Penn State Law Review

Volume 119 | Issue 4 Article 3

3-1-2015

Retribution, the Evolving Standard of Decency, and Methods of Execution: The Inevitable Collision in Eight Amendment Jurisprudence

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Retribution, the Evolving Standard of Decency, and Methods of Execution: The Inevitable Collision in Eighth Amendment Jurisprudence

Thomas E. Robins*

ABSTRACT

There exists a curious truce between death penalty advocates and detractors: both sides agree that lethal injection is the appropriate means of executing this country's convicted murderers. Ostensibly, the reason for this agreement is that both detractors and supporters view lethal injection as the most "humane" means of execution. Detractors favor lethal injection because it is less painless than alternative methods, supporters because the more humane the death penalty method, the more likely the death penalty will remain constitutional. This Article will argue, however, that this alliance belies an untenable problem in Eighth Amendment jurisprudence: retribution and the evolving standard of decency have come into direct conflict with regard to methods of execution.

If the focus of the Eighth Amendment is whether a particular method of execution involves the "*unnecessary* or wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. 153, 174 (1976), but retribution is a constitutional rationale for the imposition of the death penalty, the logical result is an intellectual quagmire. Most illustrative of this problematic reasoning is *Baze v. Rees*, in which Justice Stevens wrote that "requiring that an execution be relatively painless . . . actually undermines the very premise on which public approval of the retribution rationale [for the death penalty] rests." 553 U.S. 35, 80 (2013). *Baze*

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sets a paradoxical standard that highlights the tension between retribution and the evolving standard of decency. One needs only look to the parade of horribles touted in cases like *State v. Mata* and *Provenzano v. Moore* to see the result of this Eighth Amendment tension in practice.

What is more, the tension between these competing concepts is not merely academic: as states turn to new methods of execution in light of drug shortages, questions will be raised regarding the constitutionality of those protocols. The tension between retribution and the evolving standard of decency in method of execution jurisprudence has yet to be fully explored, but will be the future of death penalty litigation. This Article will advocate for a modified test for the application of the Eighth Amendment to methods of execution, based on the concurring opinion of Justices Thomas and Scalia in *Baze*. Instead of focusing on the risk of harm inherent in any mode of capital punishment, the state should be required only to refrain from causing intentional or reckless harm. This line of reasoning, although not without flaws, will at least preserve the popular sentiment in the states (either for or against the death penalty) while preventing the state from causing unnecessary harm to convicted murderers.

Table of Contents

> *There is no likeness or proportion between life, however painful, and death; and therefore there is no equality between the crime of murder and the retaliation of it but what is judicially accomplished by the execution of the criminal. His death, however, must be kept free from all maltreatment that would make the humanity suffering in his person loathsome or abominable.*[1]

INTRODUCTION

Those who oppose the death penalty and those who support its continued use agree on precious little. However, both sides of the divisive debate agree on one topic, at least in principle: method of execution. Both death penalty detractors and supporters find common ground in the use of lethal injection as the proper method of executing this country's condemned. Death penalty detractors support the use of lethal injection as the most "humane" method of execution. Supporters likely prefer its use because lethal injection, given the evolving standard of decency test, appears to be the only remaining constitutional method of execution.

The confluence of thought in favor of lethal injection may appear harmless, or even a rare gleam of light in an otherwise dark debate. This Article will argue, however, that this alliance belies an untenable contradiction in Eighth Amendment jurisprudence: increasing focus on the risk of pain caused by executions despite the retributive justification for capital punishment. The alliance exists only because the U.S. Supreme Court has increasingly focused on the amount of pain caused by particular methods of execution—a side effect of *Trop v. Dulles*[2] and the "dignity of man,"[3] which has come to mean that the punishment must not involve the "unnecessary and wanton infliction of pain" and must not be

1. IMMANUEL KANT, THE PHILOSOPHY OF LAW 198 (W. Hastie trans., T. & T. Clark 1887) (1796–97).
2. Trop v. Dulles, 356 U.S. 86 (1958).
3. *See id.* at 100.

grossly disproportionate to the crime.[4] As a result, both death penalty abolitionists and supporters look to the *least* painful method of execution, albeit for different reasons. But if retribution remains the primary justification for the use of the death penalty, that justification cannot be squared with an increasing focus on reducing the amount of pain experienced by convicted murderers. Perhaps most illustrative of this problematic reasoning is one of the concurring opinions in *Baze v. Rees*,[5] in which Justice Stevens noted that "requiring that an execution be relatively painless . . . actually undermines the very premise on which public approval of the retribution rationale [for the death penalty] rests."[6]

Death penalty abolitionists must delight at the strange course of Eighth Amendment jurisprudence and the Court's seeming distaste for pain in executions. Paradox supports the position that the death penalty will collapse under its own weight. Of those paradoxes, contradictory Eighth Amendment jurisprudence, which simultaneously commands humaneness and bases the constitutionality of the death penalty partly on retributive justice, is perhaps the most egregious. This Article seeks to explain the yet unexplored implications of the conflict between the retributive underpinning of death penalty jurisprudence and the evolving standard of decency test. Because *Baze v. Rees* applied the evolving standard of decency to methods of execution for the first time, and left decidedly more questions unanswered than answered, the conflict will remain constitutionally relevant for the foreseeable future as litigants continue to challenge methods of execution as violations of the Eighth Amendment. The conflict between retribution and the evolving standard of decency is not merely a theoretical problem—*Baze*'s progeny introduces a recent post-mortem method-of-execution challenge.[7] As states such as Ohio continue to experiment with new lethal injection cocktails due to a lack of available drugs,[8] the *Baze* test will necessarily be stretched to its limits.

Instead of the substantial risk of pain test presented by Chief Justice Roberts in *Baze*, this Article will advocate for a modified version of the

4. Gregg v. Georgia, 428 U.S. 153, 173 (1976).

5. Baze v. Rees, 553 U.S. 35 (2008).

6. *Id.* at 80 (Stevens, J., concurring).

7. *See Family of Executed Ohio Inmate File Lawsuit To Ban Repeat of Lethal Injection*, GUARDIAN (Jan. 25, 2014), http://www.theguardian.com/world/2014/jan/25/ohio-execution-family-lawsuit-lethal-injection [hereinafter *Ohio Lawsuit To Ban Repeat of Lethal Injection*].

8. *See Lacking Lethal Injection Drugs, States Find Untested Backups*, NAT'L PUB. RADIO (Oct. 26, 2013), http://www.npr.org/2013/10/26/241011316/lacking-lethal-injection-drugs-states-find-untested-backups [hereinafter *Lacking Lethal Injection Drugs*].

approach voiced by Justices Thomas and Scalia in *Baze*.[9] Instead of focusing on the risk of harm inherent in any mode of punishment—of which there must be some—the state should be required only to refrain from causing intentional or reckless harm.[10] This line of reasoning, although not without flaws, will at least preserve the popular sentiment in the states (either for or against the death penalty) while preventing the state from causing unnecessary harm to convicted murderers.

I. THE ORIGINS OF THE CONFLICT BETWEEN RETRIBUTION AND EIGHTH AMENDMENT JURISPRUDENCE

Since Immanuel Kant's *Philosophy of Law*, retribution has been a mainstay of criminal law theory, argued over in classrooms and academic journals for centuries. Retribution remains a fundamental, if controversial, precept of criminal law theory. Notwithstanding some ruminations to the contrary, retribution also serves as a constitutional rationale for many methods of punishment, including the death penalty. Indeed, with increasing scrutiny on the deterrence and incapacitation justifications for the death penalty, retribution maintains its relevance, both theoretically and as a matter of public opinion.

In stark opposition to retributivism stand those who hope to abolish the death penalty as cruel and unusual. Inconsistencies in death penalty jurisprudence and justifications provide ammunition for abolitionists in their fight to eliminate executions altogether. Indeed, some abolitionists have capitalized on the two sides' agreement over lethal injection as one of the many inconsistencies making death penalty jurisprudence unworkable.[11]

The noted inconsistencies in applying the Eighth Amendment have a common source: the jurisprudence of this nation's highest court. The evolving standard of decency test, and its regard for the dignity of man, has served to confuse lower courts and legal scholars alike—and has served no other end than strengthening the argument for the death penalty's demise.

A. Retribution

The paradox of lethal injection support begins with retribution. Retribution's long history in philosophical thought and its basis in constitutional law makes it one of the most widely accepted justifications

9. *See Baze*, 533 U.S. at 102 (Thomas, J., concurring).

10. *See id.*

11. *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, 68 (2002).

for punishment and specifically, the death penalty. Retribution is not naked vengeance or revenge, but rather a mandate for culpability and proportionality.

1. Basis in Criminal Law Theory

While recounting the entire philosophical history of retribution would serve only to distract from the primary purpose of this Article, a brief recitation is necessary to understand the tenets of the philosophy that have kept retribution at the forefront of the death penalty debate. *Lex talionis*—an eye for eye, or the right of retribution—strikes some as antiquated and even barbaric.[12] Some modern retributivists have indeed distanced themselves from the literal interpretation.[13] But for some retributivists, the only punishment for the heinous crime of murder is to extinguish the life of the guilty party.

For the purposes of common law, retributivism was perhaps made most famous by Immanuel Kant's 1797 work, *Philosophy of Law*. Kant notably asserted that the only appropriate punishment for murder was the death of the offender.[14] The principle of equality and right of retaliation informed Kant's unwavering position on execution.[15] The principle of equality is straightforward: "the pointer of the Scale of Justice is made to incline no more to one side than the other."[16] From this proposition comes the right of retaliation, which serves as the means to balance the scale.[17]

Proportionality, long a tenet of retributive justice, finds a solid foundation in Kant's philosophy. The criminal, in Kant's view, commits

12. For an apt description of the general reaction to *lex talionis* in application, see Jeremy Waldron, *Lex Talionis*, 34 ARIZ. L. REV. 25, 25 (1992). Others have posited that *lex talionis*, "to the extent that it is a principle," stands as a limit to punishment. *See, e.g.*, Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407, 475–76 (2005). This position is not necessarily out of line with retributivism, but reasonable minds can differ about the limits imposed by *lex talionis*: if one assumes that *lex talionis* does create a limit on the punishment that can be lawfully or morally imposed on the guilty, what is the limit for murder? It is conceivable that the limit is humane execution, that is, that society cannot also torture the offender or inflict death in the same manner perpetrated by the offender.

13. *See, e.g.*, Gerard V. Bradley, *Retribution: The Central Aim of Punishment*, 27 HARV. J.L. & PUB. POL'Y 19, 20 (2003) ("[R]etribution is not lex talionis, the law of retaliation, or 'an eye for an eye.'"); Markel, *supra* note 12, at 476 ("In any case, one need not be a retributivist to embrace lex talionis, and an embrace of retributivism need not entail a commitment to lex talionis.").

14. KANT, *supra* note 1, at 198.

15. *Id.* at 196.

16. *Id.*

17. *Id.*

a crime not only against the victim, but against himself as well.[18] Thus, one "who[] steals anything makes the property of all insecure; he therefore robs himself of all security in property."[19] Depriving the thief of his property and the benefit of his labor is therefore the thief's appropriate punishment. In death, Kant found no such proportionality.[20] Execution, according to Kant's view, was not precisely proportional to the crime of murder; execution was only the nearest analog.[21] Fundamentally, retributive justice relies on Kant's primary vision of punishment: "Juridical Punishment can never be administered merely as a means for promoting another Good either with regard to the Criminal himself or to Civil Society, but must in all cases be imposed only because the individual on whom it is inflicted *has committed a Crime*."[22] In this way, pure retributivism opposes the utilitarian notion that criminals may be punished only as a means to an end, namely, rehabilitation and reentry into society.[23]

Since the *Philosophy of Law*, renowned legal and philosophical theorists from H.L.A. Hart to Michael S. Moore have further refined the retributive justice model.[24] The continuing debate on the efficacy and relevance of retributivism remains as heated as in the nineteenth century. Other theories—rehabilitation and deterrence among them—have gone in and out of vogue. Both of these theories suffer from a significant dearth of applicable proof.[25] In any case, retribution remains a proffered

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18. *Id.* at 197.
19. KANT, *supra* note 1, at 197.
20. *Id.* at 198.
21. *Id.* at 198.
22. *Id.* at 195.
23. Kant's take on utilitarianism was not generous. Kant wrote:

> The penal law is a Categorical Imperative; and woe to him who creeps through the serpent-windings of Utilitarianism to discover some advantage that may discharge him from the Justice of Punishment, or even from the due measure of it, according to the Pharisaic maxim: 'It is better that *one* man should die than that the whole people should perish.' For if Justice and Righteousness perish, human life would no longer have any value in the world.

Id. at 195–96. Thus, Kantian retributive justice focuses not on the effect on the punished, or any perceived benefit of incarcerating or incapacitating the offender, but the simple notion that punishment must be meted out where deserved due to moral culpability.

24. *See generally* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (2d ed. 2008); Michael S. Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER, AND EMOTIONS 179 (Ferdinand Schoeman ed., 1987); Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65 (1999) [hereinafter Moore, *Victims and Retribution*].

25. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 185 (1976) ("Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view."); Furman v. Georgia, 408 U.S. 238, 396 (1972) (Burger, C.J., dissenting) (noting that the Court generally prefers to leave the "unresolved factual

justification for punishment, despite its many detractors.[26] Today, retribution, although more nuanced, retains most of the Kantian elements. Retribution demands culpability before punishment and proportionality in punishment.[27] Retributivist justice relies solely on the moral justification that the guilty require punishment, either for the benefit of the criminal and victim, or for society as a whole.[28]

2. The Constitutionality of Retribution as a Justification for Capital Punishment

Although interesting in its own right, retributivist theory is irrelevant to the death penalty debate without a basis in constitutional law. The U.S. Supreme Court has regularly upheld the state's right to justify punishment with retribution. As Justice Kennedy wrote in *Graham v. Florida*,[29] "[r]etribution is a legitimate reason to punish."[30] Despite some rumination to the contrary,[31] retribution remains one of the three generally accepted constitutional justifications for punishment.[32] Until the concurring opinions in *Furman v. Georgia*,[33] the primacy of retribution had not seriously been disputed.[34] Only two years later,

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question" of the effectiveness of deterrence to the states). The dearth of statistical deterrence proof is discussed *infra* notes 69–71 and accompanying text.

26. *See, e.g.*, David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1626 (1992). The purported theoretical flaws with retributivism are as follows: "(1) That punishment is what criminal offenders deserve suffices to morally justify the practice of punishing them. (2) The deterrence theory, but not retributivism, involves improperly 'using' persons. (3) Retributivism accords the proper *respect* to the personhood of criminals who are punished." *Id.* Professor Dolinko's sweeping criticism of the underlying philosophical and moral foundation of retributive justice is fairly typical of retribution detractors.

27. *See, e.g.*, David J. Karp, *Causation in the Model Penal Code*, 78 COLUM. L. REV. 1249, 1257–58 (positing that retribution focuses on the culpability of the offender, while retaliation focuses on the quantum of harm).

28. *See* Paul Butler, *Retribution, for Liberals*, 46 UCLA L. REV. 1873, 1879 (1999).

29. Graham v. Florida, 560 U.S. 48 (2010).

30. *Id.* at 71.

31. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 304–05 (1972) (Brennan, J., concurring); *id.* at 342–44 (Marshall, J., concurring); *see also* Williams v. New York, 337 U.S. 241, 248 (1949) ("Retribution is no longer the dominant objective of the criminal law.").

32. *See* Ewing v. California, 538 U.S. 11, 25 (2003) ("A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation."). Incapacitation does not often stand on its own as a justification for punishment and usually applies only to a limited class of punishments, most notably incarceration and execution.

33. Furman v. Georgia, 408 U.S. 238 (1972).

34. *See id.* at 342–45 (Marshall, J., concurring) ("The history of the Eighth Amendment supports only the conclusion that retribution for its own sake is improper."). Justice Brennan also distanced himself from the retributive justification for the death penalty, writing that "[w]hen the overwhelming number of criminals who commit capital

another concurring opinion seemed to indicate that retribution, however unseemly to some members of the Court, was still a constitutionally valid rationale for punishment, specifically the death penalty.[35]

Retribution and deterrence are both touted by the Court as justifications for the death penalty when faced with Eighth Amendment challenges to execution.[36] Deterrence, although much maligned given the lack of verifiable evidence of the rational murderer, is nearly always listed alongside retribution.[37] Clearly rehabilitation, at least in the non-religious sense, cannot be achieved through the execution of the condemned. In much of the Court's death penalty jurisprudence, the Court takes great pains to recognize the legitimacy of retribution as a reasonable, if problematic, foundation for the continued existence of the death penalty.

The quintessential authority on the relationship between retribution and the death penalty can be found in *Gregg v. Georgia*,[38] the landmark U.S. Supreme Court case reversing the effective ban on the death penalty. In *Gregg*, Justice Stewart, drawing on his *Furman* opinion, noted that:

> Retribution is no longer the dominant objective of the criminal law, . . . but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men . . . . Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.[39]

This concurring opinion represents the essential dynamic between retributivist justice and the death penalty, as well as the Court's affirmation of the death penalty as retribution exacted by the people.

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crimes go to prison, it cannot be concluded that death serves the purpose of retribution more effectively than imprisonment." *Id.* at 304 (Brennan, J., concurring).

35. *See* Gregg v. Georgia, 428 U.S. 153, 206–07 (1976) (White, J., concurring).

36. *See id.* at 183.

37. *See Ewing*, 538 U.S. at 25. Numerous studies have attempted to establish the deterrent effect of the death penalty. Thus far, none have convinced the Court that there is a verifiable deterrent effect. For a recitation of some of the studies and debate surrounding deterrence and the death penalty, see *Gregg*, 428 U.S. at 185 n.31. More recent studies were evaluated by Professors John Donohue and Justin Wolfers. John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 843 (2005). The professors concluded, again, that "U.S. data simply do not speak clearly about whether the death penalty has a deterrent or antideterrent effect" and that relying on such data to support either the retention or the abolition of the death penalty constituted potentially dangerous policy. *Id.* at 843, 845.

38. Gregg v. Georgia, 428 U.S. 153 (1976).

39. *Id.* at 183–84 (citations omitted).

Although retribution forms a constitutional basis for capital punishment, retribution does not stand as an unlimited power afforded to the state to mete out punishment.[40] Rather, retribution is constrained by commonsensical interpretations of the Eighth Amendment. It might also be said that retribution is, in and of itself, a limit on punishment.[41] However, the death penalty is not proportional as applied to certain, limited classes of offenders, due to a lack of requisite culpability.[42]

The U.S. Supreme Court has limited the death penalty in two lines of cases that are relevant to the issue of culpability, and therefore, to retributivism. The first line of cases involves categorical bars to capital punishment based on a characteristic or trait of the criminal defendant. This line of cases is typified by *Atkins v. Virginia*,[43] which barred the imposition of capital punishment on mentally retarded offenders.[44] In addition, the execution of juveniles is unconstitutional according to *Roper v. Simmons*.[45] One might quibble with the reasoning of *Roper*, but most retributivists would agree that the average juvenile lacks the moral culpability to deserve the highest penalty authorized by law.[46] The Court held that "[r]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished . . . by reason of youth and immaturity."[47] In both the case of

40. Retribution, as opposed to revenge, is an orchestrated, methodical, and societal approach to punishment. It is important to note that retribution, as a theory, does not encourage or require the infliction of pain on a convicted criminal. *See* Markel, *supra* note 12, at 438, 475–77. Vengeance (or revenge) and retribution are all too often conflated. They are separable concepts—distinguished by how they are carried out and why. *See* Andrew Oldenquist, *Retribution and the Death Penalty*, 29 U. DAYTON L. REV. 335, 340 (2004). The difference between vengeance and retribution often arises when the effect on the victim becomes part of the punishment rationale. *See* Moore, *Victims and Retribution*, *supra* note 24, at 75–76; *see also* Katie Long, *Community Input at Sentencing: Victim's Right or Victim's Revenge?*, 75 B.U. L. REV. 187, 228 (1995).

41. *See* Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 683 (2005). Professor Lee argues that retributivism should be considered a "side constraint" on the Eighth Amendment. *Id.* As a side constraint, Professor Lee argues, "retributivism does not require that we punish the guilty; it simply states that multiple purposes of punishment may be pursued so long as no sentence that is undeservedly harsh is imposed." *Id.* at 708; *see also* HART, *supra* note 24, at 236–37.

42. *See* Roper v. Simmons, 543 U.S. 551, 571 (2005) (reasoning that juvenile criminals lack full culpability for their actions); Atkins v. Virginia, 536 U.S. 304, 319 (2002) (reasoning that mentally handicapped criminals lack full culpability for their actions).

43. Atkins v. Virginia, 536 U.S. 304 (2002).

44. *Id.* at 321. The author is aware that there are more delicate, precise, and politically correct terms for mental disabilities once commonly referred to as retardation. For the sake of clarity and consistency, the term mentally retarded is used in this Article only to mirror the words of the Supreme Court in *Atkins*.

45. Roper v. Simmons, 543 U.S. 551, 570 (2005).

46. *Id.* at 570–71.

47. *Id.* at 571.

mentally retarded and juvenile offenders, the right of retribution is limited by culpability and therefore by a retributivist interpretation of the Eighth Amendment.[48]

Finally, retribution played a central role in vacating the death sentence in *Pannetti v. Quarterman*.[49] In *Panetti*, the Court considered whether a defendant once deemed competent despite mental illness but who makes a "substantial showing" of incompetence post-trial could still be put to death.[50] The decisive answer was a resounding "no," based partly on the lack of retributive value in such an execution:

> The potential for a prisoner's recognition of the severity of the offense and the objective of community vindication are called in question, however, if the prisoner's mental state is so distorted by a mental illness that his awareness of the crime and punishment has little or no relation to the understanding of those concepts shared by the community as a whole.[51]

The challenge was a habeas petition to review constitutionally deficient proceedings used to determine competency to stand trial.[52] The *Panetti* decision followed the decision in *Ford v. Wainwright*,[53] which added the insane to the list of those who cannot be sentenced to death.[54] As Justice Kennedy aptly pointed out in the *Pannetti* decision, the *Ford* court was likewise concerned that the executing the insane would serve no valid retributive purpose, notwithstanding the complete lack of legal precedent for executing insane persons.[55] Noticeably absent from the discussion in *Panetti* is any mention of deterrent value, or its application to the case at bar.

A second line of cases limiting the use of the death penalty deals not with the offender, but the offense itself. In *Coker v. Georgia*,[56] the Supreme Court ruled that rape did not warrant the death penalty.[57] The Court controversially found that "in terms of moral depravity and of the injury to the person and to the public," rape "does not compare with

48. There are few other specific instances in which the Supreme Court has categorically banned executions as a matter of course as applied to *particular offenders*. However, the Supreme Court has banned the execution of the insane. Ford v. Wainwright, 477 U.S. 399, 409–10 (1986).

49. Pannetti v. Quarterman, 551 U.S. 930 (2007).

50. *Id.* at 935.

51. *Id.* at 958–59.

52. *Id.* at 935.

53. Ford v. Wainwright, 477 U.S. 399 (1986).

54. *Id.* at 401.

55. *Pannetti*, 551 U.S. at 958 (citing *Ford*, 477 U.S. at 408).

56. Coker v. Georgia, 433 U.S. 584.

57. *Id.* at 592.

murder."[58] Executing a rapist was deemed "a disproportionate penalty" limited by society's ability to seek retribution only from those who also take a life.[59] Likewise, in *Kennedy v. Louisiana*,[60] the Court ruled that execution for the rape of a child was a violation of the Eighth Amendment.[61] The Court reiterated the *Coker* holding and determined that non-homicide crimes simply could not be compared to the "'severity and irrevocability'" of murder.[62] One of the unmistakable rationales behind the decision was a distinction between the retributive value of execution for a "particularly depraved murder" and the value of execution for "the crime of child rape."[63]

The Court also found the retributivist purpose of execution lacking in *Enmund v. Florida*,[64] in which the Court considered a capital punishment sentence for felony-murder.[65] The petitioner in *Enmund* was the getaway driver in an armed robbery which resulted in the deaths of two victims.[66] In overturning the petitioner's death sentence, Justice White wrote that condemning the petitioner to "death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts."[67] In the absence of proof of intent, Enmund's death penalty sentence could not withstand a retributivist analysis, much like in *Coker* and *Kennedy*.

The decisions in *Coker*, *Kennedy*, and *Enmund* find their primary rationale in retributive theory, but the questionable deterrent value of the respective capital sentences also played an important role.[68] In addition

58. *Id.* at 598. The decision was controversial not so much in the holding as in the callousness with which Justice White discussed rape. Justice White went on to compare the murder victim and the rape victim, writing that "for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair." *Id.* In *Kennedy v. Louisiana*, the Supreme Court wisely distanced itself from the ill-advised words of Justice White. *See* Kennedy v. Louisiana, 554 U.S. 407, 435 (2008).

59. *Coker*, 433 U.S. at 597, 600.

60. Kennedy v. Louisiana, 554 U.S. 407 (2008).

61. *Id.* at 446–47.

62. *Id.* at 438 (quoting *Coker*, 433 U.S. at 598).

63. *Id.* at 442.

64. Enmund v. Florida, 458 U.S. 782 (1982).

65. *Id.* at 787.

66. *Id.* at 784–85.

67. *Id.* at 801.

68. *See Kennedy*, 554 U.S. at 445. The Court reasoned:

> The experience of the *amici* who work with child victims indicates that, when the punishment is death, both the victim and the victim's family members may be more likely to shield the perpetrator from discovery, thus increasing underreporting. As a result, punishment by death may not result in more deterrence or more effective enforcement.

Id. (internal citations omitted); *Enmund* 458 U.S. at 798–800 ("We are quite unconvinced, however, that the threat that the death penalty will be imposed for murder

to the case law pointing to retributive justification for the imposition of capital punishment, the available empirical evidence clearly demonstrates that other proffered justifications, particularly deterrence, have dubious statistical support. A recent study conducted by the National Academy of Sciences found no evidence that capital punishment affected homicide rates at all.[69] This is not to say that the study found no deterrent effect or that the death penalty does not deter—in fact, the authors are quick to point out that potential fallacy—but rather that the study found no reliable evidence indicating that the death penalty affected homicide rates in any way, challenging studies that claim otherwise.[70] The essential conclusion was that studies claiming to find potential deterrent effects should not affect the debate about the continued use of the death penalty, due to a severe dearth of applicable data.[71]

The available evidence points to a categorical conclusion: retribution is the primary justification for the death penalty. As a theory of punishment justifying the death penalty, however, retribution is not without limits. This proposition flows from the very theoretical underpinning of retributivism: moral culpability. The Supreme Court's ruminations on lessened culpability and its effect on the retributive value of the death penalty are further evidence of the inescapable nexus between capital punishment and retributive justice. Eighth Amendment jurisprudence demonstrates a concerted effort by the Supreme Court to limit the imposition of capital punishment to highly culpable offenders.[72]

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will measurably deter one who does not kill and has no intention or purpose that life will be taken."). Although the *Coker* plurality did not expressly rely on the lack of deterrent effect in executing a rapist, Chief Justice Burger's dissent noted the essential problem: "[i]t is arguable that many prospective rapists would be deterred by the possibility that they could suffer death for their offense; it is also arguable that the death penalty would have only minimal deterrent effect." Coker v. Georgia, 433 U.S. 584, 617 (1977) (Burger, C.J., dissenting). The Court in *Kennedy* even wondered if the threat of the death penalty for rape might make the attacker more likely to kill the victim. *See Kennedy*, 554 U.S. at 445–46.

69. NAT'L RES. COUNCIL ET AL., DETERRENCE AND THE DEATH PENALTY 2 (Daniel S. Nagin & John V. Pepper eds., 2012).

70. *Id.* at 3 ("Judgment about whether there is a deterrent effect is still relevant to policy, but that judgment should not be justified based on evidence from existing research on capital punishment's effect on homicide.").

71. *Id.*

72. This point is further reinforced by those cases concerning mitigating factors in the death penalty selection phase. Mitigating factors serve to limit the imposition of capital punishment to "the worst of the worst." *See* Penry v. Lynbaugh, 492 U.S. 302, 319 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002). The Court reasoned:

> [P]unishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because . . . defendants who commit

Recent studies, finding evidence of deterrence lacking, bolster the case law reinforcing the retributive purpose of the death penalty. As will be explained in further detail, however, inordinate limitations on pain in execution have the effect of undermining retribution as a justification for the death penalty.

B. Death Penalty Abolition

In order to understand the lethal injection consensus and its problematic underpinning, a brief history of the death penalty abolition movement is necessary.[73] The theoretical basis for death penalty abolition is fairly straightforward, but the abolition movement's strategy shift in the twentieth century helps to explain the topic of this Article. As the abolitionist movement has shifted focus to the Eighth Amendment, the winding course of litigation has worked to delay or eliminate the use of the death penalty in many jurisdictions. Increasingly, the abolitionist movement's efforts have worked to point out flaws in the jurisprudence surrounding the death penalty—largely a creation of the same movement.

1. Origins of the Abolitionist Cause

The American death penalty abolitionist movement spans the history of our young nation and is well documented. Early efforts focused on legislative reform. During the twentieth century, abolitionists found their greatest ally: the Supreme Court. The movement took aim at

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> criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."

Id. (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)); *see also* Lockett v. Ohio, 438 U.S. 586, 605 (1978). In *Lockett*, the Court reasoned:

> [A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.

Id.

73. This Article necessarily assumes that retributivism and death penalty abolition are generally opposed theories. That underlying proposition, however, only functions as a generality. On their face, the two concepts are not necessarily opposed; for instance, a retributivist could reasonably believe that the death penalty is not proportional to the crime of murder, or that problems with the procedure in capital cases could lead to the execution of innocent persons. There exists a movement among retributivists, although a distinctly minority position, that the death penalty should be abolished for any number of reasons including the impossibility of determining guilt to a necessary degree to inflict the punishment and a lack of proportionality. For a discussion of the retributivist abolitionist's position, see generally, for example, Markel, *supra* note 12.

the judicial branch and although it experienced success, failed to end the death penalty altogether.

During the eighteenth and early nineteenth centuries, death penalty abolition followed other popular reform movements including temperance, prison reform, and women's suffrage.[74] The slavery debate, and eventually the Civil War, impeded progress on ending the death penalty, but not before several states banned capital punishment.[75] The so-called Progressive Era during the turn of the century similarly did not bring much in the way of abolitionist movement.

The 1930s and 40s saw the number of executions skyrocket and paved the way for a new abolitionist tactic.[76] Rather than focus on legislative change, reformers in the 1950s and 1960s focused on the courts. Specifically, the NAACP's Legal Education and Defense Fund spearheaded efforts to mount a constitutional attack on the death penalty.[77] This shift in strategy was effective in essentially grinding capital punishment to a halt in the 1960s and in nearly ending the punishment altogether in *Furman*. The abolitionist challenge to the constitutionality of the death penalty under an Eighth Amendment analysis by way of the Fourteenth Amendment led the Supreme Court to apply an increasingly more demanding standard to capital punishment methods. The jurisprudence on the death penalty after *Furman* created paradoxical justifications and limits on the death penalty.

2. Paradox as Support for Abolition

The legal challenges of the 1960s and 70s erected numerous barriers to the imposition of the death penalty that have changed the very legal foundation of capital punishment. Since those challenges, the abolitionist movement has drawn attention to the numerous inconsistencies in capital punishment jurisprudence, such as the seeming irony in holding that the Eighth Amendment bars the use of excessive force against inmates in prison while also allowing for capital punishment.[78] Another rhetorically alarming paradox was raised by Justice Stevens in *Baze v. Rees*: although most states use pancromium bromide (a paralytic agent) in lethal injection and its use has been

74. Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1, 7 (2002).

75. *Id.* at 8.

76. *Id.* at 11.

77. *Id.* at 13.

78. Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 399 (1997).

deemed constitutional, several states have outlawed the drug's use in animal euthanasia.[79]

The death penalty abolitionist movement has become a powerful and influential voice for changing our nation's policy on the death penalty. Increasingly, through legal challenges and academic fora, abolitionists have brilliantly turned Eighth Amendment jurisprudence into both a tool and a weapon to eliminate the death penalty. As a tool, Eighth Amendment jurisprudence is a vehicle to delay and overturn death sentences. As a weapon, the manifest paradoxes in Eighth Amendment jurisprudence are attacked and displayed as evidence of the irony, hypocrisy, and arbitrariness in imposing the death penalty.[80]

In order to counter the intellectual argument for banning the imposition of the death penalty, those who support the death penalty and those who believe that the imperative lies with legislatures to determine capital punishment's usefulness must advocate for the elimination of the paradoxes at the heart of Eighth Amendment jurisprudence. As will be detailed below, the evolving standard of decency test has led to a confusing line of cases purporting to detail the constitutionality of particular punishments. Abolitionists, to their credit, have both supported continued efforts to confuse the definition of "cruel and unusual" and simultaneously decried its innumerable complexities and inconsistencies.[81]

C. Eighth Amendment Jurisprudence: Evolving Standards of Decency

Beginning in the 1950s, the Supreme Court began exploring the meaning of the Eighth Amendment in earnest. Detailing the Supreme Court's confusing and fluid interpretation of the Eighth Amendment's ban on cruel and unusual punishment will reveal the foundation of the

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79. "It is unseemly—to say the least—that Kentucky may well kill petitioners using a drug that it would not permit to be used on their pets." Baze v. Rees, 553 U.S. 35, 72–73 (2008) (Stevens, J., concurring).

80. Professor Deborah Denno, for her part, is a master of using Eighth Amendment paradox to point out serious flaws in capital punishment. *See, e.g.*, Denno, *supra* note 78, at 399 ("[I]f the Court encouraged judicial scrutiny of execution methods to the same extent that it has evaluated prison conditions, it might reach the conclusion that no execution method that currently exists could be implemented humanely."); Denno, *supra* note 11, at 65 ("Oftentimes, friends and foes of the death penalty align both sides of the execution methods debate, despite their different goals. The result is a dangerous and distorted legal 'philosophy' of punishment that erodes human rights and constitutional safeguards, most particularly the Eighth Amendment's Cruel and Unusual Punishments Clause.").

81. *See, e.g.*, *Baze*, 553 U.S. at 104–05 (Thomas, J., concurring) (noting that currently, the "best option for those seeking to abolish the death penalty is to embroil the States in never-ending litigation concerning the adequacy of their execution procedures").

paradoxical lethal injection alliance between death penalty detractors and supporters. In 1958 the Supreme Court introduced a new theme to Eighth Amendment jurisprudence: the dignity of man. Since *Trop v. Dulles*, the Supreme Court's jurisprudence has taken confusing and seemingly disparate turns to conform to an evolving standard of decency. Adding to the Eighth Amendment milieu are the Eighth Amendment cases regarding methods of execution. The application of the Eighth Amendment to methods of execution, when combined with the Court's focus on the evolving standard of decency, sets the stage for the conflict between retribution and humaneness.

1. The Dignity of Man and Evolving Standard of Decency

The evolving standard of decency test originated in *Trop v. Dulles*, a 1958 case in which the Supreme Court considered whether punishing a citizen with a loss of citizenship violated the Constitution's protections against cruel and unusual punishment.[82] The evolving standard of decency and the dignity of man are now mainstays of Eighth Amendment jurisprudence. Although *Trop v. Dulles* was a unique case decided by a plurality of the Court and involved a military crime, a specific statutory scheme, and a particularly unusual punishment,[83] the standards embodied in *Trop* have since been applied to constitutional death penalty challenges.[84]

The facts of the case involved a former American soldier who had been punished for desertion during the Second World War.[85] After his dishonorable discharge, Albert Trop attempted to apply for a passport.[86] His application was denied based on his dishonorable discharge.[87] In fact, Mr. Trop's discharge resulted in a loss of citizenship under the Nationality Act of 1940.[88] The Supreme Court, in a split decision, found that the denationalization punishment violated the Eighth Amendment.[89] According to the Court, the "basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[90] In deciding the case, the Court aptly noted the relative lack of jurisprudential precedent

82. Trop v. Dulles, 356 U.S. 86, 99 (1958).
83. *Id.* at 87–91.
84. Gregg v. Georgia, 428 U.S. 153, 173 (1976); Furman v. Georgia, 408 U.S. 238, 269–70 (1972) (Brennan, J. concurring).
85. *Trop*, 356 U.S. at 88. Trop deserted his post in French Morocco in May, 1944. *Id.* at 87. Trop was "gone less than a day" and "willingly surrendered to an officer on an Army vehicle while he was walking back towards his base." *Id.*
86. *Id.* at 88.
87. *Id.*
88. *Id.* at 88–89.
89. *Id.* at 103–04.
90. *Trop*, 356 U.S. at 100.

on the meaning of the Eighth Amendment.[91] The Court cited to *Weems v. United States*,[92] however, to support the proposition that the Eighth Amendment was not "precise" and that the scope of the Amendment was not static.[93] Finally, in defining its interpretive methodology, Chief Justice Warren wrote that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[94]

In applying this interpretive methodology, the Court found the use of denationalization cruel and unusual.[95] The Court suggested little in the way of testing the evolving standard of decency—but did cite the "virtual unanimity" of the "civilized nations of the world" against statelessness as an appropriate punishment.[96] In addition, the Court noted that the punishment had never been recognized in the United States before 1940.[97] In its extreme unusualness, denationalization simply could not withstand the Eighth Amendment challenge.[98] The Supreme Court left open the question of defining more specifically the "evolving standard of decency." The meaning of those phrases quickly became evident in the death penalty context.

2. The Evolving Standard in the Courts Since *Trop v. Dulles*

Although *Trop v. Dulles* was not a death penalty case, the evolving standard of decency test has been applied to numerous death penalty challenges. The application of the evolving standard of decency to the death penalty, likely intended to standardize the constitutionality of the death penalty, has only served to confuse Eighth Amendment jurisprudence. Specifically, two cases applying the evolving standard of decency test underscore the problematic aspects of the test: *Furman v. Georgia* and *Gregg v. Georgia.*

Furman and *Gregg*, cases decided less than five years apart, have come to represent the modern incarnation of the evolving standard of decency test. In *Furman*, the Court's plurality opinion declared the death penalty unconstitutional and sowed the seeds of what would become the evolving standard of decency test. Justice Marshall's opinion, in particular, laid much of the foundation for what would become the standard formula. Justice Marshall looked to the other concurring

91. *Id.*
92. Weems v. United States, 217 U.S. 349 (1910).
93. *Trop*, 356 U.S. at 100–01.
94. *Id.* at 101.
95. *Id.* at 99–102.
96. *Id.* at 102.
97. *Id.* at 100 n.32.
98. *Trop*, 356 U.S. at 103–04.

decisions and distilled four primary principles: (1) that "there are certain punishments that inherently involve so much physical pain and suffering that civilized people cannot toleration them," such as the rack and the thumbscrew; (2) that "there are punishments that are unusual, signifying that they were previously unknown as penalties for a given offense" and if intended to "serve a humane purpose" may be constitutional; (3) that "a penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose" and (4) that "where a punishment is not excessive and serves a valid purpose, it still may be invalid if popular sentiment abhors it."[99] Finding that the death penalty was excessive and unnecessary, and that the penalty was abhorrent to the public, Justice Marshall voted with the plurality.[100]

In 1976, the Supreme Court heard *Gregg v. Georgia* and effectively reversed the death penalty moratorium imposed by *Furman*. Justice Stewart further refined the evolving standard of decency test. Justice Stewart's evolving standard of decency test, while drawing from the four factors enumerated by Justice Marshall in *Furman*, set out a two-part inquiry: an assessment of contemporary values followed by an analysis of whether the penalty comports with the dignity of man. Contemporary values are gauged by "objective indicia" of public opinion.[101] Whether the punishment comports with the dignity of man is primarily a legal question, which requires the Court to consider whether the punishment is excessive.[102] Finding that a "large proportion of American society continues to regard [the death penalty] as an appropriate and necessary criminal sanction," the Court moved to the second part of the test.[103] In determining whether the punishment in question is excessive, and therefore whether it comports with the dignity of man, Justice Stewart concluded that the punishment "must not involve the unnecessary and wanton infliction of pain" and must be "proportion[al] to the severity of the crime."[104] The Court further held that a punishment must not be "so totally without penalogical justification that it results in gratuitous infliction of suffering."[105] Determining that the death penalty could arguably serve deterrent and retributive purposes, and that the

99. Furman v. Georgia, 408 U.S. 238, 330–33 (1972) (Marhsall, J., concurring).

100. *Id.* at 358–60, 371. Justice Marshall's finding, particularly that public sentiment abhorred the death penalty, is subject to scrutiny. Given the Court's complete 180° in *Gregg*, one can hardly imagine that public opinion in 1972 abhorred the death penalty, but public sentiment in 1976 supported capital punishment. *Compare Furman*, 408 U.S. at 368, *with* Gregg v. Georgia, 428 U.S. 153, 175–76, 179–80 (1976).

101. *Gregg*, 428 U.S. at 173.

102. *Id.*

103. *Id.* at 179–82.

104. *Id.* at 173.

105. *Id.* at 183.

punishment was proportional, the Supreme Court held that the death penalty was once again a constitutional form of punishment.[106]

Furman and *Gregg* sum up the Supreme Court's evolving standard of decency test post-*Trop*. In particular, the dignity of man element—what has interestingly been deemed "the exercise of [the Court's] independent judgment"[107] or bringing the Court's judgment to bear—plays a leading role in considering the constitutionality of methods of execution in later cases. The evolving standard of decency, and particularly the Court's judgment as to the death penalty's basis in penalogical theory and proportionality, has created an untenable conflict in Eighth Amendment jurisprudence.

3. The Eighth Amendment and Methods of Execution

By the time the Supreme Court decided *Furman* and *Gregg*, Eighth Amendment jurisprudence was applicable not only to the constitutionality of the death penalty itself, but also to particular methods of execution. The short history of method-of-execution challenges represents a traditionally retributivist rationale for the death penalty and the relative lack of success petitioners had in challenging methods of execution. The holdings in *Furman* and *Gregg*, which espoused concern over the dignity of man, once again made it possible to successfully challenge a method of execution.

The first method-of-execution challenge to come before the court was *Wilkerson v. Utah*.[108] In *Wilkerson*, the Supreme Court held that Utah's use of the firing squad to execute inmates was constitutional.[109] The Court flatly ruled that cruel and unusual punishments are "forbidden by the Constitution, but . . . 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."[110]

In re Kemmler,[111] 12 years later, similarly rejected a claim that the electric chair was cruel and unusual punishment.[112] The Supreme Court attempted to put its stamp on Eighth Amendment jurisprudence by defining the very meaning of the Eighth Amendment: "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,

106. *Gregg*, 428 U.S. at 186–87, 206–07.
107. Roper v. Simmons, 543 U.S. 551, 564 (2005).
108. Wilkerson v. Utah, 99 U.S. 130 (1878).
109. *Id.* at 134–35.
110. *Id.*
111. *In re* Kemmler, 136 U.S. 436 (1890).
112. *Id.* at 447.

something more than the mere extinguishment of life."[113] Finding that electrocution did not meet the definition of torture, or the types of punishment outlined as cruel in *Wilkerson*, the Court upheld New York's electrocution statute. [114]

The Court rejected another method-of-execution challenge in 1947 with *Louisiana ex rel. Francis v. Resweber*.[115] In *Resweber*, the State of Louisiana previously made an unsuccessful attempt to electrocute the convict.[116] The convict then challenged the electrocution procedure, claiming that a second attempt after a first failed attempt would constitute cruel and unusual punishment.[117] The "cruelty against which the Constitution protects," wrote the plurality, "is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed [by the state] to extinguish life humanely."[118] Calling the abortive electrocution attempt "an unforeseeable accident" and finding no intent on the part of the State to subject the petitioner to cruelty, the Court ruled that Louisiana's second attempt to execute the petitioner could proceed.[119]

Not until 2008 would another method-of-execution challenge come before the Supreme Court. More than a half-century after its last method-of-execution challenge, the Court would have a vast array of new Eighth Amendment jurisprudence to consider, applying standards as yet unheard of in method-of-execution challenges. The confluence of the Court's experience with method-of-execution challenges and the evolving standard of decency test paved the way for a collision between retribution and humaneness. Retribution, one of few remaining justifications for the death penalty, does not comport with the "dignity of man" as it has evolved over the last half century.

II. RETRIBUTION AND HUMANENESS: INCOMPATIBLE ALLIES

After the establishment of the evolving standard of decency test, which inherently causes conflict between retributive justice and humaneness, an alliance between lethal injection supporters and detractors became possible and arguably necessary. The alliance is a result of sheer necessity and perceived constitutionality. However, the truce reveals some of the numerous problems with Eighth Amendment jurisprudence. The paradoxical lethal injection truce is emblematic of

113. *Id.*
114. *Id.* at 445–47.
115. Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947).
116. *Id.* at 460.
117. *Id.* at 460–61.
118. *Id.* at 464.
119. *Id.*

the larger conflict between retribution and humaneness in methods of execution—a conflict that has played out largely in state courts of last resort. Perhaps the most apposite example of this tension, however, was the U.S. Supreme Court's decision in *Baze v. Rees*.[120]

A. Retribution Versus Humaneness

The evolving standard of decency test, as applied to the Eighth Amendment method-of-execution challenges, creates conflict between retribution and humaneness—conflict that has led to support for lethal injection from both death penalty supporters and abolitionists. The result of the paradox of lethal injection support, and more importantly of the inherent tension in Eighth Amendment jurisprudence, is that courts are increasingly skeptical of capital punishment in conformity with the evolving standard of decency.

1. The Alliance: Support for Lethal Injection

Professor Deborah Denno, a notable abolitionist and prolific writer on death penalty jurisprudence, was one of the first scholars to recognize the absurdity of the lethal injection consensus. The consensus is evident in legislative battles over method of execution. The consensus is not in and of itself the problem; rather, the truce over lethal injection represents the ultimate conflict created by Eighth Amendment jurisprudence.

a. Professor Denno's Curious Observation

Given the diametrically opposed goals of retributivist death penalty supporters and death penalty abolitionists, common ground between the two groups is virtually nonexistent. One significant exception to the general rule pervades the death penalty debate: lethal injection. Professor Deborah W. Denno has noted as much in her campaign to end the death penalty:

> Generally, pro and con debates concerning the death penalty are divisively clear. Such predictability is not the hallmark of reactions to changes in execution methods, however. Oftentimes, friends and foes of the death penalty align both sides of the execution methods debate, despite their different goals.[121]

Professor Denno goes on to call attention to the "core of th[e] execution methods paradox": whether states will "reject or retain the death penalty

120. Baze v. Rees, 553 U.S. 35, 41 (2008).
121. Denno, *supra* note 11, at 65.

and which stance will ensure their success."[122] While Professor Denno is correct to note the paradox, and likely part of the reasoning behind the paradox, one must question the source of the rationale. Indeed, the abiding reason that death penalty supporters are forced to advocate for lethal injection is that the trend in Eighth Amendment jurisprudence dictates seemingly more humane methods of carrying out the death penalty. Likewise, whether states (especially those in which support for the death penalty remains high) will choose to alter their method of execution or ban it altogether is largely dictated by the perceived constitutionality of the method, by Professor Denno's own admission.[123] In any case, Professor Denno makes one final point about the paradox that bears repeating:

> Paradoxically, the two sides also have united by promoting lethal injection because it appears more humane. For this reason, some proponents feel that injection can save the death penalty from abolition while some opponents believe injection can save inmates from torture. Public opinion polls occupy both camps: the public says it wants the death penalty, but it also wants what it believes to be the most humane method of execution.[124]

The source of this strange truce over humaneness is not necessarily the result of legal actors deciding whether opposition or support for the death penalty is most politically advantageous. This viewpoint has the benefit of blaming death penalty supporters and simultaneously weakening the theoretical underpinnings of the death penalty, but it does not do the issue justice. The paradox is the direct result of Eighth Amendment jurisprudence which mandates consideration of pain as a result of evolving standards of decency in addition to the ever-expanding procedural hurdles already impeding the imposition of lawful sentences.

b. Evidence of the Truce: Lethal Injection Advocates

Professor Denno utilizes a number of media sources to support her paradox theory.[125] More specifically, she points to the example of an Ohio legislative session in which two death penalty supporters lined up on different sides of the debate over the continued use of the electric chair in that state.[126] One legislator reportedly advocated for the continued use of the electric chair as an expression of the people's retributivist sentiment, while the other claimed that its use would hasten

122. *Id.*
123. *Id.*
124. *Id.* at 65–66 (citations omitted).
125. *See generally id.*
126. Denno, *supra* note 11, at 89–90.

the end of the death penalty in Ohio.[127] The same was true for death penalty abolitionists: some wanted the electric chair to remain to highlight the perceived barbarity of executions, while others wanted to eliminate its use because the electric chair was considered torturous.[128]

As for lethal injection, support for Denno's curious observation can also be found in reporting on the death penalty. State legislators have plainly admitted that their support for lethal injection is an attempt to "save" the death penalty from constitutional attack.[129] Abolitionists are clearly troubled with the thought of legitimating the death penalty, but at least some abolition proponents would prefer some "reform" in capital punishment to none.[130] Perhaps the move toward more "humane" methods of punishment can be included in the incremental capital punishment reform movement. In any case, the most obvious example of the desperation felt by capital punishment supporters is the case of Florida's capital punishment system. Florida's legislature abruptly adopted lethal injection in 2000.[131] The sudden shift occurred after one of the legion Florida cases affirming execution by electrocution was granted certiorari by the U.S. Supreme Court.[132] To avoid the inevitable result based on the evolving standard of decency test, the Florida legislature opted to follow the trend in favor of lethal injection.

The paradoxical support for lethal injection is representative of a larger problem. That both sides agree on lethal injection means that both can find value in the use of lethal injection. For retributivists, that means constitutionality. For abolitionists, it means "humaneness" and perhaps another step toward the end of the death penalty. For the Eighth Amendment and capital punishment, the truce means trouble.

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127. *Id.* at 90.

128. *Id.*

129. In the article cited by Professor Denno, *supra* note 11, at 66 n.11, Alabama State Senator Hinton Mitchem reportedly feared that electrocution would be deemed unconstitutional. David Crary, *Electric Chair's Days Are Numbered as Cruelty is Cited*, L.A. TIMES, Aug. 19, 2001, at A.18, *available at* http://articles.latimes.com/2001/aug/19/news/mn-35783. That concern led the Senator to propose lethal injection as an option in his state. *Id.* Alabama passed legislation changing its method of execution to lethal injection in 2002. *See* Act of Apr. 25, 2002, ch. 2002-492, 2002, § 1, Ala. Acts 1243, 1244 (codified at Ala. Code § 15-18-82.1 (West, Westlaw through Act 2015-16 of 2015 Reg. Sess.)).

130. *See* Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative "Reform" of the Death Penalty?*, 63 OHIO ST. L.J. 417, 418 (2002).

131. *See* Act of Jan. 14, 2000, ch. 2000-2, sec. 1, § 922.10, 2000 Fla. Laws 2, 2 (codified as amended at FLA. STAT. § 922.105 (2014)).

132. *See* Deborah W. Denno, *Adieu to Electrocution*, 26 OHIO N.U. L. REV. 665, 665 (2000). The case was dismissed because Florida changed its method of execution before the case was heard. Bryan v. Moore, 528 U.S. 1133, 1133 (2000); Denno, *supra*, at 665.

2. The Result of the Paradox – The Undoing of the Death Penalty

Most of the litigation invoking the evolving standard of decency has been argued in state courts of last resort. The Supreme Court's reliance on the evolving standard of decency has led to a truce between death penalty advocates and abolitionists in favor of lethal injection. But that alliance is emblematic of a conflict between retribution as a constitutionally permissible goal in carrying out the death penalty and the simultaneous constitutional mandate that the death penalty be as painless as possible. The result of this curious paradox is an abolitionist's dream: court decisions decrying the death penalty as cruel and unusual. If this was not the aim of the Supreme Court, it is the result. Several recent cases are representative of the path of death penalty litigation in its current constitutional framework.

a. The States' Experience with Eighth Amendment Jurisprudence

In *State v. Mata*,[133] the evolving standard of decency test almost put an end to the death penalty in Nebraska.[134] Because Nebraska did not maintain an alternate method of execution, the judgment of the Nebraska Supreme Court effectively banned the use of capital punishment, until the Nebraska legislature passed a bill authorizing lethal injection.[135] In finding that electrocution violated Nebraska's equivalent of the Eighth Amendment,[136] the Nebraska Supreme Court adopted an unnecessary risk of harm test.[137] Specifically, the court held that a method of execution is cruel and unusual if there exists a "substantial foreseeable risk, inherent in the method, that a prisoner will suffer unnecessary

133. State v. Mata, 745 N.W.2d 229 (Neb. 2008).

134. *Id.* at 279–80.

135. Act of May. 28, 2009, ch. 36, sec. 9, § 29-2532, 2009 Neb. Laws 50, 52 (codified as amended at NEB. REV. STAT. ANN. § 83-964 (West, Westlaw though End of 2014 Reg. Sess.)).

136. The Nebraska Supreme Court took great pains to avoid Supreme Court review, specifically basing their decision on Article 1, Section 9 of the Nebraska Constitution which reads, in part: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." NEB. CONST., art. I, § 9; *Mata*, 745 N.W.2d at 261. Even though the decision in *Mata* was not expressly based on the Eighth Amendment, that Nebraska's cruel and unusual punishment provision mirrors exactly the federal Constitution partly helps to explain why the *Mata* court "look[ed] to federal precedent for guidance regarding general standards to maintain harmony between parallel constitutional provisions." *Mata*, 745 N.W.2d at 261.

137. This lower standard is different from the substantial risk of significant harm test that was established in *Farmer v. Brennan*, 511 U.S. 825, 842 (1994) and reaffirmed in *Baze v. Rees*, 553 U.S. 35, 50 (2008). Of course, the states are free to provide more constitutional protection than the floor set by the Supreme Court. While the Supreme Court distinguishes between the substantial risk test and the unnecessary risk test, the two are eerily similar.

pain."[138] The court in *Mata* found a number of deficiencies in Nebraska's electrocution protocol: a risk of burning, a lack of sufficient current to kill the inmate instantaneously, and the potential for mutilation.[139] The Nebraska Supreme Court was particularly concerned with what it deemed the "purposeless infliction of physical violence and mutilation of the prisoner's body" and that "*more humane*" methods of execution could be used.[140]

Unlike *Mata*, the Florida Supreme Court case *Provenzano v. Moore*[141] did not place a moratorium on the death penalty; however, the dissent was so alarming and sensational that it helped effectively end the use of the electric chair in Florida.[142] By describing in graphic detail the botched execution of Allen Lee Davis, Justice Shaw's dissent gained national notoriety. Justice Shaw even appended photos to his decision to emphasize his position.[143] Like the majority opinion in *Mata*, Justice Shaw's dissent was primarily concerned with "smoke and flames and blood and screams" accompanying botched electrocution attempts.[144] Although less concerned solely with the amount of pain,[145] the emphasis on the potential for mutilation and discomfort on the part of the prisoner is unmistakable. While the majority found electrocution did not violate the Eighth Amendment,[146] frequent challenges to the electric chair's constitutionality eventually led Florida to switch its method of execution to lethal injection.[147]

b. *Baze v. Rees*: Setting the Paradoxical Standard for Future Litigation

As opposed to challenges to the use of the electric chair, challenges to the use of lethal injection have largely been unsuccessful. The Supreme Court's most recent case on lethal injection, *Baze v. Rees*, highlights the difficulty in challenging the protocol used in administering lethal injection.[148] Jurisprudentially, the case is a nightmare for those seeking any semblance of uniformity or a standard to apply in future

138. *Mata*, 745 N.W.2d at 261.
139. *Id.* at 277–79.
140. *Id.* at 278 (emphasis added).
141. Provenzano v. Moore, 744 So. 2d 413 (Fla. 1999).
142. *Id.* at 422–42 (1999) (Shaw, J. dissenting).
143. *Id.* at 442.
144. *Id.* at 440.
145. *Id.* at 428.
146. *Provenzano*, 744 So. 2d at 416.
147. *See supra* notes 131–32 and accompanying text. Note that Florida changed its preferred method of execution less than one year after *Provenzano* was decided.
148. *See generally* Baze v. Rees, 553 U.S. 35 (2008).

cases—or a solution to the Supreme Court's self-created crisis in interpreting the Eighth Amendment.

Baze v. Rees is the most recent method-of-execution challenge considered by the Supreme Court. The concurring opinion left many commentators wondering what precedential value, if any, the *Baze* decision has for future challenges.[149] In any case, the Roberts concurrence, which was joined by Justices Kennedy and Alito, appears to have commanded the most respect from Court watchers.[150] The result of *Baze* was yet another unsuccessful method-of-execution challenge, but a glimmer of hope for abolitionists.

The facts of *Baze* centered on Kentucky's lethal injection protocol.[151] The petitioner argued that the procedure utilized by the Commonwealth created an "unnecessary risk of pain" that violated the Eighth Amendment.[152] Kentucky countered that the Eighth Amendment requires only that the State's lethal injection protocol must not cause any "substantial risk of serious harm."[153] The holding of the case was unmistakable: five Justices deemed the evidence insufficient to find Kentucky's lethal injection protocol unconstitutional.[154]

Justices Roberts, Kennedy, and Alito favored the substantial risk test.[155] In the future, in order to succeed under the *Baze* test, petitioners must demonstrate that a proposed alternative death penalty protocol is:

> feasible, readily implemented, and [will] in fact significantly reduce a substantial risk of severe pain. If a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State's refusal to change its method can be viewed as "cruel and unusual" under the Eighth Amendment.[156]

Justice Stevens did not adopt a test, but as detailed below, took the opportunity to disparage the death penalty and simultaneously hold that

149. *See generally* Justin F. Marceau, *Lifting the Haze of* Baze*: Lethal Injection, the Eighth Amendment, and Plurality Opinions*, 41 ARIZ. ST. L.J. 159 (2009).

150. *See* Marceau, *supra* note 149, at 211–15. Professor Marceau delves into different plurality opinion reading techniques, which result in different holdings and questionable precedential value. Professor Marceau wrote that according to the so-called predictive approach to the *Marks* rule, perhaps the most mainstream method of reading the plurality opinion tea leaves, the concurring opinion of Justices Roberts, Kennedy, and Alito carries the weight of the *Baze* holding. *Id.* at 215–17.

151. *Baze*, 553 U.S. at 45–46.

152. *Id.* at 47.

153. *Id.* at 48.

154. *Id.* at 63.

155. *Id.* at 47–48.

156. *Baze*, 553 U.S. at 52.

the protocol used by Kentucky was constitutional, if abhorrent.[157] Justices Scalia and Thomas each wrote an opinion in which the other concurred, agreeing with the eventual result of the Roberts concurrence.[158]

Thus, five Justices agreed in the result, if not the test, in *Baze*. The substantial risk of serious harm analysis is, despite Chief Justice Robert's admonitions,[159] a Pandora's Box. Justice Stevens aptly predicted that the result of this test would be a quagmire in the lower courts.[160] Numerous questions remain open. How could states and petitioners determine if an alternative method can be readily implemented? Likewise, how can a state determine that a particular method of execution will reduce the amount of pain experienced by convicts? States cannot simply alter their execution methods to test their relative effectiveness. The results of the *Baze* analysis are anything but uniform or clear. Petitioners may fail to prove an Eighth Amendment violation due to a lack of feasible alternatives. While the Roberts concurrence ostensibly requires a "feasible, readily implemented" alternative to the challenged method of execution,[161] the sheer impracticality of proposing a viable substitutionary method of capital punishment may force the Court to apply the substantial risk test to a lethal injection protocol on its face. A convicted murderer might then convince the Court that a particular lethal injection protocol poses such a substantial risk of harm, that *despite the lack of an alternative procedure*, the Court must enjoin the process from continuing.[162] Another possibility is that states will now be effectively forced to adopt the one-drug protocol advanced in *Baze*.[163] Whatever the case, *Baze* does little to solve the constitutional crisis in Eighth Amendment jurisprudence.

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157. *Id.* at 71, 87 (Stevens, J., concurring).

158. *Id.* at 107 (Thomas, J., and Scalia, J., concurring).

159. *Id.* at 61 (plurality opinion). Chief Justice Roberts admonishes:

> Justice STEVENS suggests that our opinion leaves the disposition of other cases uncertain, but the standard we set forth here resolves more challenges than he acknowledges. A stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain. He must show that the risk is substantial when compared to the known and available alternatives. A State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard.

Id. (citations omitted).

160. *Id.* at 71 (Stevens, J., concurring).

161. *Baze*, 553 U.S. at 52 (plurality opinion).

162. This eventuality is essentially the result of *State v. Mata*, the Nebraska case described *supra* notes 133–40 and accompanying text.

163. *Baze*, 553 U.S. at 51.

The constitutional quagmire will continue to present problems as increasing pressure to alter methods of execution mounts. Until very recently, the most widely-used lethal injection protocol included sodium thiopental, an anesthetic.[164] The European manufacturers of this drug ceased production beginning in 2011.[165] As such, states have increasingly sought to utilize different drugs to carry out lawful sentences. Ohio recently utilized a two-drug protocol to execute convicted rapist and murderer Dennis McGuire.[166] Following reports of his gasping and writhing in pain during his execution, Mr. McGuire's family has promised to sue.[167] While Mr. McGuire's execution is the most recent example implicating the tension between retribution and the evolving standard of decency, his will not be the last. *Baze* failed to answer many questions—and therefore left the door open for yet another round of death penalty litigation regarding new drug protocols.

Fortuitously, Professor Denno has already pounced on the perceived deficiencies in Mr. McGuire's execution and called for a reconsideration of the issues raised in *Baze*.[168] The outcry about Mr. McGuire's execution, in conjunction with the aforementioned shortage of lethal injection drugs, also alarmed death penalty advocates. A number of state senators, for instance, have proposed switching to alternate methods of execution such as the firing squad.[169] Utah's legislature recently passed a bill allowing for execution by firing squad, which only awaits the governor's approval.[170] Ohio has officially ceased the use of the two-drug protocol in favor of the three-drug protocol, despite the lack of

164. *See Lacking Lethal Injection Drugs*, *supra* note 8. Another drug commonly used in lethal injection protocols, pentobarbital, is also in short supply and banned by the European Union as an execution drug. *Id.*

165. *Id.*

166. *See* Erica Goode, *After a Prolonged Execution, Questions Over 'Cruel and Unusual'*, N.Y. TIMES, Jan. 18, 2014, at A12, *available at* http://www.nytimes.com/2014/01/18/us/prolonged-execution-prompts-debate-over-death-penalty-methods.html?_r=0.

167. *See Ohio Lawsuit To Ban Repeat of Lethal Injection*, *supra* note 7.

168. Goode, *supra* note 166.

169. *Id.* ("In Wyoming, the shortage of lethal injection drugs has led State Senator Bruce Burns, Republican of Sheridan County, to propose offering a firing squad as an alternative method of execution."). Missouri lawmaker Rick Bratten also recently proposed switching the state's primary method of execution to the firing squad. *See* H.R. 1470, 97th Gen. Assemb., 2d Reg. Sess. (Mo. 2014); *see also* Reid Wilson, *States Search for Alternatives to Lethal Injection*, WASH. POST (Jan. 30, 2014), http://www.washingtonpost.com/blogs/govbeat/wp/2014/01/30/states-search-for-alternatives-to-lethal-injection/.

170. *See* Michelle L. Price, *Utah Governor Says He'll Likely Approve Firing Squad Bill*, WASH. POST (Mar. 19, 2015), http://www.washingtonpost.com/national/utah-governor-says-hell-likely-approve-firing-squad-bill/2015/03/19/4a61f1ba-ce5c-11e4-8730-4f473416e759_story.html.

available sodium thiopental.[171] Regardless of the merits of either position, the furor surrounding Mr. McGuire's execution serves as immutable evidence that the vagaries of *Baze* are the future of death penalty litigation. In fact, members of the Court seemingly predicted future challenges involving lethal injection protocols based on the tension inherent in *Baze* between the evolving standard of decency and retribution—the very same debate raging as a result of newly designed lethal injection protocols.

Justice Stevens' concurrence in *Baze* is most emblematic of the tension between retribution and humaneness. Justice Stevens highlights the objective evidence of pain caused by the most common three-drug cocktail used by states in lethal injection.[172] Unlike Justice Roberts' opinion, in which two other Justices agreed to a substantial risk of significant harm test,[173] Justice Stevens ominously and honestly wrote that states wishing to preserve the death penalty "would do well to reconsider their continued use of pancuronium bromide," one of the drugs used in most lethal injection protocols.[174]

Justice Stevens also criticized the rest of the Court for failing to test the waters of the constitutionality of the death penalty as a whole.[175] In doing so, Justice Stevens pointed out a critical flaw in Eighth Amendment jurisprudence:

> In an attempt to bring executions in line with our evolving standards of decency, we have adopted increasingly less painful methods of execution, and then declared previous methods barbaric and archaic. But by requiring that an execution be relatively painless, we necessarily protect the inmate from enduring any punishment that is comparable to the suffering inflicted on his victim. This trend, while appropriate and required by the Eighth Amendment's prohibition on cruel and unusual punishment, actually undermines the very premise on which public approval of the retribution rationale is based.[176]

Justice Stevens' rumination on the death penalty indicates his likely support for death penalty abolition, a position he took publically after his retirement.[177] And although Justice Stevens seems to partially conflate

171. *See* Sarah Boehme, *Former State Attorneys General Ask Supreme Court To Ban Oklahoma Execution Drug Cocktail*, JURIST (Mar. 18, 2015, 1:01 PM), http://jurist.org/paperchase/2015/03/former-state-attorneys-general-ask-supreme-court-to-ban-oklahoma-execution-drug-cocktail.php.

172. Baze v. Rees, 553 U.S. 35, 71–78 (2008) (Stevens, J., concurring).

173. *Id.* at 52 (plurality opinion).

174. *Id.* at 77 (Stevens, J., concurring).

175. *Id.* at 78 (Stevens, J., concurring).

176. *Id.* at 80–81 (citations omitted).

177. Mike Sacks, *Justice John Paul Stevens Talks Death Penalty, Citizens United, New Memoir*, HUFFINGTON POST (Sept. 27, 2011, 9:52 AM),

retribution with the infliction of pain, he does note that continual efforts to make the death penalty more humane are incongruous with popular notions of retribution.[178] Justice Stevens, a death penalty opponent, has discovered the abolitionist's dream: an untenable paradox. Retribution and ever-increasing standards for limiting the pain of the condemned are diametrically opposed concepts.

Even if pain is not part of the equation for retributivists, it is problematic. Assuming that retribution remains one of the few remaining rationales for the death penalty,[179] it follows that we execute to give the convicted what they deserve. Eighth Amendment jurisprudence holds that we can punish the condemned with death—but only if that death does not cause "unnecessary or wanton pain."[180] This concern, not necessarily in line with retributivist theory, may be its demise with regard to the death penalty. Retribution, although demanding proportionality in punishment, does not require the infliction of pain upon a condemned murderer—only the deserved punishment.[181] Thus, many retributivists find capital punishment to be a proportional punishment for murder, in order to respect the sanctity of life. While some retributivists feel that capital punishment should be painful to mirror the suffering of the victim, most retributivists only call for the

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http://www.huffingtonpost.com/2011/09/27/justice-john-paul-stevens-memoir_n_982386.html; *see also* Elisabeth Semel, *Reflections on Justice John Paul Stevens's Concurring Opinion in* Baze v. Rees*: A Fifth* Gregg *Justice Renounces Capital Punishment*, 43 U.C. DAVIS L. REV. 783, 793 (2010) (detailing Justice Stevens' jurisprudential evolution from "narrowing" to outright abolition).

178. *Baze*, 553 U.S. at 78 (Stevens, J., concurring).

179. Justice Stevens posited in *Baze* that theories like incapacitation and deterrence were not necessarily adequate or demonstrably effective justifications for the death penalty. *Baze*, 553 U.S. at 78–79 (Stevens, J., concurring). Thus, Justice Stevens concluded that the only remaining justification for the death penalty was retribution and that "retribution . . . animates much of the remaining enthusiasm for the death penalty." *Id.* at 79–80. Singling out retribution is generally utilized as a tactic to discredit any remaining justification for the death penalty, in light of the Court's continual efforts to dictate "increasingly less painful methods of execution." *Id.* at 80.

180. Gregg v. Georgia, 428 U.S. 153, 173 (1976).

181. *See, e.g.*, Stephen P. Garvey, *Is It Wrong to Commute Death Row? Retribution, Atonement, and Mercy*, 82 N.C. L. REV. 1319, 1335 (2004) (citations omitted) ("Retribution holds that punishment is justified because and only because it is deserved, and only to the extent it is deserved. Retribution therefore has no end beyond itself. Its only end is doing justice, and justice is done when deserved punishment is imposed."); *see also* Bradley, *supra* note 13, at 21–22 ("[R]etribution tells us little about what a particular defendant's sentence ought to be, or even how to define a range of acceptable punishments for a given crime."). Although Mr. Bradley's position is subject to some criticism from retributivists who might say that the punishment deserved is a policy decision based partly in retributive justice, his point is well taken: retribution is an explanation of why society punishes, not necessarily a prescription for the warranted punishment for specific crimes.

extinguishment of life.[182] Therefore, retributivism's common denominator, at least in terms of the convict's pain threshold, is *no less pain than is required to carry out a proportional punishment.*

While retributivists may not necessarily concern themselves with the risk of pain a convicted murderer may experience, that ignorance cannot stand in the face of a Supreme Court increasingly skeptical of the death penalty and the methods by which capital punishment is carried out. The judicial branch's skepticism toward capital punishment, embodied by the evolving standard of decency test, has resulted in a new Eighth Amendment edict to limit the risk of pain in executions.[183] The argument has come full circle: because lethal injection is thought to be "painless"[184] and is regarded by both sides of the death penalty debate as the most agreeable means to carry out capital punishment due to its relative humaneness,[185] the Court has decided that methods of execution must be so meticulous as to practically eliminate the risk of pain.[186] The obvious problem, however, is that a risk of pain likely exists in any method of execution.

For the retributivist death penalty supporter, the focus on the risk of pain then presents a serious dilemma. The death penalty is in part or in whole justified by retributivist theory, which does not concern itself with the pain caused by punishment, except that pain which might be required to affect proportional punishment. If capital punishment is the proportional punishment chosen for murder, and most executions carry at least some risk of severe pain, then the retributivist rationale for the

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182. For an interesting discussion as to why capital punishment should be more painful, see Robert Blecker, *Killing Them Softly: Meditations on a Painful Punishment of Death*, 35 FORDHAM URB. L.J. 969, 993–98 (2008). Professor Blecker recognizes, although not without a certain degree of disdain, that most modern retributivists are happy enough with a relatively anesthetized execution. *Id.* at 969–71.

183. *See Baze*, 553 U.S. at 47–48.

184. *Id.* at 62.

185. *Id.* at 40.

186. This problem mirrors the truce between death penalty retentionists and abolitionists. Constantly seeking the "most humane" method of execution has led the Court to not only prefer lethal injection but essentially mandate its use in capital punishment regimes. *See id.* at 104 (Thomas, J., and Scalia, J. concurring). The concurrence states:

> Aside from lacking support in history or precedent, the various risk-based standards proposed in this case suffer from other flaws, not the least of which is that they cast substantial doubt on every method of execution other than lethal injection. It may well be that other methods of execution such as hanging, the firing squad, electrocution, and lethal gas involve risks of pain that could be eliminated by switching to lethal injection. Indeed, they have been attacked as unconstitutional for that very reason. But the notion that the Eighth Amendment permits only one mode of execution, or that it requires an anesthetized death, cannot be squared with the history of the Constitution.

Id. (internal citations omitted).

death penalty and the jurisprudence requiring a reduced risk of pain have come into direct opposition. Because retributivists tolerate the pain necessary to carry out the death penalty, the retributivist rationale for capital punishment now conflicts with Eighth Amendment jurisprudence that commands limiting the risk of pain.

Baze represents the ultimate incarnation of the tension between retribution and the evolving standard of decency. Justice Stevens' concurrence encapsulates the jurisprudence seen in lower courts and brings it to its logical conclusion: a conflict between jurisprudence and justification, that is, the conflict between the evolving standard of decency and retribution in method-of-execution challenges. The problem with *Mata*, *Provenazano*, and *Baze* is not necessarily in their results, but rather in the sheer inevitability of the result. Through *Mata* and *Provenzano*, one can easily predict the course of future death penalty litigation: petitioners will focus on the potential for pain and suffering in the implementation of the death penalty. If the risk of pain becomes unacceptable to an Eighth Amendment analysis, so too does the death penalty.

III. RESOLVING THE CONFLICT BETWEEN RETRIBUTION AND THE DIGNITY OF MAN IN METHOD-OF-EXECUTION JURISPRUDENCE

Having identified the essential tension in Eighth Amendment jurisprudence between the retributive justification for the death penalty and a test that inquires into the risk of pain caused by execution, the next step is to identify potential solutions to the Eighth Amendment conundrum. In that respect, the concurring opinion of Justices Thomas and Scalia in *Baze* provides the best option for resolving the retribution/humaneness paradox. Whether *Baze* holds nothing at all or establishes the constitutional floor for lethal injection procedure alternatives,[187] a modified Thomas-Scalia position represents the resolution of an untenable conflict in Eighth Amendment jurisprudence. A modified Thomas-Scalia position does suffer from some flaws, however, most notably the opinion's reliance on pre-incorporation case law.

187. The holding in *Baze* (as with most of the Court's death penalty jurisprudence) is at best unclear and at worst wholly indiscernible. *See* Marceau, *supra* note 149, at 209. The distinct possibility remains that the only holding in *Baze* was that the death sentence of the petitioner was affirmed. *Id.* at 213–14. If that is the case, an intentional harm test, like that proposed by Justice Thomas, may yet be adopted by the Court. If the opinion of Chief Justice Roberts carries the weight of a precedential test, it should be modified or overruled.

A. The Thomas-Scalia Concurrence, Modified

Resolving the paradox between retribution and humaneness cannot be achieved through the Roberts plurality in *Baze*. Justice Thomas' concurrence provides a golden opportunity to, at least, dull the contrast between the asserted justifications for the death penalty and the continuing efforts of the courts to discern the most humane method of capital punishment. By adopting this position, the Supreme Court could both end the paradox and respect the right of the states to choose whether capital punishment is appropriate for the people of those states. That said, the Thomas concurrence requires a slightly broader application in order to be functional: the state should be barred from causing intentional pain, but also from acting with knowing indifference to the potential pain caused by execution.

Justice Thomas' position, in which Justice Scalia concurred, asserted that states should only be barred from causing intentional pain through execution.[188] The opinion is based partly on originalism, and partly on previous method-of-execution challenges.[189] Justice Thomas' opinion departs from that of the other plurality supporters in that the Court's most conservative Justices view the challenge in *Baze* not as a question regarding an evolving standard of decency, but one involving simply the precedential value of other like cases involving challenges to execution methods such as electrocution and the firing squad.[190] The application of the evolving standard of decency test to a method of execution was an arguably novel interpretation of Supreme Court precedent.[191]

In previous method-of-execution challenges, the Supreme Court merely required that methods of execution not be "inhuman[e] and barbarous" or involve "torture and lingering death."[192] To meet those

188. *Baze*, 553 U.S. at 94 (Thomas, J., and Scalia, J., concurring).

189. *Id.* at 94-95, 99-101.

190. Indeed, *Baze* is more akin to the challenges in *Wilkerson v. Utah*, 99 U.S. 130 (1879), *In re Kemmler*, 136 U.S. 436 (1890), and *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), discussed *supra* notes 108–19 and accompanying text, than it is to *Furman*, *Gregg*, or the like. Not at issue are the problems in *Furman* or *Gregg*: legal procedural protections for condemned murderers. Instead, the question is about Kentucky's procedure in implementing lethal injection. The constitutional question raised in *Baze* is one that goes to the heart of the constitutionality of lethal injection as a method of execution.

191. *Baze*, 553 U.S. at 101 (Thomas, J., and Scalia, J., concurring).

192. *In re* Kemmler, 136 U.S. at 447. The reliance on *Wilkerson*, *In re Kemmler*, and *Resweber* is usually attacked due to the age of those cases and their failure to consider new tests established in Eighth Amendment jurisprudence. *See, e.g.*, *Baze*, 553 U.S. at 116, (2008) (Ginsburg, J., concurring) ("Whatever little light our prior method-of-execution cases might shed is thus dimmed by the passage of time."); Denno, *supra* note 132, at 668–72. The author is not aware of any court precedent purporting to establish a

standards, a method of execution must involve more than the "mere extinguishment of life."[193] Justice Thomas' concern with the substantial risk test was that the Roberts position interprets the Eighth Amendment to essentially permit "only one method of execution" and "requires an anesthetized death."[194] Justice Thomas noted the primary concern for death penalty supporters: the Constitution is apparently evolving so quickly that lethal injection, hailed recently as "*the* humane alternative" is under attack as cruel and unusual under the Eighth Amendment.[195] The only result of the Eighth Amendment's evolution, wrote Justice Thomas, is that the Court will eventually strike down capital punishment "as cruel and unusual in all circumstances."[196]

As opposed to Chief Justice Roberts' substantial risk of significant harm test, the Thomas-Scalia position would require the state to only avoid intentionally inflicting pain. The intentional pain analysis would ensure that retribution and the evolving standard of decency could co-exist without collision. In effect, the intentional pain test would end the inquiry into the risk of pain and shift the analysis to the intent of the state in choosing a particular method of execution. Thus, the Supreme Court's inevitable slide into finding that the death penalty, on its face, creates a substantial risk of significant harm to every condemned inmate would be halted.

However, the Thomas-Scalia intentional harm test does not go far enough in limiting the possibility of harm. Because Justice Thomas does not describe his definition of intentional, the possibility remains that under the intentional harm test the state might not be barred from pursuing methods of execution known to cause pain. For instance, a state might settle on a lethal injection protocol not because it was meant to cause pain, but despite the fact that it inflicts pain—a sort of depraved indifference.[197] If the Eighth Amendment's protections are to mean anything with regard to methods of execution, both intentional and reckless punishments must be banned.

Recent attempts to reintroduce antiquated methods of execution provide perhaps the most apt example of the need for modification to the

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per se shelf life on Supreme Court precedent. That said, the method-of-execution cases cited are pre-incorporation and are therefore technically dicta with regard to the application of the Eighth Amendment to the states. This potential problem is discussed infra at notes 205–06 and accompanying text.

193. *In re Kemmler*, 136 U.S. at 447.

194. *Baze*, 553 U.S. at 104 (Thomas, J., and Scalia, J., concurring).

195. *Id.*

196. *Id.* at 105.

197. The author is indebted to Professor Mannheimer of Northern Kentucky University's Chase College of Law for his endless help with the entirety of this project and, particularly, with this fine distinction.

Thomas-Scalia position. Assume that a state decided to adopt electrocution as its primary means of execution in light of increasing scrutiny regarding two-drug protocols and extreme shortages of commonly-used lethal injection drugs. The state is not adopting the method of execution to cause pain, but merely to carry out lawful sentences in light of the aforementioned pressures. Under the Thomas-Scalia test, as long as the subjective intent of the state in utilizing the electric chair was not malicious, Old Sparky could continue its deadly work. Assume also that the state is aware that the electric chair, as a good deal of evidence seems to indicate,[198] causes significant and potentially excruciating pain to the condemned. The result is not a pleasant one: states may choose potentially gruesome methods of execution despite their known dangers. This result, therefore, cannot be said to comport with the evolving standard of decency.

A better standard would have the state avoid both intentional and reckless harm to the inmate. After all, the state should avoid "unnecessary and wanton" harm to inmates.[199] Such a test would also keep states from adopting unproven methods of execution despite potentially serious flaws. Most importantly, this modified position is a functional middle ground between the retributivist's lack of concern for inmate comfort and necessary constitutional protections. A modified Thomas-Scalia position would ensure that retribution could remain a constitutional justification for the death penalty, as some pain—the pain necessary to carry out the deserved punishment—would remain tolerable under the Eighth Amendment. The intentional harm test also ensures that states would not go beyond the necessary infliction of pain to implement grotesque and torturous methods to satisfy the retributivist goals of capital punishment. States could maintain a retributive justice position on capital punishment: namely, that the state is neither concerned with causing unnecessary pain nor making death painless, only with carrying out the retributive aim of the death penalty.[200] Finally, the Thomas-Scalia position ensures that primacy in determining the validity of the death penalty would remain with the states.

B. Potential Flaws in the Thomas-Scalia Position

The Thomas-Scalia intentional pain test (and the modified test proposed here) suffers from at least one potential flaw. The decision relies heavily on originalism and stare decisis to reach its conclusion that

198. *See* Provenzano v. Moore, 744 So. 2d 413, 422–42 (1999) (Shaw, J. dissenting); *see also* Denno, *supra* note 132, at 673–79.

199. Gregg v. Georgia, 428 U.S. 153, 173 (1976).

200. *See supra* notes 181–82 and accompanying text.

the Eighth Amendment was never intended to limit the risk of pain in execution. The position largely ignores recent Supreme Court cases interpreting capital punishment challenges under the rubric of the evolving standards of decency and instead relies on the few decisions in Supreme Court history that directly address a method-of-execution challenge. The problem with relying on those cases is not the originalism inherent in such an application, but rather the precedential value of those cases.

Originalism strikes a chord with many as an intuitive and common-sense method of interpreting constitutional provisions. The argument is as follows: if the Founders meant one thing when they wrote the Eighth Amendment, who are we to attempt to change its meaning?[201] Justices Scalia and Thomas have made a name for themselves for rendering what they believe to be decisions faithful to the vision of the Founding Fathers.[202] How successful they have been in rendering ostensibly originalist decisions, however, is another matter entirely. Notwithstanding criticism from jurists and commentators who disagree with the fundamental originalism paradigm and its application to the Eighth Amendment,[203] both Justices Scalia and Thomas have been roundly criticized for various failings in applying an originalist view of the Constitution to the Eighth Amendment. For instance, both venerable Justices have previously disagreed that the Eighth Amendment contained

201. For an overview of several originalist perspectives, see generally Lee J. Strang, *The Challenge of, and Challenges to, Originalism*, 29 CONST. COMMENT. 111 (2013) (reviewing GRANT HUSCROFT & BRADLEY W. MILLER, THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION (2011)). The criticisms of originalism are well-documented, to the extent that an in-depth discussion is not necessary. For a detailed deconstruction of originalism, see generally Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009).

202. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 628–29 (2008) (holding that gun laws restricting firearm ownership violated the Second Amendment, based heavily on an originalist interpretation of the Second Amendment); *see also Scalia Defends Originalism as Best Methodology for Judging Law*, U. VA. SCH. L. (Apr. 20, 2010), http://www.law.virginia.edu/html/news/2010_spr/scalia.htm.

203. An originalist interpretation of the Eighth Amendment and the evolving standard of decency do not necessarily run in opposite directions. For instance, traditional retributivist ideals in line with originalism comport with the evolving standard of decency in cases like *Atkins* and *Roper*. An originalist understanding of the Eighth Amendment which deems execution to be manifestly constitutional does not preclude rational limitations on the state's ability to mete out punishment to those who lack sufficient culpability. *See supra* notes 43–67 and accompanying text (discussing limits on the imposition of the death penalty on particular classes of offenders in accordance with the retributivist culpability requirement for punishment). Even if originalism and the evolving standard occasionally conflict, originalism often gets closer to the mark in interpreting the Eighth Amendment. This is especially true when considering whether a particular method of execution meets the Eighth Amendment standard.

a proportionality requirement[204]—a view out of line with both originalism and retributivism. The originalist undertone of the Thomas concurrence may open the door for criticism from within the originalist camp, but a closely related issue in the opinion is more likely to raise some eyebrows.

As previously mentioned, the Thomas concurrence relies on cases such as *In re Kemmler* to support the intentional pain test. These cases are interesting in their discussion of the Eighth Amendment but are not technically precedential. *Wilkerson*, *In re Kemmler*, and *Resweber* were all decided before the Fourteenth Amendment incorporated the Eighth Amendment.[205] Thus, the Eighth Amendment discussions in those cases were dicta, at least when applied to state methods of execution. While this point may delight those who appreciated the Roberts concurrence, it does little to justify the complete lack of treatment given those cases by most of the opinion-writers in *Baze*. Although the cases are certainly old, and not binding precedent, they do carry some persuasive value[206] and point out the critical flaw in *Baze*. Before *Baze*, the evolving standard of decency test had never been applied to a method-of-execution challenge. Whether cases like *Wilkerson* establish mandatory precedent is therefore a red herring. The real issue at hand in *Baze* was a novel application of the evolving standard of decency to methods of execution.

Whether or not Justices Thomas and Scalia were correct in their application of originalism to methods of execution under the Eighth Amendment, their intentional pain test may be criticized because it relies on cases that are partly dicta. This criticism, while valid, does little to detract from the overall point of the decision: the application of the evolving standard of decency to methods of execution has no basis in the jurisprudence of the Supreme Court. To the extent that their conclusion relies on an originalist understanding of the Constitution, Justices

204. *See* Michael J. Zydney Mannheimer, *Cruel and Unusual Federal Punishments*, 98 IOWA L. REV. 69, 94 n.160 (2012); Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 511–12 (2012).

205. *See generally* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947); *In re* Kemmler, 136 U.S. 436 (1890); Wilkerson v. Utah, 99 U.S. 130 (1879). The Eighth Amendment was officially incorporated about 15 years after *Resweber* in *Robinson v. California*, 370 U.S. 660, 666–67 (1962).

206. Even Professor Denno is careful not to say that cases such as *In re Kemmler* are completely lacking in precedential value. While Professor Denno is very critical of the usefulness of *In re Kemmler*, and questions the rationale of the decision that defers heavily to the New York Legislature and suffers from a dearth of actual information about electrocution, she stops short of declaring its complete uselessness as persuasive authority. *See* Denno, *supra* note 132, at 669–71. In *Baze*, Chief Justice Roberts was also seemingly reluctant to dismiss previous method-of-execution cases entirely. *See* Baze v. Rees, 553 U.S. 35, 48–49 (2008).

Thomas and Scalia have succeeded in remaining faithful to a fundamental understanding of "cruel and unusual" in the Eight Amendment context, as evidenced by reliance on early decisions such as *Wilkerson* and *In re Kemmler*.

CONCLUSION

Retributivists and death penalty abolitionists agree on one thing: lethal injection is the most acceptable method of carrying out a death sentence. The reasons for their respective support highlights the problem with Eighth Amendment jurisprudence: retributivists support lethal injection because it is thought to be the least susceptible to constitutional attack, and abolitionists support it because lethal injection is thought to be the "most humane" method of execution. In *Baze v. Rees*, the inevitable Eighth Amendment collision between retribution and the evolving standard of decency was realized. Lethal injection came under attack, and Justice Stevens' concurring opinion called into question the very constitutionality of lethal injection. The intractable conflict between retributive justice and humaneness in capital punishment, which will play out in death penalty litigation for the foreseeable future,[207] is yet another paradox created by the Court's own jurisprudence. In order for capital punishment to survive in its current form under an increasingly rigorous Eighth Amendment microscope, a modified test based in part on the intentional pain test posited by Justices Thomas and Scalia should be adopted.

207. The U.S. Supreme Court will consider yet another challenge to lethal injection protocols in *Warner v. Gross, 776 F.3d 721* (10th Cir.), *cert. granted*, 135 S. Ct. 1173 (2015) (mem.), which will test the use of the drug midazolam in three-drug protocols. Florida's highest court recently imposed a moratorium on executions in that state pending the decision by the Supreme Court in *Warner* because Florida utilizes the same three-drug protocol. *See* Tracy Connor, *Florida Execution of Jerry Correll Put Off Until Supreme Court Rules*, NBC NEWS (Feb. 18, 2015), http://www.nbcnews.com/storyline/lethal-injection/florida-execution-jerry-correll-put-until-supreme-court-rules-n308266.

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