDER CASES IN NORTH CAROLINA (Duke Univ. Terry Sanford Inst. of Pub. Policy, May 1993), available at <http://www.goccp.maryland.gov/capital-punishment/documents/cook-materials.pdf>.

³⁸⁰ DIETER, *supra* note 373, at 405.

³⁸¹ Ned Walpin, *Why is Texas #1 in Executions?*, PBS.ORG, <http://www.pbs.org/wgbh/pages/frontline/shows/execution/readings/texas.html> (last visited Aug. 12, 2011).

³⁸² THE SUPREME COURT OF TEXAS, <http://www.supreme.courts.state.tx.us/> (last visited Aug. 12, 2011).

³⁸³ TEXAS COURT OF CRIMINAL APPEALS, <http://www.cca.courts.state.tx.us/> (last visited Aug. 12, 2011).

³⁸⁴ TEXAS COURTS, SALARIES OF ELECTED STATE JUDGES, available at http://www.courts.state.tx.us/pubs/AR2010/jud_branch/7-judge-salaries.pdf.

\$1,352,500 a year to nine additional judges simply to handle criminal cases (particularly death penalty matters) at the highest level.³⁸⁵

This is merely the figure reflecting the additional salaries and does not include the additional money spent on additional courtrooms, utility bills for running those additional facilities, the salaries of additional personnel, clerks, judicial assistants, and other resources necessary to maintain a bifurcated state supreme court system. In 2011, the idea of following Texas's model was contemplated by Florida's legislature, which calculated that to have only five justices handle civil cases and five justices handle criminal cases would increase its court's costs by \$1.6 million a year.³⁸⁶ Yet for all of the added costs in Texas, the Texas Criminal Court of Appeals refuses to publish most of its decisions, and may, oftentimes, not consider the complexities of each death penalty case.³⁸⁷

The average elapsed time between sentencing and execution in 2009 was 169 months, which equates to fourteen years, roughly.³⁸⁸ According to a study by Barry Latzer and James N.G. Cauthen analyzing the states of Arizona, Florida, Georgia, Kentucky, Missouri, Nevada, New Jersey, North Carolina, Ohio, South Carolina, Tennessee, Texas, Virginia, and Washington, the delays in execution of sentencing resulted in several "costly by-products of the current protracted appellate process."³⁸⁹ It was estimated by a different author that between 1976 (the

³⁸⁵ See *id.* (explaining the average salary of Texas judges). The Supreme Court is composed of eight justices and one chief justice. *Id.* The eight justices are paid salaries of \$150,000.00 per year and the chief justice is paid a salary of \$152,250.00 per year. Therefore, Texas pays the nine justices a total of \$1,352,250.00 per year.

³⁸⁶ See Jane Musgrave, *Split the Florida Supreme Court? Republican Lawmakers Say it Would Speed Up Justice*, PALM BEACH POST (Mar. 19, 2011), <http://www.palmbeachpost.com/news/split-the-florida-supreme-court-republican-lawmakers-say-1333330.html?printArticle=y>.

³⁸⁷ See Walpin, *supra* note 381.

³⁸⁸ U.S. DEP'T OF JUST., CAPITAL PUNISHMENT 2009 – STATISTICAL TABLES 1 (2010) (analyzing national data to determine the effectiveness of the death penalty and evaluating the cost exacted by the death penalty).

³⁸⁹ BARRY LATZER & JAMES N.G. CAUTHEN, JUSTICE DELAYED? TIME CONSUMPTION IN CAPITAL APPEALS: A MULTISTATE STUDY 21, 51 (2007), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/217555.pdf>.

year the *July 2 Cases* reinstated the death penalty) and 1993, the United States had spent \$500 million to maintain the death penalty.³⁹⁰

2. The Tax Burden of Justice

As Cook observed in his study of the economic impact of capital cases in North Carolina, the amount of money that could be saved in abolishing the death penalty could be “returned to the taxpayers in the form of lower tax rates.”³⁹¹ Obviously, higher taxes distort economic decision-making.³⁹² In turn, the distortion creates economic inefficiencies.³⁹³ Moreover, government spending in excess of government revenues creates deficits, which, if large enough and continued over a long enough time period, will negatively impact production and economic growth.³⁹⁴ The financial burden hits hardest on those counties that are forced to choose between bankruptcy or raising taxes in order to continue the prosecution of death penalty cases.³⁹⁵

Consider the following: in California, the death penalty costs \$114 million more than life imprisonment.³⁹⁶ In Kansas, the costs of capital cases are 70% greater than relatively comparable noncapital cases.³⁹⁷ Merely on the trial court level alone, a capital trial costs \$508,000 versus \$32,000, the costs for a noncapital murder case.³⁹⁸ In Texas, a single death penalty case costs three times as much as it does to house an inmate in prison for 40 years.³⁹⁹ In Florida, death penalty cases cost \$51 million more than what it would cost to imprison first-

³⁹⁰ DIETER, *supra* note 373, at 406.

³⁹¹ See Cook, *supra* note 375, at 514.

³⁹² U.S. GOV'T ACCOUNTABILITY OFF., UNDERSTANDING THE TAX REFORM DEBATE: BACKGROUND, CRITERIA, & QUESTIONS 38 (2005) available at <http://www.gao.gov/new.items/d051009sp.pdf>.

³⁹³ *Id.*

³⁹⁴ *Id.* at 42.

³⁹⁵ See DIETER, *supra* note 373, at 405.

³⁹⁶ JACQUELINE MURRAY BRUX, ECONOMIC ISSUES & POLICY 35 (South-Western Cengage Learning, 5th ed. 2011).

³⁹⁷ *Id.*

³⁹⁸ RUDOLPH J. GERBER & JOHN M. JOHNSON, THE TOP TEN DEATH PENALTY MYTHS: THE POLITICS OF CRIME CONTROL 167 (Praeger 2007).

³⁹⁹ BRUX, *supra* note 396, at 35.

degree murders for life without parole.⁴⁰⁰ Tennessee's Comptroller of the Treasury estimated that capital cases were costing 48% more than noncapital cases resulting in life imprisonment.⁴⁰¹

Thus, counties and states have to try to assess more taxes to raise revenues to keep up with the exorbitant costs of prosecuting capital cases. The increases in "local tax rates" become an inhibiting factor on economic development, negatively affecting economic growth in many communities.⁴⁰² State government taxes are likewise economically inefficient and can cause higher income families to migrate away. This departure of a state's most productive individuals will slow economic growth.⁴⁰³ Heavy property taxes may cause the loss of persons who own capital, as they may move to other areas with lighter burdens.⁴⁰⁴

With state governments having to slash their budgets, many states have had to scramble to get the funds to provide due process to death penalty inmates. This presses the further question of whether these states can continue the costly practice of the death penalty.⁴⁰⁵ Public support, though still in favor of the death penalty, has lost considerable traction from a decade before, when the economy was in healthier form.⁴⁰⁶ In part, the belief that the death penalty is less expensive than life imprisonment without parole stems from a lack of knowledge of the due process required by the justice system.⁴⁰⁷ The public appears to be equally ignorant of the extent of the costs, and when faced with the reality that the government does not have an unlimited

⁴⁰⁰ *Id.*

⁴⁰¹ GERBER & JOHNSON, *supra* note 398, at 168.

⁴⁰² John C. Leatherman & Terry L. Kastens, *Modelling and the Probability of Manufacturing Activity in the Great Plains*, in TARGETING REGIONAL ECONOMIC DEVELOPMENT 106 (Routledge 2009).

⁴⁰³ THE FUTURE OF STATE TAXATION 164 (David Brunori ed., Urb. Inst. Press 1998).

⁴⁰⁴ JAY RICHARD ARONSON & JOHN L. HILLEY, FINANCING STATE AND LOCAL GOVERNMENTS 125–26 (Jay Richard Aronson & James Ackley Maxwell, eds., Brookings Inst. 1986).

⁴⁰⁵ GUERNSEY, *supra* note 374, at 140.

⁴⁰⁶ *See id.* at 141.

⁴⁰⁷ HUGO ADAM BEDAU, DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT 239 (Northeastern Univ. Press 1987).

amount of money at its disposal, the opinion of death penalty supporters and law enforcement, even, appear to change.⁴⁰⁸

B. The Politics

The death penalty, largely a state level issue, has loomed over even those running for the nation's top political spot. George H. W. Bush soundly defeated Michael Dukakis in the 1988 presidential elections after being hammered politically because of his opposition to the death penalty.⁴⁰⁹ Bernard Shaw had asked Dukakis during a presidential debate whether he would support the death penalty if Kitty Dukakis, his wife, was brutally raped and murdered.⁴¹⁰ Dukakis' answer that he would not cost him the election.⁴¹¹ Yet Bill Clinton, a diehard supporter of the death penalty, defeated George H. W. Bush four years later.⁴¹² After Timothy McVeigh detonated a bomb in Oklahoma City, Congress passed, and Clinton signed into law, the Antiterrorism Effective Death Penalty Act of 1996, which streamlined and reduced the amount of capital allotted to the federal appeals process for capital cases.⁴¹³ Clinton's successor, George W. Bush, had overseen a high number of executions (152) in his less than six years as governor in Texas, and three federal executions as President.⁴¹⁴

However, Clinton had been the Governor of Arkansas; Dukakis, the Governor of Massachusetts; and Bush, the Governor of Texas—all chief executives of their respective states. Clinton, as governor, had personally overseen in Arkansas the execution of the mentally defective man Rickey Ray Rector, an African-American cop killer, while on his campaign trial.

⁴⁰⁸ EVAN J. MANDERY, *CAPITAL PUNISHMENT IN AMERICA: A BALANCED EXAMINATION* 99 (Jones & Bartlett Publishers, 2d ed. 2011).

⁴⁰⁹ LUCY BREGMAN, *RELIGION, DEATH, AND DYING, VOLUME 2: SPECIAL ISSUES* 162 (ABC-CLIO Publishing 2010).

⁴¹⁰ ALAN SCHROEDER, *PRESIDENTIAL DEBATES: FIFTY YEARS OF HIGH-RISK TV* 154 (Colum. Univ. Press, 2d ed. 2008).

⁴¹¹ *See* BREGMAN, *supra* note 409, at 162.

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ *Id.*

Clinton was determined to show voters that he was a tough-on-crime Democrat.⁴¹⁵ Even though Dukakis had not been a supporter of the death penalty and Massachusetts has not had a death penalty since its statute was struck down by its state Supreme Court in 1984,⁴¹⁶ Dukakis' successor, and every governor since him, has argued for reinstatement of the death penalty.⁴¹⁷ That list of governors also includes current presidential candidate Mitt Romney, who used an attempt to reintroduce Massachusetts' death penalty statute to seek the Republican presidential nomination from those outside of his state.⁴¹⁸ Suffice to say, the death penalty plays an important role in state and federal politics across the board.⁴¹⁹

Returning to the Texas Criminal Court of Appeals, the highest state criminal court of last resort, judges have to run for election to acquire and retain their seats.⁴²⁰ It therefore comes as no surprise that where the public's sentiments for the death penalty run high, these judges openly support the death penalty as a matter of judicial survival.⁴²¹ The same applies to most legislative

⁴¹⁵ LUCAS A. SCOT POWE, JR., *THE SUPREME COURT AND THE AMERICAN ELITE 1789-2008*, at 296 (2009).

⁴¹⁶ See *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116, 129 (Mass. 1984) (explaining that the death penalty may not be imposed when the penalty needlessly chills individuals' rights under Article 12 of the Commonwealth of Massachusetts' Constitution).

⁴¹⁷ See KATHLEEN A. O'SHEA, *WOMEN AND THE DEATH PENALTY IN THE UNITED STATES 1900-1998*, at 204 (1999).

⁴¹⁸ AUSTIN SARAT & JÜRGEN MARTSCHUKAT, *Introduction: Transatlantic Perspectives on Capital Punishment: National Identity, the Death Penalty, and the Prospects for Abolition*, in *IS THE DEATH PENALTY DYING?: EUROPEAN AND AMERICAN PERSPECTIVES* 5 (2011).

⁴¹⁹ See DAVID T. COURTWRIGHT, *NO RIGHT TURN: CONSERVATIVE POLITICS IN A LIBERAL AMERICA* 157 (2010) (discussing how the Governors of California, New York, and Florida used the death penalty issue as political capital).

⁴²⁰ *RUNNING FOR JUDGE: THE RISING POLITICAL, FINANCIAL, AND LEGAL STAKES OF JUDICIAL ELECTIONS* 201 n.29 (Matthew J. Streb ed., 2007).

⁴²¹ See Symposium, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1836 (2000). Consider the following:

One can reasonably ask how judges who have taken an oath to uphold the Constitution and laws of the United States and Texas, including the right to counsel, could play such a role in denying the protections of the Constitution to those most in need of them. How can a judge be so indifferent to injustice?

A large part of the answer is that Texas has partisan judicial elections. Some judges run and are elected with an agenda, more like a legislator than a judge. Other judges, once in office, appoint lawyers to criminal cases as political patronage, more like a political boss than a judicial officer. Once in office, any vote that might be perceived as "soft on crime" or as delaying executions-- no matter how clear the law requiring it-- carries with it the risk that the judge will be voted out of office in the next election.

officials and most politicians who, even where public support does not exist, are willing to believe that it does.⁴²²

The factors that led to the abolition of capital punishment in Europe (imposition of the elite's views on the public), are absent in large degree in America because state governments have such large control over criminal justice matters, and the public is far more influential democratically over these state governments, allowing them to keep the death penalty in place.⁴²³ This desire to keep the death penalty in the United States is so strong, that even after the polled public had been presented with DNA exoneration data leading to the conclusion that innocents were executed, 95% were still prepared to accept that price and maintain support for the death penalty.⁴²⁴ However, it remains to be seen if this symbolic attachment to capital punishment, based on traditionally conservative values, will survive after disclosure of financial data that will

In 1980, Michael J. McCormick, then the executive director of the Texas District and County Attorneys Association, challenged in an election a judge on the Texas Court of Criminal Appeals who, according to McCormick, "was not considered friendly to prosecutors." McCormick ran on a "law enforcement philosophy," spoke out against the court's doctrine of reviewing fundamental error in jury charges-- which he said was "thriving" on the court-- and won the election.

There was no danger during the next 20 years he served on the court that anyone would accuse McCormick, who became presiding judge in 1989, of not being friendly to prosecutors. Four years after his election, McCormick, his briefing attorney, and his research assistant published a law review article critical of the fundamental error doctrine, attributing hundreds of reversals in two years to it, and advocating "a retreat from rote appellate reversals of otherwise valid convictions." The following year, the Court adopted the position advocated by Judge McCormick in his campaign and law review article and by the State in a petition for rehearing, and abandoned the fundamental error doctrine, deciding that instead an appellate court was to decide if an error was "so egregiously harmful as to require reversal."

McCormick's "law enforcement philosophy" as a judge ranged from criticizing the United States Supreme Court's decision requiring states to provide lawyers for poor people accused of crimes to opposing bills in the Texas legislature that would have banned capital punishment for the mentally retarded and required that inmates be mentally competent to be executed.

Id. at 1826–27.

⁴²² MARY WELEK ATWELL, *EVOLVING STANDARDS OF DECENCY: POPULAR CULTURE AND CAPITAL PUNISHMENT* 16 (2004).

⁴²³ David Jacobs, *The Political Sociology of Criminal Justice*, in *HANDBOOK OF POLITICS: STATE AND SOCIETY IN GLOBAL PERSPECTIVE* 557 (Kevin T. Leicht & J. Craig Jenkins eds., 2009).

⁴²⁴ JOSEPH M. BESSETTE & JOHN J. PITNEY, JR., *AMERICAN GOVERNMENT AND POLITICS: DELIBERATION, DEMOCRACY AND CITIZENSHIP* 250 (2011).

impose a sobering element of realism about just how much our society monetarily pays for those values.⁴²⁵

IV. PENTOBARBITAL AND DEATH AFTER *BAZE*

A. *What does lethal injection cost?*

It has been said that the lethal injection is very inexpensive, when compared to early forms of execution.⁴²⁶ “Oklahoma's electric chair, last used in 1966, required repairs costing \$62,000, and building a new gas chamber would have cost over \$200,000. Lethal injection, it was suggested, would cost only \$10 to \$15 per execution.”⁴²⁷ However, that figure only focuses on the costs of the drugs, not the costs of the actual litigation process itself. Despite the Supreme Court upholding the constitutionality of lethal injection as an execution method in *Baze*, procedural post conviction challenges to the administrative process have not stopped in the

⁴²⁵ See MARK COSTANZO, JUST REVENGE: COSTS AND CONSEQUENCES OF THE DEATH PENALTY 162 (St. Martin's Press 1997) (describing the death penalty as the “triumph of symbolism over realism”). “[I]f information about the costs and consequences of the death penalty became widely publicized, there might be a sizable shift in even abstract support.” *Id.*

⁴²⁶ See Christina Michalos, *Medical Ethics and the Execution Process in the United States of America*, 16 MED. & L. 125, 126 n.4 (1997).

⁴²⁷ *Id.*

federal courts, let alone the state courts.⁴²⁸ The list of states that have reviewed such challenges after *Baze* continues to mount.⁴²⁹

Thus, the relatively inexpensive nature of the procedure is negated by the proliferation of mounting due process costs necessary to ensure that prisoners are executed humanely. Take, for example, the statement of a death penalty opponent speaking about California's system: "Life without parole provides swift and certain justice while the death penalty will cost the state \$1 billion over the next five years, not counting the waste of public time and money devoted to the global search for lethal injection drugs and related legal challenges."⁴³⁰ The counterargument has been, however, that litigants are using "spam" manipulation litigation in order to purposefully bring capital punishment to a halt.⁴³¹ Assuming, *arguendo*, that this is the intent of condemned inmates and their attorneys and supporters, and further assuming how valid the counterargument might be, that still does not address the excessive costs—the public will still have to pay. At what point do we draw the line?

⁴²⁸ See, e.g., *Dickens*, No. CV07-1770-PHX-NVW, 2009 WL 1904294, at *1 (D. Ariz. July 1, 2009).

Plaintiffs brought this action under 42 U.S.C. § 1983 for alleged violations and threatened violations of Plaintiffs' rights to be free from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution and for alleged violations and threatened violations of Plaintiffs' rights to be free from arbitrary and capricious ADC protocols and procedures under the Fifth and Fourteenth Amendments to the United States Constitution. Plaintiffs allege that 'lethal injection, as that method of execution is currently administered in Arizona, carries a substantial risk of inflicting torturous pain and suffering upon condemned inmates.' They further allege that 'the nature of the chemicals used by Defendants to effectuate execution by lethal injection, coupled with Defendants' failure to implement sound alternative procedures and to guarantee the use of properly trained and qualified personnel, creates a highly foreseeable and substantial risk that Plaintiffs will experience excruciating pain and suffering during execution.' They seek equitable and injunctive relief to prevent Defendants from carrying out their executions by lethal injection as that method of execution currently is performed in Arizona or any similar protocol.

Id.

⁴²⁹ See, e.g., *Wellons v. Hall*, 554 F.3d 923 (11th Cir. 2009); *Walker v. Johnson*, 328 Fed. App'x. 237 (4th Cir. 2009); *Spreitz v. Ryan*, 617 F. Supp. 2d 887 (D. Ariz. 2009); *Chamberlin v. State*, 55 So. 3d 1046 (Miss. 2010); *Walton v. State*, 3 So. 3d 1000 (Fla. 2009); *Hunt v. Commonwealth*, 304 S.W.3d 15 (Ky. 2009); *Lewis v. State*, 57 So. 3d 807 (Ala. Crim. App. 2009).

⁴³⁰ Carol J. Williams, *Judge Tours California's Rebuilt Death Chamber*, L.A. TIMES (Feb. 9, 2011), <http://articles.latimes.com/2011/feb/09/local/la-me-executions-20110209>.

⁴³¹ *Id.*

B. Pentobarbital

With the withdrawal of sodium thiopental by Hospira, state officials had to acquire pentobarbital as a substitute, but even pentobarbital's manufacturer Lundbeck has started to protest its use.⁴³² Italy had pressured Hospira to withdraw the drug, and England stopped a British company, Dream Pharma, from exporting it by imposing a ban.⁴³³ "Pharmaceutical companies worldwide have been trying to prevent their products from being used for capital punishment."⁴³⁴ However, unlike sodium thiopental, pentobarbital (Nembutal) is critical for treatment of epilepsy, and its withdrawal will not be so simple.⁴³⁵ Lundbeck has issued numerous statements condemning the use of pentobarbital for capital punishment and refuses to sell the drug directly to U.S. prisons.⁴³⁶ Yet this has not stopped the states relying on the use of lethal injection executions from proceeding forward.⁴³⁷ A new wave of litigation now focuses on the differences between pentobarbital and sodium thiopental in order to argue that the drug substitution is unconstitutional.⁴³⁸

In Oklahoma, an inmate named Jeffrey Matthews, who had been sentenced to death by lethal injection, intervened in the case of James Pavatt and moved a federal district court for a preliminary injunction against the execution.⁴³⁹ The grounds were the recent substitution of nembutal for pentothal.⁴⁴⁰ The district court had taken testimony from two anesthesiologists, Dr.

⁴³² Christian Nordqvist, *Don't Use Our Drug Pentobarbital To Execute People, Lundbeck Tells State Of Virginia*, MED. NEWS TODAY (Aug. 18, 2011), <http://www.medicalnewstoday.com/articles/233016.php>.

⁴³³ *See id.*; Nathan Koppel, *Drug Halt Hinders Executions in the U.S.*, WALL ST. J. (Jan. 22, 2011), <http://online.wsj.com/article/SB10001424052748704754304576095980790129692.html>.

⁴³⁴ Nordqvist, *supra* note 432.

⁴³⁵ *Id.*

⁴³⁶ *Id.*

⁴³⁷ *Id.*

⁴³⁸ Pam Belluck, *What's in a Lethal Injection Cocktail?*, N.Y. TIMES (Apr. 9, 2011), <http://www.nytimes.com/2011/04/10/weekinreview/10injection.html> ("Lawyers for death row inmates in Texas and Arizona have filed challenges to the executions questioning the use of specific drugs in the lethal injection of their clients.").

⁴³⁹ *Pavatt v. Jones*, 627 F.3d 1336, 1337–38 (10th Cir. 2010).

⁴⁴⁰ *Id.* at 1337.

Mark Dershwitz on behalf of the State, and Dr. David Waisel on behalf of the inmate.⁴⁴¹ The United State District Court for the Western District of Oklahoma denied the motion.⁴⁴² Matthews appealed to the Tenth Circuit Court of Appeals.⁴⁴³ The district court had before it testimony that corrections officials were planning on administering 5,000 milligrams of pentobarbital (2,500 milligrams to each arm of the inmate) as the first drug, and that this amount was well beyond the surgical plane needed to achieve anesthesia.⁴⁴⁴ The appellate court affirmed the district court's findings that the likelihood that Matthews would suffer injury was "'nil.'"⁴⁴⁵ Matthews filed a subsequent writ with the Supreme Court, and the Court denied certiorari.⁴⁴⁶

In Alabama, Jason Oric Williams, intervening on behalf of Eddie Powell, likewise challenged that state's substitution of pentobarbital.⁴⁴⁷ "Williams asserts that there is no assurance that his execution using pentobarbital will comply with constitutional requirements."⁴⁴⁸ Williams had attached the medical report of Dr. Waisel from *Pavatt* to support his claim.⁴⁴⁹ The State of Alabama relied on the affidavit of Dr. Dershwitz, which stated that use of 2,500 milligrams of pentobarbital on an inmate "by itself would cause death to almost everyone."⁴⁵⁰ The district court held that Williams was unable to prove his heavy burden under *Baze*, let alone show a sufficient alternative using other drugs.⁴⁵¹ That decision was affirmed by the Eleventh Circuit Court of Appeals.⁴⁵² The Supreme Court denied certiorari.⁴⁵³

⁴⁴¹ *Id.* at 1339–40.

⁴⁴² *Id.* at 1337–38.

⁴⁴³ *Id.* at 1336, 1338.

⁴⁴⁴ *Id.* at 1339.

⁴⁴⁵ *Pavatt*, 627 F.3d at 1339.

⁴⁴⁶ *Matthews v. Jones*, 131 S. Ct. 974 (2011).

⁴⁴⁷ *Powell v. Thomas*, 784 F. Supp. 2d 1270, 1273 (M.D. Ala. 2011), *aff'd*, 641 F.3d 1255 (11th Cir. 2011), *cert. denied*, 131 S. Ct. 2487 (2011).

⁴⁴⁸ *Id.* at 1273.

⁴⁴⁹ *Id.* at 1280.

⁴⁵⁰ *Id.* at 1281 (citations omitted).

⁴⁵¹ *Id.* at 1281–82.

⁴⁵² *Id.*

⁴⁵³ *Williams v. Thomas*, 131 S. Ct. 2487 (2011).

An attempt by an Arizona inmate to rely on Lundbeck's label use warnings about the use of pentobarbital in executions has also failed to satisfy the substantial risk of harm standard of *Baze*.⁴⁵⁴ As did another attempt by an Arizona inmate who argued that a last minute substitution of pentobarbital within twenty-four hours of the execution date would leave him facing an execution by untrained corrections officials who may not have been fully versed in the administration of the substitute drug.⁴⁵⁵ "Finally, in concluding that Plaintiff has failed to establish a likelihood of success on the merits, the Court observes that any risk of mistake from the execution medical team's lack of practice using pentobarbital is speculative and fails to rise to the level required to demonstrate a substantial risk of serious harm under Eighth Amendment jurisprudence."⁴⁵⁶ The decision was subsequently affirmed by the Ninth Circuit Court of Appeals, and certiorari was denied by the Supreme Court.⁴⁵⁷

In Delaware, Robert W. Jackson III moved to stay his execution, where prison officials were planning on using pentobarbital.⁴⁵⁸ As with the other cases, Dr. Waisel provided his expert opinion for the defense, and Dr. Dershwitz for the State.⁴⁵⁹ Dr. Dershwitz opined that five grams of pentobarbital would be a lethal dose, whereas Dr. Waisel simply opined that the drug had not been clinically tested and that the effects would be unknown.⁴⁶⁰ The district court was not very impressed with the fact that Dr. Dershwitz opined that in the executions of Eddie Powell and Roy Blankenship, the strange movements observed meant that each had suffered pain from the

⁴⁵⁴ West v. Brewer, No. CV-11-1409-PHX-NVW, 2011 WL 2836754, at *8 (D. Ariz. July 18, 2011), *aff'd*, 652 F.3d 1060 (9th Cir. 2011) (finding the manufacturer's warning against the use of pentobarbital in executions unpersuasive since it did not establish a substantial risk of harm).

⁴⁵⁵ Beaty v. Brewer, No. CIV-1037-PHX-NVW, 2011 WL 2050124, at *4 (D. Ariz. May 25, 2011), *cert. denied*, 131 S. Ct. 2929 (2011).

⁴⁵⁶ *Id.* at *6.

⁴⁵⁷ *Id.*

⁴⁵⁸ Jackson v. Danberg, No. 06-300-SL, 2011 WL 3205453, at *1 (D. Del. July 27, 2011).

⁴⁵⁹ *Id.* at *3.

⁴⁶⁰ *Id.* at *2-3.

use of pentobarbital.⁴⁶¹ The district court found this incredible, in light of his previous testimony that the effects were unknown,⁴⁶² and denied the application for stay.⁴⁶³

In Georgia, Andrew Grant De Young brought a 42 U.S.C. § 1983 claim, seeking a stay of execution and temporary restraining order (TRO) on the grounds that the use of pentobarbital would have a substantial risk of inflicting harm.⁴⁶⁴ The district court denied the motion for stay, the TRO, and dismissed the complaint.⁴⁶⁵ On appeal, the Eleventh Circuit Court of Appeals found that the statute of limitations barred his civil rights action, but also held in the alternative that De Young had failed to meet the exacting standard of *Baze*.⁴⁶⁶ Also at issue was Dr. Waisel's testimony about the Blankenship execution.⁴⁶⁷ The appellate court noted:

Second, the district court noted that Dr. Waisel admitted that “any ‘suffering’ was short lived as it clearly ended within a few minutes—three minutes at the most—after the pentobarbital was injected.” The Eighth Amendment does not protect against all harm, only serious harm; and it does not prohibit all risks, only substantial risks. “Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of ‘objectively intolerable risk of harm’ that qualifies as cruel and unusual.” *Baze v. United States*, 553 U.S. at 50, 128 S.Ct. at 1531 (plurality opinion). In any event, Dr. Waisel was not present at the Blankenship execution; rather, he opines from the witnesses' varied descriptions of Blankenship's movements that those movements were a sign of “discomfort,” which Dr. Waisel termed “suffering.”

⁴⁶¹ See *id.* at *3 n.2.

⁴⁶² See *id.* at *3.

⁴⁶³ *Id.* at *4.

⁴⁶⁴ *DeYoung v. Owens*, 646 F.3d 1319, 1322–23 (11th Cir. 2011) (“[A]lleging that the State of Georgia’s method of lethal execution will violate his Eighth Amendment right to be free from cruel and unusual punishment and his Fourteenth Amendment right to equal protection.”); see also 42 U.S.C. § 1983 (2011) (requiring civil action for deprivation of rights of any citizen or person within the United States jurisdiction). DeYoung claimed that the protocol would violate his Eighth Amendment right because “the use of pentobarbital as an anesthetic poses a substantial risk of serious harm to him because: (1) pentobarbital has been insufficiently tested for induction of anesthetic coma in fully conscious persons, and (2) in prior executions using pentobarbital, the drug did not painlessly anesthetize the prisoners.” *DeYoung*, 646 F.3d at 1323. DeYoung further claimed that the protocol would violate his Fourteenth Amendment right because: “(1) the written protocol contains gaps in the execution procedure that the GDOC fills in on an ad hoc basis, leading disparate treatment for different inmates; and (2) the GDOC deviates from the written protocol, similarly leading to disparate treatment for different inmates.” *Id.*

⁴⁶⁵ *DeYoung*, 646 F.3d at 1323 (“[T]he State moved to dismiss, arguing that DeYoung’s claims are barred by the statute of limitations and fail to state a claim upon which relief can be granted.”).

⁴⁶⁶ *Id.* at 1324, 1325.

⁴⁶⁷ *Id.* at 1326–27 (stating that Dr. Waisel’s testimony was his opinion and he did not provide a medical explanation supporting DeYoung’s claim that the use pentobarbital causes a substantial risk of serious harm during lethal injection).

Dr. Waisel acknowledged that no one reported any movement by Blankenship after the nurse's consciousness check. Further, Blankenship's autopsy revealed no evidence of trauma. The catheters were inside Blankenship's veins and the veins were not burst or broken. There was no infiltration of fluid in the soft tissue of the right arm near the catheter site.⁴⁶⁸

In short, the appellate court held that De Young wholly failed to carry forth his burden under *Baze*, and that the state's use of pentobarbital does not present a substantial risk of harm to inmates.⁴⁶⁹

At least one federal district court has not been so easygoing on corrections officials.⁴⁷⁰ “It is the policy of the State of Ohio that the State follows its written execution protocol, except when it does not. This is nonsense.”⁴⁷¹ The Southern District Court of Ohio found in *Cooey* that some of its state's execution team staff was untrained.⁴⁷² The district court also found that the staff repeatedly deviated from protocols.⁴⁷³ The staff had difficulties during the Joseph Clark execution because the IV lines had failed.⁴⁷⁴ The court found that in one case, a mandatory vein assessment check had not been performed, as required, in the botched attempted execution of Rommell Broom.⁴⁷⁵ There was also some evidence that corrections were procuring drugs without a proper license.⁴⁷⁶ Finding four core deviations from the written protocol, the district court had serious questions about the ability of Ohio to follow its protocol in the future.⁴⁷⁷

⁴⁶⁸ *Id.* at 1326–27.

⁴⁶⁹ *Id.* at 1325, 1327 (stating that DeYoung did not put forth evidence to show that pentobarbital is an “ineffective anesthetic”).

⁴⁷⁰ *Cooey v. Kasich*, No. 2:04-CV-1156, U.S. Dist. LEXIS 73606, at *9–10 (S.D. Ohio July 8, 2011).

⁴⁷¹ *Id.* at *9.

⁴⁷² *Id.* at *85.

⁴⁷³ *See id.* at *64–67 (“Defendants have attacked various inmates’ claims of dangerous state practices by pointing to the written protocol ... they have periodically updated [it] to formalize customs and practices ... all in an effort to shield Ohio’s lethal injection practice from invalidation under the Constitution.”).

⁴⁷⁴ *See id.* at *32–33.

⁴⁷⁵ *Id.* at *9.

⁴⁷⁶ *Cooey*, U.S. Dist. LEXIS, at *11.

⁴⁷⁷ *Id.* at *21.

Ohio's execution policy now embraces a nearly unlimited capacity for deviation from the core or most critical execution procedures. No inference is required to reach this conclusion, much less the stacking of inference upon inference. Rather, as set forth below, simply paying attention to the

“Plaintiff has demonstrated that the only rationale for core deviations that eliminate safeguards and introduce greater uncertainty into the execution process is to simply complete the executions at all or nearly all costs.”⁴⁷⁸ The district court granted the TRO and stayed the execution of Kenneth Smith.⁴⁷⁹ While the court wanted to be clear that it was not invalidating Ohio’s statute,⁴⁸⁰ the result has brought on a greater deal of uncertainty and is sure to embolden others to bring similar challenges in other death penalty states.⁴⁸¹

V. CONCLUSION

Capital punishment historically has served a number of purposes. For example, in the past, it served to end blood feuds between families politically, furthering the ends of vengeance and retaliation. As societies began to move towards using a social compact with a ruling government, with an accompanying delegation of punishment power to the sovereign, executions

hearing testimony mandates this conclusion. These core deviations are not mere cosmetic variations from an optional or even aspirational set of guidelines. Rather, the deviations are substantive departures from some of the most fundamental tenets of Ohio's execution policy.

Id.

⁴⁷⁸ *Id.* at *30.

⁴⁷⁹ *Id.* at *34.

⁴⁸⁰ *Id.*

⁴⁸¹ See Ty Alper, *Blind Dates: When Should the Statute of Limitations Begin to Run on a Method-of-Execution Challenge?*, 60 DUKE L.J. 865, 904 (2011).

As discussed in Part I, the lethal-injection challenges currently being litigated do not simply challenge the protocols as written. After the Supreme Court approved of Kentucky's lethal-injection procedures in *Baze v. Rees*, many states have simply adopted that protocol on the theory that if it passed muster in *Baze*, it will pass muster in their courts as well. But as several courts and commentators have noted, what is written within the four corners of the protocol does not end the constitutional inquiry. As Professor Eric Berger has written, “Two execution procedures . . . can hardly be deemed ‘substantially similar’ merely because they use the same drugs. As litigation has demonstrated, the procedure's safety hinges on *how* the drugs are administered.” Put another way, “The factual grounding of *Baze*, and its specific review of Kentucky's particular death-penalty program, caution against applying unquestioningly its result to any other case in which an inmate challenges a death-penalty protocol that uses the same three drugs that Kentucky utilizes.”

Instead, the key questions relate to how the state presently intends to administer the protocol. Who are the executioners? What is their background and experience? How updated is the equipment that will be used? How often have the executioners been trained? Were the execution drugs obtained properly? Has the expiration date on the drugs passed? A lethal-injection challenge is ripe when some or all of these questions can be answered. But it makes little sense to even attempt to answer these questions several years before the plaintiff will actually be executed.

Id. at 904–05 (citations omitted).

began to serve a number of reasons such as pure whim, fear and control, preventing disorder, and removing political obstacles. Although societies became more enlightened and gravitated towards more civilized norms that brought further positive change, retention of the death penalty seemed to be a matter of custom and tradition in the criminal justice system. Philosophically, however, a few principles have sought to justify this adherence to tradition—deterrence, incapacitation and retribution (though many have questioned whether it has any deterrent effect at all).

In the United States, the death penalty has been resorted to with less frequency each passing year. The Eighth Amendment was written broadly enough that its jurisprudence has allowed it to evolve and grow beyond the original conceptions of the Founding Fathers. In fact, this is one area of law where many jurists have specifically not attempted to interpret the constitutional provision in a true historical light, but rather, have based it on society's current needs and wants. Over time, there have been those justices that have attempted to persuade the rest of the Supreme Court that, based on those needs, the death penalty has outlived its usefulness altogether. In the face of public opinion, those efforts have been consistently thwarted and rejected, with the notable exception of the short-lived *Furman* decision. Perhaps, then, it is clear that if America is going to ever choose to dispense with capital punishment, that change needs to come through the people, through their elected legislative officials listening to the will of their constituencies.

The battleground to end the death penalty has moved from the substantive towards the procedural based on the holding of *Gregg*. This move may prove to be a costly one because, as figures and data show, the rising mandatory due process costs associated with a rigorous trial and appeal process in capital murder cases has continued to impose a heavy burden on the states.

Even Texas is not immune from this price tag. This burden may possibly have played a factor in exacerbating recent recession and recovery efforts, and the resulting need to raise revenue to prosecute capital cases may create further economic inefficiency. The public ought to be informed about those costs in order to properly determine whether or not citizens still wish to absorb the societal taxes associated with this antiquated method of punishment. Some states have already begun down the path of an economic reassessment of the costs and made decisions about values. And with good reason, as the litigation over pentobarbital shows, the rising yearly costs of death show no sign of abating. Can we continue to afford the retributive machinery of death?