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Botched: The Lethally Injected Effect of Glossip on the Future of Capital Punishment

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BOTCHED: THE “LETHALLY INJECTED” EFFECT OF *GLOSSIP* ON THE FUTURE OF CAPITAL PUNISHMENT

*The United States has maintained some form of execution as punishment for the worst criminals in our world. The form of execution has evolved and developed rapidly and frequently with time to create the most humane method of execution in our advanced society. Recently, the courts and the public have questions concerning the effectiveness of the drugs that are used in the three-drug implementation protocol, specifically, the use of midazolam. Midazolam became the popular drug in the wake of drug companies’ decision to cease production and distribution of sodium thiopental to United States prisons for execution. Midazolam is an anesthetic drug and the first drug applied in the three-drug protocol. While many prisoners may deserve execution as a punishment for the heinous crimes they committed, it is not permissible to execute prisoners in a less-than-humane method, which invokes unreasonable pain and suffering and is arguably unconstitutional. Recently, the Supreme Court ruled in *Glossip v. Gross*¹ that the use of 500-milligrams of midazolam was a sufficient dosage amidst serious challenges to its usefulness and effectiveness. This note examines the evolution of the death penalty in the United States and the ongoing issues surrounding the procedure used for execution by lethal injection. The note seeks to offer insight on the ineffectiveness of midazolam leading to botched executions that resemble torture. Finally, this note argues for a change to the United States implementation of the death penalty, to create uniformity throughout the states utilizing the death penalty and to streamline the method of lethal injection to avoid botched and inhumane deaths of death row inmates.*

INTRODUCTION

Lethal injection is “[t]he most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases.”² There have been varying methods of the death penalty throughout

¹ 135 S. Ct. 2726, 2731 (2015).

² Compare *In re Kemmler*, 136 U.S. 436, 444 (1890) (describing electrocution as most humane method of inflicting death penalty in 1800s), with James R. Wong, Comment, *Lethal Injection Protocols: The Failure of Litigation to Stop Suffering and the Case for Legislative Reform*, 25

our nation's history and modern technological advancements have determined lethal injection to be the most humane process.³ Recently, the issue of frequent and repeated botched lethal injection procedures has gained national attention and has challenged the constitutionality of capital punishment.⁴ The Eighth Amendment of the United States Constitution protects against cruel and unusual punishment and the Supreme Court has held consistently that capital punishment does not violate this proscription.⁵

TEMP. J. SCI. TECH. & ENVTL. L. 263, 263 (2006) (stating lethal injection as "the most humane possible way to execute people"). Wong states:

[L]ethal injection "has become popular because it is first and foremost a medical procedure." For most of the states that have switched execution methods to lethal injection, it is the perceived "humaneness" of lethal injection that explains why it is so widely used. This perception is largely responsible for why, of all the controversies surrounding the death penalty, lethal injection protocols receive the least amount of attention from the public. But the perception of a painless death is not necessarily accurate.

Id. at 263.

³ See *Glossip v. Gross*, 135 S. Ct. 2726, 2732 (2015) (Breyer, Sotomayor, JJ., dissenting) (explaining evolution of capital punishment and lethal injection as most humane process); *Baze v. Rees*, 553 U.S. 35, 41 (2008) (stating lethal injection adopted by all states imposing death penalty as most humane practice).

⁴ See Amy L. Mottor, Note & Comment, *Morales and Taylor: The Future of Lethal Injection*, 6 APPALACHIAN J.L. 287, 287 (2007) (discussing issues arising from lethal injection). Lethal injection is not an effective method of execution. *Id.*

Lethal injection endangers the use of the death penalty in the United States because of frequently botched procedures. Challenges to lethal injection are causing courts to grant stays of executions until a better procedure is found, or the current procedure is improved. However, some of the needed improvements are irresolvable, because of the dilemmas presented by the medical fields' codes of ethics. To continue to have the right to execute inmates, states must create a new procedure that does not require the participation of medical professionals.

Id.

⁵ See U.S. CONST. amend. VIII (outlining format and definition of cruel and unusual punishment); see also *Kemmler*, 136 U.S. at 449 ("The enactment of this statute was, in itself, within the legitimate sphere of the legislative power of the state, and in the observance of those general rules prescribed by our systems of jurisprudence"); *Baze*, 553 U.S. at 96 (finding Eighth Amendment only bars punishments adding "terror, pain or disgrace"); P. Thomas Distanislaio, III, Comment, *A Shot in the Dark: Why Virginia Should Adopt the Firing Squad as Its Primary Method of Execution*, 49 U. RICH. L. REV. 779, 783 (2015) (explaining lethal injection is less effective and arguably less humane than older forms of execution).

When raised as a constitutional issue, the Cruel and Unusual Punishments Clause is subject to two primary inquiries: (1) the proportionality of the punishment to the crime; and (2) the method of punishment. Proportionality, applied individually to each case, is meant to guarantee "the absence of a drastic disparity between the severity of the offense and the punishment imposed." The method of punishment component, in contrast, has

The Supreme Court recently heard a constitutional challenge to the method of lethal injection in *Glossip v. Gross*, where it was argued that the use of midazolam was not effective in rendering the prisoner pain-free during the execution.⁶

Lethal injection has become the most commonly used method of execution in the United States.⁷ Lethal injection typically is comprised of a three-drug protocol, which is meant to be quick and painless.⁸ The first drug in the standard three-drug protocol was sodium thiopental, which many pharmaceutical companies stopped producing.⁹ As a result, many states have been forced to accept midazolam as the paralytic in the three-drug cocktail, but its efficiency and ability to render the prisoner pain-free is being challenged as unconstitutional.¹⁰

rarely been invoked as a prescriptive measure for individual cases, and instead is viewed as having a broader, retroactive application. Since the Eighth Amendment’s adoption, courts have assumed that “traditional forms of punishment—such as burning alive on the stake, crucifixion . . . disemboweling while alive, drawing and quartering, and public dissection—are manifestly cruel and unusual.” But no method of execution employed in the United States has ever been found to violate the Eighth Amendment.

Id.

⁶ *Glossip*, 135 S. Ct. at 2731-34 (majority opinion) (upholding method of lethal injection as constitutional). The Court found that the use of a 500-milligram dose of midazolam as the first drug in the three-drug protocol was sufficient because Oklahoma was not able to obtain sodium thiopental or pentobarbital. *Id.* In *Glossip*, death-row inmates filed an action claiming that the use of midazolam violates the Eighth Amendment because the drug will not render them unable to feel pain associated with administration of the second and third drugs. *Id.* at 2735. The Court found that the prisoners failed to identify a known and available alternative method of execution that would provide a substantially less severe risk of pain, and failed to show that the use of midazolam created a demonstrated risk of severe pain. *Id.*

⁷ See Note, *A New Test for Evaluating Eighth Amendment Challenges to Lethal Injections*, 120 HARV. L. REV. 1301, 1301 (2007) [hereinafter *A New Test*] (“Lethal injection is by far the predominant method of execution in the United States. It is a method of relatively recent vintage: the first state to adopt it was Oklahoma in 1977.”).

⁸ See Joel B. Zivot, *Lethal Injection: States Medicalize Execution*, 49 U. RICH. L. REV. 711, 712-14 (2015) (illustrating how three-drug protocol should leave inmate unconscious and unable to feel pain); see also Kristen Kas et al., *Lethal Drugs in Capital Punishment in USA: History, Present, and Future Perspectives*, RES. SOC. AND ADMIN. PHARMACY Nov. 26, 2015 https://www.researchgate.net/publication/284810658_Lethal_Drugs_in_Capital_Punishment_in_USA_History_Present_and_Future_Perspectives (describing process of administering three-drug protocol).

⁹ See Distanislaio, *supra* note 5, at 790-91 (noting use of sodium thiopental until production ceased due to difficulties procuring drug’s active ingredient).

¹⁰ See *Glossip*, 135 S. Ct. at 2731 (challenging use of midazolam because it does not render prisoner unconscious or pain free).

Capital punishment has been a method of punishment for convicted criminals since the early colonial days.¹¹ The Eighth Amendment was added to the United States Constitution to provide protections for convicted criminals sentenced to capital punishment.¹² Methods of execution have evolved with the advancement of technology and medicine for the sake of humanity.¹³ An execution is considered “botched” when there is a breakdown in the process or the protocol that is called for in the method of execution.¹⁴ The current issue of whether midazolam is an effective replacement to sodium thiopental, and its ability to render the convict pain-

¹¹ See MICHAEL KRONENWETTER, CAPITAL PUNISHMENT: A REFERENCE HANDBOOK 72-73 (CA: ABC-CLIO, Inc., 1993). The First recorded execution in the English American colonies was in 1608 when officials executed George Kendall of Virginia for supposedly plotting to betray the British to the Spanish. *Id.* In 1622, the first legal execution of a criminal, Daniel Frank, occurred in Virginia for the crime of theft. See CHRISTOPHER S. KUDLAC, PUBLIC EXECUTIONS: THE DEATH PENALTY AND THE MEDIA 16 (Suzane Staszak-Silva ed., 2007).

¹² See Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 322-23, 328-29 (1997) (citing *Furman v. Georgia*, 408 U.S. 238, 287-89 (1972)). The Framers of the Constitution took the time to include a provision in the Constitution against cruel and unusual punishment. *Id.*

[“P]recisely because the legislature would otherwise have had the unfettered power to prescribe punishments for crimes,” the Framers included in the Bill of Rights a prohibition of cruel and unusual punishments. Although the Framers did not define what they considered to be “cruel” or “unusual,” there is no evidence to suggest the Framers intended to ban only torture or punishments viewed as cruel and unusual at the time.

Id.; *In re Kemmler*, 136 U.S. 436, 446 (1890) (describing intention of Eighth Amendment protections). In *Kemmler*, the court stated:

[T]he Eighth Amendment was intended to apply to the States, but it is urged that the provision of the Fourteenth Amendment, which forbids a State to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, is a prohibition on the State from the imposition of cruel and unusual punishments, and that such punishments are also prohibited by inclusion in the term “due process of law.” The provision in reference to cruel and unusual punishments was taken from the well-known act of Parliament of 1688, entitled “An act for declaring the rights and liberties of the subject, and settling the succession of the crown,” in which, after rehearsing various grounds of grievance, and among others that “excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects, and excessive fines have been imposed, and illegal and cruel punishments inflicted,” it is declared that “excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

Id.

¹³ See Distanislao, *supra* note 5, at 780-82 (finding states have been experimenting to find more humane ways to perform executions).

¹⁴ See *id.* (“[B]otched executions are ‘those involving unanticipated problems or delays that caused, at least arguably, unnecessary agony for the prisoner or that reflect gross incompetence of the executioner.’”); see also Zivot, *supra* note 8, at 723 (stating term “botched” applies to failed executions of prisoners).

free during the execution process has been questioned fervently by numerous convicts on death row, as well as scholars and members of the legal community.¹⁵

The purpose of this Note is to evaluate the constitutionality of capital punishment and the Supreme Court’s decision to uphold Oklahoma’s method of execution.¹⁶ The more that capital punishment is questioned, the greater the number of concerns and issues the public will raise concerning its necessity and constitutionality.¹⁷ The government has a responsibility to respect human dignity, regardless of the crimes that the convict has committed, and to conduct the executions in the most humane method as possible.¹⁸ Part I will provide a brief historical synopsis of the methods of execution states have employed, focusing on the transformations of methods corresponding with technological advancements.¹⁹ Part II will explore lethal injection as a method of execution, focusing on the use of midazolam as the

¹⁵ See *Glossip*, 135 S. Ct. at 2735 (exemplifying prisoners’ criticism of midazolam); J. G. Reves, M.D. et al., *Midazolam: Pharmacology and Uses*, 62 ANESTHESIOLOGY 310, 317 (1985) (describing reduced effect of midazolam in comparison to thiopental). According to Drs. Reves et al.:

[A]s an induction drug, midazolam produces sleep and amnesia but it does not have a great analgesic effect. Midazolam is not as rapid acting as thiopental; at approximately equipotent (loss of unconsciousness) doses, thiopental abolishes the eyelash reflex 50-100% faster than midazolam. Also in comparison to thiopental, the response to a given dose of midazolam is more variable. However, at higher doses of each drug, this variability greatly is reduced.

Id.; see also BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 15-16 (2015) (recognizing proliferating issue of capital punishment). According to Bryan Stevenson, “[w]e have shot, hanged, gassed, electrocuted and lethally injected hundreds of people to carry out legally sanctioned executions. Thousands more await their execution on death row . . . We also make terrible mistakes. Scores of innocent people have been exonerated after being sentenced to death and nearly executed.” *Id.*

¹⁶ See *Glossip*, 135 S.Ct. at 2746 (“[O]ur decision is tantamount to allowing prisoners to be ‘drawn and quartered, slowly tortured to death, or actually burned at the stake’”).

¹⁷ See Jonathan Yehuda, Note, *Tinkering with the Machinery of Death: Lethal Injection, Procedure, and the Retention of Capital Punishment in the United States*, 88 N.Y.U. L. REV. 2319, 2324 (2013) (discussing declining number of states employing capital punishment due to concerns of effectiveness). “As it stands today, thirty-[one] states, as well as the federal government and military, allow for capital punishment.” *Id.*

¹⁸ See *id.* at 2330 (explaining issue of public faith in legal system and inhumaneness of lethal injection). Capital punishment by way of lethal injection, which is a “seemingly ‘medical’” procedure, has led the public to believe this method of execution is a humane practice. *Id.*

¹⁹ See *infra* Part I (explaining history of capital punishment); see also Chris Fisher, *From the Guillotine to Lethal Injection: Evolution of Execution*, 21 CHI. B. ASS’N REC. 40, 41-42 (2007) (discussing evolution of capital punishment).

first drug rendered in the process.²⁰ Part III will analyze lethal injection using midazolam and will assess whether the method is effective and whether the government should consider the constitutionality of capital punishment.²¹ Part III will conclude with recommendations on the future of capital punishment that will account for a secure constitutional procedure, while still ensuring a quick and effective means of execution.²²

I. HISTORY OF CAPITAL PUNISHMENT

The earliest known set of capital offenses in the United States dates back to 1636, from the Massachusetts Bay Colony.²³ The types of capital offenses varied including crimes against morality in the Northern Colonies and disciplining slaves in the Southern Colonies.²⁴ Capital punishment has been an accepted form of punishment throughout the centuries and has been recognized since the adoption of the Bill of the Rights in most states.²⁵ The

²⁰ See *infra* Part II; *Glossip*, 135 S. Ct. at 2739 (discussing how midazolam, as first drug administered, is meant to render prisoner pain free); *Baze v. Rees*, 553 U.S. 35, 51 (2008) (discussing midazolam as alternative to sodium thiopental).

²¹ See *infra* Part III (discussing future of death penalty in United States); Robert D. Truog et al., *Physician, Medical Ethics, and Execution by Lethal Injection*, THE JAMMA NETWORK (June 18, 2014), <http://jamanetwork.com/journals/jama/fullarticle/1874217> (discussing legal professionals' recommendations to improve death penalty administration); Zivot, *supra* note 8, at 711-12 (noting *Baze* Court upheld lethal injection as constitutional means of capital punishment).

²² See Distanislao, *supra* note 5, at 799 ("Death by firing squad is a quick process, with most lives extinguished in minutes, if not seconds; and, though it may be bloody, the initial pain felt by the victim is 'comparable to being punched in the chest.'"); Truog, *supra* note 21 and accompanying text (explaining recommendations regarding role of medical profession in lethal injection); Zivot, *supra* note 8, at 729 (mentioning list of recommendations for resolutions to questions regarding lethal injection). A group of legal professionals known as the Death Penalty Committee of the Constitution Project (the "Death Penalty Committee") was recently convened. *Id.* The Death Penalty Committee generated a list of thirty-nine recommendations intended to resolve problems with lethal injection as the method of execution for capital punishment. *Id.* The Death Penalty Committee's final recommendation calls for the presence of qualified medical personnel at every lethal injection execution to ensure that the medically related elements are properly conducted. *Id.*

²³ See Frederick C. Millett, Note, *Will the United States Follow England (and the Rest of the World) in Abandoning Capital Punishment?*, 6 PIERCE L. REV. 547, 585 (2008) (providing list of capital offenses). These capital offenses include: idolatry, witchcraft, blasphemy, murder, assault in sudden anger, sodomy, buggery, adultery, statutory rape, rape (punishment of death optional), man-stealing, perjury in a capital trial, and rebellion. *Id.*

²⁴ See *id.*

²⁵ See *Glossip*, 135 S. Ct. at 2731 (Breyer, Sotomayor, JJ., dissenting) ("The death penalty was an accepted punishment at the time of the adoption of the Constitution and the Bill of Rights.").

forms of capital punishment used in the United States have greatly evolved since the adoption of the United States Constitution.²⁶

While it may appear to be new technology, “the use of chemicals in capital punishment can be traced back to the ancient human history.”²⁷ With the changes regarding human rights, there is more pressure on nations to act in a humane manner when executing the condemned, thus sparking the development of lethal injection as the primary method of execution.²⁸

A. States Without the Death Penalty

Currently, thirty-one states and the Federal Government continue to use the death penalty as the form of punishment for certain offenses, leaving nineteen states abstaining from the use of capital punishment.²⁹ Many of these states, like Massachusetts, had the death penalty, but have abolished it throughout the years, finding it “arbitrary and capricious” and unconstitutional.³⁰ While there have been efforts in these states to reinstate

²⁶ See, e.g., HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 6 (Oxford Univ. Press 1997) (stating at adoption of Constitution, hanging was method of execution); *In re Kemmler*, 136 U.S. 436, 443 (1890) (finding electrocution as acceptable form of capital punishment); *Gregg v. Georgia*, 428 U.S. 153, 170-71 (1976) (defining electrocution as method of execution); *Baze v. Rees*, 553 U.S. 35, 40-41 (2008) (stating lethal injection as method of execution); *State v. Gee Jon*, 211 P. 676, 681 (Nev. 1923) (defining lethal gas as method of execution); but see *Glossip*, 135 S. Ct. at 2732 (majority opinion) (quoting *Baze*, 553 U.S. at 48) (“[W]hile methods of execution have changed over the years, ‘[t]his Court has never invalidated a State’s chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment.’”).

²⁷ See *Kas*, *supra* note 8, at 2 (stating Socrates was forced to drink hemlock-extract). “[P]lant-based extracts that were known to cause death were sought as an alternative to decapitation and other inhuman means of execution of a condemned person.” *Id.*

²⁸ See *id.* (“The execution of condemned prisoners in a humane and painless manner was the central motive behind the consideration of lethal injection as an execution method.”).

²⁹ See *States With and Without the Death Penalty: As of November 9, 2016*, DEATH PENALTY INFO. CTR. (last visited Feb. 2, 2017), <http://deathpenaltyinfo.org/states-and-without-death-penalty> (analyzing states utilizing death penalty statutes for capital offenses). The growing trend has been for states to abolish the death penalty for several reasons, most importantly because it is cruel and unusual. *Id.* See also *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014) (“The Eighth Amendment’s protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be”). Because the legal standard is an evolving one, it is both necessary and appropriate for us to consider the issue anew, considering relevant recent developments, when it is raised. *Id.* at 1992-93; *State v. Santiago*, 122 A.3d 1, 32 (Conn. 2015) (“Whether a punishment is disproportionate and excessive is to be judged by . . . ‘evolving standards of decency that mark the progress of a maturing society’ . . . [T]he constitutional guarantee against excessive punishment is ‘not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.’”).

³⁰ See *Santiago*, 122 A.3d at 18, 30. Many states have begun to recognize the lack of necessity for having the death penalty. *Id.*

the death penalty, there has been an overwhelming lack of support for its reappointment; that is not by coincidence.³¹ In 1947, the death penalty was abolished in Massachusetts and there has not been an effort to reinstate the death penalty since 2007, when an effort was outright denied.³²

Massachusetts is a progressive state that chose to abolish the death penalty after 345 executions took place, including those during the Salem Witch Trials and Executions.³³ The first execution on American soil was that of John Billington, who was hanged in Plymouth, Massachusetts in 1630 for the murder of John Newcomen.³⁴ Several years later, the Salem Witch Trials took place and more than twenty were executed for their alleged involvement in witchcraft.³⁵ During the 1900s, the electric chair was used in Massachusetts as the primary method of execution; most notorious was the execution of Nicola Sacco and Bartolomeo Vanzetti.³⁶ Philip Bellino and Edward Gertson were the last two individuals executed in Massachusetts in 1947.³⁷

Bellino and Gertson were the last to be executed in Massachusetts for a myriad of reasons, including the 1972 Supreme Court ruling in *Furman*

We do agree with our sister courts, however, that, under the state constitution, the pertinent standards by which we judge the fairness, decency, and efficacy of a punishment are necessarily those of Connecticut. Although regional, national, and international norms may inform our analysis, the ultimate question is whether capital punishment has come to be excessive and disproportionate in *Connecticut*.

Id. See also James R. Acker & Elizabeth R. Walsh, *Challenging the Death Penalty under State Constitutions*, 42 VAND. L. REV. 1299, 1325 (1989) (“Even if state courts are guided by the doctrinal analysis now associated with the eighth amendment, their frame of reference for measuring evolving standards of decency must be within state borders . . .”) (internal citations omitted); *Fleming v. Zant*, 386 S.E.2d 339, 342 (Ga. 1989) (“The ‘standard of decency’ that is relevant to the interpretation of the prohibition against cruel and unusual punishment found in the Georgia Constitution is the standard of the people of Georgia, not the national standard”); *Dist. Attorney for Suffolk Dist. v. Watson*, 411 N.E.2d 1274, 1281-83 (Mass. 1980) (holding death penalty violated state constitution on basis of contemporary standards of decency in Massachusetts).

³¹ See Garrett Quinn, *The Complicated History of the Death Penalty in Massachusetts, From the Salem Witch Trials to Dzhokhar Tsarnaev*, MASS LIVE (Feb. 11, 2014), http://www.masslive.com/news/boston/index.ssf/2014/02/history_of_the_death_penalty_i.html (discussing lack of support for death penalty).

³² See *id.* (noting Massachusetts as original state utilizing death penalty but has since done away with it).

³³ See *id.* (exploring history of death penalty used in Massachusetts).

³⁴ See *id.* (explaining first execution in Massachusetts).

³⁵ See *id.* (describing Salem Witch Trials and resulting executions).

³⁶ See *id.* (illustrating progression of execution methods to more humane means).

³⁷ See Quinn, *supra* note 31 (noting variety of reasons for halting such executions).

v. *Georgia*,³⁸ which ceased executions nationwide.³⁹ The Supreme Court held that Georgia’s death penalty statute was cruel and unusual because of the “arbitrary and capricious” nature of the procedure.⁴⁰ Massachusetts quickly responded in 1975 by nullifying the death penalty for murder convictions, but left the mandatory death penalty for rape-murder intact.⁴¹ Later, the death penalty for rape-murder was voided in *Commonwealth v. O’Neal*,⁴² finding that “the right to life is fundamental and due process requires that the state bears the burden to demonstrate a compelling interest

³⁸ 408 U.S. 238 (1972).

³⁹ *Id.* at 244-45 (holding death penalty was unconstitutional). The Supreme Court analyzed the meaning of the words “cruel and unusual” in the Eighth Amendment to the United States Constitution. *Id.*

The words “cruel and unusual” certainly include penalties that are barbaric. But the words, at least when read in light of the English proscription against selective and irregular use of penalties, suggest that it is “cruel and unusual” to apply the death penalty—or any other penalty—selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board.

Id.

⁴⁰ *See id.* at 281-82 (discussing factors to determine whether particular punishment is cruel and unusual). The *Furman* Court analyzed the arbitrary and capricious nature of the death penalty procedure as an element of the death penalty being cruel and unusual. *Id.*

[S]ince the Bill of Rights was adopted, this Court has adjudged only three punishments to be within the prohibition of the Clause. Each punishment, of course, was degrading to human dignity, but of none could it be said conclusively that it was fatally offensive under one or the other of the principles. Rather, these “cruel and unusual punishments” seriously implicated several of the principles, and it was the application of the principles in combination that supported the judgment. That, indeed, is not surprising. The function of these principles, after all, is simply to provide means by which a court can determine whether a challenged punishment comports with human dignity. They are, therefore, interrelated, and in most cases it will be their convergence that will justify the conclusion that a punishment is “cruel and unusual.” The test, then, will ordinarily be a cumulative one: If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.

Id.

⁴¹ *See Commonwealth v. Harrington*, 323 N.E.2d 895, 896-902 (Mass. 1975) (noting situations where death sentence may be applicable form of punishment).

⁴² 339 N.E.2d 676 (Mass. 1975).

in execution that could not be served by any less restrictive means.”⁴³ The late 1970s saw turbulence surrounding the reinvigoration of the death penalty statute in Georgia, which caused many legislatures throughout the nation to begin rewriting their death penalty statutes.⁴⁴ The Massachusetts House of Representatives sought the opinion of the Supreme Judicial Court (“SJC”) concerning the constitutionality of the revised death penalty statute.⁴⁵ The SJC found that the death penalty statute failed to contribute to a legitimate state purpose, such as deterring criminal conduct.⁴⁶ In *Dist. Attorney v. Watson*,⁴⁷ the SJC held that the new death penalty statute was unconstitutionally cruel.⁴⁸ Again, the Massachusetts legislature worked to redraft the legislation, passing amendments and, ultimately, passing another

⁴³ See *id.* (finding that evidence was insufficient to demonstrate that death penalty was deterrent). “Despite the most exhaustive research by noted experts in the field, there is simply no convincing evidence that the death penalty is a deterrent superior to lesser punishments.” *Id.* at 682.

⁴⁴ See *Gregg v. Georgia*, 428 U.S. 153, 153-54 (1976) (reinstating death penalty in Georgia after statute revision). Georgia tried to revise the death penalty statute to make it less cruel and unusual. *Id.* The court stated the following:

[T]hat statute, as amended following . . . the death penalty for murder and five other crimes. Guilt or innocence is determined in the first stage of a bifurcated trial; and if the trial is by jury, the trial judge must charge lesser included offenses when supported by any view of the evidence. Upon a guilty verdict or plea a presentence hearing is held where the judge or jury hears additional extenuating or mitigating evidence and evidence in aggravation of punishment if made known the defendant before trial. At least one of 10 specified aggravating circumstances must be found to exist beyond a reasonable doubt and designated in writing before a death sentence can be imposed. In jury cases, the trial judge is bound by the recommended sentence. In its review of a death sentence (which is automatic), the State Supreme Court must consider whether the sentence was influenced by passion, prejudice, or any other arbitrary factor; whether the evidence supports the finding of a statutory aggravating circumstance; and whether the death sentence “is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.” If the court affirms the death sentence it must include in its decision reference to similar cases that it has considered.

Id. (citations omitted).

⁴⁵ See *O’Neal*, 339 N.E.2d at 682 (citing *Furman*, 408 U.S. at 346-47 (Marshall, J., concurring)) (“[T]he question to be considered . . . is not simply whether capital punishment is a deterrent, but . . . whether it is a better deterrent than life imprisonment.”).

⁴⁶ See *id.* (quoting *Furman v. Georgia*, 408 U.S. 238, 346-47 (1972)) (debating whether capital punishment is more favorable than life in jail).

⁴⁷ 411 N.E.2d 1274 (Mass. 1980).

⁴⁸ See *id.* at 1281-83 (holding death penalty is offensive to contemporary standards of decency in Massachusetts). There are alternatives to the death penalty that are not questioned as being cruel and unusual. *Id.*

new death penalty bill in 1983.⁴⁹ In *Commonwealth v. Colon-Cruz*,⁵⁰ the SJC invalidated the 1983 statute.⁵¹ Following this decision, there were several attempts to reinstate the death penalty, but they were all unsuccessful.⁵² The final attempts, first in 2005, when the Governor’s Council on Capital Punishment issued their final recommendations for creating a system “as infallible as humanly possible” was ultimately defeated by a vote of 100-53; and again in 2007, another attempt was made when Massachusetts House lawmakers overwhelmingly rejected another bill to reinstate the death penalty by a vote of 110-46.⁵³ This last attempt was the final performance surrounding the reinstatement of the death penalty in Massachusetts; however, the debate began to reignite itself during the trial of Dzhokhar Tsarnaev, when Attorney General Eric Holder sought the death penalty for the Boston Marathon bomber in federal court.⁵⁴

The vast split between the states on the death penalty is interesting, as it is difficult to perceive neighboring states having radically different

⁴⁹ See United States Department, Bureau of Justice Statistics Reports, *Capital Punishment* 1983 (last revised June 1984), <http://www.bjs.gov/content/pub/pdf/cp83.pdf> (explaining enactment of new law in Massachusetts in 1983 regarding death penalty).

⁵⁰ 470 N.E.2d 116 (Mass. 1984).

⁵¹ See *id.* at 124 (explaining unconstitutionality of provisions). The court explored the effects and the outcomes that an individual may receive or plead because they face the death penalty as a punishment. *Id.*

[T]he death penalty provisions enacted St. 1982, c. 554 violate art. 12 of the Declaration of Rights of the Massachusetts Constitution. They impermissibly burden both the right against self-incrimination and the right to a jury trial guaranteed by that article. We base this conclusion on the fact that according to the terms of St. 1982, c. 554, the death penalty may be imposed, if at all, only after a trial by jury. Those who plead guilty in cases in which death would be a possible sentence after trial thereby avoid the risk of being put to death. The inevitable consequence is that defendants are discouraged from asserting their right not to plead guilty and their right to demand a trial by jury.

Id.

⁵² See *Death Penalty News: A Summary of Events on the Death Penalty and Moves Towards Worldwide Abolition*, AMNESTY INTERNATIONAL 3, (Sept. 1994), <https://www.amnesty.org/download/Documents/184000/act530031994en.pdf> (highlighting 86-70 vote in Massachusetts House against reinstatement of death penalty).

⁵³ See HOFFMAN ET AL., GOVERNOR’S COUNCIL ON CAPITAL PUNISHMENT, available at <http://www.mass.gov/courts/docs/lawlib/docs/5-3-04governorsreportcapitalpunishment.pdf> (last visited May 20, 2016) (discussing recommendations on death penalty).

⁵⁴ See Quinn, *supra* note 31; see also Tom Keane, *Why Boston is Queasy About the Tsarnaev Death Sentence*, POLITICO MAGAZINE (May 16, 2015), <http://www.politico.com/magazine/story/2015/05/why-boston-is-queasy-about-the-tsarnaev-sentence-118019#ixzz3xuFgFnN2> (“This deep-blue state has been long known for its opposition to capital punishment, but apparently those noble principles have been trumped by cold reality. Even liberals, it seems, will seek harsh vengeance when it’s their children getting killed and their streets red with blood.”).

views on the death penalty.⁵⁵ The *Furman* case blazed a new path in finding the death penalty as “cruel and unusual,” which caused states to eliminate the death penalty or rewrite their statutes.⁵⁶ Nonetheless, it is important to remember that at a point in time, the death penalty was found unconstitutional for being cruel and unusual.⁵⁷ Massachusetts looked even further in its decisions, concluding that the death penalty does not have an effect on decreasing violence and that Due Process is violated because the right to life is a fundamental right.⁵⁸ It is interesting to have one state finding the death penalty is cruel and unusual and violative of an individual’s right to life, but the majority of the states and the Federal Government not concurring with this overwhelmingly evident constitutional right.⁵⁹

There are eighteen other states that have abolished the death penalty for a variety of reasons, mostly stemming from the fact that the death penalty constitutes cruel and unusual punishment.⁶⁰ According to Diann Rust-Tierney, executive director for the National Coalition to Abolish the Death Penalty, “[t]he death penalty is no longer getting a pass.”⁶¹ “People may support the idea in the abstract, but when they see how it’s done, how it’s doing nothing to enhance public safety, and when they see innocent people being released from death row, they see that they can’t square it with their other values.”⁶² The death penalty is not a fixture for public safety and it does not carry a significant success in deterring violent crime.⁶³

⁵⁵ See *Deterrence: States Without the Death Penalty Have Had Consistently Lower Murder Rates*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/deterrence-states-without-death-penalty-have-had-consistently-lower-murder-rates> (last visited Oct. 17, 2016) [hereinafter *Deterrence*] (comparing murder rate in states with death penalty and without death penalty).

⁵⁶ See *Furman v. Georgia*, 408 U.S. 238, 255 (1972) (recognizing capital punishment violative of Eighth Amendment).

⁵⁷ See *id.* (explaining death penalty statute was cruel and unusual).

⁵⁸ See Quinn, *supra* note 31 (reviewing Massachusetts’ historical use of death penalty).

⁵⁹ See *Deterrence*, *supra* note 55 (demonstrating low murder rate in states without death penalty).

⁶⁰ See *id.* (illustrating numerous states have abolished death penalty because it is cruel and unusual).

⁶¹ See Josh Sanburn, *Which State Will Be Next to Abolish the Death Penalty*, TIME (May 28, 2015), <http://time.com/3900156/nebraska-death-penalty-repeal> (discussing Nebraska’s abolition of death penalty).

⁶² *Id.* (explaining how people do not truly understand process of executing inmates).

⁶³ See *Deterrence*, *supra* note 55 (highlighting statistical evidence that death penalty does not impact crime rate).

B. Success of the Death Penalty

The support for the death penalty typically comes from the uninformed idea that the death penalty acts as a deterrent for violent crime.⁶⁴ The murder rate is higher in all thirty-one states that use the death penalty compared with states that do not have the death penalty.⁶⁵ Similar to the argument of the SJC in Massachusetts, the death penalty has no legitimate purpose in protecting society because it is not a successful deterrent against crime.⁶⁶

Another major issue with the death penalty is its cost, as this procedure is cumbersome and extraordinarily expensive.⁶⁷ Regular court and attorney costs are heavily scrutinized, but the astronomical costs of a death penalty case are mind-boggling at roughly \$20 million per execution.⁶⁸ The costs nearly double for an appeal, an overturned conviction, or an attempt to seek the death penalty a second time, not to mention the cost of maintaining an inmate on death row.⁶⁹

⁶⁴ See *id.* (recognizing non-death penalty states have lower murder rates compared to death penalty states).

⁶⁵ See *id.* (signaling over half of non-death penalty states fall below national average of homicide rates).

⁶⁶ See Craig J. Albert, *Challenging Deterrence: New Insights on Capital Punishment Derived from Panel Data*, 60 U. PITT. L. REV. 321, 356 (1999) (“Studies of the deterrence hypothesis that analyze the effect of executions on homicide rates within a single state over time have uniformly failed to find a deterrent effect.”).

⁶⁷ See Stephen B. Bright, *The Death Penalty as the Answer to Crime: Costly, Counterproductive and Corrupting*, 35 SANTA CLARA L. REV. 1211, 1211 (1995) (“The death penalty . . . [is] being put forward as an answer to the problem of violent crime. This approach is both expensive and counterproductive . . . It is not making our streets any safer.”).

⁶⁸ See Richard C. Dieter, *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases At Enormous Costs to All*, DEATH PENALTY INFO. CTR. 1, 15 (Oct. 2013), www.deathpenaltyinfo.org/documents/TwoPercentReport.pdf (analyzing cost of death penalty compared to number of counties that issue such sentences). The cost of executing people is incredibly expensive. *Id.*

[S]ince 1973, when states began sentencing people to death under new capital punishment statutes, there have been 8,300 death sentences through the end of 2011. [T]he bill to U.S. taxpayers for those sentences amounts to almost \$25 billion, a staggering sum for the 85% of U.S. counties that have not had a single case resulting in an execution.

If this cost is divided by the number of executions during that time, the result is that taxpayers are doling out almost \$20 million *per execution*.

Id.

⁶⁹ See *id.* at 17 (analyzing how costs of death penalty are distributed). The taxpayers pay the increase cost of inmates on death row, which is often a significant period of time. *Id.*

Nonetheless, the death penalty has continued to persevere throughout the centuries despite serious scrutiny of its constitutionality.⁷⁰ The death penalty has taken a variety of forms throughout its duration, leading to the present-day form of lethal injection.⁷¹

II. LETHAL INJECTION

Lethal injection has emerged as the most common form of capital punishment in states that still use execution as a method of punishment.⁷² This method of execution was found to be the most effective and painless

The costs of incarceration on death row are the responsibility of state taxpayers. Keeping an inmate on death row for a year is typically much more expensive than keeping a non-capital inmate in the general prison population, due to higher guard-to-inmate ratio and tighter security measures. Inmates on death row are usually in isolation cells, fed through a slot in the cell door; they have guards accompanying them to visits, and rarely participate in the work of the prison.

Id. at 17.

⁷⁰ See *Glossip v. Gross*, 135 S. Ct. 2726, 2772 (2015) (Sotomayor, J., dissenting) (illustrating continuing use of death penalty, but declining number of executions). “Last year, in 2014, only seven States carried out an execution. Perhaps more importantly, in the last two decades, the imposition and implementation of the death penalty have increasingly become unusual.” *Id.*

⁷¹ See *id.*

⁷² See *id.* at 2732 (quoting *Baze v. Rees*, 553 U.S. 35, 42 (2008)) (“[Lethal injection is] by far the most prevalent method of execution in the United States”); see also *A New Test*, *supra* note 7 (noting lethal injection is not uniform in states that utilize death penalty).

Lethal injection statutes vary considerably. Whereas some states regulate executions in detail, others have not officially adopted written protocols. Several states mandate the use of barbiturates followed by chemical paralytic agents, while others are vague. In addition, several states authorize multiple execution methods, and they vary in how the method is selected. Ten states permit the government to switch to another method if lethal injection is declared unconstitutional. However, despite the statutory variations, almost every state uses the same process for executing prisoners.

Id.; Kas, *supra* note 8, at 4 (reviewing historical trends of capital punishment in United States). The older, more reliable method of execution used sodium thiopental. *Id.*

The three-drug Chapman protocol, for lethal injection involving sodium thiopental, pancuronium bromide, and potassium chloride was practiced by the majority of U.S. states for decades. According to this protocol, the short-acting barbiturate thiopental sodium is purposefully administered as the first injection through an IV route to induce anesthesia. This follows the injection of the paralytic agent pancuronium bromide, which ceases muscular function, including those involved in respiration. The third injection involves a high dose of potassium chloride, which disrupts cardiac function, leading to death.

Id.

method of carrying out the task.⁷³ Lethal injection protocol called for the use of three drugs: sodium thiopental, paralytic agent, and potassium chloride.⁷⁴ “One or more drugs are injected to induce death of condemned prisoner during the lethal injection procedure.”⁷⁵ The inability for states to obtain sodium thiopental has led states to adopt midazolam.⁷⁶ A greater problem has recently emerged, stemming from pharmaceutical companies ceasing production of sodium thiopental, among other drugs used in the lethal injection cocktail, resulting in prisons accessing black or off market drugs to carry out the death penalty.⁷⁷

⁷³ See *Glossip*, 135 S. Ct. at 2733 (majority opinion) (“[B]ecause some risk of pain is inherent in any method of execution, we have held that the Constitution does not require the avoidance of all risk of pain”); *Baze v. Rees*, 553 U.S. 35, 47 (2008) (“Some risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure. It is clear, then, that the Constitution does not demand the avoidance of all risk of pain in carrying out executions.”); Zivot, *supra* note 8 and accompanying text; but see Chris Fisher, *supra* note 19, at 40 (“Under such circumstances, the prisoner will suffer an extremely painful sensation of crushing and suffocation, as the Pancuronium Bromide takes effect and stops his ability to breathe.”).

⁷⁴ See *A New Test*, *supra* note 7, at 1302 (“Three chemicals are used. First, the state injects sodium thiopental, a barbiturate that rapidly causes unconsciousness. Second, the state injects pancuronium bromide, a muscle relaxant that paralyzes the body. Finally, the state injects potassium chloride, which induces cardiac arrest.”); see also Jason D. Hughes, *The Tri-Chemical Cocktail: Serene Brutality*, 72 ALB. L. REV. 527, 536 (2009) (outlining reasoning for lethal injection). The purpose of lethal injection was to painlessly and quickly execute inmates. *Id.* The article’s author states:

[t]he idea of causing death by quickly releasing lethal chemicals into the condemned’s body, as opposed to inundating the victim’s organs with thousands of volts of electricity, or by filling his or her lungs with lethal, spasm-inducing gas, seems indisputably humane. Despite its comparative humanity in the abstract, however, and although causing death in such a way concededly has the potential to be the most humane method developed thus far, the current implementation of this method, specifically the chemicals used and protocols in place, amounts to a procedure that falls far short of its potential.

Id.

⁷⁵ See *Kas*, *supra* note 8, at 3 (“The commonly used drugs include sodium thiopental, pentobarbital, pancuronium bromide, midazolam, hydromorphone, and potassium chloride.”).

⁷⁶ See *Glossip*, 135 S. Ct. at 2734 (“Unable to acquire either sodium thiopental or pentobarbital, some States have turned to midazolam, a sedative in the benzodiazepine family of drugs.”); see also *Kas*, *supra* note 8, at 4 (“The shortage of sodium thiopental prompted the correctional authorities to replace this drug with pentobarbital or midazolam.”).

⁷⁷ John Ericson, *Botched Execution Shows Perils of Lethal Injection Drug Shortage*, NEWSWEEK, Apr. 30, 2014, <http://www.newsweek.com/2014/05/16/states-go-great-lengths-find-lethal-injection-drugs-249154.html> (identifying issues with third-party pharmaceutical suppliers). A black market has formed among prison officials to obtain lethal injection drugs. *Id.*

Why are high-ranking prison officials from America’s death penalty states showing up with wads of cash at under-regulated pharmacies, swapping briefcases in the desert and riffling through odd inventories of untested anesthetics? Why are correctional facilities

A. *Constitutionality of Capital Punishment*

The Eighth Amendment of the United States Constitution allows for capital punishment to be carried out as a method of punishment for the most severe crimes.⁷⁸ The controversy arises from the demand that any and all risk of pain should be eliminated from the process of capital punishment, but such a decision would render capital punishment null.⁷⁹ To have any success in an argument against the method of execution as violative of the Eighth Amendment, an opponent must demonstrate that the method presents a risk that is “sure or very likely to cause serious harm and needless suffering, and give rise to sufficiently imminent dangers.”⁸⁰

i. *Glossip v. Gross* Analysis of Constitutionality

In *Glossip v. Gross*,⁸¹ the United States Court of Appeals for the Tenth Circuit did not err when it affirmed the district court’s judgment that inmates were not entitled to enjoin the State from using a 500-milligram dose of midazolam as the first drug administered before it administered a paralytic agent and potassium chloride.⁸² The inmates were awaiting execution in

being dragged into court for refusing to disclose the compounds used to put inmates to death? And why is the state of Tennessee set to plug in its mothballed electric chair for the first time in nearly a decade?

Id.

⁷⁸ See *Glossip*, 135 S. Ct. at 2728 (“Because capital punishment is constitutional, there must be a constitutional means of carrying it out.”).

⁷⁹ See *id.* at 2733 (“Holding that the Eighth Amendment demands the elimination of essentially all risk of pain would effectively outlaw the death penalty altogether.”).

⁸⁰ See *id.* at 2737 (quoting *Farmer v. Brennan*, 511 U.S. 825, 846 (1994)) (“[T]here must be a ‘substantial risk of serious harm,’ an ‘objectively intolerable risk of harm’ that prevents prison officials from pleading that they were ‘subjectively blameless for purposes of the Eighth Amendment.’”); see also *La. ex rel. Francis v. Resweber*, 329 U.S. 459, 469-70 (1947).

[A] State may be found to deny a person due process by treating even one guilty of crime in a manner that violates standards of decency more or less universally accepted though not when it treats him by a mode about which opinion is fairly divided. But the penological policy of a State is not to be tested by the scope of the Eighth Amendment and is not involved in the controversy, which is necessarily evoked by that Amendment as to the historic meaning of “cruel and unusual punishment.”

Id.

⁸¹ See 135 S. Ct. 2728, 2726 (2015).

⁸² See *id.* at 2734-35 (defining Oklahoma’s plan to use midazolam to execute petitioners). In the case:

Oklahoma when they argued that the use of midazolam violated the Eighth Amendment.⁸³

The district court’s determination that a 500-milligram dose of midazolam would make it a virtual certainty that any individual would be at a sufficient level of unconsciousness to resist the noxious stimuli, was not clearly erroneous; and, here, the inmates failed to identify a known and available alternative method of execution that presented a substantially less severe risk of pain.⁸⁴ Furthermore, the protocol includes procedural safeguards to insure that the prisoner will not experience pain during this procedure.⁸⁵

ii. The Use of Midazolam in the Absence of Access to Sodium Thiopental

Prior to *Glossip*, numerous courts have challenged the constitutionality of capital punishment, contending that it violates the Eighth Amendment, the administration of midazolam is insufficient, and the procedure includes unnecessary pain and suffering.⁸⁶ At the time Oklahoma

[F]our of those inmates filed a motion for a preliminary injunction and argued that a 500-milligram dose of midazolam will not render them unable to feel pain associated with administration of the second and third drugs. After a three-day evidentiary hearing, the District Court denied the motion. It held that the prisoners failed to identify a known and available alternative method of execution that presented a substantially less severe risk of pain. It also held that the prisoners failed to establish a likelihood of showing that the use of midazolam created a demonstrated risk of severe pain.

Id. at 2729.

⁸³ See *id.* (arguing use of midazolam violated constitutional “prohibition of cruel and unusual punishment”).

⁸⁴ See *id.* at 2736; but see *Kas*, *supra* note 8, at 4 (describing ineffectiveness of midazolam). “Review of executions during 2014 clearly revealed the incidences of unintended adverse events (agitation, prolonged gasping for air, and prolonged time needed for the death of prisoners) associated with the use of midazolam.” *Id.* at 6.

⁸⁵ See *Glossip*, 135 S. Ct. at 2735 (outlining procedural safeguards for Oklahoma’s execution protocol). Oklahoma’s safeguards include:

(1) the insertion of both a primary and backup IV catheter, (2) procedures to confirm the viability of the IV site, (3) the option to postpone an execution if viable IV sites cannot be established within an hour, (4) a mandatory pause between administration of the first and second drugs, (5) numerous procedures for monitoring the offender’s consciousness, including the use of an electrocardiograph and direct observation, and (6) detailed provisions with respect to the training and preparation of the execution team.

Id.

⁸⁶ See *Baze v. Rees*, 553 U.S. 35, 52 (2008) (upholding lethal injection as method of execution). Death row inmates challenged the constitutionality of the three-drug protocol claiming

switched from pentobarbital to midazolam, Richard Glossip, Benjamin Cole, John Grant, and Warner filed a preliminary injunction asserting the new lethal injection protocol violated the Eighth Amendment's prohibition against cruel and unusual punishment.⁸⁷ Each of the plaintiffs were convicted of murder and sentenced to death.⁸⁸ The plaintiffs contended that: (1) midazolam, even if powerful enough to induce unconsciousness, "is too weak to maintain unconsciousness and insensitivity" for the rest of the procedure, and (2) midazolam has a "ceiling effect" that after a certain dosage it becomes ineffective.⁸⁹ After a three-day evidentiary hearing on the

that it "posed an unacceptable risk of significant pain and was cruel and unusual." *Id.* The court held that the risk of improper administration of the initial drug did not render three-drug protocol cruel and unusual, and the state's failure to adopt allegedly more humane alternatives to three-drug protocol did not constitute cruel and unusual punishment. *Id.*; see also *Howell v. State*, 133 So. 3d 511, 511-12 (Fla. 2014) (explaining use of midazolam as sufficient).

[T]he Supreme Court held that: (1) burden was on defendant to establish cruel and unusual punishment with regards to lethal injection protocol; (2) administration of midazolam as part of lethal injection protocol was not cruel and unusual punishment as applied to defendant; [and] (3) forced administration of vecuronium bromide as part of lethal injection protocol did not violate due process.

Id.; see also *Clemons v. Crawford*, 585 F.3d 1119, 1120 (8th Cir. 2009) (sustaining challenge to death penalty lethal injection protocol).

[T]he court held that: (1) written protocol for successive administration of three chemicals through intravenous (IV) line placed in femoral vein of condemned prisoner did not violate Eighth Amendment; (2) prisoners did not allege sufficiently substantial risk of serious harm or sufficiently imminent danger with regard to their pending execution to support Eighth Amendment claim.

Id. Furthermore, the court held it did not violate the inmates' due process to deny discovery to obtain information about the executions for the inmate to discover if the execution personnel was competent or qualified. *Id.*; see also *Rhoades v. Reinke*, 671 F.3d 856, 858 (9th Cir. 2011) (declining stay of execution on challenge of constitutionality of three-drug lethal injection protocol).

⁸⁷ See *Glossip*, 135 S. Ct. at 2735 (describing plaintiff-inmates' arguments about ineffectiveness of midazolam).

⁸⁸ See *id.* (explaining convictions of each plaintiff). Each plaintiff was convicted of murder and sentenced to death. *Id.*

[T]he Oklahoma Court of Criminal Appeals affirmed the murder conviction and death sentence of each offender. Each of the men then unsuccessfully sought both state postconviction and federal habeas corpus relief. Having exhausted the avenues for challenging their convictions and sentences, they moved for a preliminary injunction against Oklahoma's lethal injection protocol.

Id.

⁸⁹ *Id.* 2740 (finding midazolam capable of rendering inmates sufficiently unconscious to resist noxious stimuli from subsequent drugs).

preliminary injunction, the district court concluded that midazolam was sufficient.⁹⁰

Numerous doctors and drug manufacturers have commented on the use and effectiveness of midazolam in rendering the individual unconscious and preventing immense pain.⁹¹ The American Pharmacist Association (“APhA”) discourages all pharmacists from participating in executions.⁹² Akorn, a major drug manufacturer, refuses to ship midazolam and hydromorphone hydrochloride to prisons for use in executions.⁹³ The drug manufacturer’s CEO is cited as promoting human health and wellness, rather than being associated with convict executions.⁹⁴ While testifying as an expert witness in a botched execution in California, an affidavit from an anesthesiologist stated that to his knowledge a dosage of 10-milligrams of midazolam is not sufficient to render the inmate unconscious.⁹⁵ The doctor goes on to state that there are numerous alternatives, which could be used and that “other inmates in the future could suffer egregious inhumane deaths.”⁹⁶

⁹⁰ See *id.* at 1235-36 (holding midazolam sufficient for lethal injection protocol). The district court heard testimony from numerous witnesses, including an anesthesiologist and a doctor of pharmacy, asserting the sufficiency of midazolam. *Id.* The court held the use of midazolam made it a “virtual certainty” that the prisoner would be rendered unconscious and would not experience pain during the procedure. *Id.*

⁹¹ See *Lethal Injection*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/lethal-injection> (last visited Nov. 2015) (examining procedures used in lethal injection).

⁹² See *id.*

⁹³ See Press Release, Akorn-Investor Relations, Akorn Adopts Comprehensive Policy to Support the Use of Its Products to Promote Human Health (Mar. 4, 2015) (on file with author), <http://www.deathpenaltyinfo.org/files/AkornStatement.pdf> (releasing statement condemning use of products for death penalty).

⁹⁴ See *id.* (explaining drug manufacturers’ desire to be credited with promoting and helping people’s lives).

⁹⁵ 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, 119 (2002) (describing expert testimony about quantities of chemicals used in injection based on inmate).

⁹⁶ *Id.* at 68. There are other options to lethal injection, which is frequently improper and botched. *Id.*

[L]ethal injection appears to be unconstitutional given the science and faulty application of injections. However, the protocols are so sketchy, and the procedure so covert, that legislatures and courts are able to turn a blind eye toward the consequences. Moreover, prison officials are wrongly delegated a degree of discretion for which they have no training and knowledge.

Id. at 68-69.

Midazolam replaced pentobarbital when pharmaceutical companies ceased the production and distribution of the drug.⁹⁷ States began to turn to midazolam, which is a sedative in the benzodiazepine family of drugs.⁹⁸ “A two-drug protocol consisting of midazolam and hydromorphone combo was sought as an alternative to circumvent the shortage of drugs.”⁹⁹ The Court has held that the use of midazolam is a sufficient replacement to sodium thiopental and therefore, constitutional.¹⁰⁰

Glossip was granted a thirty-seven day stay of execution on September 30, 2015, as questions arose surrounding the method of execution and his innocence.¹⁰¹ Subsequently, numerous inmates on death row have

⁹⁷ See *Glossip v. Gross*, 135 S. Ct. 2726, 2729 (2015) (Breyer, Sotomayor, JJ., dissenting) (noting anti-death-penalty advocates pressured pharmaceutical companies to prevent sodium pentobarbital from being used in executions). States sought an alternative, but anti-death-penalty advocates lobbied the manufacturer to stop selling it for use in executions. *Id.* at 2733; see also *Kas*, *supra* note 8, at 5 (explaining pharmaceutical companies’ lethal drug production shortage); Andy Coughlan, *Ohio to Execute Prisoner Using Untested Drug Combination*, 220 NEW SCIENTIST 1, 7 (Oct. 30, 2013), available at <https://www.newscientist.com/article/mg22029413-000-ohio-to-execute-prisoner-using-untested-drug-combo/no> (discussing manufacturers ceasing production of certain drugs).

[L]ike several other states, Ohio’s prisons have run out of the anesthetic pentobarbital. In 2011, the sole manufacturer . . . said it would no longer sell to prisons in states with the death penalty . . . Pentobarbital replaced sodium thiopental, the anesthetic used until its manufacturer, Hospira ceased production in 2011.

Id.; see also *Ericson*, *supra* note 77 (stating Hospira announced ending production of drugs used in lethal injection); *Pfizer Blocks Use of its Drugs for Lethal Injections*, CBS NEWS (May 13, 2016, 11:33 PM), <http://www.cbsnews.com/news/pfizer-blocks-use-of-its-drugs-for-lethal-injections> (stating Pfizer, which bought Hospira, refuses to produce drugs for lethal injection).

⁹⁸ See *Glossip*, 135 S. Ct. at 2734 (majority opinion) (stating both drugs became unavailable causing states to turn to midazolam); Coughlan, *supra* note 97 (“Shortages of the anesthetic used in lethal injections are causing U.S. states to switch to untested combinations of drugs.”).

⁹⁹ *Kas*, *supra* note 8, at 3 (explaining lack of pentobarbital leading to alternative option).

¹⁰⁰ See *Glossip*, 135 S. Ct. at 2736 (“It found that a 500-milligram dose of midazolam would make it a virtual certainty that any individual will be at a sufficient level of unconsciousness to resist the noxious stimuli which could occur from the application of the second and third drugs.”); but see *Kas*, *supra* note 8, at 4 (stating use of two-drug protocol was ineffective). “Reports indicated the occurrence of unanticipated incidences in the executions, where prisoners reportedly suffered for an extended period of time prior to death.”; see also *Warner v. Gross*, 776 F.3d 721, 725 (10th Cir. 2015) (explaining botched execution of prisoner). The prisoner was provided with only a 100-milligram dose of midazolam, but because he had previously cut his arms, the executioners were forced to inject him in the right femoral artery. *Id.* The execution took several hours to complete. *Id.* at 725.

¹⁰¹ See *Glossip*, 135 S. Ct. at 2737 (quoting *Baze v. Rees*, 553 U.S. 35, 61 (2008)) (“A stay of execution may not be granted . . . unless the condemned prisoner establishes that the State’s lethal injection protocol creates a demonstrated risk of severe pain. And he must show that the risk is substantial when compared to the known and available alternatives.”). See also Carol Cole-Frowe & Manny Fernandez, *Oklahoma Governor Grants Richard Glossip a Stay of Execution*, N.Y. TIMES Sept. 30, 2015, <http://www.nytimes.com/2015/10/01/us/oklahoma-execution-richard->

been granted a stay in several states.¹⁰² The serious issues raised by the availability and effectiveness of the drugs used in executions and the overall constitutionality and nature of the execution have reinvigorated the debate surrounding the continued use of the death penalty.¹⁰³

B. OffMarket Purchases of Drugs to Use in Lethal Cocktail

In the absence of sodium thiopental and the swirling questions surrounding the use of midazolam, many prisons have resorted to “trading” lethal injection drugs amongst themselves and using drugs prepared by “compounding pharmacies,” which are unregulated by the Federal Government and are untested.¹⁰⁴ The use of untested and unregulated drugs

glossip.html (quoting *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015) (Breyer, Sotomayor, JJ., dissenting)).

¹⁰² See Tracy Connor, *Court OKs Ohio Do-Over of Failed Lethal Injection of Romell Broom*, NBC NEWS (Mar. 16, 2016), <http://www.nbcnews.com/storyline/lethal-injection/court-oks-ohio-do-over-failed-lethal-injection-romell-broom-n540136> (announcing state can try lethal injection again after failed attempt); Mark Berman, *After Federal Appeals Court Stays Alabama Inmate’s Lethal Injection, Evenly Split Supreme Court Rejects Request to Step In*, THE WASH. POST (May 12, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/05/12/federal-appeals-court-delays-alabama-inmates-lethal-injection-hours-before-scheduled-execution/?utm_term=.a982e7a19fal (stating stay is granted); Kim Bellware & Christian Farias, *Death Row Inmate Richard Glossip Granted Reprieve Hours Before Execution*, HUFFINGTON POST (Sept. 16, 2016), http://www.huffingtonpost.com/entry/richard-glossip-stay_us_55f99f1de4b0e333e54c28fc (granting stay hours before execution); *Stays of Execution in 2015*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/2015-stays-execution> (last visited Nov. 2015) (detailing stays given by state in 2015). In 2015, seventy-two stays were granted, surrounding looming questions of innocence and the method of execution. *Id.* Many states imposed moratoriums on executions until a reliable method of lethal injection is established. *Id.*

¹⁰³ See Ericson, *supra* note 77 (discussing perils of lethal injection drug shortage). Many prisons in the United States, aside from the black market, now rely on compounding pharmacies:

[M]ost death rows now rely on a class of suppliers known as compounding pharmacies. In the world outside of death row, compounding pharmacies typically offer made-to-order drugs for patients . . . [T]his type of drug synthesis falls[] outside the regulatory scope of the Food and Drug Administration, as it is intended for specific prescriptions backed by a solid doctor-patient relationship. “That leaves it to the state to regulate—and that’s not happening.” . . . By turning a blind eye to these transactions, “they’re basically violating state law, and perhaps federal law as well, in order to provide drugs for the department of correction.”

Id.

¹⁰⁴ See generally STEVENSON, *supra* note 15, at 15-16. When sodium thiopental became inaccessible in the United States and was not obtainable from Europe, state correctional authorities began to obtain drugs illegally, without complying with FDA regulations. *Id.* “Drug raids of state correctional facilities were a bizarre consequence of this surreal drug dealing to carry out executions.” *Id.*

draws in other questions concerning the legality of the death penalty and violations of the Eighth Amendment.¹⁰⁵

III. THE FUTURE OF THE DEATH PENALTY IN THE UNITED STATES

The death penalty is appropriately challenged as a violation of the United States Constitution, and the current method merely treats violence with more violence.¹⁰⁶ The death penalty is not a successful deterrent, it is not humane, and it is not conducted appropriately.¹⁰⁷ The number of death sentences has declined rapidly from 300 in 1998, to 106 in 2009, to 28 in 2015.¹⁰⁸ Additionally, public support for the death penalty has been declining, which suggests that the once glorified use of capital punishment can no longer withstand Eighth Amendment scrutiny in today's society.¹⁰⁹ As the world continues to develop, the standard of decency also grows, increasing the likelihood that later generations will find that the methods of the death penalty are unconstitutional.¹¹⁰

The growing problems with lethal injection are raising concerns in our modern and technologically advanced society.¹¹¹ States' support for the

¹⁰⁵ See Ericson, *supra* note 77 (explaining issues with untested drugs being used in lethal injection).

¹⁰⁶ See *New Voices—Victims' Families*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/new-voices-victims-families> (last visited Jan. 2017) [hereinafter *New Voices*] (noting victims' families are calling for end to cycle of violence); see also Brad J. Bushman, *It's Time to Kill the Death Penalty*, PSYCHOLOGY TODAY (Jan. 19, 2014), <http://www.psychologytoday.com/blog/get-psyched/201401/it-s-time-kill-the-death-penalty> ("The death penalty is used to deter killers, but it models the very behavior it seeks to prevent.").

¹⁰⁷ See *New Voices*, *supra* note 106 (describing families of capital punishment victim and their plea for end of cycle of violence).

¹⁰⁸ See Timothy Williams, *Executions by States Fell in 2015, Report Says*, N.Y. TIMES Dec. 16, 2015, http://www.nytimes.com/2015/12/16/us/executions-by-states-fell-in-2015-report-says.html?_r=0 ("Executions in the United States in 2015 fell to their lowest number in nearly 25 years, and new death sentences imposed by courts declined to levels not seen since the early 1970s."). Additionally, only six states carried out executions in 2015, as some states placed a temporary moratorium on executions due to the lack of access to reliable drugs. *Id.*

¹⁰⁹ See *Public Opinion About the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/public-opinion-about-death-penalty> (last visited Jan. 2016) (discussing decline in public opinion regarding death penalty in United States).

¹¹⁰ See *id.* (providing statistics to support this lack of public support).

¹¹¹ See Mottor, *supra* note 4, at 305-06. The Legislature will have to revisit and revise the death penalty statutes to ensure that simple human dignity is preserved. *Id.*

The criminal justice system in the United States is going to have to change the procedure for lethal injection or create a new method of execution, whether through the above-discussed suggestions or other creative measures. "Legislatures and courts have

death penalty has declined over time, as well as the number of criminals sentenced to death.¹¹² Currently, thirty-one states and the Federal Government continue to use the death penalty, but this has not been a strongly held position throughout the ages.¹¹³ The percentage of Americans supporting the death penalty is the lowest that it is has been in history.¹¹⁴ The death penalty and the method of execution has been continuously

consistently stated that the primary reason states switch execution methods is to ensure greater humaneness and decency for death row inmates.” There have been more suits and stays of executions because of this problem. Although some courts have changed their lethal injection procedure, that is not sufficient to solve this issue. The current procedure used for lethal injection is presently in danger of courts ruling it as a violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment of the United States Constitution. Despite the problems with lethal injection, people continue to claim that lethal injection is not cruel enough in light of the crimes that some of the inmates commit.

Id. (quoting Denno, *supra* note 95, at 119).

¹¹² See Kas, *supra* note 8, at 2 (noting consistent decline in number of executions since 2000). “Eighty-five executions were carried out nationwide in 2000, whereas there were only 39 of them in 2013.” *Id.*

¹¹³ See Millett, *supra* note 23, at 589-90 (noting continual fluctuation in the number of states using the death penalty).

[B]y 1917, twelve states had abolished the death penalty, though “under the nervous tension of World War I, four of those States reinstituted” it. By the end of World War II, “[t]he manner of inflicting death changed, and the horrors of the punishment were, therefore, somewhat diminished in the minds of the general public” and, as a result, nothing much happened until many decades later. Between the years 1900 and 1966, an estimated 7,226 judicial executions were carried out in the United States. In addition, by the end of the 1960s, forty-one states, the District of Columbia, and the federal government all allowed the death penalty for at least one crime.

Id. (citations omitted).

¹¹⁴ See *National Polls and Studies*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/national-polls-and-studies#Pew> (last visited Dec. 2015) (explaining statistics pertaining to support for death penalty). Public support has been steadily declining. *Id.*

Polls released this week by Pew Research Center and CBS News show that public support for the death penalty has declined to near historic lows. Both polls reported that 56% of Americans support the death penalty. That is the lowest level of support ever recorded by the CBS News poll, and near the lowest level reported by Pew in the last 40 years.

Id.

challenged and questioned.¹¹⁵ In 1967, the Supreme Court placed a moratorium on the death penalty following the decision in *Furman*.¹¹⁶

The death penalty continues to be an aggressively debated issue throughout the United States, and the debate was recently reinvigorated with the trial of the Boston Marathon bomber in Massachusetts.¹¹⁷ While constitutionality has long been the question regarding the use of the death penalty, the growing concern in today's society is the method of execution.¹¹⁸ In its earliest form, execution was done by hanging or firing squad.¹¹⁹ Today, lethal injection is viewed as the most "humane" and technologically advanced method of killing individuals for their conviction of a capital offense.¹²⁰ The unfortunate reality is that lethal injection is not humane because it is not conducted properly and, therefore, causes immense pain.¹²¹

¹¹⁵ See *Glossip v. Gross*, 135 S. Ct. 2726, 2774 (2015) (Breyer, Sotomayor, JJ., dissenting) (highlighting decrease in executions as challenges increase). "In terms of population, if we ask how many Americans live in a State that at least occasionally carries out an execution (at least one within the prior three years), the answer two decades ago was 60% or 70%. Today, that number is 33%." *Id.* (Sotomayor, J., dissenting).

¹¹⁶ See Millett, *supra* note 23, at 589-90. The article's author states:

[A]s late as the 1960s, crimes punishable by the death penalty in at least two states included the following crimes: murder, treason, kidnapping, rape, statutory rape, robbery, bombing, assault with a deadly weapon by a life term prisoner, train wrecking, burglary, arson, perjury in a capital case, espionage, machine gunning, and other particular forms of assault. Notwithstanding, the number of executions in the 1960s began to decline: twenty-one in 1963, fifteen in 1964, seven in 1965, and only three between 1966 and 1967. After the Supreme Court heard two cases in the 1960s on the death penalty, an unofficial moratorium on executions in the states began in 1967.

Id.

¹¹⁷ See Keane, *supra* note 54 ("A Boston Globe poll conducted during the Tsarnaev trial, for example, found only 30 percent of the state's residents supported the death penalty. That contrasts markedly to national polls which show that – despite growing reservations about its use – it still has solid support."); see also Kas, *supra* note 8, at 1-2 (examining effectiveness of lethal injection). "Capital punishment by means of lethal injection has been the subject of intense discussion among Americans when unanticipated adverse events occurred during executions of several prisoners including Clayton Lockett in Oklahoma and Dennis McGuire in Ohio." *Id.* at 1.

¹¹⁸ See ROBERT SINGH, *CONTEMPORARY AMERICAN POLITICS AND SOCIETY: ISSUES AND CONTROVERSIES* 97 (Sage Publications, Ltd., 2003) (noting public's frustration with wrongful and botched executions).

¹¹⁹ See *Introduction to the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/part-i-history-death-penalty> (last visited Feb. 3, 2017) (outlining earliest forms of execution in America).

¹²⁰ See *supra* Part II (arguing unconstitutionality of lethal injection).

¹²¹ See *supra* Part II (discussing how lethal injection is improperly conducted in United States); Kas, *supra* note 8, at 2 (describing occurrences of "unanticipated adverse events" during execution of American prisoners). During one execution "[Clayton] Lockett's vein was reportedly ruptured with the administration of the last two drugs of the three-drug cocktail planned for the execution.

While it is argued, “who cares if they suffer in pain, they should because of what they did,” they are still people and have fundamental rights to life under the United States Constitution.¹²²

History has shown the ever-changing method of execution and the states rewriting their respective death penalty statutes.¹²³ Perhaps it is time once again to reevaluate and reflect on the method of execution, and whether it will continue to be upheld as constitutional.¹²⁴ There have been many methods of execution in the United States since the adoption of the Constitution and the Bill of Rights, but the official method has continually evolved to always be as humane as possible.¹²⁵ The question now focuses on the humaneness of lethal injection and preservation of human dignity of the worst criminals in our nation’s prisons.¹²⁶

Practitioners and judges will play an essential role in determining the future of the method of execution, as well as the future existence of the death penalty itself.¹²⁷ Perhaps now is the time to seriously reevaluate and reconsider the use of the death penalty as a punishment for some of the most

Reports indicated that Mr. Lockett lived for 43 minutes, convulsed, raised his head, and even uttered words during the procedure indicating tremendous discomfort and pain.” *Id.*

¹²² See *supra* Part II; *Glossip v. Gross*, 135 S. Ct. 2726, 2749 (2015) (Breyer, Sotomayor, JJ., dissenting) (2015) (explaining progression of execution to be more humane).

¹²³ See *supra* Introduction (describing how process of death penalty has been evolving).

¹²⁴ See *supra* Part II (arguing that lethal injection and death penalty procedures need to be revised).

¹²⁵ See *supra* Part II (explaining that recently arguably humane method of execution is lethal injection); Hugo Adam Bedau, *The Case Against the Death Penalty*, AM. CIV. LIBERTIES UNION, <https://www.aclu.org/other/case-against-death-penalty> (last revised 2012) (explaining concerns in supporting capital punishment). The purpose of the death penalty is to ensure that death is caused quickly and painlessly, as to not violate the Eighth Amendment. *Id.*

[T]he lethal injection method . . . has turned dying into a still life, thereby enabling the state to kill without anyone involved feeling anything . . . Any remaining glimmers of doubt – about whether the man received due process, about his guilt, about our right to take life – cause us to rationalize these deaths with such catchwords as ‘heinous,’ ‘deserved,’ ‘deterrent,’ ‘justice,’ and ‘painless.’ We have perfected the art of institutional killing to the degree that it has deadened our natural, quintessential human response to death.

Id.

¹²⁶ See *supra* Part II; Bedau, *supra* note 125 (“It is also often argued that death is what murderers deserve, and that those who oppose the death penalty violate the fundamental principle that criminals should be punished according to their just desserts – ‘making the punishment fit the crime.’”).

¹²⁷ See *supra* Introduction (arguing lawyers, legislatures, and governments take necessary steps to improve method of execution).

horrific crimes.¹²⁸ The death penalty has proven to be ineffective as a deterrent and now is presenting even greater legal ramifications as a result of numerous botched executions that have occurred in recent history.¹²⁹ In the past twenty years, the United States has recognized that it is unconstitutional, cruel and unusual to execute persons who are “mentally ill” or persons under the age of eighteen for their offenses.¹³⁰ In addition to juveniles not being subject to the death penalty, the SJC in Massachusetts ruled in 2015 that it was cruel and unusual to sentence a juvenile to life imprisonment without the possibility of parole.¹³¹ Comparatively, it is time to evaluate and weigh the effectiveness of the death penalty against the grave consequences of botched executions.¹³²

¹²⁸ See *supra* Part II (calling attention to necessary improvements to methods of execution and lethal injection).

¹²⁹ See *Deterrence*, *supra* note 55 (signifying death penalty is not effective deterrent for crimes).

¹³⁰ See Bedau, *supra* note 125 and accompanying text. There has been progress made relating to the death penalty in this century, but the method of execution must now be revisited. *Id.*

[In] 2002, the Supreme Court held executions of mentally retarded criminals are “cruel and unusual punishments” prohibited by the Eighth Amendment to the Constitution. Since then, states have developed a range of processes to ensure that mentally retarded individuals are not executed. Many have elected to hold proceedings prior to the merits trial, many with juries, to determine whether an accused is mentally retarded. In 2005, the Supreme Court held that the Eighth and Fourteenth Amendments to the Constitution forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed, resulting in commutation of death sentences to life for dozens of individuals across the country.

Id.

¹³¹ See *Diatchenko v. Dist. Attorney*, 471 N.E.3d 349, 368 (Mass. 2015) (holding life imprisonment without opportunity for parole for juveniles unconstitutional). The court found that life imprisonment without the possibility of parole for juveniles defeats the purpose of the justice system, as it is meant to be rehabilitative. *Id.*

¹³² See *Glossip v. Gross*, 135 S. Ct. 2726, 2737-39, 2796 (2015) (Breyer, Sotomayor, JJ., dissenting) (illustrating Supreme Court will not find execution “cruel and unusual” unless alternative exists). An alternative must be found in order to expedite the process. *Id.* (Sotomayor, J., dissenting).

The Court today, however, would convert this categorical prohibition into a conditional one. A method of execution that is intolerably painful—even to the point of being the chemical equivalent of burning alive—will, the Court holds, be unconstitutional *if*, and only if, there is a “known and available alternative” method of execution. It deems *Baze* to foreclose any argument to the contrary.

Id. at 2793 (internal citations omitted).

IV. ANALYSIS

As the number of bungled executions increase—despite the decreasing number of executions performed each year—one must question whether lethal injection truly is more advanced and humane.¹³³

The challenges to the constitutionality of the use of the death penalty are never ending, but there must be resolution in the debate over the method of execution.¹³⁴ Glossip’s stay of execution was granted for his potential innocence, in conjunction with Oklahoma’s lingering questions regarding midazolam and its effectiveness.¹³⁵ The United States cannot be known for

¹³³ See *Glossip*, 135 S. Ct. at 2792 (Sotomayor, J., dissenting) (discussing methods of execution prohibited under U.S. Constitution). This is not the first time that the courts have been presented with the issue that certain methods of execution are not constitutional:

[The Supreme] Court has long recognized that certain methods of execution are categorically off-limits. The Court first confronted an Eighth Amendment challenge to a method of execution in *Wilkerson v. Utah*, 99 U.S. 130 (1879). Although *Wilkerson* approved the particular method at issue—the firing squad—it made clear that “public dissection,” “burning alive,” and other “punishments of torture . . . in the same line of unnecessary cruelty, are forbidden by [the Eighth A]mendment to the Constitution.” Eleven years later, in rejecting a challenge to the first proposed use of the electric chair, the Court again reiterated that “if the punishment prescribed for an offense against the laws of the State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition.”

Id. (internal citations omitted); see also Stephen B. Bright, President and Senior Counsel, Southern Center for Human Rights, Presentation at Program of the High Commissioner for Human Rights of the United Nations: Imposition of the Death Penalty Upon the Poor, Racial Minorities, the Intellectually Disabled and the Mentally Ill, 17 (Apr. 24, 2014) (quoting Arthur J. Goldberg, Letter to the Editor, BOSTON GLOBE, Aug. 16, 1976. As Justice Goldberg wrote, “[t]he deliberate institutionalized taking of human life by the state is the greatest conceivable degradation to the dignity of the human personality.” Goldberg, *supra* note.

¹³⁴ See *Glossip*, 135 S. Ct. at 2736-37 (majority opinion) (finding death penalty constitutional, regardless of means, so long as there is no alternative method).

¹³⁵ See *id.* at 2730 (explaining stay of execution).

[T]he State’s expert presented persuasive testimony that a 500-milligram dose of midazolam would make it a virtual certainty that an inmate will not feel pain associated with the second and third drugs, and petitioners’ experts acknowledged that they had no contrary scientific proof. Expert testimony presented by both sides lends support to the District Court’s conclusion. Evidence suggested that a 500-milligram dose of midazolam will induce a coma, and even one of petitioners’ experts agreed that as the dose of midazolam increases, it is expected to produce a lack of response to pain. It is not dispositive that midazolam is not recommended or approved for use as the sole anesthetic during painful surgery. First, the 500-milligram dose at issue here is many times higher than a normal therapeutic dose. Second, the fact that a low dose of midazolam is not the best drug for maintaining unconsciousness says little about whether a 500-milligram dose is constitutionally adequate to conduct an execution. Finally, the

botched executions.¹³⁶ If the government is known to commit these botched executions, it will begin to look like criminals that are not concerned with the humanity of even the most heinous of criminals.¹³⁷ The courts recognize the humanity of death row inmates in their housing quarters while awaiting death, but there is continuous disregard for the humanity of death row inmates when it comes to the method of execution.¹³⁸ While these inmates likely have committed some of the most heinous and horrific crimes, they still deserve to be treated humanely.¹³⁹

District Court did not err in concluding that the safeguards adopted by Oklahoma to ensure proper administration of midazolam serve to minimize any risk that the drug will not operate as intended.

Id.

¹³⁶ See Debbie Siegelbaum, *America's 'Inexorably' Botched Executions*, BBC NEWS (Aug. 1, 2014), <http://www.bbc.com/news/magazine-28555978>. "If there seem to have been a lot of botched executions in the U.S. recently, there have. It turns out that lethal injection – by far the most common method of execution in those states that still practice capital punishment – is also the most likely to go wrong." *Id.* "The rate of botched lethal injections, however, was a lot higher, at 7.1%."

Id.

¹³⁷ See *id.* ("The point of lethal injection, when it was introduced in the late 1970s, was to look 'clean and sterile and pretty . . .'). The United States' utilization of capital punishment moved to lethal injection believing it was the most humane method of execution; but the rising number of botched lethal injection executions challenges this proposition. *Id.* See also *Chaney v. Heckler*, 718 F.2d 1174, 1176-77 (D.C. Cir. 1983) (discussing use of unapproved drugs in injections). The court noted "substantial and uncontroverted evidence . . . that execution by lethal injection poses a serious risk of cruel, protracted death . . . Even a slight error in dosage or administration can leave a prisoner conscious but paralyzed while dying, a sentient witness of his or her own slow, lingering asphyxiation." *Id.* at 1191; Bedau, *supra* note 125 ("It is easy to overstate the humaneness and efficacy of lethal injection; one cannot know whether lethal injection is really painless and there is evidence that it is not.").

¹³⁸ See *Ball v. LeBlanc*, 792 F.3d 584, 596 (5th Cir. 2015) (finding housing death row inmates in excessively hot cells without relief unconstitutional); *Gates v. Cook*, 376 F.3d 323, 338 (5th Cir. 2004) (holding filthy cell conditions of death row inmates unconstitutional).

¹³⁹ See Bedau, *supra* note 125 (acknowledging criminals deserve to be punished according to their culpability); Tierney Sneed, *Can the Death Penalty Survive Lethal Injection?*, U.S. NEWS (Aug. 7, 2014, 12:01 AM), <http://www.usnews.com/news/articles/2014/08/07/can-the-death-penalty-survive-lethal-injection> (discussing increase in botched executions due to shortage problems of lethal injection drugs). According to Hugo Adam Bedau:

[It] is . . . often argued that death is what murderers deserve, and that those who oppose the death penalty violate the fundamental principle that criminals should be punished according to their just desserts – "making the punishment fit the crime." If this rule means punishments are unjust unless they are like the crime itself, then the principle is unacceptable: It would require us to rape rapists, torture torturers, and inflict other horrible and degrading punishments on offenders. It would require us to betray traitors and kill multiple murderers again and again – punishments that are, of course, impossible to inflict. Since we cannot reasonably aim to punish all crimes according to this principle, it is arbitrary to invoke it as a requirement of justice in the punishment of murder.

Furthermore, midazolam’s effectiveness is questioned in the wake of numerous botched executions by lethal injection.¹⁴⁰ The Eighth Amendment’s protection against “cruel and unusual punishment” does not mean that the punishment needs to be inherently risky or pain free.¹⁴¹ The greater issue now is that the level of botched executions is borderline torture.¹⁴² As doctors that have utilized midazolam explain, midazolam has a ceiling-effect meaning that after a certain dosage, it is not changing the level of unconsciousness experienced by the patient.¹⁴³ Doctors have testified that certain low dosages of midazolam are completely ineffective and that even increased dosages are ineffective.¹⁴⁴

Bedau, *supra* note 125.

¹⁴⁰ See Distanisalo, *supra* note 5, at 784, 792-93 (describing reduced effectiveness of midazolam versus thiopental).

¹⁴¹ See Nathan R. Chicoine, Note, *Flawless Execution: Examining Ways to Reduce South Dakota’s Lethal Injection Risks*, 57 S.D. L. REV. 98, 103 (2012). The Eighth Amendment’s protections are not intended to prohibit any form of pain. *Id.*

[T]he Court held that although all execution methods involve an inherent risk of pain, even if only from the possibility of failure to follow procedure, the Eighth Amendment does not require the implementation of risk-free execution. However, under some circumstances, a risk of pain, as opposed to the actual infliction of pain, may be unconstitutional. The conditions that create the risk must be “‘sure or very likely to cause serious illness and needless suffering,’ and give rise to ‘sufficiently imminent dangers.’” A constitutional violation requires a “substantial” or “objectively intolerable” risk of serious harm “that prevents prison officials from pleading that they were ‘subjectively blameless.’” For example, an execution that repeatedly failed, as opposed to an isolated accident, “would demonstrate an ‘objectively intolerable risk of harm’ that officials may not ignore.”

Id. (internal citations omitted).

¹⁴² See *La. ex. rel. Francis v. Resweber*, 329 U.S. 459, 476 (1947) (“Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life.”) (alteration in original) (internal citations omitted). This suggests that the current method of execution that leads to numerous botched executions, as a result of the experimental protocol, is barbarous and inhumane; thus lethal injection is arguably torturous and in violation of the Eighth Amendment. *Id.*

¹⁴³ See R. Amrein & W. Hetzel, *Pharmacology of Dormicum (midazolam) and Anexate (flumazenil)*, NAT’L. CTR. BIOTECHNOLOGY INFO. (June 1990), <https://www.ncbi.nlm.nih.gov/pubmed/2109472#>. “Only low doses of both drugs are necessary to produce initial effects. Increasing doses intensify the drug activity and a ceiling effect is observed after maximal doses of midazolam and flumazenil.” *Id.*

¹⁴⁴ *Contra Chavez v. Fl. SP Warden*, 742 F.3d 1267, 1272 (11th Cir. 2014) (arguing increased dosage of midazolam is effective). In *Chavez*, the court stated that:

[I]n light of the district court’s thorough and detailed credibility determinations and the extensive factual findings that flowed from them, including . . . the “massive dose [of midazolam] required by the Florida protocol . . . [which] will render the individual insensate to noxious stimuli by placing the individual in an anesthetic state, unable to

While the eradication of the death penalty is unlikely, the potential for a unified method of execution in the United States is not impractical.¹⁴⁵ Statistics show that the number of active death penalty states is small and that the practice of utilizing the death penalty is declining.¹⁴⁶

In sum, if we look to States, in more than 60% there is effectively no death penalty, in an additional 18% an execution is rare and unusual, and 6%, *i.e.*, three States, account for 80% of all executions. If we look to population, about 66% of the Nation lives in a State that has not carried out an execution in the last three years. And if we look to counties, in 86% there is effectively no death penalty. It seems fair to say that it is now unusual to find capital punishment in the United States, at least when we consider the Nation as a whole.¹⁴⁷

These circumstances perhaps reflect the fact that a majority of Americans, when asked to choose between the death penalty and life in prison without parole, now choose the latter.¹⁴⁸

discern pain,” Chavez has not demonstrated that the use of midazolam in the 2013 Protocol creates a substantial risk of serious harm. The district court’s findings, none of which are clearly erroneous, negate any contention that Chavez’s evidence shows that midazolam is not effective as an anesthetic.

Id.

¹⁴⁵ See Kas, *supra* note 8, at 3 (discussing differences in methods throughout states by utilizing one-drug or three-drug protocol). “Phenobarbital and related barbiturates have been the drugs of choice for majority of the one-drug protocols whereas the three-drug protocol comprising of sodium thiopental, pancuronium bromide, and potassium chloride have been used for decades in many states.” *Id.*

¹⁴⁶ See *Glossip v. Gross*, 135 S. Ct. 2726, 2732 (2015) (Breyer, Sotomayor, JJ., dissenting) (“And more recent data show that the practice has diminished yet further: between 2010 and 2015 (as of June 22), only 15 counties imposed five or more death sentences. . . . Between 1976 and 2007, there were no executions in 86% of America’s counties.”).

¹⁴⁷ *Id.*

¹⁴⁸ See Reid Wilson, *Support for Death Penalty Still High, But Down*, THE WASH. POST, June 5, 2014, www.washingtonpost.com/blogs/govbeat/wp/2014/06/05/support-for-death-penalty-still-high-but-down; Alex Kozinski, *Worse Than Death*, 125 YALE L.J. F. 230, 231-32 (2016), available at <http://www.yalelawjournal.org/forum/worse-than-death>. There has been a significant decline in support for the death penalty. Kozinski, *supra*, at 231-32.

When informed of this alternative, people generally become less supportive of the death penalty. Numerous opinion polls “confirm that abstract support for the death penalty drops significantly when respondents are given a choice between capital punishment and sentences which assure lengthy incarceration and compensation for the family of the victim.” Defense lawyers in several recent high-profile murder cases have tried to convince jurors not to impose the death penalty by arguing that life in solitary

There are several entities throughout the world that have consistently called for an end to the death penalty.¹⁴⁹ In today’s society, the imposition of the death penalty seems arbitrary and erroneous, especially when the execution cannot be conducted in a streamlined manner.¹⁵⁰ The decline of drug manufacturers willing to produce the drugs used in lethal injection to prisons highlights the growing disapproval of the death penalty and contributes to the argument that the death penalty is unconstitutional for being cruel and unusual.¹⁵¹ Justice Breyer in his dissenting opinion emphasized, “changes . . . have occurred during the past four decades. For it is those changes, taken together with my own 20 years of experience on this Court, that lead me to believe that the death penalty, in and of itself, now likely constitutes a legally prohibited ‘cruel and unusual punishment[t].’”¹⁵²

confinement may be just as bad. Take, for example, the recent trial of Dzhokar Tsarnaev, one of the Boston Marathon bombers. During closing arguments, Tsarnaev’s lawyer argued that the jury should let him live because he was “still going to be in isolation for the rest of his life” at ADX Florence. That super-maximum security (“supermax”) prison is the stuff of nightmares. Many inmates at ADX Florence spend twenty-three hours a day alone in an eighty-seven-square-foot cell.

Id. (internal citations omitted).

¹⁴⁹ See Marnie Hunter, *Pope Francis Calls for One-Year Moratorium on Death Penalty*, CNN (Feb. 21, 2016), <http://www.cnn.com/2016/02/21/world/pope-death-penalty-moratorium> (noting urgency with regard to suspending use of death penalty); *Pennsylvania Governor Announces Moratorium on Executions*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/node/6054> (last visited Feb. 2016) (noting Pennsylvania joins Oregon, Washington and Colorado in placing holds on executions).

¹⁵⁰ See DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA’S DEATH PENALTY IN AN AGE OF ABOLITION* 11 (2010) (noting “all other Western nations have decisively abandoned” capital punishment).

¹⁵¹ See *Glossip*, 135 S. Ct. at 2755-56 (Breyer, J., dissenting) (explaining circumstances surrounding death penalty are further indicators lethal injection is unconstitutional). Justice Breyer highlighted three reasons why lethal injection is unconstitutional. *Id.*

[I]n 1976, the Court thought that the constitutional infirmities in the death penalty could be healed; the Court in effect delegated significant responsibility to the States to develop procedures that would protect against those constitutional problems. Almost 40 years of studies, surveys, and experience strongly indicate, however, that this effort has failed. Today’s administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty’s penological purpose. Perhaps as a result, (4) most places within the United States have abandoned its use.

Id.

¹⁵² See *id.* (citing U.S. CONST. amend. VIII) (noting condition of death penalty resembles cruel and unusual punishment).

V. CONCLUSION

The death penalty lacks the power of deterrence, and public support for the imposition of execution for the worst criminals is declining throughout the United States. The death penalty has greatly evolved throughout much of American history to execute humans more effectively and humanely. To the contrary, the most modern method of execution, lethal injection, is less humane than the use of a gas chamber or a firing squad. A prisoner writhing, gasping for air, and suffering immense pain is unconstitutional. Drug companies throughout the world have begun to take a strong stance against the death penalty in the United States by refusing to provide the appropriate drugs to prisons or to states that utilize the death penalty. This has forced states to adopt different, experimental measures that have been drastically less efficient and have led to numerous legal ramifications and questions over the constitutionality of the death penalty in our modern society. Practitioners and judges must recognize the inherent danger and cruelty, and begin to take a stand. There are less painful and tortuous means of punishment for capital offenses. The death penalty is not effective, it is not a deterrent, and it casts a negative light on the United States; thus, now is the time to make great changes to the use of the death penalty. The death penalty should either be eradicated making life imprisonment without the possibility of parole the harshest punishment, or reevaluating and creating a protocol of lethal injection that is uniform throughout the states and that is greatly effective in its application. Otherwise, the United States will continue to portray to the world that the government and the American people are not concerned about the humanity of other people, and will continue to erroneously and negligently botch executions.

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