UC DAVIS LAW REVIEW

VOL. 52, NO. 4 APRIL 2019

Individualized Executions

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States continue to botch lethal injection attempts. The decision to move forward with such procedures without considering the health of the inmate has resulted in a series of brutal, horrific incidents.

In its Eighth Amendment jurisprudence, the Supreme Court has established that courts must give defendants individualized sentencing determinations prior to imposing a death sentence. Woodson v. North Carolina *proscribes the imposition of mandatory death sentences, and* Lockett v. Ohio *requires that courts examine the individualized characteristics of the offense and the offender, including allowing the defendant to provide mitigating evidence at sentencing.*

This Article argues for the extension of the Eighth Amendment Woodson-Lockett *principle to execution techniques. The Court's execution technique cases proscribe the imposition of punishments that create a substantial risk of inflicting pain. As such, application of the* Woodson-Lockett *principle to executions would require that courts assess the imposition of such execution techniques on a case-by-case basis to determine the constitutionality of the technique — as applied to the particular inmate — prior to execution.*

In Part I, the Article describes the recent epidemic of failed lethal injection executions and highlights the need for reform in this area. Part II

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describes the Woodson-Lockett *doctrine, and explores its prior applications. Part III then explains why this doctrine ought to apply to execution techniques, not just the kind of punishment imposed. Finally in Part IV, the Article argues for the adoption of this approach, highlighting its advantages both on individual and systemic levels.*

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INTRODUCTION

> Ever tried. Ever failed. No matter. Try again. Fail again. Fail better.
>
> — Samuel Beckett

Trying and failing and trying again may be admirable in life, but not when a state executes its citizens for criminal offenses. The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishments, but the use of the death penalty in recent years has amounted to what one might describe as cruel and unusual experimentation.[1]

For instance, the state of Alabama recently attempted to execute Doyle Lee Hamm.[2] Mr. Hamm suffers from lymphoma, and the cancer, in combination with hepatitis and past drug use, had severely damaged his veins.[3] The execution attempt, which took place on February 22, 2018, took over two hours, with the execution team unable to find a viable vein for the lethal injection.[4] As a result, Mr. Hamm suffered through what his current petition for review described as a "prolonged, exceedingly painful, bloody, and botched" attempt to execute him.[5] Just three months before, the state of Ohio had a similar

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[1] As explained *infra* in Part I.B, the increased problems in obtaining lethal injection drugs have contributed to this growing problem; *see also* AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA'S DEATH PENALTY 5-6 (2014) (describing America's long history of botched executions, including lethal injections); Seema K. Shah, *Experimental Execution*, 90 WASH. L. REV. 147, 151-52 (2015) (demonstrating that lethal injection is based on poorly designed experimentation that is not based on evidence or research); Seema Shah, *How Lethal Injection Reform Constitutes Impermissible Research on Prisoners*, 45 AM. CRIM. L. REV. 1101, 1101-02 (2008) (arguing for the application of biomedical standards to lethal injection).

[2] *See, e.g.*, Nicola Cohen, *Why Is No One Demanding an Explanation for the Torture of Doyle Hamm?*, NATION (Mar. 13, 2018), https://www.thenation.com/article/why-is-no-one-demanding-an-explanation-for-the-torture-of-doyle-hamm/; Tracy Connor, *Doyle Lee Hamm Wished for Death During Botched Execution, Report Says*, NBC NEWS (Mar. 5, 2018, 5:19 PM), https://www.nbcnews.com/storyline/lethal-injection/doyle-lee-hamm-wished-death-during-botched-execution-report-says-n853706 [hereinafter *Doyle Lee Hamm Wished for Death*]; Liliana Segura, *Another Failed Execution: The Torture of Doyle Lee Hamm*, INTERCEPT (Mar. 3, 2018, 6:58 AM), https://theintercept.com/2018/03/03/doyle-hamm-alabama-execution-lethal-injection/ [hereinafter *Another Failed Execution*].

[3] *See* Segura, *Another Failed Execution*, *supra* note 2.

[4] *Id.*; Connor, *Doyle Lee Hamm Wished for Death*, *supra* note 2.

[5] Petition for Writ of Habeas Corpus at 3, Hamm v. Dunn (N.D. Al. Mar. 5, 2018), http://cdn.cnn.com/cnn/2018/images/03/07/hamm.federal.habeas.petition.2018.final.with.appendix.pdf; *see also* Connor, *Doyle Lee Hamm Wished for Death*, *supra* note 2; Segura, *Another Failed Execution*, *supra* note 2. Alabama eventually decided not

failed execution attempt involving Alva Campbell.[6] In that attempt, which took place on November 15, 2017, the state tried for over thirty minutes to find a suitable vein — a task made impossible by his cancer and degraded physical condition — before calling off the execution and rescheduling it.[7]

In both cases, the medical condition of the death row inmates was apparent to doctors prior to the attempted execution.[8] Courts in both cases likewise rejected challenges to using lethal injection prior to the failed attempts.[9]

The state of Tennessee has also had similar challenges in recent executions. There is significant evidence that the August 2018 execution of Billy Ray Irick constituted torture, as a result of midazolam failing to sufficiently anesthetize Mr. Irick.[10] Dr. David Lubarsky's statement in a court filing explained that Irick "experienced the feeling of choking, drowning in his own fluids, suffocating, being buried alive, and the burning sensation caused by the injection of the potassium chloride."[11]

to attempt a future execution of Hamm. *See* Melissa Brown, *Alabama, Death Row Inmate Reach Settlement After Botched Execution*, MONTGOMERY ADVERTISER (Mar. 27, 2018, 10:52 AM CT), https://www.montgomeryadvertiser.com/story/news/crime/2018/03/27/https-montgomeryadvertiser-story-news-local-solutions-journalism-2018-03-20-can-alabama-try/461862002/.

[6] *See* Tracy Connor, *Ohio Cancels Execution of Alva Campbell After Failing to Find Vein*, NBC NEWS (Nov. 15, 2017, 1:55 PM PST), https://www.nbcnews.com/storyline/lethal-injection/ohio-set-execute-inmate-alva-campbell-who-needs-wedge-pillow-n820956.

[7] *Id.*; Liam Stack, *Execution in Ohio Is Halted After No Usable Vein Can Be Found*, N.Y. TIMES (Nov. 15, 2017), https://www.nytimes.com/2017/11/15/us/ohio-execution-alva-campbell.html. Campbell died of natural causes on death row just a few months after Ohio's botched execution attempt. *See* Tracy Connor, *Alva Campbell, Inmate Who Survived Execution Try, Dies in Ohio Prison*, NBC NEWS (Mar. 3, 2018, 5:11 PM PST), https://www.nbcnews.com/news/us-news/alva-campbell-inmate-who-survived-execution-try-dies-ohio-prison-n852961.

[8] Segura, *Another Failed Execution*, *supra* note 2; Andrew Welsh-Huggins, *Ohio Transfers Sick Inmate to Death House Ahead of Execution*, CTV NEWS (Nov. 14, 2017, 12:06 PM EST), https://www.ctvnews.ca/world/ohio-transfers-sick-inmate-to-death-house-ahead-of-execution-1.3676680.

[9] *See* Hamm v. Comm'r, Ala. Dep't of Corr., 725 F. App'x 836, 844 (11th Cir. 2018); *In re* Alva E. Campbell, Jr., 874 F.3d 454, 467 (6th Cir. 2017).

[10] Adam Tamburin & Dave Boucher, *Tennessee Execution: Billy Ray Irick Tortured to Death, Expert Says in New Filing*, TENNESSEAN (Sept. 13, 2018, 2:31 PM CT), https://www.tennessean.com/story/news/crime/2018/09/07/tennessee-execution-billy-ray-irick-tortured-filing/1210957002/.

[11] DEATH PENALTY INFO. CTR., *Medical Expert: Billy Ray Irick Tortured to Death in Tennessee Execution*, https://deathpenaltyinfo.org/node/7198 (last visited Feb. 14, 2019); *see also* Steven Hale, *The Execution of Billy Ray Irick*, NASHVILLE SCENE (Aug. 10, 2018, 2:00 PM), https://www.nashvillescene.com/news/pith-in-the-wind/article/

The United States Supreme Court had declined relief in a last-minute filing before the Court challenging the method of execution.[12] Justice Sotomayor dissented to the denial of certiorari, concluding, "[i]f the law permits this execution to go forward in spite of the horrific final minutes that Irick may well experience, then we stopped being a civilized nation and accepted barbarism."[13]

Tennessee inmate Edmund Zagorski chose the electric chair to avoid the same kind of torture Irick suffered.[14] Tennessee electrocuted Zagorski on November 1, 2018, in its first use of the electric chair in over three decades.[15] In that case, Sotomayor similarly dissented to the denial of certiorari, bemoaning the unconstitutionality of the death penalty methods.[16] She explained that "[h]is eleventh-hour decision to accept the electric chair as a marginally less excruciating alternative does not undermine, as a matter of logic, his contention that both Tennessee's lethal-injection protocol and the electric chair are cruel and unusual in violation of the Eighth Amendment."[17]

This term, the Supreme Court considers whether Missouri's attempt to give a lethal injection to Russell Bucklew would constitute a cruel

21017550/the-execution-of-billy-ray-irick (providing a witness' account of Irick's execution).

[12] Irick v. Tennessee, 139 S. Ct. 1, 1 (2018), *denial of application for stay* (Sotomayor, J., dissenting) ("Tonight the State of Tennessee intends to execute Billy Ray Irick using a procedure that he contends will amount to excruciating torture. During a recent 10-day trial in the state court, medical experts explained in painstaking detail how the three-drug cocktail Tennessee plans to inject into Irick's veins will cause him to experience sensations of drowning, suffocating, and being burned alive from the inside out.").

[13] *Id.* at 4.

[14] *See* Adam Tamburin, *Edmund Zagorski Has Chosen the Electric Chair over Lethal Injection. Will Other Inmates Do the Same?*, TENNESSEAN (Oct. 31, 2018, 2:05 PM CT), https://www.tennessean.com/story/news/crime/2018/10/31/tennessee-electric-chair-lethal-injection-zagorski/1774951002/.

[15] For commentary on the execution of Zagorski, see Stephen Cooper, *A Tennessee Execution Will Make for a Real-Life Halloween*, TENNESSEAN (Oct. 5, 2018, 3:58 PM CT), https://www.tennessean.com/story/opinion/2018/10/05/edmund-zagorski-execution-make-real-life-halloween/1498094002/. Earlier in the case, the Court denied Zagorski's petition to consider the application of *Glossip* to his case with respect to allowing him the ability to choose the method of execution. Sotomayor's dissent to the denial of that petition lamented, "When the prisoners tasked with asking the State to kill them another way are denied by the State information crucial to establishing the availability of that other means of killing, a grotesque requirement has become Kafkaesque as well." Zagorski v. Parker, 139 S. Ct. 11, 13 (2018), *denial of application for stay* (Sotomayor, J., dissenting). Tennessee ultimately relented and allowed electrocution.

[16] Zagorski v. Haslam, 139 S. Ct. 20, 21 (2018), *denial of application for stay* (Sotomayor, J., dissenting).

[17] *Id.*

and unusual punishment in light of his physical condition.[18] Bucklew suffers from a rare disease that has caused "unstable, blood-filled tumors to grow in his head, neck, and throat."[19] Bucklew argues that lethal injection will essentially torture him to death.[20]

To date, the Supreme Court has been reluctant to place any limits on state execution methods. It has upheld both the lethal injection protocol that most states have used since the 1970s,[21] as well as a challenge to the newer method that Tennessee is using.[22] The Court's doctrine requires demonstration of a "substantial risk of severe pain" for the inmate if the state uses a particular method.[23] The doctrine also, perhaps unfairly, places the burden on the inmate to offer an alternate method of execution.[24]

Other than the defendant filing an ad hoc successive habeas petition constitutional challenge to the scheduled method of execution, there exists no formal proceeding for determining an appropriate method of execution by assessing the potential impact of different methods and techniques on an inmate.[25] Rather, most states do not give the inmate a choice in the matter,[26] and further keep many of the details of the method and technique secret.[27]

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[18] *See* Brief for Petitioner, Bucklew v. Precynthe, 883 F.3d 1087 (8th Cir. 2018) (No. 17-8151), 2018 WL 3456065, at *2-5; *see also Bucklew*, 883 F.3d at 1089-90.

[19] Amy Howe, *Justices Block Missouri Execution*, SCOTUSBLOG (Mar. 20, 2018, 9:12 PM), http://www.scotusblog.com/2018/03/justices-block-missouri-execution/.

[20] *See* Brief for Petitioner, *supra* note 18, at *2-5.

[21] *See, e.g.*, Baze v. Rees, 553 U.S. 35 (2008).

[22] *See* Glossip v. Gross, 135 S. Ct. 2726, 2731 (2015) (upholding the same method used in Oklahoma). Tennessee has used midazolam as its sedative in recent years because sodium thiopental is no longer generally available. *See State By State Lethal Injection*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-lethal-injection (last visited Mar. 2, 2019).

[23] *Glossip*, 135 S. Ct. at 2740.

[24] *Id.* at 2737.

[25] For purposes of this Article, "method" refers to the kind of execution that will occur — lethal injection, hanging, electrocution, etc. — while "technique" refers to the way in which the state carries out the method — which drugs, what processes, what procedures. I have used similar terminology in prior articles. *See* William W. Berry III & Meghan J. Ryan, *Cruel Techniques, Unusual Secrets*, 78 OHIO ST. L.J. 403, 408-12 (2017) [hereinafter *Cruel Techniques*].

[26] Of the thirty death penalty states, six state allow petitioners to choose between lethal injection and an alternative method of execution — Alabama, California, Florida, South Carolina, Virginia, and Washington. Niraj Chokshi, *Map: How Each State Chooses to Execute its Death Row Inmates*, WASH. POST (Apr. 30, 2014), https://www.washingtonpost.com/blogs/govbeat/wp/2014/04/30/map-how-each-state-chooses-to-execute-its-death-row-inmates/?noredirect=on&utm_term=.7495d14a4639; *Methods of Execution*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/methods-

In its Eighth Amendment jurisprudence, the Supreme Court has established that courts must give defendants individualized sentencing determinations prior to imposing a death sentence. *Woodson v. North Carolina* proscribes the imposition of mandatory death sentences,[28] and *Lockett v. Ohio* requires that courts examine the individualized characteristics of the offense and the offender, including allowing the defendant to provide mitigating evidence at sentencing.[29]

This Article argues for the extension of the Eighth Amendment *Woodson-Lockett* principle to execution techniques.[30] The Court's execution technique cases proscribe the imposition of punishments that create a substantial risk of inflicting pain.[31] As such, application of the *Woodson-Lockett* principle to executions would require that courts assess the imposition of such execution techniques on a case-by-case basis to determine the constitutionality of the technique — as applied to the particular inmate — prior to execution.

An advantage of adopting such an approach would be the transparency with respect to execution techniques that it would provide. As lethal injection drugs become more scarce, states increasingly have concealed the identity of the drugs they use and the techniques they use from death row inmates, making challenging the techniques under the Eighth Amendment increasingly difficult. Applying the *Woodson-Lockett* principle would require the state courts to approve, prior to execution, the technique as applied to the particular inmate.

In Part I, the Article describes the recent epidemic of failed lethal injection executions and highlights the need for reform in this area. Part II describes the *Woodson-Lockett* doctrine, and explores its prior applications. Part III then explains why this doctrine ought to apply to execution techniques, not just the kind of punishment imposed.

execution?scid=8&did=245 (last visited Jan. 26, 2019). Tennessee also recently allowed an inmate to choose electrocution over lethal injection as a method. *See* Tamburin, *supra* note 14.

[27] Many states are currently engaged in litigation, trying to keep the identity of the lethal injection drug suppliers secret, including Indiana, Texas, Louisiana, Arkansas, Nebraska, Oklahoma, and Alabama. *See Lethal Injection Secrecy Laws: A Curated Collection of Links*, MARSHALL PROJECT, https://www.themarshallproject.org/records/687-lethal-injection-secrecy-laws (last updated Dec. 6, 2018) (providing updated links to news articles about lethal injection secrecy).

[28] Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

[29] Lockett v. Ohio, 438 U.S. 586, 605, 608 (1978).

[30] The principle is outlined at *infra* Part II.A.

[31] *See* Glossip v. Gross, 135 S. Ct. 2726, 2740 (2015); Baze v. Rees, 553 U.S. 35, 48-52 (2008).

Finally, in Part IV, the Article argues for the adoption of this approach, highlighting its advantages both on individual and systemic levels.

I. THE FAILURE OF LETHAL INJECTION

Failed executions are not new. As detailed in Austin Sarat's book, *Gruesome Spectacles*, administrations of the death penalty in the United States have, in many cases, failed to go according to plan and have resulted in brutal killings.[32] American history is littered with examples of failed executions, which result in horrific outcomes.[33] Sarat's book details a number of these "gruesome spectacles," from recounting the failed hanging of Art Kinsauls in 1900 to the messy electrocution of Pedro Medina in 1997.[34] When executions do not go as planned, the inmate usually still dies, but does so in an unseemly, painful, and grotesque manner.[35]

Early in his book, Sarat points out the irony of caring about the pain imposed when the state inflicts the death penalty on a criminal offender.[36] If the purpose is to kill, it follows that some level of pain will result.[37] The amount of pain inflicted, though, relates to the legitimacy of the state's actions in killing.[38] It is critical for the state to differentiate its legal killing from the illegal killing it punishes.[39] Otherwise, the state killing is no more than another form of murder.[40]

As a result, the state works hard to separate its acts from the homicides it punishes. When methods and techniques fail, the state moves to newer, purportedly more humane, techniques.[41] As detailed in Sarat's book, states moved from hanging to electrocution when hanging began to fail to cause immediate death in some cases.[42] Electrocution was supposed to cause a more immediate end through a sudden shock.[43] Eventually, though, the stories of burning flesh

32 *See* SARAT, *supra* note 1, at 5-6.
33 *See id.* at 177, 179-210.
34 *Id.* at 1-3.
35 *See generally id.*
36 *Id.* at 5-7.
37 *See id.* at 4-5.
38 *Id.* at 5.
39 *Id.* at 3-4.
40 *Id.* at 6-7.
41 *Id.*
42 *Id.* at 10.
43 *Id.* at 64-65.

likewise made it a less palatable method.[44] In some cases, inmates did not immediately die.[45] In other cases, the burning flesh that was a by-product of electrocution resembled a brutal and dehumanizing kind of killing.[46] Indeed, the increasing number of failed executions and the public reaction to such executions prompted states to look for a new method.[47]

In the 1970s, when states worked to reinstate the death penalty after the Supreme Court struck it down in *Furman v. Georgia*,[48] the state of Oklahoma developed lethal injection.[49] The state's chief medical examiner, Jay Chapman, designed a three-drug protocol, despite having no expertise in euthanasia.[50] The design sought to hide from witnesses the effects of the drugs — to avoid the fate of the methods of hanging and electrocution.[51] The first drug was an anesthetic (sodium thiopental), followed by a paralytic (pancuronium bromide), followed by a drug to stop the heart (potassium chloride).[52] The visual effect of this technique, if done properly, is to create the appearance that the inmate is simply drifting off to sleep.[53] As explained in a recent article, "a lot of people still think of lethal injection as a sophisticated medical procedure — a modern death penalty marvel. But in reality, it is junk science."[54]

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[44] *Id.* at 68.

[45] *See id.* at 73-89.

[46] *Id.* at 82.

[47] *Id.* at 86-89.

[48] 408 U.S. 238 (1972).

[49] Liliana Segura & Jackie Roche, *Cruel and Usual: The History of Lethal Injection*, NIB (Oct. 1, 2018), https://thenib.com/cruel-and-usual-the-history-of-lethal-injection?utm_campaign=web-share links&utm_medium=social&utm_source=twitter [hereinafter *Cruel and Usual*].

[50] *Id.*

[51] Brief for the Fordham Univ. Sch. of Law, Louis Stein Center for Law and Ethics as Amicus Curiae Supporting Petitioners at 23, Baze v. Rees, 553 U.S. 35 (2008) (No. 07-5439), 2007 WL 3407041; Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 65 (2007) [hereinafter *The Lethal Injection Quandary*]; *Segura & Roche*, *Cruel & Unusual*, *supra* note 49. *See generally* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY (2002); 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 (2002).

[52] Segura & Roche, *Cruel and Usual*, *supra* note 49.

[53] *Id.*

[54] *Id.*

A. Failed Lethal Injections

As with other methods, lethal injection has produced similar unintended failures. The execution of Clayton Lockett in 2014 is one brutal example.[55] Oklahoma tried to use midazolam as the anesthetic, but it did not work.[56] Instead of entering his veins, the drugs seeped into the tissue of his inner thigh.[57] The state called the execution off, but Lockett died of a heart attack after writhing in pain for half an hour.[58] One witness described the scene: "It was like a horror movie."[59]

When one considers the process of lethal injection, the presence of botched executions is not surprising. To begin with, the individuals administering lethal injections are not physicians.[60] While doctors might be present in some situations, the Hippocratic oath prevents doctors from helping states to kill.[61] Their presence more often relates to the need to save the inmate from a process gone wrong.[62]

In addition, lethal injection as a method of execution suffers in that it relies on the proper insertion of an IV into the veins of the inmate. This can be a difficult procedure for experienced medical professionals with a healthy patient possessing good veins.[63] In the death penalty context, though, the individuals inserting the IV often do not have significant experience performing such procedures and certainly do not work as doctors in the medical profession.[64] In many cases, the health of the inmate and the quality of the inmate's veins will further complicate the process. For example, the insertion of an IV becomes a

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[55] Dahlia Lithwick, *When the Death Penalty Turns into Torture*, SLATE (Apr. 30, 2014, 5:22 PM), https://slate.com/news-and-politics/2014/04/clayton-locketts-botched-execution-the-grim-but-predictable-result-of-oklahomas-constitutional-crisis.html.

[56] *Id.*

[57] Segura & Roche, *Cruel and Usual*, *supra* note 49.

[58] *Id.*; *see* Lithwick, *supra* note 55.

[59] Segura & Roche, *Cruel and Usual*, *supra* note 49.

[60] *See* Berry & Ryan, *Cruel Techniques*, *supra* note 25, at 422-40 (discussing the secrecy behind the identity and qualification of executioners); Denno, *The Lethal Injection Quandary*, *supra* note 51, at 68-69.

[61] The Hippocratic Oath is the requirement that doctors "do no harm" when treating patients. *See, e.g.*, LUDWIG EDELSTEIN, THE HIPPOCRATIC OATH: TEXT, TRANSLATION, AND INTERPRETATION 56 (John Hopkins Press 1943); Lisa D. Hasday, *The Hippocratic Oath as Literary Text: A Dialogue Between Law and Medicine*, 2 YALE J. HEALTH POL'Y L. & ETHICS 299, 229-301, 313 (2002). To assist the state in killing an inmate would overtly contradict this norm.

[62] *See* Denno, *The Lethal Injection Quandary*, *supra* note 51, at 77.

[63] *See id.* at 72.

[64] *See id.* at 68-69.

more difficult process on individuals that are obese, elderly, or have a history of drug-use. Many death row inmates fall into one or more of these categories. Doyle Hamm's failed execution underscores the difficulty of this process in some situations.[65]

A third factor has also increased the likelihood of failed executions in lethal injection procedures. Most lethal injection procedures use a paralytic as the second drug of a three-drug protocol.[66] As a result, states know very little about how the drugs actually affect the inmates they are killing.[67] Once the paralytic is administered, the witnesses are unable to tell whether the anesthetic is working and whether the intravenous line is still intact.[68] The possibility for a failed procedure becomes heightened when the inmate becomes unable to communicate or even move because of the paralytic.[69] It becomes impossible to know whether the third drug, the potassium chloride, worked as intended.[70] One can of course tell whether the inmate dies, but the actual experience could be one that is largely peaceful and only involves a minor amount of pain, or it could be the equivalent of being burned alive from the inside.[71]

In 2005, the Lancet medical journal published a study indicating that most of the forty-nine inmates receiving the death penalty in four states had not received adequate anesthesia.[72] The report described the consequence for the inmate: "Without anesthesia, the condemned person would experience asphyxiation, a severe burning sensation, massive muscle cramping, and finally cardiac arrest."[73] As one commentator observed, "[w]hat cruel irony that the method that appears most humane may turn out to be our most cruel experiment yet."[74] Another concurred, "[t]his process has gotten a lot riskier and even more irresponsible than it ever was."[75] As with failed methods before it, lethal injection may lose its place as the preferred method of execution in the near future.

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[65] Cohen, *supra* note 2; Connor, *Doyle Lee Hamm Wished for Death*, *supra* note 2; Segura, *Another Failed Execution*, *supra* note 2.

[66] Denno, *The Lethal Injection Quandary*, *supra* note 51, at 55.

[67] *See id.* at 55-56.

[68] *Id.*

[69] *See id.*

[70] *Id.*

[71] *Id.*

[72] Segura & Roche, *Cruel and Usual*, *supra* note 49.

[73] *Id.*

[74] *Id.*

[75] *Id.*

B. Barriers to Drug Acquisition

A further threat to lethal injection as an execution method has been the increased difficulty of obtaining the necessary drugs. The issue has mostly related to obtaining the proper anesthetic. The trouble began when Hospira, the lone United States manufacturer of sodium thiopental, announced a temporary halt to production after one of its suppliers ceased making a critical ingredient.[76] The Italian government also prohibited Hospira from moving to Italy, as it refused to facilitate the export of drugs for the purposes of lethal injection.[77] Other European suppliers of sodium thiopental also followed, refusing to sell such drugs to the United States.[78]

With state supplies of sodium thiopental running low, states engaged in a number of questionable tactics to obtain the drugs.[79] One batch was traced back to a driving school in the United Kingdom.[80] Even when states could obtain the sodium thiopental, it would be expired in some cases. One state used it anyway, resulting in the inmate's eyes being open at the end of the procedure.[81] The DEA caught several states illegally smuggling these drugs into the United States and seized the drugs.[82] Texas and other states began using pentobarbital as a replacement for sodium thiopental, but faced similar challenges related to lack of availability and limited supply.[83]

Another odd result of the drug shortage was Arkansas' response to its drug supply expiring. The state of Arkansas chose to execute eight inmates in an eleven-day period in order to ensure use of the drugs before they expired.[84] The shortage thus can drive the actions of states in choosing when to execute death row inmates.

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[76] *Id.*

[77] *Id.*

[78] *See, e.g.*, Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 B.C. L. REV. 1367, 1388-95 (2014) (discussing refusal to sell pentobarbital).

[79] Segura & Roche, *Cruel and Usual*, *supra* note 49.

[80] *Id.*

[81] *Id.*

[82] *See id.*

[83] In some situations, states began using one-drug protocols, with the dose of pentobarbital serving to sedate and kill the inmate with one injection. *See* Berger, *supra* note 78, at 1380-81.

[84] This was particularly odd given the lack of executions before this period. *See Arkansas Schedules Unprecedented Eight Executions in Eleven-Day Period*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/node/6692 (last visited Jan. 25, 2019).

More recently, states have chosen to use midazolam as a replacement for sodium thiopental.[85] Midazolam is widely used in surgeries as part of the anesthesia.[86] The problem with midazolam, though, is that it is not clear how long midazolam will keep a patient under sedation.[87] Furthermore, its general purpose is to sedate the patient only temporarily, not permanently.[88] As a result, the states have no way of knowing whether midazolam will adequately anesthetize inmates prior to the introduction of the third drug (potassium chloride) in the three-drug protocol.[89] The fear is that inmates will not be adequately sedated when the potassium chloride enters their veins and stops their heart.[90] Even more troubling, the paralytic serves to mask any reaction to the drug, so observers will be unable to tell whether the midazolam is working properly.[91]

The states are also guessing and experimenting with respect to the amount of midazolam.[92] The properties of the drug are such that it has a dosage ceiling — adding more beyond a certain point has no additional effect.[93] The lack of knowledge concerning how the drug might work because there are no clinical trials for killing someone has made the use of midazolam questionable.[94]

Several botched executions, including Clayton Lockett's killing, have added more evidence that the effect of midazolam may be to torture the inmate to death.[95] Justice Sotomayor's dissenting opinion in *Glossip* described Oklahoma's procedure as burning someone alive from the inside.[96] Perhaps most telling, even though the Supreme Court has affirmed lethal injections with midazolam as constitutional, Oklahoma has abandoned such procedures and instead plans to use nitrogen gas later this year.[97]

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[85] Glossip v. Gross, 135 S. Ct. 2726, 2733-35 (2015).

[86] *See id.* at 2739-42.

[87] *Id.* at 2785-88 (Sotomayor, J., dissenting).

[88] *See id.* at 2790 (Sotomayor, J., dissenting).

[89] *Id.* at 2786-92 (Sotomayor, J., dissenting).

[90] *Id.* (Sotomayor, J., dissenting).

[91] *Id.* at 2781 (Sotomayor, J., dissenting).

[92] *See id.* at 2786-92 (Sotomayor, J., dissenting).

[93] *Id.* at 2783 (Sotomayor, J., dissenting).

[94] *Id.* at 2784 (Sotomayor, J., dissenting).

[95] Lithwick, *supra* note 55.

[96] *Glossip*, 135 S. Ct. at 2786-93 (Sotomayor, J., dissenting).

[97] Sean Murphy, *Oklahoma Says It Plans to Use Nitrogen for Executions*, USA TODAY (Mar. 15, 2018, 10:04 AM ET), https://www.usatoday.com/story/news/nation/2018/03/15/oklahoma-says-plans-use-nitrogen-executions/427553002/.

Part and parcel with the challenges of obtaining the drugs has been a move on the part of states to keep the manufacturer of the drugs secret.[98] In some cases, this is a way to hide malfeasance and in other cases is a way to protect the public image of the manufacturer.[99] This has spawned extensive litigation with mixed results — some state courts have allowed this secrecy, others have forced disclosure — as well as a number of new state secrecy statutes.[100] The shield of secrecy has been an important tool by which states have been able to obtain lethal injection drugs in some situations.

Going forward, the accessibility of drugs remains a barrier to the use of lethal injection as a punishment. While not insurmountable, these challenges have shaped the procedures for executions, creating a landscape of shifting and experimental lethal injection techniques.

C. Barriers to New Procedures

Finally, there also exist barriers to adopting new execution procedures if states elect to abandon lethal injection. Retired or abandoned methods and techniques may either look too much like murder or contain gruesome elements likely to be unpalatable to the general public. In *Glossip*, Justice Sotomayor suggested in her dissent that a firing squad would provide a vastly superior method of execution to lethal injection.[101] The likelihood of torture with a firing squad would be minimal, especially if trained shooters were used as well as multiple bullets.[102] Likewise, firing squads would not suffer from the same lack of transparency that the paralytic infuses into

[98] Tom Dart et al., *Secret America: How States Hide the Source of Their Lethal Injection Drugs*, GUARDIAN (May 15, 2014, 11:00 AM EDT), https://www.theguardian.com/world/ng-interactive/2014/may/15/-sp-secret-america-lethal-injection-drugs.

[99] Erik Eckholm, *Pfizer Blocks the Use of Its Drugs in Executions*, N.Y. TIMES (May 13, 2016), https://www.nytimes.com/2016/05/14/us/pfizer-execution-drugs-lethal-injection.html.

[100] *Behind the Curtain: Secrecy and the Death Penalty in the United States*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/secrecy (last visited Jan. 25, 2019); *Execution Secrecy Takes a Hit in Court Proceedings in Indiana, Missouri*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/node/7261 (last visited Jan. 25, 2019); *see also Lethal Injection Secrecy Laws*, *supra* note 27.

[101] *Glossip*, 135 S. Ct. at 2796 (Sotomayor, J., dissenting).

[102] Traditionally firing squads include a number of individuals, some of whom have bullets in the guns, some of whom have blanks so that no one knows which shooters actually killed the inmate. *See*, *e.g.*, Nadia Pflaum, *How Utah's Execution by Firing Squad Works*, STANDARD-EXAMINER (Apr. 10, 2017), https://www.standard.net/police-fire/courts/how-utah-s-execution-by-firing-squad-works/article_1eeffdaf-a792-5f1e-9de3-552ea665e989.html.

lethal injections.[103] The problem, though, is that firing squads resemble murder. The idea that the state is shooting its transgressors for murder makes it difficult to differentiate the acts of the state from the acts of the felon.[104] Even so, some states have reintroduced the firing squad as an option,[105] and three executions since 1976 have been by firing squad.[106]

Others have advocated a return to the electric chair, and some states have it as a possibility.[107] Certainly, states have experience using the electric chair, and some states still have their equipment intact.[108] Tennessee has been the first state to reactivate this method, electrocuting multiple offenders in 2018.[109]

Two other states, Georgia and Nebraska, have held that electrocution violates their respective state constitutional laws as a cruel and unusual punishment.[110] In light of those findings, electrocution might suffer from the same rash of expensive legal challenges that has plagued lethal injection. Even if it did not, the optics of electrocutions are really bad for states hoping to continue to use the death penalty. The photos and descriptions of inmates killed by electrocution, particularly the seared and burned flesh, provoke negative reactions in the general public.[111] The concept of electrocution beckons images of brutal, violent torture that seems both excessive and unnecessary to some.

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103 *See* Berry & Ryan, *Cruel Techniques*, *supra* note 25, at 438.

104 Some prosecutors do not share this concern. *See Methods of Execution*, *supra* note 26 (quoting Hamilton County, Ohio prosecutor Joe Deters: "They ought to just bring back the firing squad — I don't care. If they're going to have a death penalty in Ohio, they should carry it out. And if you don't want it, get rid of it. That's fine with me.").

105 Oklahoma, Mississippi, and Utah all use lethal injection as their primary execution method, but allow for firing squads under certain circumstances. *Id.*

106 *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR. 3 (updated Mar. 1, 2019), https://deathpenaltyinfo.org/documents/FactSheet.pdf.

107 Nine states include electrocution as a possible method of execution: Alabama, Arkansas, Florida, Kentucky, Mississippi, Oklahoma, South Carolina, Tennessee, and Virginia. *Methods of Execution*, *supra* note 26.

108 Since 1976, states have executed inmates by electrocution 160 times. *Id.*

109 Stavros Agorakis, *Tennessee Death Row Inmates Ask for Electrocution over Lethal Injection. It's a Form of Protest.*, VOX (Dec. 6, 2018, 10:31 AM EST), https://www.vox.com/2018/12/3/18118175/tennessee-death-penalty-lethal-injection-electrocution.

110 *Methods of Execution*, *supra* note 26.

111 *See* SARAT, *supra* note 1, at 82 (providing an example of public protests against the death penalty).

Particularly after two decades of a method that appears to simply put the inmate to sleep, the idea of sending an electric current through an inmate with enough force to kill and essentially cook his body might accelerate calls for death penalty abolition. It would appear to be a step backward towards barbarism.

Hanging also remains an option in two states but suffers from similar problems as electrocution.[112] In addition to the brutal visual that hanging engenders, it has two additional cultural connotations that counsel against its use. The long history of lynching in the South equates the concept to both racism and injustice.[113] A hanging is thus symbolic of an unjust killing.[114] A similar connotation of vigilantism, likewise accompanies hanging, making it a symbol of mob justice, not the rule of law.[115] And states have not used hanging in recent years, with only three such executions since 1976.[116] States attempting to legitimize their use of capital punishment are thus likely to look in other directions.

Finally, states are exploring using lethal gas as a possible new method. Oklahoma plans to try it this fall, and eleven executions by lethal gas have occurred since 1976.[117] The central problem with this method is that it evokes the gassing of Jews during the Holocaust in Nazi Germany during World War II.[118] Killing by gas, in light of this history, seems to constitute unjust killing of innocents. If the state is attempting to create a public view that killing criminal offenders is somehow justified and is a righteous exercise of its power under the law, gassing inmates does not look like a way to communicate that idea.

Given the problems inherent with old and new methods alike, creating a process by which the state assesses the individual impact on inmates prior to execution seems both appropriate and necessary. As discussed in the next section, the Eighth Amendment has long valued the individual in capital cases, and its doctrine requires that courts

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[112] Delaware and New Hampshire allow hanging under certain circumstances. *Methods of Execution*, *supra* note 26. Washington was also in this group, but its Supreme Court recently abolished the death penalty. *See generally* Gregory v. Washington, 427 P.3d 621 (Wash. 2018).

[113] *See generally* FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT (2003) (describing the death penalty as a modern extension of lynching).

[114] *Id.*

[115] *Id.*

[116] *Facts About the Death Penalty*, *supra* note 106.

[117] *Methods of Execution*, *supra* note 26. Seven states currently allow for the possibility of lethal gas: Alabama, Arizona, California, Mississippi, Missouri, Oklahoma, and Wyoming. *Id.*

[118] *See, e.g.*, ISRAEL W. CHARNY, ENCYCLOPEDIA OF GENOCIDE 105-27 (1999).

consider the imposition of capital punishment on the person, not just in the abstract.

II. THE CONCEPT OF INDIVIDUALIZED SENTENCING

The proposal advanced in Part III involves the application of the Court's Eighth Amendment individualized sentencing doctrine to the implementation of a death sentence by a state. Before exploring how this might work in practice, it is instructive to explore the scope and origin of the underlying constitutional doctrine.

The Eighth Amendment proscribes "cruel and unusual" punishments.[119] In 1972, the Supreme Court held that the death penalty, as applied, violated the Eighth Amendment in the case of *Furman v. Georgia*.[120] *Furman* was a per curiam opinion with five separate concurrences by the five justice majority.[121] At the heart of several of the opinions was the determination that the application of the death penalty was arbitrary and random, such that receiving the death penalty was like being struck by lightning.[122]

As explored in *McGautha v. California*,[123] decided one year before *Furman*, the explanation for the arbitrariness of the death penalty related to the delegation of sentencing decisions to capital juries.[124] With no guiding principles for juries, the outcomes in capital cases varied widely

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[119] U.S. CONST. amend. VIII.

[120] 408 U.S. 238 (1972).

[121] *See id.*

[122] *See id.* at 306 (Stewart, J., concurring); *id.* at 240 (Douglas, J., concurring); *id.* at 257 (Brennan, J., concurring); *id.* at 310 (White, J., concurring); *id.* at 314 (Marshall, J., concurring).

[123] 402 U.S. 183 (1971). It is worth noting that the *McGautha* opinion also announced the outcome in a companion case, *Crampton v. Ohio*. *Id.* at 185.

[124] The Court in *McGautha* explained:

> States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel. For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete. The infinite variety of cases and facets to each case would make general standards either meaningless "boiler-plate" or a statement of the obvious that no jury would need.

402 U.S. at 208.

and wildly, with no clear principle separating the few murder cases that received the death penalty from the many that did not.[125]

As jury sentencing served to cause a significant part of why the Court found the death penalty unconstitutional, states sought a way to revise their capital sentencing processes after *Furman* in an attempt to make their capital statutes comply with the Eighth Amendment.[126] Some states added aggravating and mitigating circumstances to capital sentencing.[127] Other states, like North Carolina and Louisiana, adopted a mandatory capital sentencing scheme that removed sentencing discretion from the death penalty determination.[128]

A. The Woodson-Lockett Doctrine

In North Carolina, the state legislature adopted a statute that imposed a mandatory death sentence for first-degree murder.[129] The statute defined first-degree murder as including premeditated murder, felony murder, as well as certain kinds of killings including poisoning, lying in wait, starving, and torture.[130]

Woodson challenged this death sentence under the Eighth Amendment.[131] The Supreme Court in *Woodson* held that the Eighth

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[125] *See id.*

[126] *See generally* Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1 (2007).

[127] Gregg v. Georgia, 428 U.S. 153, 154-56 (1976); Jurek v. Texas, 428 U.S. 262, 262 (1976); Proffitt v. Florida, 428 U.S. 242, 247-54 (1976); Barrett Lain, *supra* note 126, at 46-55; *see also* William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post-*Furman *Capital Statutes*, 26 CRIME & DELINQUENCY 563, 565-66 (1980).

[128] *See* Woodson v. North Carolina, 428 U.S. 280, 285-86 (1976); Roberts v. Louisiana, 428 U.S. 325, 328-29 (1976).

[129] *Woodson*, 428 U.S. at 286. The complete language of the statute was as follows:

> Murder in the first and second degree defined; punishment. — A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison.

Id. (quoting N.C. GEN. STAT. ANN. § 117 (1975)).

[130] *Id.*

[131] *Id.* at 285.

Amendment barred mandatory death sentences.[132] Drawing on both *McGautha*[133] and one of the dissenting opinions in *Furman*,[134] the Court reasoned that mandatory death sentences violated the "evolving standards of decency that mark the progress of a maturing society."[135] Because states had largely abandoned the practice of mandatory death sentences, and the only reason that North Carolina adopted its statute was to satisfy the Court's decision in *Furman*, the Court held that the applicable societal standard prohibited mandatory sentences.[136] In other words, the Court found that mandatory death sentences were unusual punishments.[137]

Second, the Court explained that North Carolina's statute did not solve the problem of unbridled jury discretion raised in *Furman*. It merely "papered over" the issue by adopting a mandatory death sentence for first-degree murders.[138] From the Court's perspective, allowing juries to determine guilt under a mandatory death statute made jury nullification likely, which created the same kind of arbitrary and random outcomes that result from jury sentencing in capital cases.[139]

The third constitutional shortcoming of North Carolina's statute forms the basis for the doctrine that is the focus of this Article: individualized sentencing.[140] The Court explained this as the "failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death."[141] Thus, the Eighth Amendment requires states to use a death penalty process that accords "significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of

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132 *Id.* at 301.

133 402 U.S. 183 (1971).

134 *See* 408 U.S. 238, at 375 (Berger, C.J., dissenting). Chief Justice Berger's opinion explained as follows: "I had thought that nothing was clearer in history, as we noted in *McGautha* one year ago, than the American abhorrence of 'the common law rule imposing a mandatory death sentence on all convicted murderers.'" *Id.* at 402.

135 *Woodson*, 428 U.S. at 301 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

136 *Id.* at 302.

137 *See* William W. Berry III, *Promulgating Proportionality*, 46 GA. L. REV. 69, 92-94 (2011) [hereinafter *Promulgating Proportionality*] (linking the state counting part of the evolving standards test to the concept of unusualness).

138 *Woodson*, 428 U.S. at 302.

139 *Id.* at 302-03.

140 *Id.* at 303-05.

141 *Id.* at 303.

death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind."[142]

What made the lack of individualized consideration so objectionable to the Court in *Woodson* was its consequence — the mandatory death penalty results in the execution of the criminal offender.[143] As the Court emphasized, the North Carolina mandatory death penalty statute treated "all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."[144] The Court concluded by limiting the constitutional scope of its Eighth Amendment individualized sentencing approach to capital cases, even while acknowledging that such an approach constituted "enlightened policy."[145] To be clear, the Court in *Woodson* opined that the "fundamental respect for humanity underlying the Eighth Amendment" made individualized sentencing a "constitutionally indispensable part of the process of inflicting the penalty of death."[146]

In *Roberts v. Louisiana*, decided the same day as *Woodson*, the Court likewise barred the use of mandatory death sentences in holding that Louisiana's statute[147] violated the Eighth Amendment.[148] The

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[142] *Id.* at 304.

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] The statute provided:

> First degree murder
>
> First degree murder is the killing of a human being:
>
> (1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery; or
>
> (2) When the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or a peace officer who was engaged in the performance of his lawful duties; or
>
> (3) When the offender has a specific intent to kill, or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving a life sentence; or
>
> (4) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; [or]
>
> (5) When the offender has specific intent to commit murder and has been offered or has received anything of value for committing the murder.

Louisiana mandatory death penalty statute was narrower than the North Carolina statute in two ways: it limited the kinds of murder that counted as first-degree murder[149] and it provided more guidance to the jury about lesser-included offenses.[150]

Nonetheless, the Court found that the differences were not material.[151] Mandatory capital statutes, even if narrow, still violate the Eighth Amendment.[152] The Court explained:

> The futility of attempting to solve the problems of mandatory death penalty statutes by narrowing the scope of the capital offense stems from our society's rejection of the belief that "every offense in alike legal category calls for an identical punishment without regard to the past life and habits of a particular offender."[153]

In reaffirming its *Woodson* decision, the Court emphasized that Louisiana's statute did not eliminate the "constitutional vice" of mandatory death statutes: the "lack of focus on the circumstances of the particular offense and the character and propensities of the offender."[154]

> For the purposes of Paragraph (2) herein, the term peace officer shall be defined any include any constable, sheriff, deputy sheriff, local or state policeman, game warden federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, district attorney, assistant district attorney or district attorneys' investigator.
>
> Whoever commits the crime of first degree murder shall be punished by death.

LA. REV. STAT. ANN. 14:30 (1974) (overruled by Louisiana v. Comeaux, 239 So. 3d 920 (La. Ct. App. 2018)).

148 *See generally* Roberts v. Louisiana, 428 U.S. 325 (1976).

149 *Id.* at 331-32. The Louisiana statute had only five categories of homicide that constituted first degree murder: killing in connection with the commission of certain felonies; killing of a fireman or a peace officer in the performance of his duties; killing for remuneration; killing with the intent to inflict harm on more than one person; and killing by a person with a prior murder conviction or under a current life sentence. *Id.* at 332. Unlike North Carolina, the Louisiana statute did not have broad categories of felony murder or premeditated murder in its definition of first-degree murder. *Id.*

150 *See id.*; *see also* LA. CODE CRIM. PROC. ANN., arts. 809, 814 (1975); Louisiana v. Cooley, 257 So. 2d 400, 401 (La. 1972).

151 *See Roberts*, 428 U.S. at 332-33.

152 *Id.*

153 *Id.* at 333 (quoting Williams v. New York, 337 U.S. 241, 247 (1949)).

154 *Id.*

The Court expanded the individualized sentencing doctrine two years later in *Lockett v. Ohio*.[155] The issue in *Lockett* was whether Ohio's statute violated the rule from *Woodson* by restricting mitigating evidence at capital sentencing.[156] Specifically, the Ohio capital statute limited mitigation at sentencing to situations where: (1) the victim induced the offense, (2) the offense was committed under duress or coercion, or (3) the offense was the product of mental deficiencies.[157] By limiting the available mitigating evidence, the statute essentially made an aggravated murder conviction a mandatory death sentence for offenders who did not exhibit the statutorily enumerated kinds of mitigating evidence.[158]

The Court held that the Ohio statute violated the Eighth Amendment.[159] It cited its prior finding from *Woodson* that the Eighth Amendment required assessment of "character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[160] This concept, the Court emphasized, comes from "the fundamental respect for humanity underlying the Eighth Amendment."[161]

The statute's shortcoming was the limitation it placed on mitigating factors at sentencing.[162] It limited the consideration of mitigation evidence only to the enumerated mitigating factors and did not allow the court to consider other mitigating factors.[163] The Court explained that the sentencing judge having "'possession of the fullest information possible concerning the defendant's life and characteristics' is '[h]ighly relevant — *if not essential* — [to the] selection of an appropriate sentence . . . .'"[164] Under the Eighth Amendment, this included all relevant mitigating evidence.[165]

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155 438 U.S. 586 (1978).

156 *Id.* at 602. The facts of *Lockett* were particularly egregious. Sandra Lockett received a death sentence for agreeing to serve as the getaway driver for a robbery. She had no reason to believe that the other offenders would kill, no intent to kill, and took no part in the actual killing. *See id.* 590-91.

157 *Id.* at 594 (citing OHIO REVISED CODE §§ 2929.03-2929.04(B) (1975)).

158 *See Lockett*, 438 U.S. at 594-95.

159 *See id.* at 602-05.

160 *Id.* at 601 (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976)).

161 *Id.* at 604.

162 *Id.*

163 *See id.* at 608-09. It was not the listing of the factors per se, but the limitation on using non-listed factors that created the constitutional problem. *Id.*

164 *Id.* at 602 (quoting Williams v. New York, 337 U.S. 241, 247-48 (1949)).

165 *See id.* at 607-09.

In deciding *Lockett*, the Court again emphasized its differentness principle, concluding that the nature of the death penalty made the individualized sentencing protection important in a way that did not extend to non-capital cases.[166] The Court focused on the variety of post-trial techniques available to modify the imposition of the sentence in non-capital cases, such as parole, probation, and work furloughs, that in its mind, minimized the comparative seriousness of non-capital sentences.[167]

B. Application of the Doctrine

The Court has consistently applied the *Woodson-Lockett* doctrine to capital cases, and has, in recent years, expanded it to include juvenile life-without-parole sentences.[168] It has only, though, applied this concept to the imposition of the sentence of death (or juvenile life-without-parole) at sentencing.[169] Courts have not explored the question of whether the same concept also might apply to execution methods and techniques.

One example of the Court's application of the *Woodson-Lockett* individualized sentencing rule came in *Eddings v. Oklahoma*.[170] In *Eddings*, the trial judge considered the relevant aggravating evidence at sentencing,[171] but refused to consider the defendant's mitigating evidence, aside from his youth.[172] Specifically, Eddings had attempted to put on evidence of his family history of abuse as well as his severe psychological and emotional disorders.[173]

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166 *See id.* at 597-609.

167 *Id.*

168 *See, e.g.*, Miller v. Alabama, 567 U.S. 460, 475-78 (2012).

169 *See, e.g.*, Smith v. Texas, 543 U.S. 37, 45-48 (2004); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982).

170 *See Eddings*, 455 U.S. at 112-16.

171 Eddings had murdered a police officer, which made the death penalty a more likely punishment. *Id.* at 105.

172 Eddings was age sixteen at the time of the crime. *Id.* Death sentences would later be prohibited for juvenile offenders under the Eighth Amendment. Roper v. Simmons, 543 U.S. 551, 574-76 (2005).

173 *Eddings*, 445 U.S. at 109-10. In rejecting this evidence on appeal, the Oklahoma Court of Appeals explained:

> [Eddings] also argues his mental state at the time of the murder. He stresses his family history in saying he was suffering from severe psychological and emotional disorders, and that the killing was in actuality an inevitable product of the way he was raised. There is no doubt that the petitioner has a personality disorder. But all the evidence tends to show that he knew the difference between right and wrong at the time he pulled the trigger, and

In assessing the decision by the trial judge to exclude mitigating evidence at sentencing, the Court held that the Eighth Amendment barred Eddings' death sentence.[174] The Court explained, "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence."[175] It further found that, in light of the age of the defendant (age sixteen), evidence of Eddings' childhood was very relevant. The Court concluded, "there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant."[176]

In *Smith v. Texas*, the Texas trial court gave a nullification instruction with respect to mitigating evidence in a death sentencing proceeding.[177] The instruction limited consideration of mitigation evidence to the nullification of the two "special issue" aggravating factors under the Texas statute: (1) whether the offender committed the murder deliberately, and (2) whether the offender constituted a future danger to society such that he would kill again.[178] In other words, the mitigating evidence could only be considered to the degree to which it bore on the required determinations of deliberateness or dangerousness. Smith's mitigating evidence dealt with his intellectual disabilities, including a low IQ, as well as his family background.[179]

The Court applied *Lockett* and held that the nullification instruction violated the Eighth Amendment. Specifically, the Court explained, "the key . . . is that the jury be able to 'consider and *give effect to* [a defendant's mitigation] evidence in imposing sentence.'"[180]

By contrast, the Court later explained that the individualized sentencing consideration requirement under the Eighth Amendment does not bear on the weighing process of aggravating and mitigating factors in the case of *Kansas v. Marsh*.[181] In *Marsh*, the Court upheld

> that is the test of criminal responsibility in this State. For the same reason, the petitioner's family history is useful in explaining why he behaved the way he did, but it does not excuse his behavior.

Id.

174 *See id.* at 113-14.

175 *Id.*

176 *Id.* at 115.

177 Smith v. Texas, 543 U.S. 37, 37-38 (2004).

178 *Id.* at 39.

179 *Id.* at 41.

180 *Id.* at 46 (quoting Penry v. Johnson, 532 U.S. 782, 797 (2001)).

181 548 U.S. 163 (2006).

Kansas' sentencing process that instructed the jury to choose death unless the mitigating evidence outweighed the aggravating evidence.[182] Because the procedure allowed for the full and complete consideration of mitigating evidence, it did not violate the principle adopted in *Woodson* and *Lockett*.[183]

Finally, it is worth noting that the *Woodson-Lockett* principle may, in some senses, conflict with the general principle established by *Furman* of requiring limits on discretion to minimize random and arbitrary sentences.[184] The individualized sentencing principle requires consideration of all relevant evidence.[185] By contrast, the *Furman* principle requires some level of consistency in decision-making.[186] Proportionality review, however, provides one answer to this doctrinal conundrum.[187] State supreme courts can remedy arbitrary or random outcomes by excluding outlier cases, while still allowing juries to consider mitigating evidence.[188] Another way of understanding this idea relates to the degree to which two cases are in fact similar such that a disparate sentencing outcome would constitute disparity.[189] Using broad categories of similarity, like aggravating factors in capital cases or some crimes more generally, may not really capture fundamental differences that ought to bear on the sentencing outcome.[190]

Finally, in *Miller v. Alabama*,[191] the Court expanded the doctrine beyond the death penalty to juvenile life-without-parole sentences. At the time of *Miller*, a number of states imposed mandatory life without parole sentences for juvenile offenders.[192] In many cases, these sentencing schemes were not the original legislative design.[193] Two

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[182] *Id.* at 165.

[183] *Id.* at 175.

[184] *See* Walton v. Arizona, 497 U.S. 639, 656-74 (1990) (Scalia, J., concurring). *See generally* Scott E. Sundby, *The* Lockett *Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147 (1990).

[185] *Walton*, 497 U.S. at 662-63.

[186] *Id.* at 667-68.

[187] *See generally Promulgating Proportionality*, *supra* note 137.

[188] *Id.* at 94-95.

[189] *See* William W. Berry III, *Practicing Proportionality*, 64 FLA. L. REV. 687, 691 (2012).

[190] *See id.*

[191] Miller v. Alabama, 567 U.S. 460 (2012).

[192] William W. Berry III, *The Mandate of* Miller, 51 AM. CRIM. L. REV. 327, 350-51 (2014).

[193] William W. Berry III, *Life-With-Hope Sentencing*, 76 OHIO ST. L.J. 1051, 1054-56 (2015) [hereinafter *Life-With-Hope Sentencing*].

major developments shaped the rise of juvenile life without parole sentences — the abolition of parole[194] and the abolition of the juvenile death penalty.[195]

In the 1970s, many states began abolishing parole, particularly for more serious crimes like murder.[196] This "truth-in-sentencing" movement eschewed the concept of rehabilitation in favor of retribution and incapacitation.[197] The penal populism movement sought not to reform the offender, but instead protect society from the offender.[198] Many crimes that previously carried life *with* parole sentences thus became life without parole sentences because parole was no longer an option.[199] This meant that sentences that were formerly fifteen years in length, as a practical matter, essentially became life sentences.[200]

Then, in 2005, the Supreme Court held that juvenile death sentences violated the Eighth Amendment in *Roper v. Simmons*.[201] The effect of this decision was to commute juvenile death sentences to juvenile life without parole sentences.[202] It also made juvenile life without parole sentences the most severe sentence in juvenile murder cases, moving some possible death sentences to life without parole sentences.[203]

In *Miller*, the Court considered whether mandatory juvenile life without parole sentences violated the Eighth Amendment.[204] Relying on the *Woodson-Lockett* concept of individualized sentencing[205] and

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194 *See, e.g.*, Robert P. Crouch, Jr., *Uncertain Guideposts on the Road to Criminal Justice Reform: Parole Abolition and Truth-in-Sentencing*, 2 VA. J. SOC. POL'Y & L. 419 (1995).

195 Roper v. Simmons, 543 U.S. 551, 575 (2005).

196 *See, e.g.*, Cristine Scott-Hayward, *The Failure of Parole: Rethinking the Role of the State in Reentry*, 41 NEW MEX. L. REV. 421, 451 (2011).

197 *See id.* at 419; DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 142-43 (2001).

198 *See* GARLAND, *supra* note 197, at 142-43; JOHN PRATT, PENAL POPULISM 94-95, 112-13 (2007).

199 Berry, *Life-With-Hope Sentencing*, *supra* note 193, at 1059-60.

200 *Id.* at 1056.

201 543 U.S. 551 (2005).

202 Hillary J. Massey, *Disposing of Children: The Eighth Amendment and Juvenile Life Without Parole After Roper*, 47 B.C. L. REV. 1083, 1084-85 (2006).

203 It also raised the question concerning whether the Court should do the same for juvenile accomplices. *See* Brian R. Gallini, *Equal Sentences for Unequal Participation: Should the Eighth Amendment Allow All Juvenile Murder Accomplices to Receive Life Without Parole?*, 87 OR. L. REV. 29, 32, 40-47 (2008).

204 Miller v. Alabama, 567 U.S. 460, 465 (2012).

205 *See* discussion *supra* Part II.A.

the *Roper-Graham* idea that juveniles are different,[206] the Court held that the Eighth Amendment requires a sentencing determination by a judge or jury before sentencing a juvenile offender to life without parole.[207] With respect to the concept of individualized sentencing, the Court was particularly concerned that mandatory juvenile life without parole sentences "preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it."[208] The consideration of such characteristics was paramount precisely because the mandatory sentence would not allow the Court to take into account what often amounts to clear and significant differences between adult and juvenile offenders.[209]

Two years after *Miller*, the Court revisited this issue in *Montgomery v. Louisiana* in which it considered whether the decision in *Miller* applied retroactively.[210] Under the Court's retroactivity doctrine, the core question was whether the holding in *Miller*, which proscribed the imposition of mandatory juvenile life without parole sentences, constituted a substantive rule or a procedural rule.[211] Under *Teague v. Lane*, new substantive rules of constitutional law apply retroactively, which new procedural rules generally do not.[212] The Court held that

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[206] *Miller*, 567 U.S. at 471. The Court explained, "*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, 'they are less deserving of the most severe punishments.'" *Id.*

[207] *Id.* at 479.

[208] *Id.* at 476.

[209] *Id.* at 477-78. As the Court stated:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features — among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him — and from which he cannot usually extricate himself — no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth — for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.

Id.

[210] Montgomery v. Louisiana, 136 S. Ct. 718, 725 (2016).

[211] *See id.* at 727.

[212] *Id.* at 728; Teague v. Lane, 489 U.S. 288, 316 (1989). For an argument concerning how the Court should improve its doctrine, see William W. Berry III, *Normative Retroactivity*, 19 U. PA. J. CONST. L. 485, 506-18 (2016) [hereinafter

the *Miller* rule was substantive for retroactivity purposes, and applied to pre-*Miller* juvenile life without parole sentences.[213] Importantly, the Court gave guidance on when a judge should sentence a juvenile offender to life without parole.[214] The Court explained:

> *Miller* requires that before sentencing a juvenile to life without parole, the sentencing judge take into account "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." The Court recognized that a sentencer might encounter the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified. But in light of "children's diminished culpability and heightened capacity for change," *Miller* made clear that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon." (internal citations omitted).[215]

The importance of this decision for the *Woodson-Lockett* doctrine rests in the requirement that a sentencer give full and fair consideration to mitigating evidence.[216] As the Court held, this is a substantive consideration, it requires more than a court simply allowing the offender to present mitigating evidence; it requires a court to actively consider such evidence.[217] The Court explained, "*Miller*, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'"[218]

That then is the virtue of individualized consideration — to assess whether, in light of the evidence, a punishment remains justified with respect to the offender in the case. While a punishment might seem to fit a crime in the abstract, it may not always do so in practice. As such, sentencing courts must consider aggravating and mitigating evidence in determining the appropriate sentence for an offender.

As discussed, the Court has made it clear that these principles apply to capital cases and juvenile life without parole cases. The remainder

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Normative Retroactivity].

213 *See Montgomery*, 136 S. Ct. at 736.

214 *Id.* at 733.

215 *Id.* at 733-34.

216 *Id.*; Berry, *Normative Retroactivity*, *supra* note 212, at 503.

217 *See Montgomery*, 136 S. Ct. at 733-34.

218 *Id.* at 734.

of the Article makes the case for extending this doctrine to all felony offenses. To understand the basis for shifting and expanding the doctrine, though, it is necessary to explore the theoretical underpinnings of individualized sentencing under the Eighth Amendment.

C. Theoretical Underpinnings of the Doctrine

The Supreme Court's early Eighth Amendment cases establish two core principles that undergird its conceptualization of the proscription against cruel and unusual punishments. As explored below, the Court has made clear that, at the very least, punishments that cause torture are cruel and unusual. In addition, the Court has stated that states violating basic notions of human dignity through punishment violate the Eighth Amendment.

In *Weems v. United States*, the Supreme Court held that the punishment of cadenal temporal — fifteen years of hard labor in prison — for the crime of falsifying a document violated the Eighth Amendment.[219] An early Eighth Amendment case, *Weems* noted that "[w]hat constitutes a cruel and unusual punishment has not been exactly decided. It has been said that, ordinarily, the terms imply something inhuman and barbarous — torture and the like."[220] The Court nevertheless emphasized that:

> 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, and something more than the mere extinguishment of life.[221]

In *Trop v. Dulles*, the Supreme Court developed the scope of the Eighth Amendment, building on the ideas expressed in *Weems*.[222] In finding that denaturalization was an unconstitutional punishment for the crime of treason, the Court in *Trop* emphasized the concept of human dignity as a corollary principle emerging from the proscription against torture.[223] The Court explained, "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands

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[219] Weems v. United States, 217 U.S. 349, 382 (1910).

[220] *Id.* at 368.

[221] *Id.* at 370 (quoting *In Re Kemmler*, 136 U.S. 436, 447 (1890)).

[222] *See* Trop v. Dulles, 356 U.S. 86, 100-04 (1958).

[223] *Id.* at 100.

to assure that this power be exercised within the limits of civilized standards."[224] The Court has often cited this language in its later cases to establish the importance of preserving human dignity in state-sponsored punishment.[225]

While the idea of dignity is perhaps ephemeral, the Court has described how mandatory sentences rob offenders of such dignity in capital cases.[226] By depriving individuals of individualized sentencing determinations, the Court essentially denies the individual of his or her humanity by refusing to consider the aggravating and mitigating aspects of his or her particular case.[227]

As discussed below, both the concepts of torture and dignity bear heavily in the context of execution methods and techniques. To satisfy the Eighth Amendment, these methods and techniques must not inflict torture or compromise the human dignity of the condemned.[228] There is, however, no formal proceeding to make such a determination on an individualized basis in each case prior to execution. Such claims may be evaluated in the context of habeas litigation but are not considered de novo by courts as part of a standard procedure.

Before exploring this proposal, though, it is also instructive to examine two applications of the principles of avoiding torture and preserving human dignity — the concepts of differentness and uniqueness. The former has little bearing on the conversation, the latter is, on the other hand, at its core.

The Supreme Court has long held that "death is different," meaning that capital cases receive higher scrutiny.[229] This is because the death

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[224] *Id.*

[225] *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 311-12 (2002) (quoting *Trop*, 356 U.S. at 100); Woodson v. North Carolina, 428 U.S. 280, 303-05 (1976) (A mandatory sentence "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."). *See generally* Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment*, 2016 U. ILL. L. REV. 2129 (2016) (exploring the concept of dignity under the Eighth Amendment).

[226] *Woodson*, 428 U.S. at 304.

[227] *Id.*

[228] It is fair to argue that the death penalty itself constitutes torture and is always a cruel and unusual punishment. Justices Brennan and Marshall took this position in *Furman*, and there is much merit in it. *See* Furman v. Georgia, 408 U.S. 238, 240-307 (1972). For purposes of this Article, however, the current consensus on the Court that the death penalty is not per se unconstitutional will be adopted.

[229] Justice Brennan's concurrence in *Furman v. Georgia* is apparently the origin of the Court's "death is different" capital jurisprudence. Carol S. Steiker & Jordan M.

penalty is a unique punishment, both in its severity and its finality.[230] As a result, the Court has paid particular attention to the concepts of torture and dignity in evaluating the imposition of the death penalty in various circumstances.[231] With respect to individualized sentencing determinations, the Court has held that death cases are "different," and as such, require individualized sentencing determinations to ensure that sentences do not involve torture or disrespect human dignity.[232]

It is not controversial to suggest that these concepts also extend to the act of killing, not just the imposition of the sentence. Indeed, the Supreme Court's method of execution cases have indicated as much.[233] In other words, the Court should, as part of its assessment of the method or technique under the Eighth Amendment, give heightened scrutiny to assure that the method or technique in question does not violate human dignity or involve torture.

Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 370 (1995) (crediting Justice Brennan as the originator of this line of argument); *see also Furman*, 408 U.S. at 286 (1972) (Brennan, J., concurring) ("Death is a unique punishment in the United States."); Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 117-19 (2004) (discussing the Court's death-is-different jurisprudence). Indeed, it is not a stretch to suggest that the United States has two tracks of criminal justice. *See, e.g.*, Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145 (2009); Nancy J. King, *How Different Is Death? Jury Sentencing in Capital and Non-Capital Cases Compared*, 2 OHIO ST. J. CRIM. L. 195 (2004) (highlighting the similarities and differences in jury sentencing between capital and non-capital cases).

[230] *See, e.g.*, Ring v. Arizona, 536 U.S. 584, 616-17 (2002) (Breyer, J., concurring) (finding particularly alarming the fact that DNA evidence used to convict persons on death row may be unreliable, considering "death is not reversible"); Spaziano v. Florida, 468 U.S. 447, 460 n.7 (1984) ("[T]he death sentence is unique in its severity and in its irrevocability . . . ."); Gregg v. Georgia, 428 U.S. 153, 187 (1976) ("There is no question that death as a punishment is unique in its severity and irrevocability."); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (explaining that death differs from life imprisonment because of its "finality").

[231] *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407 (2008); Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002).

[232] It is not clear, though, that the corollary is true — that death sentences are the only ones entitled to heightened scrutiny. I have suggested elsewhere that life sentences warrant heightened protection, see William W. Berry III, *More Different than Life, Less Different than Death*, 71 OHIO ST. L.J. 1109, 1113 (2010), and more recently, that such constitutional protections ought to extend to all felony cases. William W. Berry, *Individualized Sentencing*, 76 WASH. & LEE L. REV. (forthcoming 2019) (manuscript at 79) (on file with author).

[233] *See, e.g.*, Glossip v. Gross, 135 S. Ct. 2726 (2015); Baze v. Rees, 553 U.S. 35 (2008).

Having established the execution methods and techniques are "different" because they are a part of the death penalty itself, the second application of the principles of prohibiting torture and preserving dignity becomes relevant. This second principle relates to the uniqueness of the offender as developed as part of the individualized sentencing requirement of the Eighth Amendment.[234]

Part of the reason that the Eighth Amendment requires individualized sentencing relates to the unique characteristics of each offender.[235] Certainly, the decision to give an individual the death penalty requires the sentencing jury or judge to consider all of the relevant aggravating and mitigating factors, both with respect to the crime and also with respect to the character of the offender.[236] The unique characteristics help to differentiate those who deserve the death penalty, at least under guidelines adopted by state legislatures, from those who do not.[237] The failure to consider relevant evidence in this context violates the constitutional rights of the accused; the Eighth Amendment requires consideration of all relevant aggravating and mitigating evidence.[238]

As explored below, this uniqueness can become even more pronounced when the issue shifts from the appropriateness of a death sentence to the practical imposition of the death penalty on the inmate. The physical condition of the inmate, including a wide variety of health issues, bears directly upon the effect of the punishment on the inmate in terms of physical pain. An execution method or technique that may be constitutionally acceptable[239] for one inmate may not be for another given the effect of imposing the method or technique upon them. A lethal injection may constitute physical torture for a particular inmate. Likewise, even the process of setting up the procedure, as seen in the cases of Hamm and Campbell, can impinge on the human dignity of the inmate.[240]

In light of the logical connection between the concept of individualized sentencing and the need to consider the effect of execution methods and techniques on inmates under the Eighth

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234 *See supra* Part II.A.

235 *See* Lockett v. Ohio, 438 U.S. 586, 604-05 (1978).

236 *Id.*

237 *Id.*

238 *See id.*

239 Again, this presumes, per the Court's jurisprudence, that killing an inmate is not per se unconstitutional.

240 *See supra* INTRODUCTION.

Amendment, the next section advances the core proposal of the Article — constitutionally mandated individualized execution hearings.

III. INDIVIDUALIZED EXECUTIONS

The concept of individualized executions extends the Eighth Amendment doctrine of individualized sentencing to execution methods and techniques. Specifically, the argument is that the Eighth Amendment should entitle each death row inmate to a hearing at which the trial court determines whether the proposed method and technique of execution constitutes a cruel and unusual punishment with respect to the inmate in question. This approach has two aspects: the basics of the proposal itself and an explanation of how it fits within and subsequently extends the doctrine of the Eighth Amendment. Each are considered in turn.

A. The Proposal

In capital cases, states typically bifurcate trials, holding a separate sentencing hearing in order to consider the applicable punishment, after the tribunal has found the defendant guilty in the initial trial.[241] This proposal advocates for the addition of a third hearing — an individualized execution hearing — to assess the method and technique the state intends to use in the execution of the inmate. Given the evidentiary nature of such a hearing, the state trial court would conduct it.

As with the concept of individualized sentencing, the hearing would focus not on the method and technique as a general matter, but instead on the individual characteristics of the inmate to be executed. Specifically, the court would assess whether the proposed method and technique would satisfy the dual requirements of the Eighth Amendment discussed above — the requirement that the procedure not involve torture, and the corollary idea that the procedure would not demean the human dignity of the inmate.[242]

The individualized execution hearing would occur at the time that the state supreme court sets a date for execution for the death row inmate. That way, the state trial court could assess the suitability of the execution method and technique with respect to the inmate in enough temporal proximity to the execution to make the required

[241] *See, e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976) (holding that such an approach safeguards against arbitrariness in capital cases).

[242] *See supra* Part II.C.

determination accurately. Establishing a standard, set, constitutional hearing also would ensure that courts give proper, careful consideration to the key individualized execution questions without the typical rush and pressure of exploding execution dates.

The individualized execution hearing would operate much like a sentencing hearing in that the hearing operates in light of prior determinations. A sentencing hearing functions in light of a finding of guilt, whereas, an individualized execution hearing would function in light of both the determination that the individual is guilty of capital murder and the imposed sentence is the death penalty.

Because the state is the party engaging in the killing of the inmate, the state would bear the burden of proof, as it does at trial and at sentencing.[243] The standard of proof should be beyond a reasonable doubt. If the state cannot demonstrate beyond a reasonable doubt that its killing method and technique does not involve torture, the Constitution should bar it from engaging in such homicidal acts. Specifically, the state would need to prove that: (1) its method and technique do not torture the inmate, and (2) its method and technique do not infringe on the human dignity of the inmate. This inquiry would go beyond the question of whether the punishment generally fit the criteria in question and examine specifically whether they would be true as applied to the individual inmate in question.

For purposes of the first category, the Court's cases make clear that the Eighth Amendment proscribes methods and techniques of execution that are "inhuman,"[244] "barbarous,"[245] constitute "torture or a lingering death,"[246] or otherwise involve something more than the mere extinguishment of life."[247] While the Supreme Court has never found that a particular American punishment constitutes torture, it has provided examples of torture.[248] These include cases from England in which "terror, pain, or disgrace were sometimes superadded" to the sentence, such as where the condemned was "embowelled alive,

[243] This proposal contradicts parts of the Court's current execution methods doctrine. *See infra* Part III.B.

[244] *In re Kemmler*, 136 U.S. 436, 447 (1890); *see also* Baze v. Rees, 553 U.S. 35, 48-49 (2008).

[245] Rhodes v. Chapman, 452 U.S. 337, 345 (1981).

[246] *In re Kemmler*, 136 U.S. at 447; *see also* Baze, 553 U.S. at 100.

[247] *In re Kemmler*, 136 U.S. at 447; *see also* Baze, 553 U.S. at 49.

[248] The *Wilkerson* Court explained that "it is safe to affirm that punishments of torture, . . . and all others in the same line of unnecessary cruelty, are forbidden" by the Eighth Amendment. Wilkerson v. Utah, 99 U.S. 130, 136 (1879); *see also* Baze, 553 U.S. at 48.

beheaded, and quartered," or instances of "public dissection in murder, and burning alive."[249]

The question with respect to current methods or techniques would then be whether, for the individual inmate, the process would amount to torture. While justices of the Supreme Court disagree on whether lethal injection in the abstract constitutes torture, a court engaged in an individualized execution proceeding could assess whether the lethal injection would amount to torture for the inmate, given his health condition.

For purposes of dignity, the Court's cases similarly proscribe punishments that infringe upon the dignity of the offender. As with the torture question, the dignity question would assess whether the method or technique of killing the state intended to use would have the effect of infringing upon the dignity of the inmate.[250] If the method or technique amounted to torture, the dignity of the inmate would clearly be compromised, and the procedure would, as applied, violate the Eighth Amendment.

But the dignity inquiry is broader than just torture. Although the Court has not directly addressed this application of dignity, it does not seem contrary to the principle to suggest that there are certain situations when the health and condition of the inmate might make using certain methods or techniques constitutionally inappropriate. For instance, attempting to use lethal injection to execute an inmate who has severely damaged veins might infringe upon the dignity of the inmate by engaging in repeated stabbing of their body as well as risking a botched execution.[251] Similarly, choosing to execute an inmate that is terminally ill and about to die might also compromise the individual's dignity. Likewise, executing an individual that does not understand why he is being executed as the result of mental illness may compromise the individual's dignity.

The two cases before the Supreme Court this term will offer insight into the concept of dignity under the Eighth Amendment in these types of situations. First, in *Bucklew v. Precythe*, Missouri is attempting to use lethal injection to kill an inmate whose dire physical condition is likely to make the procedure a brutal event.[252] Bucklew's physical condition will likely cause him to choke to death on his own blood

[249] Wilkerson, 99 U.S. at 135.

[250] *See* Ryan, *supra* note 225, at 2161-63.

[251] *See, e.g.*, Glossip v. Gross, 135 S. Ct. 2726, 2734 (2015) (explaining that "the viability of the IV access point was the single greatest factor that contributed to the difficulty in administering the execution drugs" in Lockett's lethal injection").

[252] *See* Bucklew v. Precythe, 883 F.3d 1087, 1090 (8th Cir. 2018).

prior to even being injected if the state attempts its typical method and technique.[253] Subjecting an inmate to such an ordeal seems as if it would denigrate him and impair his dignity.

Second, in *Madison v. Alabama*, Alabama is attempting to execute an inmate with dementia that has resulted from multiple strokes.[254] Using its current lethal injection method will likely threaten the dignity of Madison, as his mental condition will prevent him from understanding why the state is killing him.[255]

Having explained what the state must prove, the next issue is how the state will meet its burden. As with any sentencing hearing, the state would present evidence relevant to the execution of the inmate in question. As part of that presentation, the state would obviously have to present the methods and techniques that it plans to use to kill the inmate.

In recent years, extensive litigation related to lethal injection has emerged with respect to the identity of the drug manufacturers of the drugs used in the execution procedure. States have fought hard to keep the identity of the manufacturers secret.[256] In part this decision relates to protecting the drug companies from negative public relations related to the association of their drug with state-sponsored killing.[257] Some drug companies might be reluctant to provide the needed drugs without assurances that their identity be kept secret.[258]

This move toward secrecy may also, though, relate to the untoward manner in which states have obtained the drugs in the first place. There is evidence that states have illegally imported certain drugs for the sole purpose of using them in executions. As documented in *Glossip*, it is becoming increasingly difficult for states to obtain lethal injection drugs. And if they are able to procure such drugs, the states do not necessarily want to reveal the method that such drugs were obtained.

Nonetheless, the Eighth Amendment ought to accord the inmate, at the very least, knowledge concerning how the state proposes to kill

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253 *Id.*

254 Madison v. Comm'r, Ala. Dep't of Corr., 851 F.3d 1173, 1177 (11th Cir. 2017), *vacated*, Madison v. Comm'r, Ala. Dep't of Corr., 879 F.3d 1298 (11th Cir. 2018).

255 *Id.* at 1178; *see also* Panetti v. Quarterman, 551 U.S. 930, 954 (2007); Dan Markel, *Executing Retributivism: Panetti and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1163, 1168 (2009).

256 *See, e.g.*, Berger, *supra* note 78, at 1388-95 (detailing state efforts to ensure lethal injection secrecy and judicial acquiescence).

257 *See supra* Part I.B.

258 *Id.*

him. The type of drug and how it is intended to work is what is most important with respect to the dignity of the inmate. Not knowing how or when the state intends to kill you can create its own form of psychological torture.[259]

In some cases, the manufacturer may be synonymous with the drug itself, which may make hiding the manufacturer from the inmate impossible. In most cases, though, a court could either: (1) hide the identity from the jury while revealing it to the inmate or (2) allow the manufacturer to be revealed only when it is germane to the outcome of the hearing.

The better approach, however, is to make the hearing public and transparent, including the identity of the drug manufacturer. If the state is acting on behalf of its citizens in pursuing the execution of an inmate, the citizens should be informed as to the identity of the drugs, their manufacturer, and the execution procedure the state intends to pursue. If revealing these facts results in a backlash, perhaps state officials are not accurately performing the will of the people with respect to the death penalty.

After the state establishes the efficacy of its procedure and its likelihood of avoiding torture and injury to the inmate's dignity, the inmate must then have the opportunity to introduce evidence that the procedure in question will cause torture or infringe upon the defendant's dignity. This can include expert medical testimony, or any other relevant mitigating evidence that concerns the method or technique of execution.

To be clear, the purpose of such a hearing is not for the defendant to avoid the death penalty. Rather, it is for the courts to make sure that the death penalty method and technique that the state intends to impose does not involve torture or denigrate the dignity of the inmate.

Paramount in this proceeding is the provision of adequate discovery on both sides of the case. The state must provide a complete and comprehensive overview of the procedure it is proposing to use to execute the inmate. Trial judges would play an important gatekeeper role in an individualized execution proceeding. The judge must require the state to be as transparent as possible such that the inmate can truly understand the process by which it intends to kill. Likewise, the inmate must provide adequate and complete mitigating evidence to the extent that the inmate seeks to challenge the proposed method

[259] *See* Jones v. Chappell, 31 F. Supp. 3d 1050 (C.D. Cal. 2014), *rev'd by* Jones v. Davis, 806 F.3d 538 (9th Cir. 2015).

and technique on grounds that as applied it constitutes torture or compromises dignity.

Having completed discovery, the state may either elect to alter its method and technique in light of the information provided by the inmate or choose to proceed under its prior proposal. In the former case, the state can provide an accommodation to the inmate with respect to the method and technique in order to eliminate the risk of torture and / or dignity denigration. The inmate would again have the opportunity to respond to the new proposal by the state. The parties could then negotiate an appropriate outcome for the inmate that would allow the state to kill but without violating the Eighth Amendment principles of anti-torture and dignity as currently defined by the Supreme Court.

If the parties cannot agree, or if the state refuses to alter its initial proposal, the court will then litigate the dispute in a hearing and determine whether the proposed execution method and technique satisfies the Eighth Amendment. If the result of the individualized execution determination is that the procedure does not violate the Eighth Amendment, then the state can proceed as planned.

If, on the other hand, the state fails to meet its burden, the execution date is removed, and the state must wait two years before setting another execution date. The purpose of the two-year penalty is to encourage the state to develop procedures that account for the individual characteristics of the inmate, and to make every effort to avoid torture and the denigration of inmate dignity. If the state serves the two-year penalty and fails again, another two-year penalty is imposed.

Placing the burden on the state in this context makes sense. The state is the party choosing to kill the other. In order for such a killing to be lawful and not just a masked form of revenge, it requires a heightened level of inquiry and legitimacy.[260]

Another worry might be that inmates act in bad faith in this context, particularly because they arguably have nothing to lose and everything to gain by causing a delay of execution date. To be fair, death row conditions are often so horrible that they may contribute to the inmates' decision to volunteer to waive all of their appeals and proceed to execution.[261] Even outside of the context of volunteers, though,

[260] Of course, it is also possible to conclude that such actions by the State are never inherently lawful, as the death penalty is simply a masked form of murder.

[261] *See Information on Defendants Who Were Executed Since 1976 and Designated as "Volunteers*," DEATH PENALTY INFO. CTR. (Dec. 7, 2017), https://deathpenaltyinfo.org/information-defendants-who-were-executed-1976-and-designated-volunteers.

living an additional two years on death row is not generally thought of as a desirable prize.

Further, trial judges are in a position to monitor the good faith of inmates. Where inmates demonstrate a real concern with a particular method, courts can encourage the state to alter their method to avoid torture without sacrificing the death penalty altogether. The point here is to encourage a conversation within the context of litigation to ameliorate unnecessarily brutal killings by the state.

The good faith concern can also swing the other way, with the real possibility of trial judges affirming every method and technique proposed by the state without any real scrutiny. Because the effect of ruling for the inmate is not eliminating the death penalty, though, and instead just ensuring that the inmate is not tortured to death, courts may be more open to requiring some level of care on the part of the state in choosing execution methods and techniques.

If anything, a transparent and public individualized execution proceeding will encourage the accountability of state officials to citizens who will be able to observe the manner in which the court conducts the hearing. It might also help citizens come to terms with how their state's death penalty is used, and whether the process is one to which they want to continue to ascribe.

A final part of the individualized execution proceeding would be to establish the identity of the decision-maker. As in capital trials and sentencing proceedings, having a jury make such decisions would both eliminate any possible Sixth Amendment problems,[262] but also ensure that the people had a say in how the state was carrying out their decision to kill. As with prior proceedings, a unanimous jury verdict with respect to the torture question and the dignity question would be required. Because "death is different," these safeguards would be essential to legitimizing what the state was planning to engage in during the execution.

Given that the individualized execution proceeding could be a decade or more after the initial sentencing hearing,[263] it would be impractical to attempt to use the same jury. A new jury would be helpful as well, in broadening the community input into the execution method and technique.

As with any trial or hearing, allowing the parties to negotiate and come to their own agreement would not only be possible, but also

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[262] *See* Hurst v. Florida, 136 S. Ct. 616, 621-22 (2016); Apprendi v. New Jersey, 530 U.S. 466, 476 (2000).

[263] *Time on Death Row*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/time-death-row (last visited Jan. 30, 2019).

encouraged in this context. If the typical lethal injection protocol caused specific issues for a defendant in light of his health, the state could offer to accommodate the individual by tweaking its approach or electing to use a different method altogether. While the individualized execution hearing provides a venue to fully litigate this question, the parties could also negotiate and agree on what made the most sense in light of the state's goal of execution and the individual inmate's physical condition.

One way to circumscribe and narrow the individualized execution hearing would be for the state to give the inmate a choice of execution method. As indicated above, five states adopt such an approach.[264] A hearing would still be required, however, as the states do not detail the actual execution technique, and the details of that technique would be subject to review. A firing squad method, for instance, might in itself not constitute torture, but if the technique were to use pellet guns and shoot the inmate with thousands of pellets in the hope that he would bleed to death, the technique would raise Eighth Amendment questions.

The secrecy involved in lethal injection specifically and the administration of the death penalty more generally makes such hearings increasingly necessary. If no one knows how a state is killing its inmates, the likelihood of torture and lost dignity grow exponentially.

B. The Doctrinal Extension

In order to make individualized execution hearings a reality under the Eighth Amendment, the United States Supreme Court must expand the individualized sentencing doctrine, as well as slightly tweak its current methods of execution jurisprudence. This section maps out how such a doctrinal shift might work in light of the Court's precedents.

The first piece of the doctrinal puzzle — the expansion of the concept of individualized sentencing — is relatively straightforward and fits nicely in the context of the Court's Eighth Amendment jurisprudence. As explained above, the concept of individualized sentencing mandates that courts examine all relevant aggravating and mitigating circumstances at the capital sentencing proceeding.[265]

The doctrinal move here would take that concept, individualized sentencing, and migrate it to the question of suitability for execution.

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[264] *See supra* INTRODUCTION.

[265] *See supra* Part II.C.

The individualized sentencing idea would apply to the individual to be executed, requiring a similar inquiry into the individual's personal situation prior to moving forward.[266] Just as a sentencing jury may not sentence to death without considering all relevant aggravating and mitigating evidence,[267] a state should not move forward with an execution without considering whether the execution will constitute torture or otherwise denigrate the dignity of the inmate. The concept would be the same — assessing whether the next step is appropriate in light of a prior judicial decision.

The shift from capital punishment to juvenile life without parole under the Eighth Amendment provides a similar example of such a move. In that context, the Court has applied the same categorical limitations on mandatory death sentences to mandatory juvenile life without parole sentences.[268] The Court had thus applied one doctrinal rule in a new construct, similar to the approach advocated here.

From a policy perspective such a shift makes sense as well. The concept of individualized sentencing — determining a death sentence based on the individual characteristics of the offender — loses its legitimacy if the actual punishment itself is a one-size fits all approach. The sentencing hearing typically does not consider the physical impact of the death penalty on the inmate; it simply presumes such an exercise is constitutional and would satisfy the Eighth Amendment. Even if a sentencing court wanted to engage in such an inquiry, the typical gap of over a decade between the sentencing hearing and the execution means that the relevant evidence — the physical health of the inmate — would be largely unavailable at the time of sentencing.

The second question is how the proposal relates to the Court's method of execution jurisprudence. As an initial point, the decision to uphold lethal injection in *Glossip v. Gross* does not foreclose challenges to it that might be the subject of an individualized execution hearing. Justice Alito's opinion makes clear that the Court's inquiry into the method in that case is categorical.[269] Certainly, the goal of the individualized execution hearing is not to evaluate execution methods and techniques generally. Instead, the approach is to consider the use of the method *as applied* to the inmate facing the execution as the Court considers this term in *Bucklew* and *Madison*.[270]

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[266] *Id.*

[267] *Id.*

[268] *Compare* Woodson v. North Carolina, 428 U.S. 280 (1976), *with* Miller v. Alabama, 567 U.S. 460 (2012).

[269] *See* Glossip v. Gross, 135 S. Ct. 2726, 2737-38 (2015).

[270] Bucklew v. Precythe, 138 S. Ct. 1706 (2018); Madison v. Alabama, 138 S. Ct.

The Court's current doctrine with respect to methods is as follows. Inmates must demonstrate that the proposed procedure will create an unnecessary risk of substantial pain.[271] If the inmates can demonstrate that the risk is present, they still do not prevail unless they also show that another less risky procedure exists.[272] In short, the Court places the burden on the inmate to show that the method and technique will be unconstitutionally painful *and* to propose an alternative method.[273]

Inmates are typically in a poor position with respect to having information concerning the possible methods that a state can impose, outside of the states' statutory directives. State execution statutes, though, often provide only general guidance. For instance, a statute might require use of a barbiturate in a lethal injection proceeding, but might not specify the manufacturer or type of barbiturate.[274] Similarly, if the state statute authorizes death by firing squad, the statute might not provide details as to the execution technique — the number of shooters, the kinds of bullets, the kinds of guns, the distance from the shooters to the inmate, and so forth.[275]

The current approach, then, turns a blind eye to what the state is doing and places an almost insurmountable burden on the inmate to challenge it. But this approach ignores the current reality of repeated botched executions and rampant experimentation with execution methods and techniques. The Court's worry in *Glossip* related to the worry that declaring a method unconstitutional would block the death penalty altogether; the methods challenge was in essence a back door challenge to the death penalty itself.[276] Justice Breyer's dissent, in which he at length makes the case for abolition, confirms this understanding.[277] Thus, the Court was in part trying to ensure that methods challenges could not kill the death penalty.[278]

But the individualized execution hearing proposal cures this worry while, at the same time, creating space for sanguine consideration of what the state intends to do and the processes it intends to use. In

943 (2018).

271 *Glossip*, 135 S. Ct. at 2737.

272 *Id.*

273 *Id.*

274 *See States and Capital Punishment*, NAT'L CONF. OF STATE LEGIS. (June 6, 2018), http://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx.

275 *See supra* Part I.C.

276 *Glossip*, 135 S. Ct. at 2732-33.

277 *See id.* at 2755 (Breyer, J., dissenting).

278 *Id.* at 2732-33.

other words, this model provides some accountability for states without rejecting the death penalty in its entirety.

The Court, I think, would be open to the state carrying the burden in this context if the procedure worked, as proposed, like a supervised mediation rather than a winner-take-all trial. That is certainly the model for capital sentencing hearings — the offender will receive a serious punishment no matter what; the only question is which one. Similarly, in an individualized execution proceeding, the expectation is that the state will put the inmate to death; the only question is what procedure will be used.

The Supreme Court will thus have to tweak its methods doctrine, particularly with respect to the burden of proof, to adopt an individualized execution model. The model proposed here does change the posture, however, from a series of desperate, last minute appeals to reverse a decision to execute to a standard procedure developed to eliminate torture and preserve dignity for an individual that the state is going to kill.

Moving the inquiry from a habeas appeal to a standard hearing triggered by the setting of an execution date changes the model of the litigation here and will work to create a better result for all involved. Instead of a state rushing to conduct an execution and the inmate receiving stays and then losing stays repeatedly over a short period, an individualized execution hearing would provide an opportunity to address all of the last-minute issues, particularly related to the health of the inmate. At the same time, this approach would preserve the inmate's dignity by limiting the psychological torture emerging from the twists and turns of last-minute litigation.

Having outlined both the proposal and its relationship to the current Eighth Amendment doctrine, the Article concludes by exploring the many benefits of adopting individualized executions. These occur both on an individual level and a systemic level.

IV. BENEFITS OF INDIVIDUALIZED EXECUTIONS

Increasing evidence that lethal injections impose unconstitutional hidden torture on inmates that denigrates their dignity make individualized executions a logical next step under the Eighth Amendment. This process would, at the very least, encourage a more critical examination into the execution protocols of states without requiring courts to ban certain methods in their entirety. This proposal takes on increasing significance as states continue to explore alternative methods of execution as well as revise the techniques by which they administer lethal injections.

A. Individualized Benefits

The clearest beneficiary of the adoption of individualized execution hearings is the inmate sentenced to death. While the individualized execution inquiry will not remove the death sentence and at best will only delay an execution for a couple of years, this inquiry will, if used properly, ensure that the state respects the dignity of the inmate and does not torture him to death.

Given the recent epidemic of tortured inmates and botched executions, eliminating torture in capital executions would be no small feat. What makes the current reality of lethal injection so maddening is that the state has adopted a procedure that, by its very nature, hides the torture from plain view. The concept that one can impose the death penalty with eyes closed undermines the legitimacy of the death penalty itself.

The individualized execution hearing considers the personhood of the inmate in ways that the current litigation model does not. It provides a clear opportunity to litigate a core constitutional issue, while avoiding the rules and unequal burdens of habeas challenges to death sentences. It also provides an opportunity to litigate what has not been litigated — the actual protocol to be used on the inmate.

There is also flexibility in such proceedings. Inmates without health conditions or who are otherwise fatigued by litigation can simply agree to the proposed protocol. Inmates can also have a say with respect to the way in which they are killed at least to the extent that they can avoid torture and retain their dignity.

Eliminating the secrecy involved in the lethal injection process or other methods processes will also restore a level of dignity. While some may disagree as to whether an inmate should have a right to choose the method of execution used on him, it seems clearer that the inmate should at least be on notice with respect to how the state intends to kill him. Such information should be as specific as possible, not general and vague. Without this kind of transparency, states are free to experiment with their procedures, even in the moment. This kind of ad hoc approach dramatically increases the likelihood that the inmate will be tortured and does little to preserve his dignity.

B. Systemic Benefits

In addition to the obvious individual benefits that adopting individualized execution proceedings would accord individual inmates, such hearings also have significant systemic benefits as well. As discussed, these benefits are both doctrinal and institutional.

To begin, the Eighth Amendment has long embodied the basic notion that the state cannot torture its citizens, and that punishments should respect the dignity of their recipient. The Court's cases, however, do not translate that core idea into action. As explained above, the methods cases of the Court only look at lethal injection categorically; they do not explore its application on an individual level.[279] As such, the Court's doctrine allows courts to ignore the core principles of the Eighth Amendment with respect to the death penalty.

Expanding the Eighth Amendment doctrinal construct of individualized sentencing to executions serves to ensure that the Eighth Amendment values of dignity and anti-torture have real meaning and are not abstract pronouncements with no practical import. Creating a required hearing, similar to the Court's affirming of the bifurcation adopted by Georgia in its opinion in *Gregg*,[280] would mandate careful consideration of the concepts of torture and dignity with respect to each individual inmate. That the Court has taken two cases this term addressing this problem underscores the need for a systemic Eighth Amendment solution.

Beyond the constitutional doctrine, an individualized execution hearing would also carry institutional benefits for the state, the courts, and the prisons. At the very least, individualized execution proceedings would help revitalize the legitimacy of capital punishment for states. The repeated botched executions and the inherent flaws with lethal injection continue to plague states, both in terms of public opinion and litigation.

Without a defined place to hear claims, inmates are left to navigate the wild thicket that is state and federal habeas law. This creates confusion concerning when and how inmates are to raise such claims, the extent to which procedural bars might block such claims and opens the door to categorical class challenges to methods and techniques. To be sure, categorical challenges to certain methods should always be available, but the presence of a dedicated hearing to individualized execution determinations makes efficiency with respect to unwieldy litigation more likely.

While individualized execution hearings might add economic costs, the efficiencies generated by housing all methods of challenges in one hearing might serve to offset or at least minimize such cost increases. States would enjoy greater predictability with respect to execution dates and reduce the need for last minute briefings and claims.

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[279] *See supra* Part II.C.

[280] 428 U.S. 153 (1976).

The state would also profit from the enhanced transparency that individualized execution hearings would generate. Capital punishment protocols would no longer be state secrets; instead, the general public could have a deep, full understanding of exactly what the state was going to do to the inmate. This only seems fair, as the state is inflicting the protocol and ultimately killing the offender on behalf of its citizens. While in the short run, executions might diminish in light of the current absence of legitimate procedures, over time states would be able to create a death penalty process that was torture-free and respected inmate dignity. If states could not do this, the death penalty could disappear, but it ought to if states cannot find a way to execute inmates that does not involve torturing them. Another possibility is that citizens might elect to abolish the death penalty once they have full access to the actions of the state. Equally likely, though, would be the development of more legitimate forms of execution that avoid torture and preserve dignity.

The courts would also benefit from individualized execution hearings because such an approach would both streamline litigation and diminish the temporal urgency that often accompanies such challenges. Courts would be able to carefully assess execution protocols, including having medical professionals opine on the processes, rather than simply defer to the ad hoc determinations of individuals that lack relevant scientific expertise. Judges would not have to decide between overriding rigid finality rules on habeas and ignoring the law in favor of justice or alternatively, turning a cold shoulder to the impending suffering of the inmate in favor of procedural limitations.

The individualized execution hearings would also have benefits for prisons in that it would make the execution process more predictable and less haphazard. Prisons would have more guidance with respect to lethal injections and more consistency in their processes. The amount of uncertainty would decrease.

Finally, for abolitionists, an individualized execution hearing and the avoidance of torture may be a small consolation, but it is a necessary step, nonetheless. The idea that difficulty in finding a method of execution would force abolition because of a lack of possible method was always a false hope; the best that the methods crisis has done is to grant inmates longer lives. The state will always be able to find some method by which to kill. If anything, requiring the states to think more critically about capital punishment methods and techniques makes more obvious what the state is doing — killing people. And with every method that is questioned, it increases the

likelihood that the death penalty itself becomes questioned and perhaps eventually abandoned.

Such hearings also have the potential to add to the cost of the already very expensive death penalty. To the extent that costs drive reform, adding more procedures can only serve to help foster such reform.

For death penalty advocates, the creation of an individualized execution hearing also should hold some appeal. Putting aside the question of costs, these hearings have the ability to help legitimize the use of the death penalty again.

The hearings, if held properly, will reduce the amount of torture in death penalty protocols, as well as actually consider the dignity of the condemned instead of ignoring it. Again, considering the inmate's dignity will help differentiate the death penalty from murder. By elevating the procedure and imposing it only in a careful, circumscribed way, the state could be conducting executions out of a sense of duty and responsibility, not out of a fear that the public will choose abolition if it can see what the state is doing.

CONCLUSION

This Article has proposed the adoption of individualized execution hearings to assess the suitability of the execution methods and techniques that states intend to use on inmates. Specifically, the state must prove that the procedures it intends to use satisfy the Eighth Amendment in that the procedures do not torture the inmate physically and that the procedures respect the dignity of the inmate. Contrary to the current approached used by states, this approach would ensure the protection of the individual rights of the inmate, even as the state endeavors to end his life.

The proposal uses current Eighth Amendment doctrine as a basis for this doctrinal move. The well-developed concept of individualized sentencing serves as a basis for according death row inmates more constitutional rights, while also providing the state with the opportunity to legitimize its killing by making it more transparent. The Supreme Court would have to tweak its methods jurisprudence slightly to accommodate this proposal, but only in a way that removes the most unreasonable aspects of its current approach.

In sum, this proposal would help eliminate some of the ghastly, torture-ridden exercises that permeate the use of the modern death penalty. States could exercise their power in a manner that would be more defensible and constitutional.