TINKERING WITH THE MACHINERY OF DEATH: LETHAL INJECTION, PROCEDURE, AND THE RETENTION OF CAPITAL PUNISHMENT IN THE UNITED STATES

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This Note builds on the work of Professor William Berry, who has proposed a concept called "procedural exceptionalism" to explain the persistence of the death penalty in the United States in an age of abolition elsewhere in the West. Berry argues that there is a distinctive American faith in the procedural protections afforded defendants, such as the jury trial and multiple levels of appeal, which helps legitimize the institution of capital punishment in the United States. This analysis, however, only takes into account the conviction and sentencing aspect of the death penalty. This Note contends that the actual method by which executions are carried out is equally important in explaining the retention of capital punishment. This Note applies Berry's idea of "American procedural exceptionalism" to method of execution in the particular context of judicial decisions governing the administration of lethal injection. It argues first that lethal injection as a method of execution perpetuates the notion of a more "humane" death penalty, and second that judicial faith in the perfectibility of the procedures governing lethal injection serves to reinforce this notion. This faith in the perfectibility of the procedure of lethal injection works in conjunction with a similar faith in the procedures governing conviction and sentencing to create an equilibrium that allows for the continued use of capital punishment in the United States.

 J.D., 2013, New York University School of Law; A.B., 2008, Princeton University. I would first like to thank Dustin Koenig for his tireless and meticulous editing of this piece in preparation for publication. I would also like to thank Sheila McAnaney, Peter Kauffman, and Kristy Fields for their encouragement early on, and especially Zoey Orol for her support and encouragement throughout the process. Finally, I'd like to thank my parents, David Yehuda and Anita Yehuda, and my brother Daniel Yehuda for their love and support throughout law school and my life. The title of this Note is, of course, borrowed from Justice Blackmun's dissent from the denial of certiorari in *Callins v. Collins*, 510 U.S. 1141, 1145 (1994).

INTRODUCTION

In March 2012, the *New York Times* reported the execution of a Belarusian man convicted of helping to carry out a subway bombing in 2011.[1] When describing the death penalty in Belarus, the *Times* noted that Belarus "is the only country in Europe that still has the death penalty."[2] The author continued: "Its system of capital punishment, which has changed little since Soviet days, has been criticized as barbaric. Prisoners are told of their impending execution only moments before it is carried out. Typically, the condemned are shot in the back of the head."[3]

This passage, likely directed toward an American audience, succeeds in eliciting shock at execution practices in Belarus. It is somewhat ironic, however, for an American reporter to note that Belarus is the "only country in Europe that still has the death penalty,"[4] when the United States itself remains the last Western democracy that continues to implement capital punishment.[5] Yet, in light of the article's description of death penalty practice in Belarus, it does not seem like much of a contradiction for an American reporter to implicitly criticize the death penalty system in Belarus. After all, the reporter might argue, the American death penalty is different. American execution occurs only after layers of legal process and in a carefully controlled, quasi-medical environment. This faith in the perceived procedural protections inherent in the American system of capital punishment, together with the sanitization of the method of execution, can help answer the question of why capital punishment has persisted in the

[1] Michael Schwirtz, *Belarussian is Executed over Attack on Subway*, N.Y. TIMES (Mar. 17, 2012), http://www.nytimes.com/2012/03/18/world/europe/belarus-executes-man-convicted-in-subway-bombing.html?_r=1.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] William W. Berry III, *The European Prescription for Ending the Death Penalty*, 2011 WIS. L. REV. 1003, 1004 (book review); *see also infra* notes 22–25 and accompanying text (discussing reinstitution of capital punishment after moratorium).

United States thirty years after all other Western democracies have abolished it completely.[6]

This Note argues that the prevailing method of execution in the United States—lethal injection—creates a unique and "digestible" death penalty package that, coupled with faith in the procedural protections of the judicial process, serves to entrench the death penalty as a whole. It does so by analyzing the current scholarship surrounding the death penalty in the United States, as well as judicial decisions concerning method of execution. This Note builds on the work of Professor William Berry, who argues that the persistence of capital punishment in the United States can be traced to what he calls "American procedural exceptionalism"—the idea that the distinctive American faith in the procedural protections afforded by our justice system accounts for the acceptance of capital punishment and makes it more difficult to abolish.[7] "Simply put," he writes,

> the common understanding that an individual will have had his day in court, represented by an attorney, with his case unanimously decided by twelve members of the local community, and the opportunity to appeal his case many times over several years, creates a strong public presumption that his execution is just and deserved.[8]

Berry's work, however, focuses on only one portion of the capital punishment equation: the procedure governing conviction and sentencing. An equally important aspect of capital punishment is the method by which the execution itself is carried out. This Note applies Berry's idea of "procedural exceptionalism" to method of execution in the particular context of judicial decisions that govern the means by which lethal injection is administered. I argue first that lethal injection as a method of execution perpetuates the notion of a more "humane" death penalty, and second that judicial faith in the perfectibility of the procedures governing lethal injection serves to reinforce this notion. This faith in the perfectibility of the procedure of lethal injection works in conjunction with a similar faith in the procedures governing conviction and sentencing that Berry points out to create a tentative equilibrium that allows for the continued use of capital punishment in the United States. This is not to say that the death penalty will last indefinitely—but it suggests that the elimination of the death penalty in the United States is not inevitable. Moreover, it illustrates that its

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[6] *See infra* note 16 and accompanying text (noting that capital punishment was abolished in France in 1981).

[7] For an overview of Berry's argument, see generally William W. Berry III, *American Procedural Exceptionalism: A Deterrent or a Catalyst for Death Penalty Abolition?*, 17 CORNELL J.L. & PUB. POL'Y 481 (2008).

[8] *Id.* at 490.

future will depend on the stability of the balance between these two factors: faith in the procedures surrounding both death penalty conviction *and* the method by which it is carried out.

This Note proceeds in two parts. Part I sets out the historical puzzle posed by the retention of the death penalty in the United States and analyzes existing scholarship surrounding the issue. It provides a brief overview of the major scholarly arguments and a detailed analysis of Berry's "procedural exceptionalism" argument to explain the continued implementation of capital punishment in the United States. Part II contends that Berry's and other scholars' arguments do not place enough weight on the distinctiveness of the American method of execution itself, and will show how courts' concentration on procedural protections surrounding the administration of lethal injection serves to entrench the death penalty in the United States.

I
THE PUZZLE OF AMERICAN RETENTION OF CAPITAL PUNISHMENT

A. The Road to Death Penalty Abolition: The Contrast Between Western Europe and the United States

In examining the persistence of the death penalty in the United States, it is important to first understand the basic process by which the death penalty was abolished in other Western democracies. This highlights the divergence between the United States and the rest of the West. This divergence is all the more puzzling considering that American states had been at the forefront of the abolition movement in the nineteenth century, and that the United States had tracked the trajectory of other Western countries toward abolition until the 1970s.[9]

The elimination of capital punishment in most of the West during the twentieth century was a top-down phenomenon, led by cultural elites and political leaders in opposition to public sentiment.[10] In fact, at the time of each country's abolition, approximately two-thirds of the respective populations of Great Britain, Canada, France, and West Germany were against abolition.[11] In West Germany, for example,

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[9] *See infra* notes 18–22 and accompanying text (describing the movement toward abolition in the United States and its decline in the 1970s).

[10] *See* Nora V. Demleitner, *The Death Penalty in the United States: Following the European Lead?*, 81 OR. L. REV. 131, 132–34 (2002) (describing the general trend of abolition in Europe).

[11] Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97, 109 (2002). Steiker notes that over the three decades since abolition, support for the

capital punishment was abolished in its Basic Law of 1949.[12] This sudden abolition set off a fifteen-year debate over the merits of capital punishment in which German elites on both sides explicitly disregarded public opinion.[13] Similarly, support for abolition in Britain came from cultural elites who slowly began to influence decision-makers in Parliament. "As with Germany, Parliament's debates invoked the concept of Burkean trusteeship, overtly ignoring the 'fickle' public opinion concerning the death penalty."[14] This culminated in the abolition of capital punishment in Britain in 1969.[15] Finally, the French road to abolition was largely the same, as changing opinions among French elites provided momentum to ultimately abolish the death penalty in 1981.[16]

The trajectory toward abolition in the United States mirrored that of Europe for much of this period. In fact, the United States was in the vanguard of the abolition movement in the nineteenth century, when states such as Michigan and Wisconsin began to eliminate capital punishment.[17] Sixteen states had abolished the death penalty by 1929, although it reappeared in many jurisdictions in the interwar period.[18] By the 1960s, executions became less frequent,[19] and in the landmark case of *Furman v. Georgia* in 1972, the Supreme Court held that the death penalty, as applied to that defendant, violated the Eighth Amendment's prohibition against cruel and unusual punishment.[20] Although there was no majority opinion in *Furman*, in reaching their ultimate decision the Justices focused primarily on the arbitrary manner by which the death penalty was imposed on some

death penalty among Europeans has diminished. *Id.* She argues, however, that this is likely a "product of abolition" itself. *Id.*

12 Demleitner, *supra* note 10, at 133–34.

13 ANDREW HAMMEL, ENDING THE DEATH PENALTY: THE EUROPEAN EXPERIENCE IN GLOBAL PERSPECTIVE 82–85 (2010) ("Here we see members of the elite, speaking of and to themselves, drawing a clear line of demarcation between the kind of arguments that 'should' count . . . and those that one encounters on the pages of a tabloid . . . .").

14 Berry, *supra* note 5, at 1010 (reviewing HAMMEL, *supra* note 13).

15 *Id.*

16 *See* HAMMEL, *supra* note 13, at 139–44.

17 *See* John Paul Stevens, *On the Death Sentence*, N.Y. REV. BOOKS, Dec. 23, 2010, at 8, 8, *available at* http://www.nybooks.com/articles/archives/2010/dec/23/death-sentence/?pagination=false (noting early abolition in some U.S. states).

18 Demleitner, *supra* note 10, at 134.

19 Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117, 132–33 ("The American death penalty began a significant decline beginning in the 1960s.").

20 408 U.S. 238, 239–40 (1972) (per curiam) ("The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.").

defendants—particularly black defendants—and not on others.[21] This resulted in a de facto moratorium on capital punishment throughout the United States, and it looked as though the United States was moving toward abolition along with the rest of the West. Many states, however, began to revise their death penalty statutes to address the procedural concerns outlined in *Furman*.[22] In 1976 the Court reversed course and upheld the constitutionality of the death penalty with the addition of these procedural changes, holding that the death penalty was constitutional as long as the procedures for its imposition met certain standards that would ensure fairness and uniformity.[23]

As it stands today, thirty-two states, as well as the federal government and military, allow for capital punishment.[24] In addition, a series of Gallup polls found that, as of December 2012, 63% of Americans favor the death penalty for people convicted of murder, and, as of May 2013, 62% believe that the death penalty in general is morally acceptable.[25] Professor Andrew Hammel argues, based on an examination of the European experience, that abolition of capital punishment requires a unified group of elites who oppose the death penalty, as well as a centralized political system that can allow for the top-down abolition experienced in Europe.[26] Because of the federal system in the United States, the most readily available mechanism to implement counter-majoritarian abolition of the death penalty is the judicial system, which acted as an agent of reform in the United States

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[21] *See id.* at 251–57 (Douglas, J., concurring) ("Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority . . . ."); *id.* at 274 (Brennan, J., concurring) ("[T]he very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments.").

[22] *See* David Garland, *Capital Punishment and American Culture*, 7 PUNISHMENT & SOC'Y 347, 358 (2005) (noting revisions by state legislatures to death penalty statutes after *Furman*).

[23] Gregg v. Georgia, 428 U.S. 153, 196–98, 202–07 (1976); *see also id.* at 196–99, 206–07 (noting that after revisions to the sentencing guidelines which included requiring a jury to find the existence of statutory aggravating circumstances and allowing for automatic appeal to the Georgia Supreme Court, "[n]o longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines").

[24] *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Oct. 18, 2013).

[25] *Death Penalty*, GALLUP.COM, http://www.gallup.com/poll/1606/death-penalty.aspx (last visited Oct. 18, 2013).

[26] *See* HAMMEL, *supra* note 13, at 169–78 (describing, via case studies of countries such as Germany, France, and England, how having a centralized legislature, an entrenched anti-capital punishment culture among the political elites, and insulation of the criminal justice system from the political realm was important to maintaining a ban on the death penalty).

throughout the twentieth century.[27] Thus, courts will likely play a major role in the retention or abolition of the death penalty. At the same time, courts play an important role in shaping public opinion. This Note focuses on judicial treatment of method-of-execution litigation in order to show how judicial analyses of lethal injection serve to entrench the death penalty in the United States.[28]

B. Entrenchment in the United States: Procedural Exceptionalism Explained

Scholars have put forth a number of different theories to explain the persistence of capital punishment in the United States. Franklin Zimring and James Whitman point to the concept of American cultural exceptionalism and argue that deep-seated cultural differences between the United States and the rest of the Western world account for different attitudes toward capital punishment.[29] David Garland, on the other hand, criticizes these theories[30] and argues that the United

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[27] Garland, *supra* note 22, at 363 ("Given the federal structure of American government, the Supreme Court is the institution best placed to bring about a nation-wide cessation of capital punishment . . . ."); Paul J. Kaplan, *American Exceptionalism and Racialized Inequality in American Capital Punishment*, 31 LAW & SOC. INQUIRY 149, 172 (2006) ("[I]t seems more likely that if capital punishment is abolished, it will be by the Supreme Court."); Berry, *supra* note 5, at 1024 ("The United States Supreme Court provides the best opportunity to abolish capital punishment in the United States.").

[28] *See infra* Part II.B. (discussing the procedural focus of method-of-execution litigation).

[29] Franklin Zimring attributes the continued use of the death penalty in the United States to the persistence of historical vigilante values in American culture, particularly in the South. FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 89–90 (2003). He argues that the "lynching tradition . . . seems to have lasting influence on capital punishment in parts of the United States; it represents a still-honored tradition of vigilante justice that has never been completely exorcised from American culture." *Id.* Thus, according to Zimring, the death penalty in modern America is inextricably linked to the historical and cultural tendencies of the American South. *Id.* at 93, 96–98. Alternatively, James Whitman points to the American culture of egalitarianism as the reason behind harsher punishment in modern America, as compared to Europe. JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 6–7 (2003). He argues that the European movement *away* from a hierarchical culture made Europeans acutely aware of class differences in punishment, and led to the widespread imposition of milder punishments that had been traditionally reserved for the upper classes. *Id.* at 9–11, 15–16 (2003). In contrast, American culture stressed equality across class, and as a result, all offenders have been given harsher punishment and treated as lower-class offenders since the founding of the nation. *Id.* at 41–67. According to Whitman, this cultural tradition of harsh punishment, including the death penalty, has continued to the present day. *Id.* at 3, 37–38.

[30] Garland critiques Zimring and Whitman's notion of cultural exceptionalism. He argues that the theory is "inappropriately deep and deterministic" and does not account for the fact that the differences between American and European death penalty policies are relatively recent. Garland, *supra* note 22, at 349. Garland correctly points out that these theories rest on the doubtful assumption that there are certain underlying aspects of

States is simply the "last nation in its peer group to abolish the penalty—its place in the series being determined not by long-standing cultural differences, but by proximate causes acting in the time period during which the divergence actually occurred."[31] Thus, Garland sees the fact of American retention as a matter of historical contingency.[32] Instead of cultural exceptionalism, he argues that federalism and populism largely account for the retention of the death penalty in the United States.[33] To Garland, however, these factors are not insurmountable; they merely explain why the death penalty has not yet been abolished in the United States.[34] Like Garland, Carol Steiker points to populist tendencies in the United States, particularly in the judicial process, to account for the retention of capital punishment in the United States.[35] She also identifies the seemingly obligatory "tough on crime" attitude of American politicians that makes opposition to the death penalty a politically toxic stance.[36]

"American cultural exceptionalism" that are static and unchanging, and which inform the way the country deals with capital punishment. *Id.* He notes that arguments based on cultural exceptionalism would seem to suggest that the core cultural elements that are purportedly so central to American retention somehow did not manifest themselves in the period before the 1970s (when the trajectory toward abolition in the United States largely tracked that of Europe), and only found full expression in the period after the reinstatement of capital punishment in 1976. *Id.* at 355.

[31] *Id.* at 355.

[32] According to Garland, the reinstatement of the death penalty in 1976 does not signal a clear break with the trajectory of the rest of the West. Instead, he calls it the "unintended consequence" of the "fateful" decision by the NAACP and the ACLU to argue issues of both procedural inequality and per se unconstitutionality in mounting legal challenges to the death penalty. *Id.* at 357–58. As it happened, "the specific nature of the *Furman* decision *invited* reform of the state capital punishment procedures—an invitation that was quickly taken up in many state legislatures." *Id.* at 358.

[33] Garland notes that in the United States, authority over criminal matters is diffused among different states and localities throughout the country. *Id.* at 363. Because legislative abolition of the death penalty by the federal government would require a constitutional amendment, it is much more difficult in the United States to eliminate capital punishment legislatively in the top-down manner in which it was accomplished in Europe. *Id.* At the same time, Garland observes, local government in the United States is particularly attuned to populist sentiment, most remarkably in the form of elected judges and prosecutors who have a direct impact on the implementation of the death penalty. *Id.*

[34] *See id.* at 362–63 (arguing that the United States is "on the same abolitionist trajectory as other western nations" and that "the continued existence of the penalty today is a contingent outcome of political, legal and cultural developments that occurred in the last 30 years").

[35] *See* Steiker, *supra* note 11, at 114–15, 118–20 (noting structural elements in the American political system—referenda and the primary system, which reinforce populist tendencies, as well as the prevalence of lay juries and elected judges and prosecutors—that are influential in retention of the penalty).

[36] *See id.* at 111, 113–14 (noting that American politicians often invoke support for the death penalty as a useful proxy for being tough on crime).

This Note, however, will focus on what William Berry has termed "American procedural exceptionalism."[37] Berry argues that Americans have a distinctive faith in the fairness of their legal system, which, to a large extent, accounts for the persistence of the death penalty in the United States.[38] Berry points to three factors in the American system—trial by jury, the writ of habeas corpus, and the right to counsel provided by the Sixth Amendment—which provide procedural protections that strengthen Americans' confidence in the accuracy of death penalty verdicts.[39] The trial by jury creates a sense of trustworthiness because it can serve as a check by ordinary citizens against the arbitrary exercise of state power.[40] In addition, the recommendation for the death penalty is often made by a jury, which adds particular credibility to the death sentence itself.[41] The constitutional guarantee of the writ of habeas corpus ensures a right to thoroughly appeal the verdict, which gives the general public confidence that the decision is correct if it is sustained after multiple levels of review.[42] Finally, the right to counsel assures the public that the accused was not alone in his defense,[43] and that he was not railroaded by the state. Whether or not these factors, in truth, ensure fairness to defendants may be debatable, but that is not at issue here; the *perception* that they do provides legitimacy to the process of capital punishment.

This is not to say that Americans' confidence in their legal system—and the death penalty as a result—is unwavering. Like Garland, Berry takes issue with the cultural exceptionalism explanation advanced by Zimring and Whitman because of the "static" characterization of American culture underlying their theory.[44] As an alternative to Zimring's and Whitman's arguments, Berry's "procedural exceptionalism" concept accounts for variations in American

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[37] Berry, *supra* note 7, at 489.

[38] *Id.* at 483.

[39] *Id.* at 489–90.

[40] *See id.* at 491 (noting that the jury system both acts as check on state power and increases credibility of judicial process).

[41] *Id.* at 493 (describing the Supreme Court decision in *Ring v. Arizona*, 536 U.S. 584 (2002), that recognized the primacy of the jury as the fact finder in death penalty cases and explaining how this adds to the presumption of fairness in capital punishment cases).

[42] *Id.* at 496.

[43] *See id.* at 498 (noting that the right to effective counsel gives the public the notion that the defendant had the opportunity to fully express his perceptions of the incident and meet the prosecution's case).

[44] *Id.* at 490 ("Unlike the cultural exceptionalism posited by Zimring, Whitman, and others, the concept of procedural exceptionalism is not a static one."). In particular, Berry takes issue with the cultural exceptionalism theory because it fails to take into account the historical changes in American attitudes toward the death penalty. *Id.* at 487; *see also id.* at 490 (emphasizing that the retributive impulse and exercise of the death penalty decreases when faith in the judicial process wanes).

attitudes: He notes that public support for the death penalty has fluctuated in direct relation to public confidence in the procedural effectiveness of the judicial system.[45] In his view, while confidence in the American legal system may generally be high,[46] waning certainty about procedural fairness can result in decreased support for capital punishment itself.

Berry's theory is also supported by the fact that in the most important cases concerning capital punishment, the Supreme Court's principal focus has been the procedural fairness of the death penalty's implementation. The outcome in *Furman v. Georgia*, for example, rested upon the notion that the *application* of the death penalty and the procedures for its implementation were arbitrary, and therefore violated the Eighth Amendment.[47] When these procedural deficiencies were seemingly cured by new state legislation, the Court upheld the use of capital punishment in *Gregg*, lifting the effective moratorium on capital punishment that had followed *Furman*.[48] Later, in ruling that the execution of mentally disabled defendants was unconstitutional, the Court in *Atkins v. Virginia* focused on the difficulty faced by mentally disabled defendants in presenting an adequate defense rather than the per se wrongfulness of executing the mentally ill.[49] Similarly, in *Roper v. Simmons*, the Court ruled that execution of a defendant for a crime committed as a juvenile violated the Eighth Amendment based largely on the procedural concern that juries would not adequately account for age as a mitigating factor.[50]

While the Supreme Court's focus on procedure may be a result of reluctance to make normative judgments about the death penalty or, as Garland suggests, a result of the way the litigants in death penalty

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[45] *Id.* at 499.

[46] *Id.* at 483 (arguing that there is a "unique American belief in [the American] legal process").

[47] *See supra* notes 18–20 and accompanying text (discussing *Furman* and its impact on state legislatures).

[48] *See supra* note 23 and accompanying text (discussing the reinstatement of the death penalty after *Gregg*).

[49] 536 U.S. 304, 320–21 (2002) (noting the "lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence" and that "[m]entally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes").

[50] 543 U.S. 551, 573 (2005) ("An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.").

cases choose to argue their cases,[51] the fact remains that procedural concerns have become central to the American debate over capital punishment. It is illuminating that Professor Austin Sarat, in advancing a "new abolitionism," proposes focusing less on a "frontal assault on the morality of state killing" and more on an appeal to the incompatibility of the implementation of capital punishment with American ideals of equality and fairness.[52] Sarat argues that this approach gives abolitionists a political out by not having to explain why they are against the execution of perpetrators of the most heinous crimes and by allowing them to "be as tough on crime as the next person yet still reject state killing."[53] While this may be a result of expediency, it presumably reflects an understanding among abolitionists themselves that American faith in the justice system is a major driving force behind the retention of the death penalty—or at least that if confidence in the procedural safeguards of the system dwindled, the American people would not countenance the continued implementation of capital punishment.

II
Lethal Injection and the Entrenchment of the Death Penalty

Berry argues that American confidence in the procedure of the justice system "will more likely than not prevent the complete abolition of capital punishment for the foreseeable future in the United States."[54] His arguments and the arguments of the other scholars described in Part I, however, focus primarily on the retention of the death penalty generally, and place less emphasis on the *method of execution* itself. This Part argues that the unique nature of lethal injection, the most prevalent method of execution in the United States, contributes significantly to the retention of capital punishment in the United States. In particular, Berry's argument about American confidence in the procedural protections of the justice system can be applied to the procedure governing the method of execution as well. While Berry focuses on procedural protections in the application of the *sentence* of death, the same concerns permeate the administration of lethal injection itself.

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[51] *See* Garland, *supra* note 22, at 358 (discussing Garland's view that "contingencies of choice" in the litigation contributed to the focus on procedural aspects of the death penalty rather than a head-on challenge).

[52] Austin Sarat, When the State Kills: Capital Punishment and the American Condition 251 (2001).

[53] *Id.* at 253–54.

[54] Berry, *supra* note 7, at 513.

This Part will extend Berry's procedural analysis to lethal injection. First, it will illustrate how the procedures surrounding lethal injection create a sanitized and digestible package and engender faith in the process. Second, it will show how judicial analyses of procedures surrounding the administration of lethal injection have focused largely on improving those procedures rather than direct challenges to lethal injection generally—a trend which has served to validate and entrench the lethal injection process and, as a result, the institution of capital punishment in the United States.

A. The Sanitization of the Death Penalty Through Lethal Injection

This Subpart will argue that lethal injection has been uniquely successful at sanitizing the institution of capital punishment for public consumption. The seemingly "medical" procedures surrounding lethal injection have engendered public faith in the humaneness of lethal injection, much as the judicial procedures that Berry identified have led to public confidence in conviction and sentencing in death penalty cases. Lethal injection has thus made it more difficult for arguments against the death penalty based on the inhumaneness of the method of execution to gain traction among the American public.

Capital punishment does not exist in a vacuum, and cannot be completely separated from the way in which it is carried out.[55] The historical emphasis on modernizing the *apparatus* of death in the United States—from the gallows to the electric chair to lethal injection[56]—suggests a possible attachment to retention; but the evolution of the method of execution to lethal injection may also be a *cause* of retention. Garland observes that "the search for the painless, problem-free execution was more marked in the United States than elsewhere, and produced a series of innovations that were distinctively American."[57] To him, however, the "medicalization and bureaucratization of today's American executions"[58] simply means that the

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[55] *See* TIMOTHY V. KAUFMAN-OSBORN, FROM NOOSE TO NEEDLE: CAPITAL PUNISHMENT AND THE LATE LIBERAL STATE 102–03 (2002) ("To ignore these instrumentalities [of capital punishment], as legal scholarship does when it confines itself to constitutional controversy about the hypostatized legal category of 'capital punishment,' is to permit this reified abstraction to run roughshod over the grim particularities of state-sponsored killing . . . .") (footnote omitted).

[56] *See* Deborah W. Denno, *Lethally Humane? The Evolution of Execution Methods in the United States*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 693, 705–08 (James R. Acker et al. eds., 2d ed. 2003) (noting the common trend among state legislatures away from electrocution and toward lethal injection).

[57] DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 117 (2010).

[58] *Id.* at 111.

"American death penalty is shaped by the same kinds of values and sensibilities that operated in other nations that ultimately became abolitionist."[59] While American developments in capital punishment may have had the same root as those in Europe, the movement in the United States from hanging, to electric chair and gas chamber, and finally to lethal injection has changed the nature of the institution itself, which may make comparisons to other nations more difficult. The death penalty in the public conscience is necessarily bound up in the way executions are carried out in a particular country or era. The "idea" of capital punishment evokes images of the methods with which members of a certain society are most familiar, and those images influence perceptions of the practice itself. Great Britain and France, for example, abolished the death penalty at times when it was carried out by hanging and by guillotine, respectively.[60] Although abolition was achieved by elites who may have rejected the death penalty in any form, the seemingly antiquated methods by which it was carried out likely served to galvanize support for abolition among those elites.[61] Tellingly, Albert Camus titled his influential essay on capital punishment "Reflections on the Guillotine,"[62] an indication that the concept of the guillotine had come to symbolize the death penalty as a whole.

Lethal injection, on the other hand, is uniquely "palatable" to the general public. The procedures followed take on a distinctly medical character, as exemplified by the well-known irony of using sterile instruments and alcohol swabs before the administration of deadly chemicals.[63] The typical lethal injection procedure involves three drugs, administered in succession. The first, sodium thiopental, is a

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[59] Garland, *supra* note 22, at 356.

[60] *See* Peter Hodgkinson, *The United Kingdom and the European Union*, *in* CAPITAL PUNISHMENT: GLOBAL ISSUES AND PROSPECTS 193, 195 (Peter Hodgkinson & Andrew Rutherford eds., 1996) (noting that the last execution to take place in the UK was by hanging); Simon Grivet, *Executions and the Debate over Abolition in France and the United States*, *in* IS THE DEATH PENALTY DYING?: EUROPEAN AND AMERICAN PERSPECTIVES 150, 151 (Austin Sarat & Jürgen Martschukat eds., 2011) ("France . . . did away with the guillotine in 1981.").

[61] *See* Berry, *supra* note 5, at 1011 ("Elites, over time, became increasingly disenchanted with both the guillotine and the death penalty generally.").

[62] Albert Camus, *Reflections on the Guillotine*, *in* RESISTANCE, REBELLION, AND DEATH 173 (Justin O'Brien trans., Alfred A. Knopf 1961).

[63] Leigh B. Bienen, *Anomalies: Ritual and Language in Lethal Injection Regulations*, 35 FORDHAM URB. L.J. 857, 864–65 (2008) ("By reciting the technical terms and adopting a tone of certainty, the protocols create the illusion that a 'scientifically validated,' approved 'medical' procedure is taking place, even if competent doctors or trained or competent non-medical personnel are not present . . . ." (footnote omitted)).

fast-acting barbiturate meant to render the condemned unconscious.[64] The second, pancuronium bromide, is a paralytic agent. Ostensibly meant to stop respiration, the paralytic agent also prevents the condemned from making sounds or secreting fluids upon death, which helps make the death appear "clean."[65] The third drug, potassium chloride, stops the heart.[66] Some states have moved to a "one-drug protocol" which consists of a single large dose of a barbiturate such as sodium thiopental.[67]

While all methods of execution necessarily have some sort of "procedure" that governs their administration, the procedures governing lethal injection blur the line between saving and ending life. In fact, in 1888, a New York commission on capital punishment rejected lethal injection in favor of the electric chair because the syringe was "so associated with the practice of medicine, and as a legitimate means of alleviating human suffering, that it is hardly deemed advisable to urge its application for the purposes of legal executions . . . ."[68] It is the trappings of medicine that distinguish lethal injection from other methods of execution because they allow the execution to "assume[] the character of a depoliticized humanitarian (non)event, a painless matter of putting someone 'to sleep.' "[69] Although the participation of medical professionals in executions remains controversial,

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64 Robin Miller, Annotation, *Substantive Challenges to Propriety of Execution by Lethal Injection in State Capital Proceedings*, 21 A.L.R.6th 1, § 2 (2007).

65 *See* Bienen, *supra* note 63, at 873 ("[I]t is the paralytic agent which accomplishes an easy death for the viewer and the administrators."); *see also* Susan Blaustein, *Witness to Another Execution*, *in* THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 387, 399 (Hugo Adam Bedau ed., 1997) ("The lethal injection method . . . has turned dying into a still life, thereby enabling the state to kill without anyone involved feeling anything at all."); Alison J. Nathan & Douglas A. Berman, Debate, Baze*-d and Confused: What's the Deal with Lethal Injection?*, 156 U. PA. L. REV. PENNUMBRA 312, 316–17 (2008), http://www.pennlawreview.com/online/156-U-Pa-L-Rev-PENNumbra-312.pdf ("The nature of this drug is to *mask* the realities of the execution from meaningful public scrutiny. . . . [W]itnesses, including members of the media . . . see only a sanitized version.") (statement of Alison J. Nathan).

66 Miller, *supra* note 64, § 2.

67 Tanya M. Maerz, Note, *Death of a Challenge to Lethal Injection? Missouri's Protocol Deemed Constitutional Yet Again*, 75 MO. L. REV. 1323, 1344–45 (2010). Seven states—Arizona, Georgia, Idaho, Ohio, South Dakota, Texas, and Washington—have carried out lethal injections with a single drug. Four additional states—Arkansas, Kentucky, Louisiana, and Missouri—have announced their intention to use the one-drug protocol but have yet to carry out an execution using it. *State by State Lethal Injection*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/state-lethal-injection (last visited Oct. 18, 2013).

68 REPORT OF THE COMMISSION TO INVESTIGATE AND REPORT THE MOST HUMANE AND PRACTICAL METHOD OF CARRYING INTO EFFECT THE SENTENCE OF DEATH IN CAPITAL CASES 78 (Albany, Argus Co. 1888), *available at* http://www.nysl.nysed.gov/scandoclinks/ocm23137745.htm (follow "View Document" hyperlink).

69 KAUFMAN-OSBORN, *supra* note 55, at 199.

the presence of medical personnel can serve to legitimize the process.[70] In *Nelson v. Campbell*, for example, Justice O'Connor noted the lack of procedural safeguards in Alabama's lethal injection procedure partly because "[t]here was no assurance that a physician would perform or even be present for the procedure."[71] Similarly, the Sixth Circuit suggested that "[t]he presence of a supervising or attending physician at an execution by lethal injection undoubtedly could help to ensure that executions proceed as smoothly and painlessly as possible."[72] This suggests that the medical nature of the process is an important factor in the legitimacy of lethal injections—the closer lethal injection can come to approximating a medical procedure, the more it will engender faith in the protections from unnecessary pain afforded to the condemned. Just as the conviction and sentencing procedures that Berry highlights create a sense of fairness and faith in the judicial process, so too do the medicalized procedures of lethal injection lead to faith in the humaneness and painlessness of the execution process.

Perhaps most importantly, while the general development of capital punishment has taken executions out of the public square and hidden them from view, lethal injection has, in some sense, brought executions back into the realm of experience to which the general public can relate. Even when executions took place in public, few, if any, members of the public had ever had the experience of ascending a scaffold and thus could do little to understand or relate to the experience of the condemned. When executions were first taken out of public view, the methods employed—such as hanging or the electric chair—still likely seemed painful in the public conscience.[73] But unlike any method of execution before it, lethal injection is at least superficially analogous to the somewhat common experience of being "put under" for a medical procedure, which many people have experienced or have some familiarity with. Thus, for the first time, the average person feels as though he or she can "imagine" what it is like, and can accept, regardless of whether it is true, that the process is

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[70] Maerz, *supra* note 67, at 1340–42 (noting that "medical expertise is arguably required to ensure the humane aspect advocated by lethal injection"); *see also, e.g.*, Taylor v. Crawford, 487 F.3d 1072, 1084 (8th Cir. 2007) ("The [lethal injection] protocol adequately requires trained medical personnel to . . . verify that the IV is working properly.").

[71] 541 U.S. 637, 641 (2004).

[72] Cooey v. Strickland, 589 F.3d 210, 226 n.4 (6th Cir. 2009).

[73] A British Home Secretary believed that a hanging which took place behind closed doors would actually increase deterrence because "the criminal class have a greater dread of death on a private than on a public scaffold." KAUFMAN-OSBORN, *supra* note 55, at 85 (quoting V.A.C. GATRELL, THE HANGING TREE: EXECUTION AND THE ENGLISH PEOPLE 1770–1868, at 592 (1994)).

relatively painless. In fact, in the jury trial of Mohamed al-'Owhali, who was convicted of bombing the U.S. Embassy in Kenya, the jury did not recommend death, in part because they believed lethal injection was "very humane and the defendant will not suffer."[74]

Lethal injection's legitimacy as a painless and acceptable method of execution goes essentially unquestioned, and debates over the acceptability of this method are largely absent from the public discourse. A 2004 Gallup poll found that 75% of Americans believe that lethal injection is not a cruel and unusual form of punishment and approve of it as a method of execution.[75]

Even more telling is the absence of discussion about lethal injection and method of execution from the discourse surrounding the abolition of capital punishment in individual states. This absence suggests that appeals to defects or cruelty in the method of execution are largely ineffective in gaining support for the abolition of capital punishment. Only five states—New Jersey in 2007, New Mexico in 2009, Illinois in 2011, Connecticut in 2012, and Maryland in 2013—have legislatively abolished the death penalty after it was reinstated by *Gregg* in 1976 and since lethal injection began to be implemented.[76] Concerns about the fairness of sentencing, execution of innocent people, and the high costs of the death penalty were frequently cited as the reasons behind these states' moves to abolition.[77] In fact, high cost, primarily in the form of the almost certainly protracted appeals process, seemed to be the most compelling reason for many

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[74] Wayne A. Logan, *Casting New Light on an Old Subject: Death Penalty Abolitionism for a New Millennium*, 100 MICH. L. REV. 1336, 1353 (2002) (reviewing SARAT, *supra* note 52) (quoting Benjamin Weiser, *Life for Terrorist in Embassy Attack*, N.Y. TIMES, June 13, 2001, at A1); *see also infra* notes 91–93 and accompanying text (noting examples of discontent with the painlessness of lethal injection).

[75] Dennis Welch, *Lethal Injections: Cruel and Unusual Punishment?*, GALLUP.COM (May 18, 2004), http://www.gallup.com/poll/11716/Lethal-Injections-Cruel-Unusual-Punishment.aspx.

[76] *States with and Without the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last visited Oct. 18, 2013).

[77] *See* GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT, REPORT 19, 127, 207 (2002) [hereinafter ILLINOIS REPORT], *available at* http://illinoismurderindictments.law.northwestern.edu/docs/Illinois_Moratorium_Commission_complete-report.pdf; Carol S. Steiker & Jordan M. Steiker, *Capital Punishment: A Century of Discontinuous Debate*, 100 J. CRIM. L. & CRIMINOLOGY 643, 672–75 (2010) (noting the increased prevalence of cost as a motivation for abolition); Ian Simpson, *Maryland Becomes Latest U.S. State to Abolish the Death Penalty*, REUTERS (May 2, 2013), http://www.reuters.com/article/2013/05/02/us-usa-maryland-deathpenalty-idUSBRE9410TQ20130502 ("The governor's office said the death penalty does not deter crime, cannot be administered without racial bias . . . costs three times as much as life without parole [and a] mistake cannot be reversed if an innocent person is put to death . . . .").

legislators.[78] High cost was also one of the primary driving forces behind a recent push to abolish the death penalty in Washington, and behind decisions not to renew death penalty statutes in New York and Massachusetts.[79] Moreover, commissions were established in Illinois, New Mexico, New Jersey, and Maryland to make findings on the death penalty and make recommendations for the future of capital punishment in those states. The reports contain numerous findings about deficiencies in the justice system as well as the high costs of retaining the death penalty in comparison to "life without parole."[80] Nowhere in any of these reports is there any mention of lethal injection or method of execution generally.[81]

The New Jersey commission, which, along with the Maryland commission, recommended outright abolition, even made a finding that the death penalty was "inconsistent with evolving standards of decency,"[82] thus directly invoking language from Eighth Amendment jurisprudence that prohibits cruel and unusual punishment.[83] Still, in its explanation for this finding the commission cited fears about executing the innocent, reduced implementation of capital punishment overall, and alternatives for dealing with criminals—among other reasons—as the bases for its conclusion.[84] Thus, in an analysis based on the Eighth Amendment, the commission made no mention of the actual way in which executions were carried out.[85]

It is hard to believe that if New Jersey had, at the time of the report, employed hanging, electric chair, or virtually any other known method of execution, the commission would not have used the

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[78] *See, e.g.*, Keith B. Richburg, *N.J. Approves Abolition of Death Penalty; Corzine to Sign*, WASH. POST, Dec. 14, 2007, at A3 ("[E]qually persuasive to lawmakers was not saving lives but money . . . ."); *see also* Steiker & Steiker, *supra* note 19, at 118 (noting that "the argument for abolition based on the expense of administering a system of capital punishment is . . . extraordinarily powerful in current public policy debates").

[79] Steiker & Steiker, *supra* note 77, at 671–73.

[80] ILLINOIS REPORT, *supra* note 77, at 198–99; STATE BAR OF N.M. TASK FORCE TO STUDY THE ADMIN. OF THE DEATH PENALTY IN N.M., FINAL REPORT 5–6 (2004) [hereinafter NEW MEXICO REPORT], *available at* http://www.nmbar.org/attorneys/lawpubs/tskfrcdthpnltyrprt.pdf; N.J. DEATH PENALTY STUDY COMM'N, REPORT 23 (2007) [hereinafter N.J. REPORT], *available at* http://www.njleg.state.nj.us/committees/dpsc_final.pdf; MD. COMM'N ON CAPITAL PUNISHMENT, FINAL REPORT TO THE GENERAL ASSEMBLY 7–8, 44 (2008) [hereinafter MARYLAND REPORT], *available at* http://www.goccp.maryland.gov/capital-punishment/documents/death-penalty-commission-final-report.pdf.

[81] *See generally, e.g.*, ILLINOIS REPORT, *supra* note 77; NEW MEXICO REPORT, *supra* note 80; N.J. REPORT, *supra* note 80; MARYLAND REPORT, *supra* note 80.

[82] N.J. REPORT, *supra* note 80, at 1.

[83] *See* Trop v. Dulles, 356 U.S. 86, 101 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

[84] N.J. REPORT, *supra* note 80, at 35–40.

[85] *Id.*

method itself as evidence that the death penalty was anachronistic under an "evolving standards of decency" analysis. It is likely that the members of the commission—prominent jurists, lawyers, activists, and lawmakers[86] recommending the outright abolition of capital punishment—would have made such an argument if they believed it would be effective. Evidently they did not. This suggests that the sanitized and medicalized procedure of lethal injection has essentially rendered ineffective appeals for abolition based on the cruelty of the method of execution. Perceptions of the humanness of lethal injection have essentially removed from common discourse one of the most powerful and tangible arguments against the death penalty generally—the method itself.[87]

The strength of the general faith in the humaneness of lethal injection is further highlighted by the fact that abolitionists like Professor Mona Lynch hope that the widespread belief in the painlessness of lethal injection will actually render the death penalty obsolete.[88] She believes that the driving force behind the death penalty is retribution, and that supporters want condemned criminals to feel some measure of the pain they have caused to others.[89] By making the death penalty so painless and uneventful, lethal injection saps capital punishment of the meaning it once had.[90] "If and when the death penalty loses its potency as a shorthand answer to serious social woes," she writes, "its superfluousness as penal policy and practice will likely be revealed."[91] This, Lynch believes, will mark the end of capital punishment in the United States.

At first blush, there is evidence to support Lynch's assessment that the continued vitality of the death penalty depends on its painful effects. In the wake of Timothy McVeigh's execution, for example, many were dissatisfied with the quick and seemingly painless death he received.[92] Following other tragedies and crimes, victims' family

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[86] *Id.* at 3.

[87] *See* Radley Balko, *Why Americans Still Support the Death Penalty*, HUFFINGTON POST (Sept. 28, 2011, 1:00 PM), http://www.huffingtonpost.com/radley-balko/death-penalty-support-america_b_984931.html?page=1 (identifying the perceived humaneness of lethal injection as a reason for widespread support).

[88] Mona Lynch, *The Disposal of Inmate #85271: Notes on a Routine Execution*, 20 STUD. IN L. POL. & SOC'Y 3, 24–25 (2000) ("[T]he reshaping of the death penalty into a sanitized and routinized disposal process . . . may actually hasten its obsolescence.").

[89] *Id.* at 25–26.

[90] KAUFMAN-OSBORN, *supra* note 55, at 210–11.

[91] Lynch, *supra* note 88, at 27.

[92] *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, 126–27 (2002) (noting that some witnesses complained that McVeigh's death was too painless as compared to those of his victims).

members have expressed similar views. As the mother of one murder victim put it, lethal injection "'is too quick. . . . He would need to suffer a little bit more according to what he gave [my daughter], which was a lot of suffering.'"[93] Even Justice Scalia seemed to echo this view when, after describing the gruesome rape and murder of an eleven-year-old girl, he exclaimed, "[h]ow enviable a quiet death by lethal injection compared with that!"[94] Yet Lynch's argument is undercut by the fact that "the majority of Americans in public opinion polls . . . prefer lethal injection because they consider it to be the most humane method."[95] This suggests that lethal injection more likely contributes to the perpetuation of capital punishment than to its abolition.

In addition, Professor Andrew Hammel points to what he calls the "stabilization effect"—the idea that the continued existence of the death penalty has a legitimizing effect that engenders confidence in the justice of the punishment among members of the public.[96] In other words, the status quo is difficult to alter and serves to reinforce itself. In light of this effect, it seems unlikely that the perceived humanity of lethal injection would galvanize support for its abolition as Lynch suggests. Rather than serve as a catalyst for change, the continued practice of the death penalty by lethal injection will likely work to bolster the "stabilization effect" and perpetuate capital punishment.

B. How the Procedural Focus of Judicial Analyses of Lethal Injection Entrenches the Death Penalty

Judicial analyses of lethal injection have served to reinforce citizens' faith in the perfectibility of lethal injection procedures. This Subpart will show how lethal injection has removed the doctrinal bases that made it possible to find older methods of execution unconstitutional, and has driven the focus of death penalty litigation toward improving lethal injection procedures.

While the European approach to abolition has been largely "top-down" in nature, a similar top-down approach would be more difficult to implement in the United States.[97] As noted in Part I, the judicial

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[93] *Id.* at 126 (alteration in original) (quoting *Man Executed for 1986 Murder*, AUSTIN AM.-STATESMAN, June 21, 1995, at B5).

[94] Callins v. Collins, 510 U.S. 1141, 1143 (1994) (Scalia, J., concurring).

[95] Denno, *supra* note 92, at 126.

[96] *See* HAMMEL, *supra* note 13, at 36 (explaining that the stabilization effect requires a nation free of political upheaval, a smooth-functioning judicial system with reasoning and fair trials, and restriction of capital punishment to murder and other serious crimes).

[97] Berry, *supra* note 5, at 1015–16 (noting that the federal system and the political climate of the United States make it unlikely for abolition by legislation to take place); *see also supra* notes 33–36 and accompanying text (discussing similar arguments by Garland and Steiker).

system—a mechanism for social change in other contexts—seems to be a plausible means to achieve European-style counter-majoritarian change in the United States.[98] However, since the reinstitution of capital punishment following *Gregg*, part of the trend in death penalty litigation has been to focus on procedural defects in conviction and sentencing rather than on the validity of the act of execution itself, and the judiciary has engaged largely in an attempt to correct those procedural defects. Robert Cottrol has likened this process to a "rear guard action" on the part of the anti–death-penalty movement.[99]

The trend in litigation over lethal injection has followed a similar trajectory, and attempts by courts to tinker with the procedural defects of the lethal injection process have largely mirrored those attempts on the conviction and sentencing side of the death penalty equation. The focus has been on improving the procedures surrounding lethal injection. By taking as given the acceptability of lethal injection generally and implying that the procedures *can* be perfected and, moreover, *are* being perfected, this focus serves to solidify faith in the process much as the procedural protections that Berry identified engender trust in the fairness of the judicial system. Thus, the "procedural exceptionalism" model that Berry espouses is applicable to the method-of-execution aspect of capital punishment, and the procedural focus of lethal injection litigation plays an important role in entrenching the death penalty as a whole.[100]

1. Cases Concerning Older Methods of Execution

Method-of-execution litigation is grounded in the Eighth Amendment prohibition against cruel and unusual punishment.[101] The Supreme Court has spoken on a particular method of execution only

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[98] *See supra* note 27 and accompanying text (noting that the Supreme Court may be the most effective vehicle for "top-down" abolition).

[99] Robert J. Cottrol, *Finality with Ambivalence: The American Death Penalty's Uneasy History*, 56 STAN. L. REV. 1641, 1669 (2004) (reviewing STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY (2002)). For a similar argument that advocating moratoria on the death penalty can serve to legitimize it, see Kenneth Williams, *The Death Penalty: Can It Be Fixed?*, 51 CATH. U. L. REV. 1177, 1179 (2002) ("This paper argues that the moratorium movement is likely to have the effect of simply legitimating the death penalty.").

[100] Carol and Jordan Steiker echo Berry's argument, noting that perceived "stringent regulation" of the imposition of the death penalty makes "participants in the criminal justice system and the public at large more comfortable with the death penalty" and leads to its "legitimation." Carol S. Steiker & Jordan M. Steiker, *Judicial Developments in Capital Punishment Law*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 55, 74–78 (James R. Acker et al. eds., 2d ed. 2003). This same concept can be applied to method-of-execution litigation.

[101] U.S. CONST. amend. VIII, cl. 3.

three times: once concerning the firing squad in *Wilkerson v. Utah*[102] in 1878, once concerning the electric chair in *In re Kemmler*[103] in 1890, and most recently, concerning lethal injection in *Baze v. Rees*[104] in 2008. The Court in *Wilkerson* held that the punishment of death by shooting in the Utah territory was not contained within the prohibitions of the Eighth Amendment because of the widespread use of shooting generally, as well as the understanding that the Eighth Amendment's prohibitions referred to methods that included "torture" and "unnecessary cruelty."[105] A decade later, *Kemmler* took up New York's newly introduced electric chair before it had ever been used in an execution.[106] The Court wrote that punishments were "cruel when they involve torture or a lingering death" and "something more than the mere extinguishment of life."[107] The latter phrase sums up the never-ending quest for a pain-free method of execution and has become the starting point for much of the judicial examination of the role of pain in executions.

Before examining *Baze v. Rees* and other lethal injection cases, this Subpart examines lower courts' treatment of older methods of execution: hanging, lethal gas, and the electric chair. This Subpart will highlight the doctrinal bases that have historically been used for upholding or overturning these methods, as well as the way lethal injection has removed the doctrinal footholds on which judges have historically relied in finding older methods of execution unconstitutional. In the past, judges were able to look to overt indicia of pain or evidence of mutilation in order to argue that a particular form of

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102 99 U.S. 130 (1878).

103 136 U.S. 436 (1890).

104 553 U.S. 35 (2008). The Supreme Court did grant certiorari in a case challenging Florida's executions by electric chair, but dismissed the writ after Florida enacted legislation to make lethal injection the default method of execution unless the electric chair was affirmatively chosen by the condemned. Bryan v. Moore, 528 U.S. 960 (1999), *cert. dismissed*, 528 U.S. 1133 (2000).

105 *Wilkerson*, 99 U.S. at 134–36.

106 *Kemmler* was heard at a time when the Eighth Amendment did not apply to the states, and the Court found that the decision upholding the validity of the method under the state constitution was not reviewable. *Kemmler*, 136 U.S. at 446–47. The Court further found that the decision of the state court did not violate Kemmler's rights under the Fourteenth Amendment. *Id.* at 447. Although *Kemmler* has limited precedential weight because it took place before the Eighth Amendment was incorporated against the states, *see* Robinson v. California, 370 U.S. 660, 675 (1962) (holding that the Eighth Amendment applied to the states through the Fourteenth Amendment), and because Eighth Amendment analysis today involves "evolving standards of decency," *see* Trop v. Dulles, 356 U.S. 86, 101 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."), the language the Court employed has nevertheless been influential in method-of-execution cases.

107 *Kemmler*, 136 U.S. at 447.

execution was unconstitutional. These arguments have become much more difficult to make in the context of lethal injection, making it extremely difficult to raise an effective per se challenge to lethal injection. As a result, most lethal injection litigation is instead targeted at improving the procedures governing the execution.

In 1994, the Ninth Circuit took up the constitutionality of Washington's method of hanging in *Campbell v. Wood*.[108] The court began with the *Kemmler* standard and the idea that a method of execution violated the Eighth Amendment only if it involved more pain than that necessarily associated with death.[109] The court, in applying the evolving standards of decency standard, confined itself to an analysis of the pain involved and concluded that the fact that few states at the time employed hanging, as well as the existence of a lethal injection alternative, had no bearing on the analysis.[110] Instead, the court focused on the procedural protections present in Washington's Field Instruction, including specific drop lengths for different body weights to ensure that the neck broke, specifications for the thickness of the rope and its treatment to ensure minimal elasticity, and the location of the knot on the neck.[111] These procedural protections made the risk of death by asphyxiation or decapitation "slight" according to the court, and meant that judicial hanging under Washington's Field Instruction was constitutional.[112] If an en banc panel of the Ninth Circuit in 1994 found the procedural protections of a hanging protocol sufficient to ensure the constitutionality of that method, it is hardly surprising that courts would have faith in the perfectibility of lethal injection protocols.

In dissent, Judge Reinhardt criticized the *Campbell* majority's limitation of the analysis to pain, pointing out that the evolving standards of decency analysis "'extends beyond prohibiting the unnecessary infliction of pain'" and requires the "'minimization of physical violence during execution irrespective of the pain that such violence might inflict.'"[113] Judge Reinhardt also argued that the existence of lethal injection was relevant to the inquiry in order to decide if the pain involved was actually necessary as a general matter.[114] Because hanging was a "crude, rough, and wanton procedure, the purpose of

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[108] 18 F.3d 662 (9th Cir. 1994) (en banc).

[109] *Id.* at 683.

[110] *Id.* at 682, 687.

[111] *Id.* at 683–85.

[112] *Id.* at 687.

[113] *Id.* at 705 (Reinhardt, J., dissenting in relevant part) (quoting Glass v. Louisiana, 471 U.S. 1080, 1085 (1985) (Brennan, J., dissenting) (emphasis omitted)).

[114] *Id.* at 715–16.

which is to tear apart the spine," and because it was "deliberately degrading and dehumanizing," it was unconstitutional according to the dissent.[115] For Judge Reinhardt, hanging's clear imagery and antiquated symbolism provided a doctrinal basis to prohibit it—but even that was not enough to convince the majority. This casts into sharp relief the difficulty of convincing a court to find a method of execution to be per se unconstitutional—a difficulty that is magnified in the lethal injection context by the absence of both hanging's symbolism and a readily available alternative form of execution.

Campbell served as the backdrop when, that same year, the Northern District of California held that execution by lethal gas was unconstitutional in *Fierro v. Gomez*.[116] The Ninth Circuit affirmed this holding two years later.[117] As in *Campbell*, pain was the main focus of the court's decision in *Fierro*. In this case, the district court interpreted the Ninth Circuit's decision in *Campbell* as first requiring an analysis of the pain involved in the method of execution. If the amount of pain was not conclusively within or outside constitutional limits, the court could then conduct an analysis of legislative trends to assess the constitutionality of the particular method of execution at issue.[118] While the *Fierro* court did reference the "slapdash manner in which the San Quentin [execution] protocol was created," the focus of the analysis was not on the procedure of execution, but rather on a direct challenge to lethal gas itself.[119] Analyzing the extensive record before it, the court found a substantial risk that inmates would drift in and out of consciousness during the procedure and were "likely to suffer intense physical pain" due to cellular asphyxiation.[120] Nevertheless, the district court was unable to conclude that the pain itself was enough to make lethal gas unconstitutional and turned instead to an analysis of legislative trends away from lethal gas to reach that conclusion.[121] Two years later, the Court of Appeals affirmed the ruling based on the finding that the pain itself was enough to make lethal gas unconstitutional and found the district court's analysis of legislative trends to be unnecessary.[122]

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115 *Id.* at 701.

116 865 F. Supp. 1387, 1415 (N.D. Cal. 1994).

117 Fierro v. Gomez, 77 F.3d 301, 309 (9th Cir. 1996), *vacated on other grounds*, 519 U.S. 918 (1996) (vacating and remanding to the Ninth Circuit for consideration in light of a California statute allowing condemned inmates to choose between lethal injection and lethal gas).

118 *Fierro*, 865 F. Supp. at 1412.

119 *Id.* at 1413.

120 *Id.*

121 *Id.* at 1414.

122 *Fierro*, 77 F.3d at 308.

Thus, the overt indicia of pain in the form of asphyxiation provided a basis for a direct challenge to lethal gas under the Eighth Amendment.[123] The fact that the extensive record developed in the *Fierro* case was not enough for the district court to find lethal gas unconstitutional on the basis of pain alone highlights the difficulty litigants face in convincing a court that pain experienced during an execution rises to the level of an Eighth Amendment violation. Indeed, the Fourth Circuit in *Hunt v. Nuth* was unconvinced by similar arguments and declined to follow *Fierro* altogether, noting that "graphic descriptions of the death throes of inmates executed by gas are full of prose calculated to invoke sympathy, but insufficient to demonstrate that execution by the administration of gas involves the *wanton* and unnecessary infliction of pain."[124] The difficulty faced by litigants is compounded in the lethal injection context, in which the lack of external signs of pain[125] makes it more difficult to conclusively prove the existence of pain.[126] In fact, the litigants in *Hunt* challenged lethal gas *and* lethal injection—both of Maryland's methods of execution.[127] It is indicative of the difficulty of making out a per se challenge to lethal injection that in the same case in which litigants challenged the per se constitutionality of lethal gas, they chose to challenge lethal injection only on procedural grounds, arguing that the lethal injection statute "fail[ed] to minimize the risk of a botched execution."[128]

Finally, in cases concerning the electric chair, judges who have sought to strike down electrocution have had, until recently, to look beyond evidence of physical pain. These judges have found a doctrinal hook in the mutilation and humiliation caused by electrocution. In *Provenzano v. Moore*[129] the Florida Supreme Court rejected a challenge to the constitutionality of the electric chair, focusing on the "abundant evidence that execution by electrocution renders an inmate

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123 A direct challenge to the constitutionality of lethal gas under the Eighth Amendment had been made two decades earlier in *Gray v. Lucas*, although unsuccessfully. 710 F.2d 1048, 1061 (5th Cir. 1983). Like in *Fierro*, the arguments focused on the pain of asphyxiation by gas *generally*, rather than the specific procedures used in the execution. *See id.* at 1059 (describing four particularly painful executions).

124 57 F.3d 1327, 1338 (4th Cir. 1995) (quoting Hunt v. Smith, 856 F. Supp. 251, 260 (D. Md. 1994)).

125 *See supra* note 65 and accompanying text (discussing the use of the paralytic agent which helps sanitize the execution).

126 *See* State v. Webb, 750 A.2d 448, 455 (Conn. 2000) (rejecting a per se challenge to lethal injection because "[u]nlike the evidence in *Fierro*, there is no objective evidence in the present case indicating that unnecessary pain is *inherent* in execution by lethal injection" (emphasis added)).

127 Appellant's Reply Brief at 18–19, Hunt v. Nuth, 57 F.3d 1327 (4th Cir. 1995) (No. 94-4006), 1994 WL 16014476.

128 *See id.*(arguing, for instance, that lethal injection is preempted by federal drug law).

129 744 So.2d 413 (Fla. 1999).

instantaneously unconscious, thereby making it impossible to feel pain."[130] Without evidence of pain, the dissenting justices looked beyond pain to other factors in order to find electrocution unconstitutional. Justice Shaw noted that an analysis of pain should not end the inquiry. For example, the guillotine, although relatively quick and painless, would constitute "frank violence . . . mutilation . . . and disgrace" that would "fail constitutional muster in all states."[131] Justice Shaw went on to argue that electrocution caused mutilation and violence in the form of burns and convulsions that did not comport with evolving standards of decency and rendered electrocution, "with its attendant smoke and flames . . . a spectacle whose time has passed."[132] In the same case, Justice Pariente similarly noted that civilized standards require "minimization of physical violence" regardless of the pain caused.[133]

Two years later, in *Dawson v. State*,[134] the Georgia Supreme Court became the first appellate court in the United States to declare electrocution cruel and unusual punishment.[135] Like the *Provenzano* dissenters, the majority in *Dawson* looked beyond the pain caused by electrocution because it was unable to conclusively determine that there was unnecessary conscious pain involved.[136] The court also noted that to limit the focus just to pain would seemingly allow for the implementation of outmoded forms of execution such as crucifixion, so long as the condemned were medicated enough so as to feel no pain.[137] Instead, the court relied on "mutilation" caused by electrocution in *all cases*, regardless of whether or not the procedures were correctly followed, which made "no measurable contribution to accepted goals of punishment."[138] Thus, the court held, "death by electrocution, with its specter of excruciating pain and its certainty of cooked brains and blistered bodies, violates the prohibition against cruel and unusual punishment."[139]

However, according to the dissent, the "mutilation" referred to by the majority amounted to nothing more than superficial burns less

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130 *Id.* at 415.

131 *Id.* at 428–29 (Shaw, J., dissenting).

132 *Id.* at 431, 435, 440.

133 *Id.* at 449 (Pariente, J., dissenting) (quoting Glass v. Louisiana, 471 U.S. 1080, 1085 (1985) (Brennan, J., dissenting)).

134 554 S.E.2d 137 (Ga. 2001).

135 Patricia Roy, Casenote, *Not So Shocking: The Death of the Electric Chair in Georgia at the Hands of the Georgia Supreme Court in* Dawson v. State, 53 MERCER L. REV. 1695, 1697 (2002).

136 *Dawson*, 554 S.E.2d at 142–43.

137 *Id.* at 143.

138 *Id.*

139 *Id.* at 144.

than a quarter of an inch in diameter, which occurred where the electrodes made contact with the inmate's body.[140] The dissent argued that the majority was, in fact, usurping the role of the Georgia legislature, and was forced to focus on mutilation because it could not find conclusive evidence of conscious suffering.[141]

It was only in 2008 that the Nebraska Supreme Court found that, in addition to the mutilation rationale used in the above cases, electrocution "will unquestionably inflict intolerable pain unnecessary to cause death in enough executions so as to present a substantial risk that any prisoner will suffer unnecessary and wanton pain."[142] But even in this case, the court was unable to determine that conscious pain was involved in all cases as a matter of law.[143]

Electrocution thus provided doctrinal bases for a finding of unconstitutionality that, like the overt indicia of pain used in the lethal gas context, are not readily available when analyzing lethal injection. Indeed, Justice Pariente specifically noted in her dissent in *Provenzano* that lethal injection "creates far less a spectacle than electrocution,"[144] thus signaling that lethal injection would be able to withstand the challenges that had convinced her and her fellow dissenters with regard to electrocution. In order to find lethal injection unconstitutional based on the mutilation rationale used in the earlier electrocution cases, a court would have to find that a pinprick constitutes impermissible mutilation.[145]

What is left in order to level a per se challenge to lethal injection may only be arguments based on "broad and idealistic concepts of dignity, civilized standards, humanity, and decency" which the Supreme Court has acknowledged as part of Eighth Amendment analysis.[146] For this to be successful, a court would have to be convinced that the features of lethal injection, such as being strapped to the gurney, or observed by witnesses, were in conflict with human dignity. While not outside the realm of possibility, this would essentially constitute a challenge to the death penalty as a whole, as it is hard to

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140 *Id.* at 147 (Thompson, J., dissenting).

141 *Id.* at 146–47.

142 State v. Mata, 745 N.W.2d 229, 278 (Neb. 2008).

143 *See id.* at 278 ("The record supports the district court's statement that no expert could predict with certainty the result for any particular condemned prisoner.").

144 Provenzano v. Moore, 744 So.2d 413, 449 (Fla. 1999) (Pariente, J., dissenting).

145 *See Dawson*, 554 S.E.2d at 147 (Thompson, J., dissenting) ("In effect, the majority defines constitutionally forbidden 'mutilation' to be anything other than a needle prick.").

146 *See* Estelle v. Gamble, 428 U.S. 97, 102 (1976) ("Thus, we have help repugnant to the Eighth Amendment punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society.'" (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958))).

imagine any form of execution that would not involve an affront to human dignity equal to or greater than that which is involved in lethal injection.[147] Thus pain and mutilation, the bases on which other forms of execution were challenged, seem to have little traction when it comes to lethal injection.[148]

It is important to note, however, that the challenges to these older methods of execution, and the decisions and dissents which found them unconstitutional, were made in the context of the existence of lethal injection, and were no doubt affected in large part by the existence of a viable and seemingly more humane alternative to death by hanging, gas, or electrocution. In fact, the *Dawson* majority explicitly stated that lethal injection "clearly must play an important factor [sic] in the determination [of] whether an older method is cruel and unusual punishment."[149] It may be that lethal injection is particularly difficult to challenge on a per se basis today simply because there is no readily available alternative. Still, judges are reluctant to find a method of execution unconstitutional simply because of the existence of another method and, as shown above, have looked for other doctrinal bases (such as pain and mutilation) to do so.[150] As Timothy Kaufman-Osborn has noted, lethal injection, in comparison to other methods of execution, "is most successful at leaving the body unsigned."[151] Lethal injection removes the doctrinal footholds that have made it possible to find other methods of execution

147 At least one judge has noted that "[a]lthough lethal injection may not disfigure the body, may not cause any pain, and . . . may not rise to the same level of indignity as some of the other methods of execution, it is no less cruel when viewed in the context of the *power relationship* . . . ." State v. Webb, 750 A.2d 448, 459 (Conn. 2000) (Katz, J., dissenting) (emphasis added). However, this statement was made after the judge expressed his view that capital punishment generally was impermissibly cruel. *Id.* This lends credence to the idea that a challenge to lethal injection based on an affront to human dignity would amount to a challenge to capital punishment.

148 *But see* Roy, *supra* note 135, at 1715 (arguing that decisions like *Dawson* and the move to lethal injection may signal the "beginning of the end" for the death penalty as a whole under an "evolving standards of decency" analysis).

149 *Dawson*, 554 S.E.2d at 143; *see also* Campbell v. Wood, 18 F.3d 662, 715–16 (9th Cir. 1994) (Reinhardt, J., dissenting in relevant part) (arguing that lethal injection is relevant to the inquiry about whether the pain involved in hanging is necessary); Fierro v. Gomez, 865 F. Supp. 1387, 1407 (N.D. Cal. 1994) (noting the legislative trend toward lethal injection and abandonment of lethal gas); ZIMRING, *supra* note 29, at 50 ("Even before court challenges to gas and electricity as cruel and unusual punishment gained a foothold in the courts, both the electric chair and the gas chamber had image problems that threatened to undermine social support for the resumption of executions.").

150 *See, e.g.*, Hunt v. Nuth, 57 F.3d 1327, 1338 (4th Cir. 1995) ("[T]he existence . . . of more humane methods [of execution] does not automatically render a contested method cruel and unusual."); *Dawson*, 554 S.E.2d at 143 (acknowledging the above-quoted reasoning in *Hunt*).

151 KAUFMAN-OSBORN, *supra* note 55, at 110–11.

unconstitutional, making it increasingly difficult to raise a successful per se challenge to the method itself. It is unsurprising, then, that litigation over lethal injection has focused primarily on the procedural aspect of lethal injection and on correcting procedural defects. Like the procedural focus of death penalty litigation that Berry has examined in the context of conviction and sentencing, this trend has helped entrench lethal injection and the death penalty more broadly.

2. Baze v. Rees *and the Lethal Injection Cases*

Without the doctrinal bases of pain and mutilation to make out a case against lethal injection generally, most cases challenging lethal injection have proceeded under the assumption that lethal injection does not constitute a per se violation of the Eighth Amendment.[152] As a result, the litigation concerning lethal injection has been pushed toward a focus on procedural defects and the risk of incorrect administration of the lethal injection protocols. This section examines recent case law on procedures surrounding lethal injection and argues that they reflect and reinforce faith in the perfectibility of those procedures. This faith, combined with faith in the sentencing and conviction procedures examined by Berry, bolsters the death penalty's continued vitality in the United States.

The arguments put forth in *Baze v. Rees* are typical of the cases challenging lethal injection.[153] In *Baze*, the petitioners argued that Kentucky's lethal injection protocols allowed for a significant risk that the first drug in the sequence, sodium thiopental, would be administered in an inadequate dose and leave the inmate still conscious during the administration of the next two drugs in the sequence.[154] This would subject the petitioner to excruciating pain. The petitioners conceded, however, that the *proper* administration of the first drug would "eliminate[ ] any meaningful risk that a prisoner would

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[152] *See, e.g.*, Baze v. Rees, 553 U.S. 35, 49 (2008) ("Petitioners do not claim that lethal injection or the proper administration of the particular protocol adopted by Kentucky by themselves constitute the cruel and wanton infliction of pain."); Harbison v. Little, 571 F.3d 531, 536 (6th Cir. 2009) ("As in *Baze*, the inmate here concedes that if the protocol were followed perfectly, it would not pose an unconstitutional risk of pain . . . ."); Taylor v. Crawford, 487 F.3d 1072, 1078–79 (8th Cir. 2007) (noting that the case is not about the death penalty generally nor about lethal injection in the abstract); Morales v. Tilton, 465 F. Supp. 2d 972, 973 (N.D. Cal. 2006) ("Nor is [this case] about whether California's primary method of execution—lethal injection—is constitutional in the abstract . . . ."). *But see* State v. Webb, 750 A.2d 448, 456 (Conn. 2000) (challenging lethal injection generally in addition to challenging the procedures adopted, and arguing that it "offends society's standards of decency").

[153] *See supra* note 149 (discussing lethal injection challenges).

[154] *Baze*, 553 U.S. at 49, 53–54.

experience pain from the subsequent injections."[155] They argued only that the procedures adopted by Kentucky allowed for too high a risk of improper administration and suggested an alternative method—a single large dose of anesthetic—as a solution to the constitutional problem presented by Kentucky's three-drug protocol.[156]

Chief Justice Roberts, writing for a plurality of the Court, rejected this argument. He found that "a condemned prisoner cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative."[157] Even more significantly, his opinion relied heavily on findings that Kentucky's protocols provided adequate procedural protections against improper administration of the drugs. He noted the "practice sessions," "redundant measures" that ensure a proper dose of sodium thiopental, and other "safeguards" including observation by the warden.[158] Chief Justice Roberts summed up by stating: "In light of these safeguards, we cannot say that the risks identified by petitioners are so substantial or imminent as to amount to an Eighth Amendment violation."[159] His analysis reveals an implicit faith in the perfectibility of the lethal injection process and its attendant procedures.

Justice Ginsburg, joined by Justice Souter, filed the only dissenting opinion in the case. In it, she focused on the procedural deficiencies of Kentucky's protocol and the lack of adequate protections against improper administration. She noted easily implementable measures to check for consciousness, such as calling the inmate's name, brushing his or her eyelashes, and measuring anesthetic depth using the electrocardiogram machine and blood pressure cuff already in place during Kentucky's lethal injection procedures.[160] Yet, by comparing Kentucky's protocol to the more substantial safeguards provided for by other states and suggesting improvements toward these additional safeguards, Justice Ginsburg's analysis similarly reveals confidence in the idea that procedural protections can ensure that lethal injection is carried out in a constitutional manner.[161]

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155 *Id.* at 49.

156 *Id.* at 51.

157 *Id.*

158 *Id.* at 55–56.

159 *Id.* at 56.

160 *Id.* at 118–19 (Ginsburg, J., dissenting). Justice Ginsburg emphasized the importance of ensuring unconsciousness before the injection of the second drug (the paralytic agent, pancuronium bromide) because the inmate "will not be able to scream after the second drug is injected, no matter how much pain he is experiencing." *Id.* at 121–22.

161 *Id.* at 114, 118 (noting that "Kentucky's protocol lacks basic safeguards used by other States" and suggesting measures, such as calling the inmate's name and brushing his/her eyelashes, that could be used in order to confirm unconsciousness).

The Supreme Court's analysis resembles those undertaken by lower courts in other lethal injection cases, both before and after *Baze*. In *Morales v. Tilton*, a pre-*Baze* case, Judge Fogel embarked on a massive undertaking to thoroughly analyze California's lethal injection procedure. To do so, he visited the San Quentin correctional facility and personally observed the execution chamber.[162] In fact, the *Morales* case was one of the most significant cases concerning lethal injection to that date and set off a flurry of revisions to lethal injection protocols across the country.[163] Judge Fogel found that the California lethal injection protocol, as applied, created a substantial risk that the inmate would be conscious during the administration of the second two drugs and thus violated the Eighth Amendment.[164] He noted substantial deficiencies in the implementation of the protocol, including unreliable screening of the execution team, inadequate training and lighting, unreliable record-keeping, and incorrect mixing of drugs.[165] However, like the Supreme Court Justices after him, Judge Fogel expressed confidence in the perfectibility of the lethal injection procedures.[166] He summed up most judicial analyses of lethal injection when he wrote: "Defendants' implementation of lethal injection is broken, but it can be fixed."[167] Thus, even in cases in which courts have struck down lethal injection protocols, they have focused on procedural deficiencies and implied (or, as in *Morales*, explicitly stated) that those procedures could be amended to cure any Eighth Amendment problems.[168]

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[162] 465 F. Supp. 2d 972, 978 (N.D. Cal. 2006); *see also* Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 53 (2007) ("Judge Fogel organized an unusually long and thorough evidentiary hearing."). For a discussion of Judge Fogel's personal experience with the trial, see Hon. Jeremy D. Fogel, *In the Eye of the Storm: A Judge's Experience in Lethal-Injection Litigation*, 81 FORDHAM URB. L.J. 735 (2008).

[163] *See* Denno, *supra* note 162, at 55 ("*Morales* served as the catalyst for [the] protocol-revising rush . . . .").

[164] *Morales*, 465 F. Supp. 2d at 980–81.

[165] *Id.* at 979–80.

[166] *Id.* at 982 ("[G]iven that the deficiencies in the implementation of the protocol appear to be correctable, a thorough, effective response to the issues raised in this memorandum likely will enable the Court to enter . . . a favorable judgment.").

[167] *Id.* at 974; *see also* Denno, *supra* note 162, at 58 ("Most courts would agree with Judge Fogel that while the system of 'lethal injection is broken, . . . it can be fixed.'" (quoting *Morales*, 465 F. Supp. 2d at 974)).

[168] *See, e.g.*, Taylor v. Crawford, No. 05-4173-CV-C-FJG, 2006 WL 1779035, at *8 (W.D. Mo. June 26, 2006) ("Having determined that Missouri's current method of administering lethal injections subjects condemned inmates to an unacceptable risk of suffering unconstitutional pain and suffering, the Court concludes that it is within its equitable powers to fashion a remedy . . . ."), *rev'd*, 487 F.3d 1072, 1085 (8th Cir. 2007).

In the years following *Baze*, the procedural focus of method-of-execution litigation has become firmly established. This has made challenges to lethal injection extremely difficult to make out, as a finding of similarity to the protocol in *Baze* has increasingly become enough to uphold a lethal injection protocol.[169] In *Harbison v. Little*, for example, the Sixth Circuit rested its ruling upholding the Tennessee lethal injection protocol largely on its finding that the Tennessee protocol was "substantially similar" to the Kentucky protocol upheld in *Baze*.[170] The court also rejected the proposed "one-drug" alternative because the *Baze* Court had upheld the three-drug protocol in the face of the one-drug alternative.[171] Similarly, in upholding Missouri's protocol, the Eighth Circuit noted that the "Missouri protocol's safeguards . . . are similar to, and in many ways more stringent than, Kentucky's."[172] The Fourth Circuit has even explicitly stated that a protocol will be upheld "[i]f a state employs a 'lethal injection protocol substantially similar to the protocol' upheld in *Baze*."[173] Thus, *Baze* has created a sort of yardstick against which lethal injection procedures can be measured. If a state's procedures provide for a similar level of procedural safeguards as the Kentucky protocol, they can be deemed adequate. This mode of analysis underlines the judicial faith in procedural protections and further ingrains the idea that the lethal injection process can be perfected by those procedures.

It may be, then, that lethal injection and the focus on procedure in the litigation surrounding it have resulted in a situation in which method-of-execution litigation of the sort that challenged the electric chair or the gas chamber is no longer as viable. In essence, the judicial treatment of lethal injection may have "distilled" capital punishment to the point at which we are forced to look at the death penalty in the

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169 *See* Harvey Gee, *Eighth Amendment Challenges After* Baze v. Rees*: Lethal Injection, Civil Rights Lawsuits, and the Death Penalty*, 31 B.C. THIRD WORLD L.J. 217, 234–37 (2011) (noting judicial analyses that consist largely of comparisons to *Baze* and arguing that *Baze* has come to be used as a "safe harbor" for courts in this context).

170 571 F.3d 531, 536 (6th Cir. 2009). Judge Clay, in dissent, criticized the court's reliance on this reasoning. *Id.* at 540 (Clay, J., dissenting) ("It is not unforeseeable that a three-drug protocol that is, at first glance, similar to Kentucky's protocol, could fail to meet the standard set forth in *Baze*.").

171 *Id.* at 539 (majority opinion) ("[T]he *Baze* Court determined that a state's failure to adopt the one-drug protocol did not violate the prisoner's Eighth Amendment rights since the comparative efficiency of that method was not well-established." (quoting Baze v. Rees, 553 U.S. 35, 37–38 (2008)).

172 Clemons v. Crawford, 585 F.3d 1119, 1126 (8th Cir. 2009); *see also* Dickens v. Brewer, No. CV07-1770-PHX-NVW, 2009 WL 1904294, at *30, *38 (D. Ariz. July 1, 2009) (upholding Arizona's lethal injection protocol based on a finding that it provided for even more procedural protections than the Kentucky protocol in *Baze*).

173 Emmett v. Johnson, 532 F.3d 291, 299 (4th Cir. 2008) (quoting *Baze*, 553 U.S. at 61).

abstract, and to make a judgment about it on its face. Thus, it may be that death penalty abolitionists' only path to success is to convince a court that the death penalty *itself* constitutes a per se violation of the Eighth Amendment's evolving standards of decency. It is telling that in *Baze*, Justice Stevens announced his belief that the death penalty generally was a violation of the Eighth Amendment, yet felt compelled to concur in the judgment upholding Kentucky's lethal injection protocol.[174] Justice Stevens found that, despite his opposition to the death penalty per se, "the evidence adduced by petitioners fails to prove that Kentucky's lethal injection protocol violates the Eighth Amendment," and he was bound by precedent to concur in the judgment.[175] Indeed, as the analysis above has shown, lethal injection has removed the doctrinal footholds upon which earlier method-of-execution challenges were based and has driven lethal injection litigation toward procedural analyses that have made it increasingly difficult to challenge lethal injection protocols. The constant focus on improving the procedures surrounding lethal injection has served to entrench and legitimize it, making it more difficult to raise a challenge to the method of execution as well as the death penalty itself.

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[174] *Baze*, 553 U.S. at 86–87 (2008) (Stevens, J., concurring in the judgment).

[175] *See id.* (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (per curiam), in explaining that "[a] penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment," and yet finding that the Court "must respect precedents that remain part of our law"). Moreover, the main concern that Justice Stevens raised with respect to Kentucky's actual procedure was the use of the paralytic agent, pancuronium bromide, which he believed was a needless step in the process that increased the risk of excruciating pain and served only to make the process more palatable to those viewing it. *Id.* at 72–77. The constitutional questions raised by Justice Stevens concerning the use of this drug can easily be addressed through increasing use of the one-drug protocol, removing yet another avenue available to challenge lethal injection as a method of execution. In fact, Justice Stevens even suggested that "[s]tates wishing to decrease the risk that future litigation will delay executions or invalidate their protocols would do well to reconsider their continued use of pancuronium bromide." *Id.* at 77 (Stevens, J., concurring in the judgment). Judge Fogel similarly noted that an execution carried out through administration of a single large dose of anesthetic "would eliminate constitutional concerns, subject only to the implementation of adequate, verifiable procedures." Morales v. Tilton, 465 F. Supp. 2d at 983. It is worth noting, however, that the elimination of pancuronium bromide could, as Chief Justice Roberts noted in *Baze*, decrease the "dignity" of the procedure because the inmate might move more often during the injection of the drugs. *See Baze*, 553 U.S. at 57 (plurality opinion) ("The Commonwealth has an interest in preserving the dignity of the procedure, especially where convulsions or seizures could be misperceived as signs of consciousness or distress."). It is not impossible for a claim that the lack of dignity in the one-drug procedure could offend the "evolving standards of decency" embodied in the Eighth Amendment.

Conclusion

William Berry has argued that "procedural exceptionalism," or a unique American faith in the protections afforded to defendants through judicial procedures in sentencing and conviction, has largely accounted for the persistence of the death penalty in the United States. This same faith in procedure is evident on the method-of-execution side of the death penalty equation—a fact that is largely attributable to the uniqueness of lethal injection. The execution of the condemned Belarusian referred to in the Introduction to this Note is so shocking precisely because Belarus had no procedures in place to ensure that the execution did not cause excessive pain. Even if the procedures we put in place to ensure that the American version of the death penalty is not as cruel amount to mere ritual and ceremony, they provide reassurance that we are carrying out an enlightened version of a severe act.[176] Our judges and our courts, by exhibiting a similar faith in the process, reinforce that understanding. Thus, the faith in procedural protections and the perfectibility of the process on *both* sides of the equation have converged to legitimize and entrench the institution of capital punishment as a whole in the United States.

This is not to say that there is no path toward abolition in the United States. Justice Stevens, along with Justices Marshall, Brennan, Powell, and Blackmun before him, arrived at the conclusion that the death penalty is a per se violation of the Eighth Amendment.[177] It seems that if capital punishment is to be abolished, it will be when a majority of the Supreme Court reaches a similar conclusion. The "rear guard" action and focus on procedure have led to the constant search for perfection and improvement, a process which, unwittingly, legitimizes the institution. Ultimately, the successful challenge will have to be head-on.

[176] It seems inconceivable that Americans would support the death penalty, even by lethal injection, if these procedures were removed and the process were carried out, say, by having the executioner simply enter the convict's cell and inject him or her in the arm.

[177] Elizabeth 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, 791 n.28 (2010).