

# LETHALLY INJECTED: DEVOLVING STANDARDS OF DECENCY IN AMERICAN SOCIETY

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## INTRODUCTION

The Eighth Amendment to the United States Constitution was originally intended to protect the citizenry from the potentially vengeful hand of the government.<sup>1</sup> The Founding Fathers provided: “Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishment inflicted.*”<sup>2</sup> For more than two hundred years, society has progressed with the mistaken belief that it has adhered to this mandate.<sup>3</sup> So long as the masses are appeased and convinced of their moral superiority, the protections guaranteed under the Eighth Amendment may be undermined.

For centuries, death statutes have led to the executions of thousands of confirmed guilty and mistakenly convicted individuals.<sup>4</sup> Interest among the populace has remained high throughout the years.<sup>5</sup> Generally, Americans have supported the use of capital punishment as a permissible method of retribution for, and deterrence of, the most heinous crimes.<sup>6</sup>

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\* J.D. candidate, 2006. I would like to thank my wonderful family and friends, without whom I would have nothing. Sincerest thanks also to Professor J. Joseph Bodine, Jr., whose insight was invaluable in researching and drafting this Comment.

<sup>1</sup> See Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted:*” *The Original Meaning*, 57 CAL. L. REV. 839, 839–42 (1969).

<sup>2</sup> U.S. CONST. amend. VIII (emphasis added).

<sup>3</sup> See generally Philip English Mackey, *Introduction* to VOICES AGAINST DEATH: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT, at xi, xi–liii (Philip English Mackey ed., 1976) (documenting the historical evolution of death penalty statutes in the United States).

<sup>4</sup> See James R. Acker et al., *Introduction* to AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 3, 3 (James R. Acker et al. eds., 2d ed. 2003) [hereinafter AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT]. Conservative estimates suggest that at least 19,000 individuals have been executed since colonial settlement. *Id.*

<sup>5</sup> See *id.*

<sup>6</sup> See FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 10–13 (2003).

Dissenters have frequently and successfully exposed flaws in the majority population's underlying bases for the sanction.<sup>7</sup>

Presently, the preferred method of execution of capital convicts in nearly all states, as well as the federal government, is lethal injection.<sup>8</sup> For years, governing bodies have assured the public that this method is the most expedient and least painful approach to ending human life.<sup>9</sup> They are wrong. Eighth Amendment litigation is increasing in light of recent claims that lethal injection employs agonizing techniques and results in harmful effects.<sup>10</sup> The concoction of chemicals used to bring a quick and painless death may expose the condemned to the very horrors that our Founding Fathers intended to prevent.<sup>11</sup> Furthermore, intravenous drug users are subjected to “cut-down” surgical procedures, which involve extreme levels of pain and result in the degradation of bodily integrity.<sup>12</sup> Indeed, lethal injection violates the minimum standards mandated by the Eight Amendment.

In order to survive an Eighth Amendment challenge, a “punishment must not involve . . . unnecessary and wanton infliction of pain.”<sup>13</sup> “The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>14</sup> Society has indeed been marked by a phenomenon of continual progression toward

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<sup>7</sup> See Mackey, *supra* note 3, at xxix–xxx, xxxv–xxxvii, li–lii.

<sup>8</sup> THOMAS P. BONCZAR & TRACY L. SNELL, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT, 2003 (2004), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp03.pdf> [hereinafter CAPITAL PUNISHMENT].

<sup>9</sup> ZIMRING, *supra* note 6, at 50–51.

<sup>10</sup> See, e.g., *Nelson v. Campbell*, 541 U.S. 637, 643–47 (2004) (holding that 42 U.S.C. § 1983 is a permissible method by which a petitioner may challenge a state's execution protocol); *Hines v. Johnson*, 543 U.S. 801 (2004) (relying on *Nelson* in vacating lower court's decision denying petitioner's challenge to lethal injection protocol by way of 42 U.S.C. § 1983); *Aldrich v. Johnson*, 388 F.3d 159, 161 (5th Cir. 2004) (dismissing petitioner's 42 U.S.C. § 1983 action because petitioner failed to allege a specific alternative method of execution).

<sup>11</sup> See, e.g., *Cooper v. Rimmer*, 358 F.3d 655, 657–58 (9th Cir. 2004) (discussing potential agony involved in state's execution protocol); *Poland v. Stewart*, 92 F.3d 881, 892 (9th Cir. 1996) (noting instances of botched executions); *Oken v. Sizer*, 321 F. Supp. 2d 658, 668–69 (D. Md. 2004) (detailing potential complications in execution process), *vacated*, 542 U.S. 916 (2004).

<sup>12</sup> See *Nelson*, 541 U.S. at 642, 644–45.

<sup>13</sup> *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion) (citing *Furman v. Georgia*, 408 U.S. 238, 392–93 (1972) (Burger, C.J., dissenting)).

<sup>14</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

*supposedly* more humane methods of execution.<sup>15</sup> From public hangings and shootings to the “benign” gas chambers, methods of execution have repeatedly withered into obscurity.<sup>16</sup> An apparently more humane method of killing always follows.<sup>17</sup>

This progression does not indicate that the most modern method is in line with Eighth Amendment jurisprudential standards.<sup>18</sup> It shows only that science and reasoning have not caught up with the method and its cruel reality. In essence, the technique has not yet been smelt out and sent to its own death. Furthermore, the judiciary has rarely held methods of execution intolerable.<sup>19</sup> In failing to address these issues, the United States Supreme Court has breached its duty of assuring that our most basic rights are protected.

The evolution of execution methods most often occurs as the result of public outcry—the result of firsthand or popular knowledge that particular modes of killing are barbaric in nature.<sup>20</sup> The courts have played a minimal role in deciding which methods of execution are constitutionally intolerable—presumably because prison officials eventually adhere to the mandates of the public.<sup>21</sup> While the Supreme Court has provided words and phrases regarding what actions might constitute cruel and unusual

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<sup>15</sup> See ROBERT JOHNSON, *DEATH WORK: A STUDY OF THE MODERN EXECUTION PROCESS* 40–47 (2d ed. 1998).

<sup>16</sup> See *id.* at 43–44.

<sup>17</sup> See *id.*

<sup>18</sup> One of this Comment’s basic arguments is that American methods of execution, while ever-evolving, do not evolve as the result of government belief that methods are in fact in violation of the Eighth Amendment. Rather, public perception compels state governments to pacify intolerant members of society. History has shown that each successive form of execution is eventually eliminated. See *id.* The move has not been so much toward a lack of excessive infliction of pain, but toward more *apparently* benign ways of bringing about death. In essence, the newer methods of execution are not necessarily less painful or torturous, but masked so as to deny the public the ability to witness the torturous effects involved.

<sup>19</sup> See, e.g., *Glass v. Louisiana*, 471 U.S. 1080, 1082–84 (1985) (Brennan, J., dissenting) (discussing continued judicial reliance on antiquated precedent in upholding methods of execution); *Gray v. Lucas*, 463 U.S. 1237, 1239–40 (1983) (Burger, C.J., concurring) (asserting that execution by lethal gas is not sufficiently distinguishable from past popular methods of execution).

<sup>20</sup> See JOHNSON, *supra* note 15, at 40.

<sup>21</sup> See *id.* at 40–43.

punishment,<sup>22</sup> it has not lent a hand in applying those standards when appropriate challenges have arisen.

This is alarming. Lethal injection, which will soon enter its third decade of existence as a form of capital punishment,<sup>23</sup> has not inflamed the population to the extent of methods of the past.<sup>24</sup> At first glance, it involves an air of solace.<sup>25</sup> Evidence shows, however, that while the condemned do not scream and writhe about, unnecessary and wanton pain is involved in the process.<sup>26</sup> Without public disdain and intolerance, policymakers will not adopt a method of killing compliant with Eighth Amendment standards.<sup>27</sup>

This is a recipe for social disaster and a gross violation of the rights of capital convicts. While the public will likely become fully aware of the nature of death by lethal injection and call out for its abolition as it has done with previous methods, the revolution will occur far too slowly. Lives are being taken in violation of the Eighth Amendment at a staggering rate.<sup>28</sup> As the public remains insulated from the truth behind this form of execution, policymakers will presumably do little to protect the rights of those whom they deem the most unsavory. Thus, the role of the Supreme Court becomes ultra-significant. The Court has a duty to ensure that Eighth Amendment guarantees are not abridged by the states. It must now fulfill its role of guaranteeing that even our most heinous offenders are afforded their constitutional rights. To do less would demean our Constitution's function of assuring protection for all Americans, not just the most respected members of society.

It is now time to strike down the use of lethal injection in the killing of our condemned. The use of lethal injection as a method of execution is barbaric, cruel, and impermissible under the Eighth Amendment to the United States Constitution. The Court's failure to act is intolerable. The Eighth Amendment is at the heart of our protection from the unjust tendencies of the dark side of human nature. We should not delay in

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<sup>22</sup> See *Campbell v. Wood*, 511 U.S. 1119, 1119–23 (1994) (Blackmun, J., dissenting).

<sup>23</sup> CAPITAL PUNISHMENT, *supra* note 8, at 11.

<sup>24</sup> See JOHNSON, *supra* note 15, at 43–46.

<sup>25</sup> See *id.* at 46–47.

<sup>26</sup> See Deborah W. Denno, *Execution and the Forgotten Eighth Amendment*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT, *supra* note 4, at 547, 562–64.

<sup>27</sup> See *id.* at 567–68.

<sup>28</sup> Since 1977, approximately 718 Americans have been executed by lethal injection. CAPITAL PUNISHMENT, *supra* note 8, at 1.

facing the obvious. It is time to evolve and mature into a more decent society.<sup>29</sup>

Part I of this Comment provides the historical background of capital punishment that led to the currently preferred method of execution. This section continues by discussing the cases that set the applicable standards of appellate review and also includes a brief introduction to the current issues. Part II contains analysis of the relevant issues. A comparison of medical, scientific, and legal authority will lend support to the thesis and refute opposing opinions. This section also includes a discussion as to why the courts and society in general have refused to confront this issue. The section will close by pointing out the effect that this phenomenon has on our society. Finally, the conclusion will provide a final assessment of the relevant issues and offer solutions to the problem.

## I. BACKGROUND

### A. *A Brief History of Capital Punishment*

Throughout history, the death penalty has been as ubiquitous as criminal liability itself.<sup>30</sup> The much respected ancient empires of Greece and Rome used the death penalty to heavy-handedly enforce compliance with government policy.<sup>31</sup> As centuries passed and legal systems modernized, the cruel nature of capital punishment failed to cease.<sup>32</sup> Not surprisingly, the harsh consequences of capital conviction carried over to

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<sup>29</sup> Should the courts hold that execution by lethal injection violates the Eighth Amendment, it is unlikely that more popular prior methods will be viewed as permissible. In effect, a moratorium on capital punishment will commence. While discourse regarding methods that might be in compliance with Eighth Amendment standards is encouraged, such suggestions are outside of the scope of this Comment.

<sup>30</sup> See generally JEAN KELLAWAY, *THE HISTORY OF TORTURE AND EXECUTION* (2000) (detailing various forms of execution used throughout history). The most torturous practices have been used to shock the public into apparent loyalty to the law, including the sawing of individuals in half, allowing wild animals to devour bound and helpless prisoners, public burning, drawing and quartering, stoning, crucifixion, stretching, beheading, live disembowelment, et cetera. *Id.* at 10–77. The author apologizes for subjecting the reader to the grizzly mistakes of the past. Our often macabre history, however, is undeniable and is best remembered in an effort to prevent reoccurrence.

<sup>31</sup> See *id.* at 9, 12–15.

<sup>32</sup> *Id.* at 56–75. The execution devices of late medieval and renaissance Europe included the garrote, a specialized rope used to strangle the condemned, and the mazzatello, a club used to fracture the skull of the punishee. *Id.* at 56–57.

the Americas.<sup>33</sup> The Eighth Amendment was no doubt intended to change the rules by which punishing bodies were to play.<sup>34</sup> Still, it was not until the late eighteenth century that wide-scale reforms were considered.<sup>35</sup> Finally, in the early nineteenth century, states began to acknowledge the often violent, arbitrary, and peculiar nature of their death statutes.<sup>36</sup>

*B. The United States Supreme Court Awakens*

In the landmark 1958 case of *Trop v. Dulles*,<sup>37</sup> the Supreme Court stated, “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”<sup>38</sup> This assertion was coupled with the notion that while states may punish harshly, they must do so in a just and civilized manner.<sup>39</sup> Nearly twenty years later, the Court noted that “American draftsmen, who adopted the English phrasing in drafting the Eighth Amendment, were primarily concerned . . . with proscribing ‘tortures’ and other ‘barbarous’ methods of punishment.”<sup>40</sup> The Court further held that the Eighth Amendment is not to be read as proscribing only those methods of torture and execution thought to be impermissible at the time of its drafting; rather, it was intended to be “dynamic” in nature.<sup>41</sup> Finally, the Court reiterated the sentiment of Chief Justice Warren that “the [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>42</sup> These

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<sup>33</sup> See Mackey, *supra* note 3, at xi. Prior to the American Revolution, capital punishment remained both common and harsh, with the colony of New York recognizing no fewer than eleven crimes punishable by death. *Id.*

<sup>34</sup> See *Furman v. Georgia*, 408 U.S. 238, 255–56 (1972) (Douglas, J., concurring).

<sup>35</sup> See Mackey, *supra* note 3, at xiii–xvii.

<sup>36</sup> *Id.* at xviii–xix. Rhode Island, Pennsylvania, New York, Massachusetts, and New Jersey led the reform toward private hangings, while Michigan became the first state to opt for overall abolition of capital punishment. *Id.* at xx, xxvi. Progression toward more humane methods of execution continued with the formation of the first interest groups aimed at abolishing the practice. *Id.* at xxv–xxvi.

<sup>37</sup> 356 U.S. 86 (1958).

<sup>38</sup> *Id.* at 100.

<sup>39</sup> *Id.*

<sup>40</sup> *Gregg v. Georgia*, 428 U.S. 153, 170 (1976) (plurality opinion) (citing Granucci, *supra* note 1, at 842).

<sup>41</sup> *Id.* at 171.

<sup>42</sup> *Id.* at 173 (quoting *Trop*, 356 U.S. at 101).

sentiments have been restated in numerous subsequent decisions and the language remains valid today.<sup>43</sup>

*C. The Evolution of Modern Execution Methods Toward Lethal Injection*

With few exceptions, the past one hundred years have seen the punitive execution of American convicts brought about in only a handful of ways.<sup>44</sup> The gallows and firing squads once popular throughout the nation, although still lurking in some jurisdictions,<sup>45</sup> have given way to more seemingly innocuous approaches to ending life.<sup>46</sup> The conception that *publicly* held executions are an earmark of rogue civilization was most responsible for this phenomenon.<sup>47</sup>

By far, the most notorious means of carrying out capital punishment since the late nineteenth century has been the electric chair.<sup>48</sup> Although the chair has often been attacked for its potential brutal capability,<sup>49</sup> it managed to remain popular until the late twentieth century.<sup>50</sup> Accounts of extended periods of torture, burning bodies, and swollen, bloodied corpses eventually led to its decline.<sup>51</sup> Today, only nine states allow death by electrocution.<sup>52</sup>

The final link in the evolutionary chain to lethal injection is death by lethal gas.<sup>53</sup> While its popularity has diminished since its introduction in 1921,<sup>54</sup> four states continue its use.<sup>55</sup> This method typically involves

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<sup>43</sup> See, e.g., *Hope v. Pelzer*, 536 U.S. 730 (2002) (arguing that prison conditions may prove to undermine human dignity); *Farmer v. Brennan*, 511 U.S. 825 (1994) (suggesting that the placement of a transsexual prisoner in general prison population promotes risks of violence not in compliance with prevailing standards of decency).

<sup>44</sup> See KELLAWAY, *supra* note 30, at 140–49.

<sup>45</sup> CAPITAL PUNISHMENT, *supra* note 8, at 4.

<sup>46</sup> *Furman v. Georgia*, 408 U.S. 238, 296–97 (1971) (Brennan, J., concurring).

<sup>47</sup> See *id.* at 297.

<sup>48</sup> See KELLAWAY, *supra* note 30, at 140–41.

<sup>49</sup> See, e.g., *Glass v. Louisiana*, 471 U.S. 1080, 1086–92 (1985) (Brennan, J., dissenting).

<sup>50</sup> KELLAWAY, *supra* note 30, at 141.

<sup>51</sup> See Denno, *supra* note 26, at 547–50.

<sup>52</sup> CAPITAL PUNISHMENT, *supra* note 8, at 4. Alabama, Arkansas, Florida, Kentucky, Nebraska, Oklahoma, South Carolina, Tennessee, and Virginia still may utilize death by electrocution. *Id.*

<sup>53</sup> See KELLAWAY, *supra* note 30, at 142–43.

<sup>54</sup> *Id.* at 142.

<sup>55</sup> CAPITAL PUNISHMENT, *supra* note 8, at 4. Arizona, California, Missouri, and Wyoming may utilize death by lethal gas. *Id.*

binding the prisoner to a table or chair within a sealed chamber and introducing a mixture of hydrochloric acid and potassium cyanide, the combination of which forms a toxic vapor that asphyxiates the condemned.<sup>56</sup> Firsthand reports of the method are horrifying and have led to several state court and state policy decisions to end its use.<sup>57</sup>

Death by lethal injection is the preferred method of execution throughout most of the nation.<sup>58</sup> The approach has gained popularity due to its seemingly benign nature and low-key coverage by the media.<sup>59</sup> The population considers the method quick, painless, peaceful, and for death penalty proponents, a soft and disproportionate way to die.<sup>60</sup>

Typically, the prisoner is strapped to a gurney in the presence of attending prison personnel.<sup>61</sup> Two intravenous drips are then inserted into the prisoner's body by which sodium thiopental (a sedative), pancuronium bromide (induces paralysis), and potassium chloride (induces heart stoppage) are administered.<sup>62</sup> If all goes well, death should occur within minutes, with the prisoner in a state of unconscious incapacitation at the time of passing. This is, of course, if all goes well.

#### *D. Current Issues Indicating the Unconstitutionality of Lethal Injection*

The fight against the use of lethal injection as a method of execution is gaining support. Instances of botched lethal injection executions have led to a peaked interest in the medical and scientific communities.<sup>63</sup> While notions of "humane" execution have led some in the medical field to argue

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<sup>56</sup> See KELLAWAY, *supra* note 30, at 142.

<sup>57</sup> See *id.* Unlike electrocution, the effects of the gas chamber do not bring about partial paralysis. *Id.* The writhing of the body is readily apparent to observers, and inmates who have chosen to hold their breath have lingered on for nearly twelve minutes. *Id.*; see also *Gray v. Lucas*, 463 U.S. 1237, 1240–44 (1983) (Marshall, J., dissenting).

<sup>58</sup> CAPITAL PUNISHMENT, *supra* note 8, at 4. Thirty-seven states and the federal government use this method. *Id.*

<sup>59</sup> See KELLAWAY, *supra* note 30, at 145.

<sup>60</sup> See *id.* at 144–45.

<sup>61</sup> See *id.* at 145.

<sup>62</sup> *Id.* at 144; Brief for Appellant at 7–8, *Harris v. Johnson*, 376 F.3d 414 (5th Cir. 2004) (No. 04-70028), 2004 WL 2473073 [hereinafter *Harris Brief*].

<sup>63</sup> See Arif Khan & Robyn M. Leventhal, *Medical Aspects of Capital Punishment Executions*, 47 J. FORENSIC SCI. 847, 850 (2002) (noting that the failure rate of a first attempt is relatively high among all executions).

for further medical involvement in actual executions,<sup>64</sup> others have been inclined to explore the possible brutality behind this approach to killing.<sup>65</sup>

The courts have likewise been privy to an influx of claims regarding the impermissibility of the method.<sup>66</sup> In *Nelson v. Campbell*, the Supreme Court held that 42 U.S.C. § 1983<sup>67</sup> was an appropriate method by which petitioner Nelson could challenge the use of a cut-down procedure to access useable veins in the administration of his lethal injection.<sup>68</sup> The Court did not rule whether the use of the cut-down procedure itself was in violation of the petitioner's Eighth Amendment protection against cruel and unusual punishment.<sup>69</sup> It merely held that when a prisoner is not attacking the validity of the death sentence itself, the use of the § 1983 procedural mechanism is appropriate in challenging the manner in which death is to occur.<sup>70</sup>

In this case, Nelson was a confirmed life-long intravenous drug abuser whose habit had rendered the piercing of readily accessible veins impossible.<sup>71</sup> The State of Alabama informed Nelson that it planned to use a medical procedure known as a cut-down in order to reach veins located in deeper tissue areas of his body.<sup>72</sup> Nelson challenged the use of this procedure via § 1983, claiming that the procedure would constitute cruel and unusual punishment in violation of his Eighth Amendment rights.<sup>73</sup>

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<sup>64</sup> See *id.* at 847.

<sup>65</sup> See, e.g., Leonidas G. Koniaris et al., *Inadequate Anaesthesia in Lethal Injection for Execution*, 365 LANCET 1412 (2005) (reporting that toxicology results from various states indicate that post-mortem concentrations of sedative in the blood of lethal injection victims were less than the amount required for surgery at a rate of 88%, while 43% of the victims were administered dosages consistent with awareness of the process).

<sup>66</sup> See, e.g., *Nelson v. Campbell*, 541 U.S. 637 (2004) (holding that 42 U.S.C. § 1983 is an appropriate vehicle by which a petitioner may challenge the use of surgical "cut-down" in locating a viable vein); *Cooper v. Rimmer*, 358 F.3d 655 (9th Cir. 2004) (per curiam) (challenging California lethal injection protocol); *Reid v. Johnson*, 105 F. App'x 500 (4th Cir. 2004) (per curiam) (holding that 42 U.S.C. § 1983 may be used to challenge the concoction of drugs used in Virginia's lethal injection protocol).

<sup>67</sup> This federal statute provides for a civil cause of action in cases where an individual acting "under color of state law" deprives a citizen of his or her federal constitutional rights. *Nelson*, 541 U.S. at 643.

<sup>68</sup> See *id.* at 644–45.

<sup>69</sup> See *id.*

<sup>70</sup> See *id.* at 643–47.

<sup>71</sup> *Id.* at 640.

<sup>72</sup> *Id.* at 641.

<sup>73</sup> *Id.*

He argued that alternative methods were not only available, but that they would greatly reduce the risk of pain and discomfort.<sup>74</sup>

In *Reid v. Johnson*,<sup>75</sup> petitioner Reid likewise filed a § 1983 action seeking injunctive relief from the State of Virginia's plan to carry out his execution by lethal injection.<sup>76</sup> Reid argued that the prison's lethal injection protocol involved the use of a chemical concoction that had a distinct possibility of bringing about torturous effects prior to death.<sup>77</sup> The United States Court of Appeals for the Fourth Circuit, following *Nelson*, held that § 1983 was a proper mechanism by which petitioner Reid could bring his Eighth Amendment claim.<sup>78</sup> Again, the underlying constitutional issue was not addressed by the court.<sup>79</sup>

In light of the change in procedural case law, other petitioners have begun to use § 1983 to challenge the use of lethal injection in bringing about their deaths.<sup>80</sup> The issue of whether or not such methods are indeed permissible under the Eighth Amendment, however, has yet to be addressed by the Supreme Court.

In fairness, it should be noted that in *Nelson* and *Reid*, each petitioner carefully tailored his argument to the § 1983 issue in an effort to delay his execution for the purpose of exploring the underlying Eighth Amendment claim on remand.<sup>81</sup> The Supreme Court has wide discretion as to which issues it chooses to adjudicate.<sup>82</sup> Presumably, however, the underlying Eighth Amendment issues in *Nelson* and *Reid* will continue to haunt the Court until it finally decides to address them.

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<sup>74</sup> *Id.* at 646.

<sup>75</sup> 105 F. App'x 500 (4th Cir. 2004) (per curiam).

<sup>76</sup> *Id.* at 501–02.

<sup>77</sup> *Id.* at 502.

<sup>78</sup> *Id.* at 503.

<sup>79</sup> *See id.*

<sup>80</sup> *See, e.g.,* Johnston v. Crawford, No. 4:04CV1075-DJS, 2005 WL 1474022 (E.D. Mo. 2005) (challenging three-drug cocktail used in lethal injection protocol); Oken v. Sizer, 321 F. Supp. 2d 658 (D. Md. 2004) (challenging the medical proficiency of lethal injection executioners), *vacated*, 542 U.S. 916 (2004); Harris v. Johnson, 323 F. Supp. 2d 797 (S.D. Tex. 2004) (challenging the trio of drugs involved in Texas lethal injection procedure), *vacated*, 376 F.3d 414 (5th Cir. 2004).

<sup>81</sup> *See* Nelson v. Campbell, 541 U.S. 637, 645–46 (2004); *Reid*, 105 F. App'x at 503.

<sup>82</sup> *See* United States v. Williams, 504 U.S. 36, 41 (1992); *see also* Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 917–19 (1950) (stating that the Supreme Court may deny certiorari for a variety of reasons and that it need not give any reasons for its decision to refuse to hear the case).

*E. The Court's Choice to Avoid the Substantive Issue*

It is not surprising that the Court has decided not to directly face the issue. The Court has rarely met head-on constitutional questions regarding the permissibility of particular methods of execution.<sup>83</sup> In the 1890 case of *In re Kemmler*, the Court held that death by electrocution did not itself constitute cruel and unusual punishment, absent evidence of “inhuman and barbarous” treatment.<sup>84</sup> It held that the method did not constitute the practice of torture against which the Eighth Amendment was intended to protect.<sup>85</sup>

Historically, the Court has been prone to denying certiorari in cases challenging the constitutionality of methods of execution,<sup>86</sup> causing the rejected cases to stockpile over the years.<sup>87</sup> The dissenting opinions of more willing Justices have suggested, however, that the issues raised by petitioners in such cases are not only justiciable, but ripe for analysis.<sup>88</sup>

Justice Brennan’s dissent in *Glass v. Louisiana*, where petitioner Glass challenged the use of the electric chair in his execution, provided a lengthy analysis of the Court’s lack of action in execution method challenges.<sup>89</sup> According to Justice Brennan, “Glass’[s] petition present[ed] an important and unsettling question that cut[] to the very heart of the Eighth Amendment’s Cruel and Unusual Punishments Clause—a question that demand[ed] measured judicial consideration.”<sup>90</sup> Justice Brennan went on to note that “an ever-increasing number of condemned prisoners have contended that electrocution is a cruel and barbaric method of extinguishing human life, both *per se* and as compared with other available means of execution.”<sup>91</sup> As argued, Justice Brennan noted that “such claims have uniformly and summarily been rejected, typically on the strength of this Court’s opinion in *In re Kemmler* . . . [, which] was grounded on a

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<sup>83</sup> See *Campbell v. Wood*, 511 U.S. 1119, 1119–23 (1994) (Blackmun, J., dissenting); *Glass v. Louisiana*, 471 U.S. 1080, 1082–84 (1985) (Brennan, J., dissenting); *In re Kemmler*, 136 U.S. 436, 446–47 (1890).

<sup>84</sup> *Kemmler*, 136 U.S. at 447.

<sup>85</sup> See *id.* at 446–47.

<sup>86</sup> See *Glass*, 471 U.S. at 1081. Indeed, the Court has commented little on the subject over the past one hundred years. *Id.* at 1083–84.

<sup>87</sup> See *id.* at 1081 n.3.

<sup>88</sup> See *id.* at 1081; *Gray v. Lucas*, 463 U.S. 1237, 1244–47 (1983) (Marshall, J., dissenting).

<sup>89</sup> 471 U.S. at 1080–84.

<sup>90</sup> *Id.* at 1080–81 (footnote omitted).

<sup>91</sup> *Id.* at 1081.

number of constitutional premises that have long since been rejected[,] and on factual assumptions that appear not to have withstood the test of experience.”<sup>92</sup>

In *Gray v. Lucas*,<sup>93</sup> the Court denied certiorari, but Chief Justice Burger went on to discuss the underlying challenge to the use of lethal gas in the execution of Mississippi convicts.<sup>94</sup> The Chief Justice, concurring in the denial of certiorari, stated that “no evidentiary hearing on the effects of lethal gas is required. A number of affidavits describing such effects were filed . . . [and f]or purposes of my vote in this case, I accept the truth of the affidavits submitted by the petitioner, but . . . conclude . . . [that there is no] Eighth Amendment violation.”<sup>95</sup> He further stated that “the showing made by petitioner does not justify a court holding that . . . ‘the pain and terror resulting from death by cyanide is so different in degree or nature from that resulting from other traditional modes of execution as to implicate the [E]ighth [A]mendment right.’”<sup>96</sup> The majority failed to address the glaring reality that these prior methods have been repeatedly rejected by policymakers as barbaric.<sup>97</sup> Instead, the Court relied on the tradition of the use of the challenged method, without addressing the fact that the pain caused is unnecessary and wanton, regardless of its supposed similarity to upheld methods of the past.<sup>98</sup>

Justice Marshall, in his dissent of the denial of certiorari, further analyzed the merits of petitioner Gray’s claims. Justice Marshall expressed his view that the use of lethal gas in the execution of Mississippi prisoners was indeed in violation of the Cruel and Unusual Punishments Clause of the Eighth Amendment.<sup>99</sup> Perhaps most importantly, he criticized the Court’s continuing trend of giving substantial deference to state methods of execution, despite the fact that throughout history, the use of those methods were repeatedly abandoned through humanitarian efforts.<sup>100</sup>

The observations of the dissenting Justices were not without merit. Time eventually proved to decrease the use of lethal gas as a method of

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<sup>92</sup> *Id.* (footnote omitted).

<sup>93</sup> 463 U.S. 1237 (1983).

<sup>94</sup> *Id.* at 1237–40 (Burger, C.J., concurring).

<sup>95</sup> *Id.* at 1239.

<sup>96</sup> *Id.* at 1239–40 (quoting *Gray v. Lucas*, 710 F.2d 1048, 1061 (5th Cir. 1983)).

<sup>97</sup> See JOHNSON, *supra* note 15, at 45–46.

<sup>98</sup> See *Gray*, 463 U.S. at 1239–40.

<sup>99</sup> *Id.* at 1244–47 (Marshall, J., dissenting).

<sup>100</sup> *Id.* at 1245–47.

execution due to the publicity surrounding several botched executions. This lent irrefutable weight to the arguments expressed in *Gray*.<sup>101</sup>

## II. ANALYSIS

### A. *The Permissible and the Damned*

The governing bodies of our nation are killing prisoners in violation of the protective mandates of the Eighth Amendment. The Cruel and Unusual Punishments Clause is intended to ensure that our nation maintains its status as one of civility and justice.<sup>102</sup> The callous truth of death by lethal injection has been uncovered and it is time for the courts to take action. The use of lethal injection as a method of execution is barbaric, cruel, and impermissible under the Eighth Amendment to the United States Constitution. Accordingly, its use must end.

The use of capital punishment itself has repeatedly been affirmed as a non-violation of the Cruel and Unusual Punishments Clause.<sup>103</sup> In 1890, the United States Supreme Court held that “[p]unishments 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 [is] something inhuman and barbarous, something more than the mere extinguishment of life.”<sup>104</sup> Sixty-eight years later, the Court announced that “[w]hatever the arguments may be against capital punishment, . . . the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.”<sup>105</sup> Two decades later, the same notion was reiterated by Justices Stewart, Powell, and Stevens when they stated, “Despite the continuing debate, dating back to the 19th century, over the morality and utility of capital punishment, it is now evident that a large proportion of American society continues to regard it

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<sup>101</sup> See Denno, *supra* note 26, at 573–74; see also JOHNSON, *supra* note 15, at 45–46.

<sup>102</sup> See *Gregg v. Georgia*, 428 U.S. 153, 169–73 (1976) (plurality opinion); *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion).

<sup>103</sup> See *In re Kemmler*, 136 U.S. 436, 444–49 (1890). In *Kemmler*, the Court upheld the constitutionality of electrocution and discussed the overall permissibility of capital punishment in general. *Id.* In *Gregg v. Georgia*, the Court held “that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.” 428 U.S. at 187.

<sup>104</sup> *Kemmler*, 136 U.S. at 447.

<sup>105</sup> *Trop*, 356 U.S. at 99.

as an appropriate and necessary criminal sanction.”<sup>106</sup> The plurality further noted that “all of the post-*Furman* statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people.”<sup>107</sup> Clearly, the Court has given considerable deference to the legislatures and society’s prevailing attitude.

This is not to say, however, that governing bodies may kill in whatever manner they wish. The Eighth Amendment, as applied to the states through the Fourteenth Amendment,<sup>108</sup> has produced jurisprudential guidelines regarding how governing bodies may execute prisoners.<sup>109</sup> In *Gregg v. Georgia*, the Court held that in order to survive an Eighth Amendment challenge, a “punishment must not involve the unnecessary and wanton infliction of pain.”<sup>110</sup> In *Trop v. Dulles*, the Court stated unequivocally that “[w]hile the State has the power to punish, the [Eighth] Amendment stands to assure that this power be exercised within the limits of civilized standards,” and that “[t]he Amendment must draw its meaning from the *evolving standards of decency* that mark the progress of a maturing society.”<sup>111</sup>

While the Court has done well to provide compelling language with which execution procedures must comply, it has done little, if anything, to enforce the ideas behind its verbosity. Following the decisions of *Glass* and *Gray*, the Court entered a two-decade period of inaction that remains today. This breach of judicial duty has resulted in the deaths of hundreds of capital convicts<sup>112</sup> in violation of their constitutional rights.

### B. *The New Wave of Challenges*

Public pressure, eyewitness accounts, and undeniable notions of common sense have been the most compelling forces in eliminating

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<sup>106</sup> *Gregg*, 428 U.S. at 179.

<sup>107</sup> *Id.* at 180–81. In *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972), the Supreme Court ruled that the capital punishment violated the Eighth Amendment in the specific cases under review. “The concurrence of [five Justices] on the basic issue meant . . . that all of the six hundred thirty-one men and women on death rows were spared and that capital punishment, insofar as it was imposed by judges and juries with untrammelled sentencing discretion, was abolished in the United States.” Mackey, *supra* note 3, at lii.

<sup>108</sup> See *Robinson v. California*, 370 U.S. 660, 666–67 (1962).

<sup>109</sup> See *supra* Part I.B.

<sup>110</sup> 428 U.S. at 173 (citing *Furman*, 408 U.S. at 392–93 (1972) (Burger, C.J., dissenting)).

<sup>111</sup> 356 U.S. 86, 100–01 (1958) (plurality opinion) (emphasis added).

<sup>112</sup> See CAPITAL PUNISHMENT, *supra* note 8, at 1, 4.

barbaric methods of execution.<sup>113</sup> The Supreme Court's reluctance to confront these issues is troubling. Indeed, deference to state legislative bodies is a fundamental component of a federalist system of government.<sup>114</sup> When compelling evidence of torture is brought before a court, however, it becomes a judicial duty to ensure that the Eighth Amendment is given its intended effect of assuring individual protection and the civility of our society.<sup>115</sup> A lack of action in spite of well-supported proof that inhumane acts are occurring within our boundaries may lead to the devolution of our society.<sup>116</sup>

In *Nelson v. Campbell*,<sup>117</sup> the Supreme Court held that a 42 U.S.C. § 1983 action is an appropriate manner by which a prisoner may attack the method by which the state intends to carry out his execution.<sup>118</sup> The Court was not forced to address the issue of whether or not the cut-down procedure at issue was indeed impermissible under Eighth Amendment standards.<sup>119</sup> Furthermore, in *Reid v. Johnson*,<sup>120</sup> the Fourth Circuit Court of Appeals followed *Nelson* in holding that § 1983 was a proper method by which petitioner Reid could attack the potentially torturous concoction of drugs that was to be used in his lethal injection procedure.<sup>121</sup>

Petitioners' arguments in these cases were tailored to allow them to further explore their Eighth Amendment claims on remand.<sup>122</sup> It is unclear whether these holdings lend hope to the fight against lethal injection. Both decisions addressed only procedural issues and solidified a pathway by which future petitioners will challenge their methods of execution. The future will show whether the Court will opt to address the underlying issue. It is doubtful that it will. While Justice Brennan's and Justice Marshall's

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<sup>113</sup> See KELLAWAY, *supra* note 30, at 140–49; see also Denno, *supra* note 26, at 567–68.

<sup>114</sup> See *Younger v. Harris*, 401 U.S. 37, 44–45 (1971).

<sup>115</sup> See *Trop*, 356 U.S. at 100–01; see generally *Chicot County v. Sherwood*, 148 U.S. 529, 534 (1893) (“[T]he courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction.”); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (“We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.”).

<sup>116</sup> See *Trop*, 356 U.S. at 100–01.

<sup>117</sup> 541 U.S. 637 (2004).

<sup>118</sup> *Id.* at 644–51.

<sup>119</sup> See *id.*

<sup>120</sup> 105 F. App'x 500 (4th Cir. 2004) (per curiam).

<sup>121</sup> *Id.* at 502–03.

<sup>122</sup> See *Nelson*, 541 U.S. at 644–46; *Reid*, 105 F. App'x at 501–03.

argument—that particular methods of execution are unconstitutional—has overwhelmingly proven to have merit,<sup>123</sup> the Court continues to lend a deaf ear to those supporting lethal injection abolition.

Extensive scientific data may be needed to convince the Court to address the issue.<sup>124</sup> Fortunately, such studies have been conducted.<sup>125</sup> While lethal injection is widely believed to be the most humane and efficient method devised to date, torture continues to result.<sup>126</sup> Ignorance within the population at large is the primary reason for the continued existence of this method of killing.<sup>127</sup>

### C. Chemically Induced Torture

The chemicals used in the administration of a lethal injection are individually torturous.<sup>128</sup> The first chemical involved in the process is the weak barbiturate, sodium thiopental.<sup>129</sup> It has a low-level effect as a sedative that may not last throughout the execution.<sup>130</sup> Without proper administration, this drug can actually cause an increase in sensitivity to pain.<sup>131</sup> Because medical ethical canons disallow doctors from participating in executions,<sup>132</sup> it is quite possible that an insufficient dose may be given.

The second chemical is pancuronium bromide, a neuromuscular blocking agent.<sup>133</sup> While it paralyzes voluntary muscles, it has no effect on the cognition of the condemned, leaving the individual in a state of conscious paralysis.<sup>134</sup> The drug has produced a wide level of scrutiny in the veterinary community.<sup>135</sup> In 2001, Tennessee made it a crime for

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<sup>123</sup> See Denno, *supra* note 26, at 570–71.

<sup>124</sup> See *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam) (relying on statistics to invalidate the death sentences of several prisoners).

<sup>125</sup> See, e.g., Harris Brief, *supra* note 62, at 7–8 (providing a medical analysis of the potential complications of lethal injection procedure); Khan & Leventhal, *supra* note 63, at 850 (finding that executions involve significant physical complications).

<sup>126</sup> See KELLAWAY, *supra* note 30, at 144–45.

<sup>127</sup> See *id.* at 145.

<sup>128</sup> Harris Brief, *supra* note 62, at 7–8.

<sup>129</sup> *Id.* at 7.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> L. KAY GILLESPIE, *INSIDE THE DEATH CHAMBER: EXPLORING EXECUTIONS* 68 (2003).

<sup>133</sup> Harris Brief, *supra* note 62, at 7.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 9.

veterinarians to use the drug in animal euthanasia.<sup>136</sup> Shortly thereafter, a Tennessee judge held that its use “‘bore no legitimate purpose’” in human executions and that its role may provide a false sense of serenity to onlookers.<sup>137</sup> The petitioner’s argument that he was a “non-livestock animal,” however, failed to convince the reviewing court.<sup>138</sup>

Reputable physicians are baffled by the use of the drug in executions.<sup>139</sup> According to one, “‘It strikes me that it makes no sense to use a muscle relaxant in executing people. Complete muscle paralysis does not mean loss of pain sensation.’”<sup>140</sup> While one may then wonder why the drug is used at all, the answer becomes obvious when considering the characteristics that are believed to render this method of execution constitutionally permissible. The paralysis of skeletal muscles keeps the prisoner from moving or speaking.<sup>141</sup> The drug renders the inmate incapable of expressing pain.<sup>142</sup> Thus, the public is unable to detect the cruel nature of this method of execution. This is not compliant with Eighth Amendment mandates. The purpose of the Cruel and Unusual Punishments Clause is not to protect onlookers from the brutal reality of what they see; it is to protect the condemned from the unspeakable horrors that have plagued humanity when vengeance is sought.<sup>143</sup>

The American Veterinary Medical Association has also condemned the use of the drug.<sup>144</sup> The Texas legislature, like Tennessee, has outlawed the use of pancuronium bromide in animal euthanasia.<sup>145</sup> The state has nevertheless decided to maintain the use of the drug in the execution of human beings.<sup>146</sup> Those actually involved in lethal injection executions

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<sup>136</sup> See *Abdur’Rahman v. Bredesen*, No. M2003-01767-COA-R3-CV, 2004 WL 2246227, at \*6 (Tenn. Ct. App. Oct. 6, 2004).

<sup>137</sup> Adam Liptak, *Critics Say Execution Drug May Hide Suffering*, N.Y. TIMES, Oct. 7, 2003, at A1.

<sup>138</sup> *Abdur’Rahman*, 2004 WL 2246227, at \*7–8.

<sup>139</sup> Liptak, *supra* note 137.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> Harris Brief, *supra* note 62, at 8.

<sup>143</sup> See *supra* Part I.B.

<sup>144</sup> Harris Brief, *supra* note 62, at 9.

<sup>145</sup> TEX. HEALTH & SAFETY CODE ANN. § 821.052(a) (Vernon Supp. 2004–2005).

<sup>146</sup> *E.g.*, *Ex parte Hopkins*, 160 S.W.3d 9, 9 (Tex. Crim. App. 2004) (Price, J., dissenting). Judge Price’s hopeful dissent pointed out that “twenty-one states have [banned] the use of . . . pancuronium bromide in the euthanasia of animals,” and that “[i]t stands to reason that what is cruel and inhumane for use in animals is also cruel and inhumane for use in human beings.” *Id.* at 10.

have also been affected by the process. Prison Chaplain Carroll Pickett sought psychiatric therapy following his personal observation of the execution of a Texas inmate.<sup>147</sup> According to Pickett, he could still feel the pulse of the young man far into the execution (when the effects of the sedative are likely dulled) as the pancuronium bromide was administered.<sup>148</sup>

The third drug used is potassium chloride, the death agent.<sup>149</sup> Potassium chloride sets off the nerve fibers within the patient's veins and disrupts the contractions of the heart.<sup>150</sup> Pulmonary function is impeded causing oxygen deprivation.<sup>151</sup> As a result, the condemned suffocates (due to the combination of muscle paralysis and lack of oxygen transfer), while the first drug provides little relief from pain and the second drug induces paralysis to mask this pain.<sup>152</sup> Thus, the serenity of the process is a sham.

As one would expect, the current practice of lethal injection has been supported by reputable medical authorities.<sup>153</sup> In a recent California decision, the judge accepted a government expert's belief that the use of sodium thiopental, as administered, would result in only a 0.00006% probability of a prisoner's experiencing pain after a period of five minutes.<sup>154</sup> Basic statistics beg to differ. The prisoner is unable to communicate any sensation of pain as he is both strapped to a gurney<sup>155</sup> and chemically paralyzed.<sup>156</sup> A source of error arises in that the only individual able to communicate the sensation of pain is incapacitated.

Over seven hundred executions by lethal injection have occurred in the United States since 1977.<sup>157</sup> Assuming that only one lethal injection has resulted in conscious pain in the condemned, the resulting statistical reality would be 0.13928%, roughly 2,300 times the probability accepted by the

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<sup>147</sup> CARROLL PICKETT & CARLTON STOWERS, *WITHIN THESE WALLS: MEMOIRS OF A DEATH HOUSE CHAPLAIN* 178 (2002).

<sup>148</sup> *Id.* at 177.

<sup>149</sup> Harris Brief, *supra* note 62, at 8.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Deborah W. Denno, *Lethally Humane? The Evolution of Execution Methods in the United States*, in *AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT*, *supra* note 4, at 693, 713–14.

<sup>154</sup> See *Cooper v. Rimmer*, No. C04436JF, 2004 WL 231325, at \*3 (N.D. Cal. Feb. 6, 2004).

<sup>155</sup> Khan & Leventhal, *supra* note 63, at 848.

<sup>156</sup> Harris Brief, *supra* note 62, at 8.

<sup>157</sup> See *CAPITAL PUNISHMENT*, *supra* note 8, at 11.

California judge.<sup>158</sup> Far more than one botched lethal injection procedure has been reported, however, and several inmates have lingered on for longer than five minutes past the introduction of sodium thiopental.<sup>159</sup>

The apparent innocuous effects of death by needle have proven to opiate the masses for over twenty-five years.<sup>160</sup> It indeed appears to be painless.<sup>161</sup> The condemned are believed to be subjected to little more than the prick of a needle,<sup>162</sup> a sensation that nearly every American has experienced at one time or another. Chemicals then flow into the vein and death results within minutes.<sup>163</sup> While the government has managed to instill this notion in the populace for quite some time, evidence shows that this is clearly not the case.<sup>164</sup> If not administered correctly, the combination of drugs used to bring about death is *likely* to cause unbearable pain.<sup>165</sup> Even when properly performed, it has become readily apparent that the techniques involved may result in excessive levels of pain and discomfort.<sup>166</sup>

#### *D. Surgical Torture of Intravenous Drug Abusers*

In addition to the overall potential for painful death, some jurisdictions employ “cut-down” procedures when dealing with condemned inmates whose veins are compromised.<sup>167</sup> This method is employed even though less intrusive and more merciful approaches are available.<sup>168</sup> The procedure has been described as “painful and disturbing, specifically the smoke, odor, as well as the buzzing and sizzling noises that can result from cauterization.”<sup>169</sup> It is a procedure that should be performed by a competent

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<sup>158</sup> One inmate experiencing conscious pain during lethal injection divided by 718 inmates suffering death by lethal injection in the United States 1977–2003 equals 0.13928%. This percentage divided by 0.00006% equals 2321.26277.

<sup>159</sup> Denno, *supra* note 153, at 742–43.

<sup>160</sup> See KELLAWAY, *supra* note 30, at 144–45.

<sup>161</sup> See *id.* at 144.

<sup>162</sup> See *id.* at 144–45.

<sup>163</sup> See *id.*

<sup>164</sup> See Harris Brief, *supra* note 62, at 7–8; KELLAWAY, *supra* note 30, at 144–45; Denno, *supra* note 153, at 742–43.

<sup>165</sup> See Denno, *supra* note 153, at 721.

<sup>166</sup> *Id.* at 742–43.

<sup>167</sup> Brief of Laurie Dill, M.D. et al. as Amici Curiae in Support of Petitioner at 2, *Nelson v. Campbell*, 541 U.S. 637 (2004) (No. 03-6821), 2004 WL 234123 [hereinafter Dill Brief].

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

physician.<sup>170</sup> Physicians, however, have long avoided the death chambers of prisons and in many jurisdictions they are not used at all.<sup>171</sup>

The technique aims to go deeply into the patient's arms, legs, or chest in an effort to find larger and less compromised veins.<sup>172</sup> Fat, muscle, veins, arteries, and other viscera are sliced through in an effort to locate a useable vein.<sup>173</sup> Complications are more frequent and more dangerous depending on the location of the cut-down procedure.<sup>174</sup> Due to the potential complexity of complications, it is urged that a full medical staff be available in the event that procedures go awry.<sup>175</sup> As noted, however, such a staff may not be present.

Horror stories abound regarding the disastrous results of botched cut-down lethal injection attempts.<sup>176</sup> In one well-documented incident, a man waited for forty-five minutes as attendants searched fruitlessly for a viable vein.<sup>177</sup> Eventually, the man came to the aid of his inept executioners and attempted to locate the vein himself.<sup>178</sup> Prisoners subjected to this procedure often are not adequately sedated and are free to view the bloody scene and to smell the burning of their flesh.<sup>179</sup>

#### *E. The Cover-Up*

As a civilized society, we cannot say with sincerity that this method of punishment is consistent with evolving standards of decency. The denial of constitutional rights cannot be tolerated by the Supreme Court. In order for a punishment not to be characterized as cruel and unusual, the punishment must be in line with "the evolving standards of decency that mark the progress of a maturing society."<sup>180</sup> A maturing society must not stand by idly and watch condemned inmates suffer at the hands of a masked method of torture. Still, the Court has refused to face the issue head on.

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<sup>170</sup> *Id.* at 4.

<sup>171</sup> See AM. COLL. OF PHYSICIANS ET AL., BREACH OF TRUST: PHYSICIAN PARTICIPATION IN EXECUTIONS IN THE UNITED STATES 37–39 (1994).

<sup>172</sup> Dill Brief, *supra* note 167, at 4.

<sup>173</sup> *Id.* at 4.

<sup>174</sup> *Id.* at 4–5.

<sup>175</sup> *Id.* at 5.

<sup>176</sup> Denno, *supra* note 153, at 742–43.

<sup>177</sup> KELLAWAY, *supra* note 30, at 145.

<sup>178</sup> *Id.*

<sup>179</sup> See Dill Brief, *supra* note 167, at 2–3, 6.

<sup>180</sup> Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

For some two hundred years, the approaches to carrying out capital punishment have seemingly moved toward the *more humane*.<sup>181</sup> Public hangings and shootings were the norm only until the electric chair's birth in the late nineteenth century.<sup>182</sup> It was not so much the lack of civility in the killing that compelled this change, but rather the population's disgust with the fact that such gruesome events continued to exist as public spectacles.<sup>183</sup>

Deference to state policy has been a primary concern of the Court when challenges have arisen as to methods of execution.<sup>184</sup> Accordingly, it has not been constitutional mandates that have compelled the states to invent seemingly more serene causes of death—it has been public interest.<sup>185</sup> Simply put, if the population makes enough noise, the government will eventually fold.

The electric chair has been responsible for the deaths of thousands of ill-fated inmates.<sup>186</sup> Dozens of botched electrocutions resulting in unnecessary pain were not enough to bring about the decline of its use until the late twentieth century.<sup>187</sup> The chair, like the firing squad and gallows, is still a viable option for some death row inmates.<sup>188</sup> The most horrific witness accounts describe the burning of the body, a phenomenon that often occurred while the condemned was still cognizant.<sup>189</sup> Other accounts include extended periods of electrocution and extensive bleeding from the orifices.<sup>190</sup> The individual chairs themselves were often antiquated, leading to mechanical breakdowns and extended periods of agony.<sup>191</sup> The Supreme Court has never abolished the use of the electric chair.<sup>192</sup> It was not until legal challenges began to stockpile and the stories became public folklore that state governments sought out less barbaric methods of execution.<sup>193</sup>

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<sup>181</sup> See Mackey, *supra* note 3, at xi–liii.

<sup>182</sup> See KELLAWAY, *supra* note 30, at 140–41, 146–47; Denno, *supra* note 26, at 567.

<sup>183</sup> See Mackey, *supra* note 3, at xx–xxi.

<sup>184</sup> See *Gregg v. Georgia*, 428 U.S. 153, 174–76 (1976); *Younger v. Harris*, 401 U.S. 37, 41 (1971).

<sup>185</sup> See Denno, *supra* note 26, at 567–70.

<sup>186</sup> KELLAWAY, *supra* note 30, at 141.

<sup>187</sup> See *id.* at 140–41; see also Denno, *supra* note 153, at 740–41.

<sup>188</sup> See *supra* note 52 and accompanying text.

<sup>189</sup> See Denno, *supra* note 153, at 740–41.

<sup>190</sup> *Id.*

<sup>191</sup> See KELLAWAY, *supra* note 30, at 141.

<sup>192</sup> See *Glass v. Louisiana*, 471 U.S. 1080, 1082–83 (1985) (Brennan, J., dissenting).

<sup>193</sup> See Mackey, *supra* note 3, at xi–liii.

The gas chamber was the next answer to the problem.<sup>194</sup> In an execution by lethal gas, cyanide pellets are dropped into containers of hydrochloric acid, producing a toxic vapor that, when inhaled, induces asphyxiation.<sup>195</sup> A quick death occurs only if the prisoner *chooses* to breathe normally<sup>196</sup>—a ridiculous request.

During one lethal gas execution, the attempt lasted for over eight minutes with the victim eventually “banging his head against a steel pole in the gas chamber while the reporters counted his moans.”<sup>197</sup> Politicians finally took issue with the cruel chambers when the public learned that some prisoners opted for the method, claiming that they would “suffer more.”<sup>198</sup> The Supreme Court has not ruled the practice impermissible under the Eighth Amendment.<sup>199</sup>

Note the historical correlation to the current argument. As time progresses, our penal system moves toward methods of execution that appear to be more humane.<sup>200</sup> They only *appear*, however, to be more in line with Eight Amendment and public decency mandates. It appears that the pain involved in lethal injection may rival that experienced in execution methods of the past.<sup>201</sup> The docility of the process is a sham; smoke in the mirror that the public gazes into when viewing its standards of decency, treatment of other human beings, and collective conscience. With the prick of a needle, a monster responsible for despicable acts drifts off into oblivion. People could not possibly find this to be cruel or barbaric—that is until they learn of the true nature of the beast.

With lethal injection comes the truism that the public will be slow to learn of the torturous effects of the method.<sup>202</sup> The excessively painful effects of both normal lethal injection procedures and cut-down lethal injection methods are not apparent to the observer.<sup>203</sup> As a result, witnesses cannot experience the screams of agony from those trapped in

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<sup>194</sup> See KELLAWAY, *supra* note 30, at 142.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 425 (1997) (quoting David Bruck, *Decisions of Death*, THE NEW REPUBLIC, Dec. 12, 1983, at 18, 24–25).

<sup>198</sup> See KELLAWAY, *supra* note 30, at 142 box.

<sup>199</sup> See *Gray v. Lucas*, 463 U.S. 1237, 1237–40 (1983) (Burger, C.J., concurring).

<sup>200</sup> See KELLAWAY, *supra* note 30, at 136–149.

<sup>201</sup> See *supra* Part II.C.

<sup>202</sup> See ZIMRING, *supra* note 6, at 50–51.

<sup>203</sup> See *supra* Part II.C.

lethal gas chambers,<sup>204</sup> smell or view burning flesh as was often the case with the electric chair,<sup>205</sup> or observe the bodily contortion that has been synonymous with virtually all other methods of execution.<sup>206</sup> To both the ignorant and the well-informed viewer, the process would appear to be as peaceful as watching one drift off to sleep.<sup>207</sup> The masked conscious of the inmate, however, is likely to be confronted with a gruesome series of physiological reactions resulting in unbearable pain.<sup>208</sup> The paralyzed prisoner will never get the chance to express this.<sup>209</sup> This is precisely why the Court must step in. There will be no public outcry. The legislatures will not move to correct the cruel effects of the procedures. Our evolution as a nation of civility will be impeded.

When cut-down procedures are performed in the death chamber, non-prison personnel are shielded from the gruesome display.<sup>210</sup> The amount of blood spilled in the process would turn the stomach of a human being of low sensitivity.<sup>211</sup> The odor and presence of smoke is not witnessed by the gallery.<sup>212</sup> Perhaps most importantly, onlookers are unable to see the complications that arise when performing a sophisticated surgery in a prison setting.<sup>213</sup> They are unable to view the difficulty in locating useable veins. On at least two occasions, the inmate had to aid the executioner find a suitable vein.<sup>214</sup> One can only imagine the horror that witnesses would be subjected to in watching the inmate become actively involved in the process.

Whether or not we will ever fashion a manner of execution that *should* truly withstand Eight Amendment and public perception attacks is a question for another day. In most jurisdictions, specific approaches to execution are eventually rejected and replaced.<sup>215</sup> Death penalty

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<sup>204</sup> See JOHNSON, *supra* note 15, at 46.

<sup>205</sup> See KELLAWAY, *supra* note 30, at 141.

<sup>206</sup> See generally *id.* at 36–148 (detailing execution methods).

<sup>207</sup> *Id.* at 144–45.

<sup>208</sup> See Harris Brief, *supra* note 62, at 6–8.

<sup>209</sup> *Id.* at 8.

<sup>210</sup> See Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What it Says About Us*, 63 OHIO ST. L.J. 63, 124 (2002) (reporting that states shield viewers from the lethal injection process by drawing a curtain until catheters are actually inserted).

<sup>211</sup> See *supra* note 173 and accompanying text.

<sup>212</sup> See Dill Brief, *supra* note 167, at 2; Denno, *supra* note 210, at 124.

<sup>213</sup> See Dill Brief, *supra* note 167, at 4–5; Denno, *supra* note 210, at 124.

<sup>214</sup> See Denno, *supra* note 153, at 742–43; KELLAWAY, *supra* note 30, at 145.

<sup>215</sup> See KELLAWAY, *supra* note 30, at 140–49; see also Mackey, *supra* note 3, at xi–liii.

proponents in general will always provide well articulated arguments from members of the professional community in support of their position. This, however, does not change the mandates of the Eighth Amendment and subsequent Supreme Court jurisprudence.

Compliance with the Eighth Amendment involves an understanding of what separates us from other animals. Humans have the ability to reason. We have the ability to weigh the consequences of our actions and move toward decency. The infliction of unnecessary and wanton pain does not fall within the realm of decent human behavior.<sup>216</sup> It is neither civilized nor just. At best, the infliction of unnecessary pain appeals only to our primitive instinct of vengeance, an instinct that should not be entertained by the cool hand of the courts, and never without careful weighing of its potential consequences by the public.

It is readily apparent that execution by lethal injection is cruel. It entails the infliction of unnecessary and wanton pain upon a human being, however deplorable his sins of the past. The cases in support are beginning to weigh heavily upon the courts. The scientific and medical communities have studied lethal injection and have concluded that it results in appreciable periods of time of undue agony. Such substantiation cannot be ignored in an evolving and maturing society.

#### CONCLUSION

The scientific and medical communities have provided countless hours of sincere effort in determining whether or not execution by lethal injection involves excessive levels of pain, and the answer from many reputable professionals is *yes*.<sup>217</sup> Whether approaches to executions have involved unnecessary and wanton infliction of pain has been debated for centuries.<sup>218</sup> Shining through this period has been the fact that however ignorant we may remain as to the true brutality of these killings, the Eighth Amendment guarantees that such brutality may not be permitted, and that when it is apparent that such cruel acts are being committed, the acts must cease. It has also been apparent that over time, an adequately informed population will not allow its representatives to engage in intolerable cruelty on its behalf.<sup>219</sup> Sadly, the population has been pacified by a charade of serenity in the killing of its prisoners. While these protections

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<sup>216</sup> See *Furman v. Georgia*, 408 U.S. 238, 241–42 (1972) (Douglas, J., concurring).

<sup>217</sup> See *supra* Part II.C; see also Koniaris et al., *supra* note 65.

<sup>218</sup> See Mackey, *supra* note 3, at xi–xiii.

<sup>219</sup> See *id.* at xiii–xix.

instill a limited degree of optimism, not enough is being done to breathe life into the intended functions of the Eighth Amendment.

So long as public intolerance remains the lynchpin in ending cruel modes of punishment, lethal injection will continue to function as an administrator of human rights deprivation. The courts have been made fully aware of the potential for unnecessary and wanton infliction of pain that accompanies this method of killing. Still, the Court, characteristic of the past, remains silent. Whether it be the belief that the death penalty is a valid form of retribution and deterrence, or just the idea that people who perform despicable acts are only “getting what they deserve,” the Supreme Court has chosen to defer to the states the ability to take lives in violation of precious constitutional protections. In short, the Court’s majority has failed to fulfill its oath.

The Eighth Amendment applies to the federal government, and by way of the Fourteenth Amendment, to the states of the nation.<sup>220</sup> From coast to coast, courts have a duty to ensure that cruel punishment is *never* inflicted. While the essence of federalism is a high degree of deference to lower governing bodies, this does not eliminate the duty of the courts to adhere to the mandates of the United States Constitution.<sup>221</sup> It is time for the courts to fulfill their obligation to the people.

Remedies are available. The Supreme Court must opt to hear the next applicable case regarding this issue. It must not tip-toe around the issue by addressing only procedural mechanisms. A moratorium on the method should be compelled at the next available opportunity. It will prove to save hundreds, if not thousands, of Americans from the ultimate violation of constitutional guarantees.<sup>222</sup>

Lower courts should likewise take on this matter.<sup>223</sup> For over a century, the lower courts have relied on the Supreme Court’s inaction and substantial deference to state legislatures regarding permissible methods of

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<sup>220</sup> See *Robinson v. California*, 370 U.S. 660, 666–67 (1962).

<sup>221</sup> See *supra* note 114 and accompanying text.

<sup>222</sup> In 2005 alone, sixty individuals were executed by lethal injection. Death Penalty Information Center, Searchable Database of Executions, <http://www.deathpenaltyinfo.org/executions.php> (Search Year “2005” and Method of Execution “Lethal Injection”) (last visited Feb. 3, 2006).

<sup>223</sup> While lower courts are much more likely to hear Eighth Amendment challenges, it is a rarity for such a court to nullify the use of a particular method. See, e.g., *Miller v. State*, No. CR-99-2282, 2004 Ala. Crim. App. LEXIS 239, at \*31–32 (Ala. Crim. App. Oct. 29, 2004) (holding that use of electric chair as a method of execution does not violate the Eighth Amendment).

execution. State courts have the same duty to uphold the protections against cruel and unusual punishment.<sup>224</sup> While it is true that our notions of decency change over time, and that this can be gauged by the laws promulgated by our governing bodies and accepted by the represented, the courts must intervene when the public is not adequately informed. The involvement of excessive pain in lethal injection is likely akin to that of prior popular methods of execution. The difference is the manner by which this will be discovered. Human reaction to grotesque practices in the death chamber will not be a factor.

The legislatures are perhaps the most accessible vehicle by which change may occur. They too have been guilty of avoiding the mandates of the Eighth Amendment.<sup>225</sup> So long as the population is uninformed and passive regarding execution methods, the legislatures have done little to address any problems in the approaches.<sup>226</sup> A look at history demonstrates that once the population is enraged, change is expected.<sup>227</sup> The governing body then responds with a new and improved method of killing.<sup>228</sup> Regarding lethal injection, however, this will not occur without judicial intervention. The courts must exercise their intended checking function and abolish this practice.

We pride ourselves as a just, civil, and advanced society. While our self-perception is predominantly merited, we currently employ a method of execution that subjects individuals to constitutionally impermissible levels of wanton pain. This is not just, civil, or advanced. It is time to move forward.

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<sup>224</sup> See *Robinson*, 370 U.S. at 666–68.

<sup>225</sup> See Denno, *supra* note 153, at 722–30.

<sup>226</sup> See *id.*

<sup>227</sup> See Mackey, *supra* note 3, at xx–xxi.

<sup>228</sup> See *id.*