

Spring 2008

Civil Rights in the Execution Chamber: Why Death Row Inmates' Section 1983 Claims Demand Reassessment of Legitimate Penological Objectives

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Recommended Citation

Daniel R. Oldenkamp, *Civil Rights in the Execution Chamber: Why Death Row Inmates' Section 1983 Claims Demand Reassessment of Legitimate Penological Objectives*, 42 Val. U. L. Rev. 955 (2008).
Available at: <http://scholar.valpo.edu/vulr/vol42/iss3/6>

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**CIVIL RIGHTS IN THE EXECUTION
CHAMBER: WHY DEATH ROW INMATES'
SECTION 1983 CLAIMS DEMAND
REASSESSMENT OF LEGITIMATE
PENOLOGICAL OBJECTIVES**

*The worst sin towards our fellow creatures is not to hate them,
but to be indifferent to them: that's the essence of
inhumanity.*¹

I. INTRODUCTION

Lawful capital punishment must be neither reckless nor ignorant in its means or ends.² Historically, excessiveness in capital killings was the norm.³ In modern times, by contrast, the death penalty (or aspects

¹ George Bernard Shaw, *THE DEVIL'S DISCIPLE*, act 2 (1901), reprinted in *THE OXFORD DICTIONARY OF QUOTATIONS*, 706 (Elizabeth Knowles ed., 5th ed. Oxford Univ. Press 1999).

² See, e.g., *Trop v. Dulles*, 356 U.S. 86, 99 (1958) (stating that "the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination"). *But see* *Weems v. United States*, 217 U.S. 349, 378 (1910) (asserting the general concept of legislative deference, which permits judicial intervention only in cases where punishments are potentially unconstitutional); John H. Gordon, Jr., Note, *Criminal Procedure – Capital Punishment – Texas Statutes Amended to Provide for Execution by Intravenous Injection of a Lethal Substance*, 9 ST. MARY'S L.J. 359, 363 n.47 (1977-1978):

When . . . the means adopted [to administer the death penalty] are chosen with . . . intent, and are devised for the purpose of reaching the end proposed as swiftly and painlessly as possible, . . . they are not forbidden by the constitution, although they should be discoveries of recent science and never should have been heard of before.

Gordon, *supra* (quoting *In re Storti*, 60 N.E. 210, 210-11 (Mass. 1910)). Likewise, the risk of an accident occurring in the execution process is always present, so the process does not need to be flawless for the procedure to be constitutional. *Campbell v. Wood*, 18 F.3d 662, 687 (9th Cir. 1994).

³ *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (prohibiting excessive punishment). Some scholars have shown that the Code of Hammurabi, a document roughly 4000 years old, was favorable toward capital punishment. Robert J. Sech, *Hang 'Em High: A Proposal for Thoroughly Evaluating the Constitutionality of Execution Methods*, 30 VAL. U. L. REV. 381, 387 (1995); see also *Furman v. Georgia*, 408 U.S. 238, 317 n.8 (1972) (Marshall, J., concurring) (describing embellishments on the punishment of death in England, including torture, the "Bloody Assizes" of the late fifteenth century, and "attainder" – a decedent's forfeiture of legal rights in property).

When this country was founded, memories of the Stuart horrors were fresh and severe corporal punishments were common. Death was not then a unique punishment. The practice of punishing criminals by death, moreover, was widespread and by and large acceptable to society. Indeed, without developed prison systems, there was frequently no workable alternative.

thereof) offends the Eighth Amendment's prohibition of "cruel and unusual punishment" if it is either grossly disproportionate to the crime or criminal involved or does not measurably advance a legitimate penological objective when measured against evolving standards of decency.⁴ For roughly the last century, only gross disproportionality, one of the Eighth Amendment's two prohibitions, has been expounded upon in death penalty jurisprudence.⁵ This Note proposes, instead, that addressing legitimate penological interests should be the next focus of capital punishment jurisprudence.⁶

Recent death row inmates' Section 1983 civil rights causes of action suggest that penological objectives must be adequate responses to specific Eighth Amendment allegations.⁷ Section 1983 claims concern inmate "circumstances of confinement," which, when interpreted

Id. at 305 (Brennan, J., concurring); Marla L. Domino & Marcus T. Boccaccin, *Doubling Thomas: Should Family Members of Victims Watch Executions?*, 24 LAW & PSYCHOL. REV. 59, 61-63 (2000). From the mid-1600s to the late 1800s, when guillotine, quartering, stoning, whipping, and hanging executions were common, public executions were a community event where, "much like a county fair, . . . it was common for families to attend . . . together, children and picnic basket in tow." Domino & Boccaccin, *supra*, at 62. "Punishment philosophy hinged upon humiliation of the accused—undoubtedly stimulated by audiences anxiously awaiting remorse-laden confessions by the criminal." *Id.*

⁴ *Gregg v. Georgia*, 428 U.S. 153, 182-83 (1976); *Coker*, 433 U.S. at 592 n.4. The Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. See Abdur'Rahman v. Bredesen, 181 S.W.3d 292, 306 (Tenn. 2005) (describing the components of method-of-execution analysis).

⁵ See Timothy S. Kearns, Note, *The Chair, The Needle, and the Damage Done: What the Electric Chair and the Rebirth of the Method-of-Execution Challenge Could Mean for the Future of the Eighth Amendment*, 15 CORNELL J.L. & PUB. POL'Y 197, 198-99 (2005). See *infra* Part II.B.2.

⁶ See discussion *infra* Parts III, IV.

⁷ See *Nelson v. Campbell*, 541 U.S. 637, 643 (2004). "[Section] 1983 would be an appropriate vehicle for an inmate who is not facing execution to bring a 'deliberate indifference' challenge We see no reason on the face of the complaint to treat prisoner's claim differently solely because he has been condemned to die." *Id.* at 644-45. United States Code Section 1983 (as amended in 1871) states, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

Civil Action for Deprivation of Rights, 42 U.S.C. § 1983 (2000). See *infra* Part II.C.2.

simultaneously with the phrase “cruel and unusual punishment,” permit inmates to challenge the extra-punishment components of their executions.⁸ The theme of this Note is that Section 1983 nuances on death penalty procedures must in turn alter Eighth Amendment analysis, correcting a traditionally narrow-minded conception of “legitimate penological interests” under habeas jurisprudence while retaining the essence of longstanding method-of-execution formulae.⁹ Within that proposed framework, every condition or aspect of a death row inmate’s treatment, prior to the necessary pains attendant to death itself, which itself presents an unnecessary and substantial risk of pain and suffering, should be strictly penological and legitimately necessary to be justly imposed.¹⁰

To reach a conclusion favoring only legitimate penological interests over alleged Eighth Amendment deprivations, this Note first describes the background of capital punishment jurisprudence, particularly its development from Eighth Amendment claims brought by writ of habeas corpus to more recent accommodations for Eighth Amendment claims brought by Section 1983, followed by other developments relevant to Section 1983 that affect the death penalty.¹¹ The following analysis chronicles the significant changes which Section 1983 capital punishment litigation permits, specifically, a more responsible notion of “legitimate penological interests.”¹² The final portion of this Note offers a judicial test to weigh the constitutional rights of condemned prisoners against the government’s procured penological interests.¹³ The proposed test concludes with some specific challenges for judges, lawmakers, and

⁸ *Muhammad v. Close*, 540 U.S. 749, 750 (2004) (explaining conditions or circumstances of confinement actions).

The final principle inherent in the [cruel and unusual punishment] Clause is that a severe punishment must not be excessive. A punishment is excessive under this principle if it is unnecessary: The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering.

Furman v. Georgia, 408 U.S. 238, 279 (1972) (Brennan, J., concurring) (considering challenges to extra-punishment conditions). See *infra* notes 131-35 and accompanying text.

⁹ See discussion *infra* Part II.B.3 (introducing traditional death penalty penological interests).

¹⁰ See discussion *infra* Part III.A.

¹¹ See discussion *infra* Part II.

¹² See discussion *infra* Part III.

¹³ See *infra* Part IV.

administrators toward the end of advancing both legitimate penological interests and death row inmates' constitutional and civil rights.¹⁴

II. BACKGROUND

What follows is essentially a chronological overview of capital punishment jurisprudence. Part II.A describes an overarching competition and balance between prisoners' constitutional rights and the governmental right to impose the death penalty and defines "cruel and unusual punishment."¹⁵ Part II.B discusses the traditional judicial analysis for death row inmates' claims for post-conviction relief, which challenge capital punishment as a whole, in part to demonstrate that test's compatibility with present-day challenges to pre-punishment conditions of confinement.¹⁶ Finally, Part II.C charts the development of legitimate penological interests in the realm of conditions of confinement challenges, which, in addition to the traditional Eighth Amendment analysis, gives context to the recent death penalty conditions decisions explained thereafter.¹⁷

A. *An Introduction to the Eighth Amendment and Other Basic Rights of Prisoners*

Death row inmates do not by virtue of their guilt forfeit their constitutional rights entirely.¹⁸ From very early on, several states prohibited certain torturous or inhumane forms of execution.¹⁹ In light

¹⁴ See *infra* Part IV.

¹⁵ See *infra* Part II.A.

¹⁶ See *infra* Part II.B.

¹⁷ See *infra* Part II.C.

¹⁸ E.g., *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (stating that prisoners retain First Amendment rights where not inconsistent with inmate status or legitimate penological objectives). See RANDALL COYNE & LYN ENTZEROTH, *CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS* 61 (3d ed. 2001). A person's constitutional rights are entitlements safeguarded by substantive and procedural due process of the Fifth Amendment (applied to federal government) and the Fourteenth Amendment (applied to states), unless and until properly denied. *Id.* "[T]he Fifth and Fourteenth Amendments clearly countenance the death penalty [, yet] [b]oth provide that no person shall be deprived 'of life, liberty, or property, without due process of law.'" *Id.*

¹⁹ See *Furman v. Georgia*, 408 U.S. 238, 319 (1972) (Marshall, J., concurring) (stating that, in 1776, Virginia, followed quickly by other states, first adopted the English Bill of Rights of 1689 and did so verbatim); COYNE & ENTZEROTH, *supra* note 18, at 61. Among the first and only recorded prohibitions of inhumane punishment in the United States, prior to the Bill of Rights being enacted in 1791, was elimination of the death penalty by live burning of female felons in 1790. COYNE & ENTZEROTH, *supra* note 18, at 61. Capital punishment was used prior to and after the Bill of Rights was ratified with only Eighth Amendment-type cruel and unusual punishment limitations. *Id.*

of more standardized and expansive Bill of Rights' guarantees which followed, the Supreme Court has said that prisoners reserve whatever rights are not reasonably taken away in furtherance of penological objectives.²⁰ Of these rights, capital punishment precedent has tended to consider only death row prisoners' Eighth Amendment freedom from "cruel and unusual punishment."²¹

Though it evades exact definition, unconstitutional cruel and unusual punishment has been summed up as the calculated infliction of either unnecessary pain and suffering or lingering death.²² When

²⁰ *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (citing *In re Kemmler*, 136 U.S. 436, 447 (1890) and *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1879), each prescribing the penological justification component); see *Pell*, 417 U.S. at 822 (stating that penological interests are legislative objectives provided to correctional systems administrators as the authority to divest prisoners of various rights); *Price v. Johnston*, 334 U.S. 266, 285 (1948) ("Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."); BLACK'S LAW DICTIONARY 1155 (7th ed. 1999) (defining "penology" as either the study of criminal punishment—of deterrence, rehabilitation, reform, and prison management—or as a branch of criminology dealing with penal institutions). See generally COYNE & ENTZEROTH, *supra* note 18 (regarding retained prisoners' rights).

²¹ See U.S. CONST. amend. VIII. The Eighth Amendment's prohibition of cruel and unusual punishment was directly adopted from the English Declaration of Rights in 1689, which in turn was based upon the Magna Carta. *Trop v. Dulles*, 356 U.S. 86, 100 (1958). See discussion *infra* Part II.B.

²² *Trop v. Dulles*, 356 U.S. 86, 99-100 (1958). Cruel and unusual punishment is whatever is unnecessary and wanton infliction of pain or is otherwise "calculated to cause unnecessary pain or lingering death." Gordon, *supra* note 2, at 360 (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Kemmler*, 136 U.S. at 447; *Wilkerson*, 99 U.S. at 135). See also *Furman*, 408 U.S. at 279. The terms "cruel" and "unusual" are intentionally not static references to only that which was considered unlawfully inhumane at the time the Constitution was framed. *Id.* "The Clause may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 378 (1910). "The question, in any event, is of minor significance; this Court has never attempted to explicate the meaning of the Clause simply by parsing its words." *Furman*, 408 U.S. at 277. By this model, the concepts of cruelty and unusual punishment, if courts are so urged by the public sentiment, could certainly regress, as occurred, for example, when the electric chair was first implemented to execute William Kemmler in New York in 1890. See Kearns, *supra* note 5, at 200-01, n.38 (describing the attention drawn to electrocution by celebrities like Thomas Edison). Kemmler's execution, and many electrocutions that followed, occurred at a time when the nation was fascinated with the scientific innovation the electric chair represented, though most courts and laypeople alike knew very little about the properties of electricity and its effect on human bodies. *Id.*; CRAIG BRANDON, *THE ELECTRIC CHAIR: AN UNNATURAL HISTORY* 67-88 (1999) (chronicling the "Battle of the Currents," from electrocution's testing phase on horses, calves, and dogs to its human application). According to the New York Supreme Court at the time, "[I]t detracts nothing from the force of the evidence in favor of this conclusion that we do not know the nature of electricity, nor how it is transmitted in currents, nor how it operates to destroy the life of animals and men

initially adapted from English law, the words “cruel” and “unusual” merely explained one another; whereas, today, these words have independent significance.²³ Far from prohibiting only torture or physical barbarity, cruel punishment is essentially any which is wantonly or recklessly inflicted.²⁴ Unusual punishment is punishment not standardized in policy or procedure to eliminate the serious risk of unnecessary pain and suffering.²⁵ In sum, in *Coker v. Georgia*, the Supreme Court declared cruel and unusual punishment coextensive with excessiveness, in that excessive punishment either does not contribute to

exposed to its force.” Kearns, *supra* note 5, at 201 (quoting *People ex. rel. Kemmler v. Durston*, 7 N.Y.S. 813, 818 (N.Y. Sup. Ct. 1889)). Upon review of the decision, a higher court described the state Supreme Court’s lack of objective skepticism as alarming. *Id.*

²³ Anthony F. Granucci, “Nor Cruel and Unusual Punishments Inflicted”: *The Original Meaning*, 57 CALIF. L. REV. 839, 860 (1969). The framers’ use of “cruel and unusual” did not intend to categorically deny any method of punishment, only “severe punishment unauthorized by statute and not within the jurisdiction of the court to impose.” *Id.* At that time, the phrase implied simple illegality and did not carry the same connotations of barbarity as today. *Id.* Indeed, the seventeenth century definition of “cruel” merely meant severe or hard. *Furman*, 408 U.S. at 318-19 n.13 (Marshall, J., concurring). *But see* *Walton v. Arizona*, 497 U.S. 639, 670 (1990) (Scalia, J., concurring) (arguing that, separately, the words “cruel” and “unusual” mean nothing of constitutional significance). According to the concurrence in *Walton*, a proportionality of sentencing case, the only “excessive” punishment is both cruel and unusual and no amount of one can compensate for the lack of the other. *Id.* “[T]hat is to say, the text [of the Eighth Amendment] did not prohibit a traditional form of a punishment that is rarely imposed, as opposed to a form of punishment that is not traditional. *Id.*

²⁴ *Kemmler*, 136 U.S. at 447 (holding that cruelty includes not torture alone but also whatever is “inhuman and barbarous, something more than the mere extinguishment of life”); *Gregg*, 428 U.S. at 171 (not only about deciphering what is “barbarous”); *Furman*, 408 U.S. at 322 (Marshall, J., concurring). The Supreme Court said in *Louisiana ex rel Francis v. Resweber*, 329 U.S. 459, 463 (1947), that “[t]he cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely.” Gordon, *supra* note 2, at 359 n.5. *See also id.* at 360 n.12 (providing examples of execution methods that have been termed “torturous punishment” and were thus rather swiftly prohibited in the United States, including: drawing and quartering, cutting off ears and limbs, burning alive, starvation, boiling alive, and disemboweling).

²⁵ *Trop v. Dulles*, 356 U.S. 86, 100 n.32 (1958). “If the word ‘unusual’ is to have any meaning apart from the word ‘cruel,’ . . . the meaning should be the ordinary one, signifying something different from that which is generally done.” *Id.* *See also Furman*, 408 U.S. at 242 (Douglas, J., concurring) (describing how procedures are “unusual” if they discriminate upon either an unlawful basis such as race or a lawful basis like social class or wealth); Granucci, *supra* note 23, at 860 (explaining “usual” punishment as proven, codified punishment); Gordon, *supra* note 2, at 363 n.46 (“The word ‘unusual’ . . . cannot be taken so broadly as to prohibit every humane improvement not previously known.”); *Constitutional Law – Second Electrocution Attempt Not Violation of Constitutional Prohibition against Cruel and Unusual Punishment*, 33 VA. L. REV. 348, 349 (1947) [hereinafter *Second Electrocution Attempt*] (“[B]ut punishment that is greater than has been described, known or inflicted is cruel and unusual.”).

a legitimate penological objective, as when it results in a serious risk of gratuitous pain or suffering, or makes a criminal's sentence grossly disproportionate to his or her wrongdoing.²⁶ Regarding execution specifically, "cruel and unusual" likewise encompasses whatever surplus risk of pain and suffering unnecessarily accompanies the death penalty, where unjustified by legitimate penological interests.²⁷

B. Traditional Method-of-Execution Analysis during Habeas Corpus Primacy

To safeguard the Eighth Amendment rights of condemned persons, the Supreme Court has traditionally relied upon a three-part "method-of-execution" balancing test.²⁸ Method-of-execution analysis considers the following: (1) evolving societal standards of decency; (2) the appropriate proportion of a criminal's sentence compared to the crime(s) committed; and (3) the legitimacy of penological objectives for the death penalty imposed.²⁹ Although the Court has only intermittently utilized this test explicitly over the last century,³⁰ determining cruel and unusual

²⁶ 433 U.S. 584, 592 (1977).

²⁷ *Id.*; see Gordon, *supra* note 2, at 364 ("The substance and procedures selected to perform the execution must not inflict undue pain or cause lingering death in order to withstand the expected [E]ighth [A]mendment challenge."); see also Francis, 329 U.S. at 463.

²⁸ Nelson v. Campbell, 541 U.S. 637, 643; Wilkerson v. Utah, 99 U.S. 130 (1879); see Kearns, *supra* note 5, at 198 nn.10-11.

²⁹ See, e.g., Abdur'Rahman v. Bredesen, 181 S.W.3d 292, 306 (Tenn. 2005). In practice, the standards of decency prong of analysis operates primarily as the measuring stick for what constitutes grossly disproportionate punishments. See, e.g., Solem v. Helm, 463 U.S. 277, 288 (1983) (holding a seven-time non-violent felony offender unconstitutionally sentenced to life imprisonment without parole under the Eighth Amendment). Otherwise, it measures whether a punishment advances acceptable penological objectives. See Coker, 433 U.S. at 592 n.4 (citing the legislative decisions of States and foreign countries aggregately, holding that the death penalty for rape of an adult woman was deemed both grossly disproportionate and a failed rationale when tested for being "an indispensable part of the States' criminal justice system"); see also COYNE & ENTZEROTH, *supra* note 18, at 61.

³⁰ The first, most explicit invocation of this Eighth Amendment balance was the Supreme Court's decision in *Wilkerson v. Utah*, in 1879, to declare Utah's firing squad an unconstitutional method of execution. 99 U.S. 130 (1879). Although the analysis was not ignored wholesale in the century that followed, post-*Wilkerson*, the Supreme Court avoided making any further method-of-execution resolutions until its 2005 decision of *Roper v. Simmons*. 543 U.S. 551 (2005). Kearns, *supra* note 5, at 198-99.

In assessing whether a punishment is cruel and unusual, the Supreme Court has taken a number of methods: . . . in death penalty cases, whether the method of executing the death sentence is cruel and unusual. This last category, which is termed method-of-execution analysis, has largely languished at the Supreme Court level, with no cases directly engaging in method-of execution analysis in 115 years.

Id. The dearth of method of execution claims is difficult to explain since *Trop*, however, as all the Circuit courts have agreed that *Trop's* standards of decency test applies to the

punishment has essentially remained the same, largely owing to the fact that, historically, death row inmates' sole cause of action was the petition for writ of habeas corpus.³¹ The following sub-sections examine the prevailing habeas and method-of-execution avenue for death penalty relief.

1. Standards of Decency

Eighth Amendment jurisprudence prescribes consideration of societal values because, in actuality, the values of citizens continually temper governmental interests.³² Early on, the Supreme Court had ruled on various occasions that torturous forms of punishment were inherently indecent; the *de facto* measurement for Eighth Amendment violations was the Justice's own judgment.³³ Bearing heavily on judicial interpretations were the press and public, who had traditionally overseen and scrutinized execution proceedings, and, prior to the 1830s, were rarely so indirectly involved as to merely cast their ballots for legislative decisions on their behalf.³⁴ During the course of the next

methods of implementing executions as opposed to the sentencing phase of a death penalty trial. *Id.* at 222.

³¹ *Id.* at 198-99. "Postconviction proceedings are usually seeking a writ of habeas corpus, and the terms will be used interchangeably in this section." LINDA E. CARTER & ELLEN KREITZBERG, UNDERSTANDING CAPITAL PUNISHMENT LAW 197 (2004) (commenting on the symbiosis between habeas and post-conviction relief). See U.S. CONST. Art. I, § 9, cl. 2. "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." *Id.*; see also 28 U.S.C. § 2254 (2000). "Habeas corpus," in Latin, means "have the body." COYNE & ENTZEROOTH, *supra* note 18, at 755. The purpose of habeas challenges, like others for state post-conviction relief, focuses on "whether or not a conviction and sentence has been illegally obtained." *Id.* at 730 n.3. Claims challenging the very fact of an impending death penalty upon oneself or the length of time one is imprisoned for are core to habeas corpus and must be brought under the habeas statute, Section 2254. *Nelson*, 541 U.S. at 643 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973)). *But see Hill v. McDonough*, 126 S. Ct. 2096 (2006). Eighth Amendment claims fall outside the core of habeas where an inmate seeks injunctive relief from being executed by the state "in the manner they currently intend . . . [where] the anticipated protocol allegedly causes 'a foreseeable risk of . . . gratuitous and unnecessary' pain." *Id.*

³² See *Trop v. Dulles*, 356 U.S. 86, 101 (1958) ("The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.") (emphasis added); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (stating that generalized opinions of experts cannot weigh as heavily in determining contemporary standards of decency as the public attitude toward a given sanction); see also *Kearns*, *supra* note 5, at 200-01, 202 n.38 (describing society's enamored with the electric chair and New York courts' uncritical employment of the chair).

³³ See *Gordon*, *supra* note 2, at 360.

³⁴ *Domino & Boccaccin*, *supra* note 3, at 63 (describing a significant history of public attendance at executions prior to the electric chair and how clergy or public officials often explained to attendees their integral role as witnesses). Public attendance of this vigor

century, however, jurisdictions nationwide restructured executions so as to restrict admission of public witnesses by means of private execution statutes and the decision to move the death penalty into small, inner chambers.³⁵ Despite the less direct public involvement in the death penalty that ensued, maturing societal conceptions of human dignity have periodically caused state and federal judiciaries to reconsider their approaches toward capital punishment and to implement more humane methods of execution.³⁶

remains the norm in the trial context. The Supreme Court, in *Richmond Newspapers v. Virginia*, recognized that public access to the judicial processes has a “specific structural significance” in assuring “fair and accurate adjudication” and is supported by “the weight of historical practice.” 448 U.S. 555, 594, 598 (1980). Additionally, that Court held that “[s]ecrecy is profoundly inimical to this demonstrative purpose of the trial process,” and “[p]ublic access is essential . . . if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice.” *Id.* at 595. Consequently, the public’s right and interest in access to trials cannot be obviated unless there is a compelling government interest, narrowly tailored to serve that interest. *Id.*; *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

³⁵ Domino & Boccaccin, *supra* note 3, at 63. States in the Northeast began the move to privatize executions, and nationwide this shift was nearly complete by the early 1900s. *Id.* at 63; see also John D. Bessler, *Televised Executions and the Constitution: Recognizing a First Amendment Right of Access to State Executions*, 45 FED. COMM. L.J. 355, 361-62 (2000). The last two recorded public executions were in August 1936 and May 1937. Domino & Boccaccin, *supra*, at 64. *But see id.* at 63 (describing several instances in the 1800s in which executions of infamous criminals revitalized public interest in executions, at times drawing viewers in the tens of thousands, thus challenging the premise of limited attendance regulations); Robert Perry Barnidge, Jr., Comment, *Death Watch: Why America was not Allowed to Watch Timothy McVeigh Die*, 3 N.C. J. L. & Tech. 193 (describing how thousands of interested families of victims of the Oklahoma City bombings were not allowed to watch the federal execution of domestic terrorist Timothy McVeigh in 2001). See, e.g., COYNE & ENTZEROTH, *supra* note 18, at 76. Today, most capital punishment jurisdictions specify a finite number of persons who may attend executions, according to their relationship to the offender, the offender’s victim(s), and the correctional system. Domino & Boccaccin, *supra*, at 64. Approximately twelve states regulate attendance by quantity alone and not by function. *Id.* at 64 nn.37-38. One such private execution statute, the Texas Department of Corrections Procedures for the Execution of Inmates Sentenced to Death (protocol dating back to Texas’ adoption of lethal injection in 1982) provides that the only personnel permitted at an execution are the Huntsville warden’s own operations personnel, a medically trained individual (not to be identified), certain designated members of the press, a justice of the peace, an attending physician, an inmate’s chaplain (if so desired), and certain other state delegates. *Id.*

³⁶ See Casey Lynne Ewart, *Use of The Drug Pavulon in Lethal Injections: Cruel and Unusual?*, 14 WM. & MARY BILL RTS. J. 1159, 1162 (2006) (arguing that America’s preferred methods of execution have always changed “[a]s a result of . . . public distaste” or due to “the public’s focus shifted from punishment to rehabilitation,” or for like reasons). Preferred methods of execution in “Post-Revolutionary America” evolved in this order: hanging, the electric chair, lethal gas, firing squad, and lethal injection. *Id.* at 1162-66. See also *infra* note 233.

Guided by earlier judicial ideals, the Court determined in *Trop v. Dulles*, in 1958, that method-of-execution analysis is concerned with an execution method's humaneness in light of "the dignity of man" and the "evolving standards of decency . . . of a maturing society."³⁷ Evolving standards of decency analysis evaluates the public consciousness through the aggregate position of state legislatures as objective criteria and both international law and a court's own sense of substantial shifts within and among the states as subjective criteria.³⁸ The subjective inquiries were retained to champion society's death penalty influence and its maturation in the event that society's progress conflicts with lethargic legislative standards.³⁹

³⁷ 356 U.S. 86, 100-01 (1958). In doing so, the Supreme Court in *Trop* reiterated a much earlier Supreme Court decision to consider evolving concepts of human justice in Eighth Amendment analysis, that of *Weems v. United States*. 217 U.S. 349, 378 (1910). The Court in *Trop*, however, elaborated significantly upon the concept of decency proposed in *Weems*:

[T]he death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty. But it is equally plain that the existence of the death penalty is not a license for the Government to devise any punishment short of death within the limit of its imagination. . . . The 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 to assure that this power be exercised within the limits of civilized standards. . . . The Court recognized in [*Weems*] that the words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

356 U.S. at 99-101; see also *Furman v. Georgia*, 408 U.S. 238, 270-71 (1972) (Brennan, J., concurring) (advocating prohibition of uncivilized and inhuman punishment which are an affront to human dignity).

³⁸ Kearns, *supra* note 5, at 214; see Neil Vidmar & Phoebe Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245, 1246 (1973-1974) (stating that both the concurring and dissenting justices in *Furman* accepted *Weems'* and *Trop's* "evolving standards of decency" as the appropriate test but disagreed about the role of public sentiment and public opinion polls in determining those standards). When subjectively weighing substantial shifts among state legislatures, "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change." *Atkins v. Virginia*, 536 U.S. 304, 315 (2003). As to international standards, some have argued that the United States' contemporary standards on the death penalty violate her treaty obligations. *Hill v. McDonough*, 126 S. Ct. 2096 (2006) (Brief of Amicus Curiae, Human Rights Advocates, Human Rights Watch, and Minnesota Advocates for Human Rights, in Support of Petitioner Hill).

³⁹ See *Atkins*, 536 U.S. at 313 ("Thus, in cases involving a consensus, our own judgment is 'brought to bear' by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators."); *Roper v. Simmons*, 543 U.S. 551, 563 (2005) (overruling *Atkins* to the extent that it authorized judicial discretion only in certain cases,

Eventually, a much narrower view of evolving societal standards of decency was popularized by the Supreme Court case of *Penry v. Lynaugh*.⁴⁰ There, the Court traded out *Trop's* "human dignity" and "evolving standards of decency" for a more simplistic "contemporary standards of decency" analysis.⁴¹ The *Penry* analysis avoids *Trop's* subjective factors and instead regards the aggregate legal or formal position of all state and federal execution statutes as the *sine qua non* of standards of decency.⁴² *Roper v. Simmons*, decided in 2005, has since been the only Supreme Court decision to overtly employ the "evolving

instead stating that judicial recognition of substantial shifts is always constitutional); see also *Furman*, 408 U.S. at 277, 299, 300 (Brennan, J., concurring).

⁴⁰ 492 U.S. 302, 331 (1989).

⁴¹ *Trop*, 356 U.S. at 100-01; *Penry*, 492 U.S. at 331. "The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry*, 492 U.S. at 331. *Penry* additionally considered objectively the actions of sentencing juries in determining whether mentally incapacitated persons could be executed. *Id.* at 331. The shift from evolving to contemporary standards was likely simultaneous with a shift in Supreme Court majorities. See Vidmar & Ellsworth, *supra* note 38, at 1246-47, n.14 (comparing various concurring and dissenting justices in *Furman* for their views on the appropriate factors for determining standards of decency). For instance, in his concurrence to *Furman*, Justice Brennan opined:

A third principle inherent in the Clause is that a severe punishment must not be unacceptable to contemporary society. Rejection by society, of course, is a strong indication that a severe punishment does not comport with human dignity Legislative authorization, of course, does not establish acceptance. The acceptability of a severe punishment is measured, not by its availability, for it might become so offensive to society as never to be inflicted, but by its use The objective indicator of society's view of an unusually severe punishment is what society does with it, and today society will inflict death upon only a small sample of the eligible criminals. Rejection could hardly be more complete without becoming absolute. At the very least, I must conclude that contemporary society views this punishment with substantial doubt.

Furman, 408 U.S. at 277, 279, 300.

⁴² *Penry*, 492 U.S. at 331; see also *Atkins*, 536 U.S. at 313 (a prodigy of *Penry* analysis). A recent Tennessee Supreme Court decision adhering to contemporary standards of decency relied on three indicators that lethal injection is proper: first, that lethal injection is "commonly thought to be the most humane form of execution;" second, that thirty-seven of thirty-eight death penalty jurisdictions prefer lethal injection; and third, that no court has ever held lethal injection as a method to be cruel and unusual punishment. *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 306-07 (Tenn. 2005). But see *Atkins*, 536 U.S. at 312 (there the Supreme Court indicated only that *Penry's* demand for "objective factors" circumscribed broader evolving standards in *proportionality* review cases) (citing *Rummel v. Estelle*, 445 U.S. 263, 274-75 (1980)); Kearns, *supra* note 5, at 222 (noting that all Circuit courts have stated this same proposition as *Atkins*). See generally *Wheeler v. Commonwealth*, 121 S.W.3d 173, 186 (Ky. 2003); *Cooper v. Rimmer*, 358 F.3d 655, 659 (9th Cir. 2004); *State v. Webb*, 750 A.2d 448, 457-58 (Conn. 2000) (describing at length the lethal injection legislation in thirty-four states).

standards of decency” analysis in lieu of *Penry’s* “contemporary standards of decency” analysis.⁴³

The significance of the *Trop/Penry* distinction remains potent today. After *Trop*, lethal injection became the preferred method of execution in most jurisdictions.⁴⁴ Lethal injection is touted as the best assurance of humane execution,⁴⁵ owing largely to its likeness to medical procedures.⁴⁶ The method also requires a great deal of technical skill; however, states have had an increasingly difficult time enlisting medical

⁴³ 543 U.S. 551, 562-63 (2005) (stating that the Court in *Atkins* did not solidify whether or not the Court’s independent judgment could be a factor in determining standards of decency, this Court opted to return to earlier precedent, namely *Coker v. Georgia*, 433 U.S. 584, 592 (1977)). *Coker* stated: “[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.” *Coker*, 433 U.S. at 597 (emphasis added). *Roper*, being thus far a rare exception to *Penry* analysis, has been chastised for its return to international law considerations and judicial discretion in noting substantial shifts in society. Kearns, *supra* note 5, at 199-200.

⁴⁴ FREDERICK DRIMMER, UNTIL YOU ARE DEAD: THE BOOK OF EXECUTIONS IN AMERICA 75 n.2 (Carol Publishing Group 1990). New York’s Death Commission, in the 1880s, was the first in any state to consider using lethal injection, though it ultimately decided to implement electrocution instead. *Id.* In 1977, Oklahoma was the first state to implement lethal injection. *Id.* at 75-76. Presently, thirty-seven states, the U.S. federal government, and the U.S. military authorize capital punishment by statute. Ewart, *supra* note 36, at 1159, n.2. Lethal injection is the preferred option, if not the only option, for execution in each of these jurisdictions except Nebraska (authorizing only the electric chair). *Id.* at 1169-82. As of 2001, twenty states offered, by statute, at least two constitutional methods-of-execution. COYNE & ENTZEROTH, *supra* note 18, at 80. In addition to the thirty-eight jurisdictions that then provided for lethal injection (thirty-seven today), eleven permitted electrocution, three permitted hanging, three permitted the firing squad, and five permitted lethal gas as methods of execution. *Id.* at 91-105 (citing Jacob Weisberg, *This is Your Death, in THE NEW REPUBLIC*, July 1, 1991 [hereinafter Weisberg]).

⁴⁵ COYNE & ENTZEROTH, *supra* note 18, at 103 (citing Weisberg, *supra* note 44). See, e.g., *Workman v. Bredesen*, 486 F.3d 896, 906-07 (6th Cir. 2007); *Abdur’Rahman v. Bredesen*, 181 S.W.3d 292, 306-07 (Tenn. 2005).

⁴⁶ Ewart, *supra* note 36, at 1166 n.77 (citing Meghan S. Skelton, *Lethal Injection in the Wake of Fierro v. Gomez*, 19 T. JEFFERSON L. REV. 1, 2 (1997)). Dr. Stanley Deutch developed the current form of lethal injection in 1977 at the Anesthesiology Department of Oklahoma University. COYNE & ENTZEROTH, *supra* note 18, at 83 (citing Weisberg, *supra* note 44). The most popular lethal injection machine in use today, however, was developed by Dr. Fred Leuchter at the behest of the New Jersey Department of Corrections to help eliminate accidents. *Id.* at 104. For a detailed description of the machine, see *id.* at 123 (citing the *Lethal Injection Manual for the State of Missouri*, Fred A. Leuchter Associates, Inc., describing the delivery module and the manufacturer’s suggested procedure). As in medical procedures, lethal injection protocols have accounted for some or all of the following, to some degree: the step-by-step of the procedure to be undertaken; the qualifications, training, and description of duties for team members; monitoring and contemporaneous records of each step in the procedure; and guidelines for selecting, obtaining, storing, and disposing properly of intravenous chemicals. See *Workman v. Bredesen*, 486 F.3d 896, 902 (6th Cir. 2007).

practitioners' assistance in the procedure because most consider effectuating death by any means an ethical conflict of interest.⁴⁷ With lethal injection instead being administered by corrections officials, whether or not lethal injection remains largely judgment-proof may well depend on whether the courts adhere to "contemporary" or "evolving" standards of decency.⁴⁸

2. Proportional Death Sentencing

A cruel and unusual death sentence is one "grossly disproportionate" to the legitimate penological objectives and/or standards of decency before a court.⁴⁹ In the lethal injection era,

⁴⁷ Colin Miller, *A Death by Any Other Name: The Federal Government's Inconsistent Treatment of Drugs Used in Lethal Injections and Physician-Assisted Suicide*, in 17 J. L. & HEALTH 221, 234-35 (2002-2003). The American Medical Association (AMA) adopted formal rules of ethics, derived in part from the Supreme Court's decision in *Washington v. Glucksberg*, 521 U.S. 702 (1997), prohibiting physician-assisted suicide and in part from the predominant understanding of the Hippocratic Oath—" [first], do no harm"—stating that assisting in the performance of capital punishment would be a serious ethical breach. *Id.* For instance, in California, two anesthesiologists refused to participate, citing ethical reasons, in the execution of Michael Angelo Morales on the eve of his February, 2006 execution. Ewart, *supra* note 36, at 1189-90. Nevertheless, in the absence of willing licensed physicians, the Eastern District of Virginia has simply assumed that, "for exceedingly practical reasons," the standard of care owed in lethal injection is reduced below that owed in hospitals. *Emmett v. Johnson*, 489 F. Supp. 2d 543, 543 n.5, 553 (E.D. Va. 2007) (citing *Workman*, 486 F.3d at 910). The Eleventh Circuit in *Abdur'Rahman* likewise held that denying prison wardens the authority to "obtain, mix, and administer a controlled substance . . . would risk frustrating the Tennessee General Assembly's considered decision to adopt execution by lethal injection as the primary method of execution in Tennessee." *Abdur'Rahman*, 181 S.W.3d at 313, 314. Even so, that same court attempted to attract medical technicians by guaranteeing their immunity from suit, asserting that executions fall outside the purview of licensing statutes. *Id.*

⁴⁸ See Miller, *supra* note 47, at 231-33 (reporting at least thirty-one botched executions between the nation's first lethal injection in 1982 and 2001). Three things are primarily to blame for these failures: "a wide variance in the drugs and dosages used in different states," "that many states do not provide adequate instructions for executioners," and "untrained executioners," which compounds the inadequate instructions problem. *Id.* at 232-33.

⁴⁹ *Coker v. Georgia*, 433 U.S. 584, 592 (1977). Proportionality is not a simple weighing of facts in each state. Post-*Furman* reforms show that states had assumed one of three sentencing patterns: mandatory death penalty sentencing for specific crimes (no discretion intended), aggravating or mitigating factors for the trier of fact to consider (limiting and controlling discretion), or mandatory death penalty sentencing if certain aggravating factors are present (a combination of the other two). William R. Taylor, Comment, *Criminal Law – Capital Punishment – The Texas Statutes Authorizing the Death Penalty Do Not Violate the Eighth Amendment's Prohibition of Cruel and Unusual Punishment*, 7 TEX. TECH. L. REV. 170, 177 (1975-1976). The outer bounds of unnecessary or arbitrary proportionality determinations are by no means easy to determine. See Kearns, *supra* note 5, at 200. "As a result of the Court's 115 year refusal to hear method-of-execution cases, there is little or no

proportionality has undergone more change than any other branch of Eighth Amendment analysis.⁵⁰ Beginning with *United States v. Furman* in 1967, the Supreme Court attempted to mitigate arbitrary determinations at death penalty sentencing by implementing a temporary nationwide moratorium on the death penalty.⁵¹ Nevertheless, *Furman* did not profess to end capital punishment itself. The moratorium was lifted in 1976 when, in *Gregg v. Georgia*, the Court deemed three states' death penalty standards were no longer arbitrary or unreasonable.⁵² Since 1976, nearly all of the changes to Eighth Amendment precedent in habeas proceedings have, likewise, regarded proportionality.⁵³ To date, *Furman's* progeny have held capital punishment to be either inherently indecent or lacking penological support—and consequently an unconstitutional sentence—for pregnant women, the mentally insane, juveniles, and the mentally retarded.⁵⁴

illustrative precedent to facilitate meaningful understanding of what constitutes cruel and unusual punishment." *Id.*

⁵⁰ See, e.g., Kearns, *supra* note 5, at 206-07. "[A]fter the progressive standards of Trop were announced, the Court seemingly turned its back on method-of-execution analysis, instead chipping away (sic) at death-eligible offenses and demographic eligibility for the death penalty." *Id.*

⁵¹ 408 U.S. 238 (1972). *Furman* stated, specifically, that pregnant women could not rightly be executed under Trop's standards of decency indicia or in furtherance of penological objectives. *Id.* at 239-40. The effect of *Furman*, cumulatively, was to nullify each of the thirty-two state death penalty statutes that existed at the time and retroactively free every inmate who was sentenced under those statutes from the threat of execution. DRIMMER, *supra* note 44, at 76. As shocking an effect as it was, it was not necessarily a surprise. *Id.* "Actually, there had been an unofficial moratorium on executions since 1967 as one legal challenge after another to the death sentence moved through the courts." *Id.*; see also Miller, *supra* note 47, at 225-26 (on ending the capital punishment moratorium).

⁵² 428 U.S. 153, 207 (1976). "No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines." *Id.* at 206-07. The moratorium, a *de facto* state of affairs since the late 1960s, had formalized primarily to allow study into and improvements on state and federal capital punishment statutes, rules, and regulations. *Furman*, 408 U.S. at 305, 436 n.18. Thereafter, in *Gregg*, and in companion cases, the Georgia, Texas, and Florida state death penalty statutes and regulations were deemed adequately revised to protect against arbitrary jury discretion in death sentencing. BRANDON, *supra* note 22, at 244. See also Taylor, *supra* note 49, at 171. "*Furman* thus was viewed [by the Texas Criminal Court of Appeals in *Jurek v. State*, 522 S.W.2d 934, 938 (Tex. Crim. App. 1975)] as doing no more than condemning the arbitrary, capricious, and standardless manner in which juries had been allowed to impose the death penalty." *Id.*

⁵³ CARTER & KREITZBERG, *supra* note 31, at 21. See *supra* note 50; *infra* note 54.

⁵⁴ *Furman*, 408 U.S. at 238 (pregnant women); *Ford v. Wainwright*, 477 U.S. 399 (1986) (mentally insane); *Atkins*, 536 U.S. at 321 (mentally retarded); *Roper*, 543 U.S. at 578 (juveniles). Although *Atkins* supported *Penry's* contemporary standards of decency analysis, it departed on proportionality grounds from *Penry's* previous affirmation of the death penalty for less-severely mentally retarded persons. *Atkins v. Virginia*, 536 U.S. 304, 321 (2003); *Penry*, 492 U.S. at 340.

3. Legitimate Penological Objectives

Aside from inherent indecency or gross disproportionality, a punishment may be unconstitutionally cruel and unusual if it fails to advance materially a legitimate penological objective.⁵⁵ The Supreme Court illustrated in *Coker* that any punishment which fails to meet this threshold is “nothing more than the purposeless and needless imposition of pain and suffering.”⁵⁶ The Supreme Court has required state governments to show relevant penological interests when instituting capital punishment since the birth of method-of-execution analysis in *Wilkerson v. Utah* and *In re Kemmler*.⁵⁷ Currently, courts accept penological objectives for the death penalty and the justifications for the punishment in its entirety, especially retribution and deterrence.⁵⁸ This is because, under habeas corpus, death row prisoners’ only post-conviction relief was an equitable stay of execution rather than an injunction against specific conditions of confinement.⁵⁹ Since even one stay of execution would erode the states’ retributive and deterrence

⁵⁵ *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (addressing, in particular, how the original trier of fact had been given almost standardless discretion to find a convicted rapist of adult women worthy of the death sentence). See *supra* notes 20, 25 and accompanying text (offering definitions and scope for legitimate penological objectives); see also CARTER & KREITZBERG, *supra* note 31, at 29 (indicating that some have donned the category of punishments which fail for want of legitimate penological objectives “punishments unauthorized by law.”). See, e.g., Gordon, *supra* note 2, at 360 n.12 (illustrating how, by this *Coker* criterion, torture is inherently indecent).

⁵⁶ *Coker*, 433 U.S. at 592. Actually, *Gregg* was the first case to elaborate on Justice Powell’s dissenting plug for “the ends of penology” in *Furman*. *Gregg*, 428 U.S. at 182-83 (citing *Furman*, 408 U.S. at 451). “[T]he sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.” *Id.* at 183.

⁵⁷ 99 U.S. 130 (1879); 136 U.S. 436 (1890). “The infliction of capital punishment is itself a deliberate act, deliberately administered for a penal purpose.” *Taylor v. Crawford*, 487 F.3d 1072, 1081 (8th Cir. 2007) (citing *Wilson v. Seiter*, 501 U.S. 294, 300 (1991)). See *supra* note 20.

⁵⁸ *Gregg*, 428 U.S. at 183; CARTER & KREITZBERG, *supra* note 31, at 32.

⁵⁹ See *Nelson v. Campbell*, 541 U.S. 637, 643, 647 (2004).

Despite its literal applicability . . . § 1983 must yield to the more specific habeas statute . . . where an inmate seeks injunctive relief challenging the fact of his conviction or the duration of his sentence. . . . By contrast, constitutional claims that merely challenge the conditions of a prisoner’s confinement, whether the inmate seeks monetary or injunctive relief, fall outside of that core and may be brought pursuant to § 1983 in the first instance. . . . If a request for a permanent injunction does not sound in habeas, it follows that the lesser-included request for a temporary stay (or preliminary injunction) does not either.

Id. at 643, 647; see *supra* note 31 and accompanying text; see also *infra* notes 111-12 (discussing the factors for determining whether injunctive stay is appropriate).

justifications for death sentencing, courts have jealously guarded legislatures' penological interests by lending them massive deference in method-of-execution analysis.⁶⁰

Retribution is perhaps the most compelling and longstanding penological justification for affirming death penalty sentences and among the oldest qualities distinguishing governance from statelessness.⁶¹ Retribution is the ideological principle that governments *deserve* to resort to capital punishment because society has authorized criminal justice as the means of restoring moral balance.⁶² Entrusting

⁶⁰ See *Gregg v. Georgia*, 428 U.S. 153, 186-87 (1976) (noting that federalism and respect for the abilities of legislatures are sufficient reasons for due deference to them). See, e.g., *Hill v. McDonough*, 2006 WL 2556938 *2-4 (N.D. Fla. Sept. 1, 2006); *Workman v. Bredesen*, 486 F.3d 896, 904-10 (6th Cir. 2007); *Emmett v. Johnson*, 489 F. Supp. 2d 543, 550-55 (E.D. Va. 2007).

⁶¹ *Gregg*, 428 U.S. at 183, n.30. See, e.g., M.R. Gardner, *Executions and Indignities – an Eighth Amendment Assessment of Methods of Inflicting Capital Punishment*, 39 OHIO ST. L.J. 96, 113-18 (1978) (discussing deterrence, retribution, and moral outrage as a part of retribution); COYNE & ENTZEROTH, *supra* note 18, at 31 (offering an overview of the death penalty interest in retribution); CARTER & KREITZBERG, *supra* note 31, at 8, 24 (assuming categorization of retribution and deterrence as penological interests without comment). The Court in *Gregg* called retribution and deterrence “two principal social purposes” of the death penalty. *Gregg*, 428 U.S. at 183. Some death penalty advocates believe retribution is the most important justification for capital punishment:

I would favor retention of the death penalty as retribution even if it were shown that the threat of execution could not deter prospective murderers not already deterred by the threat of imprisonment. . . . At any rate, the actual monetary costs are trumped by the importance of doing justice. . . . Retribution is an independent moral justification.

COYNE & ENTZEROTH, *supra*, at 16, 17 (quoting Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1665-66 (1986) [hereinafter van den Haag]). See generally Domino & Boccaccin, *supra* note 3 (explaining when and how public execution gave way to private execution). But see Ewart, *supra* note 36, at 1162. Retribution interest was partially abandoned when the public began to prefer rehabilitation to punishment in the early 1800s. *Id.* The focus on rehabilitation began a movement to create other state-custody endeavors: penitentiaries, asylums, and the like. *Id.* Notwithstanding its erosion, the Supreme Court has noted that, while retribution may not be the “dominant objective” of criminal law anymore, it has still been upheld as consistent with “respect for the dignity of” all people. *Gregg*, 428 U.S. at 183 (quoting *Williams v. New York*, 337 U.S. 241, 248 (1949)).

⁶² JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 16 (Lexis 2001). “Retributivists believe that punishment is justified when it is deserved. It is deserved when the wrongdoer freely chooses to violate society’s rules.” *Id.* This is the theory of so-called “just desserts,” which originated in part from Old Testament references to the “eye for an eye” principal, philosophers like Immanuel Kant, and the Biblical concept of *lex talionis*. CARTER & KREITZBERG, *supra* note 31, at 11, nn.20-23. But see *Furman v. Georgia*, 408 U.S. 238, 304-05 (1972) (Brennan, J., concurring) (critiquing retribution of right and describing society’s greater desire for deterrence):

government agents with the death penalty task has at least two benefits.⁶³ First, capital punishment is how civilized societies attempt to dole out vengeance in lieu of personal vendettas and mob justice.⁶⁴ The public at large, in particular the family and friends of an offender's victims, would likely lack the ability or desire to dispassionately, if humanely, perform executions.⁶⁵ Second, capital punishment also grants death row inmates a measure of mercy which mob justice would not.⁶⁶

The only other purpose suggested, one that is independent of protection for society, is retribution. Shortly stated, retribution in this context means that criminals are put to death because they deserve it The claim must be that for capital crimes death alone comports with society's notion of proper punishment. . . . The asserted public belief that murderers and rapists deserve to die is flatly inconsistent with the execution of a random few. As the history of the punishment of death in this country shows, our society wishes to prevent crime; we have no desire to kill criminals simply to get even with them.

Id.; see *id.* at 303 (explaining how societies manifest moral outrage toward crime and how he believes imprisonment can serve the purpose as effectively as capital punishment).

⁶³ *Furman*, 408 U.S. at 308 (Stewart, J., concurring) (also cited in *Gregg*, 428 U.S. at 183, n.29):

The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.

Id.; see also COYNE & ENTZEROTH, *supra* note 18, at 28 (recounting a story from RIDEAU & WIKBERG, LIFE SENTENCES: RAGE AND SURVIVAL BEHIND BARS 306-07 (1992) in which, when an executioner failed to properly decapitate a woman and gave up in desperation, the angry crowd responded by brutally killing him).

⁶⁴ Compare *Furman*, 408 U.S. at 308, with *Richmond Newspapers v. Virginia*, 448 U.S. 555, 571 (1980). The Supreme Court in *Richmond Newspapers* justified a public right of open access to trials as a prophylactic measure against "vengeful 'self-help'" and as an outlet for societal retribution and closure, much the same reasoning which goes into death penalty retribution. *Richmond Newspapers*, 448 U.S. at 571.

⁶⁵ Domino & Boccaccin, *supra* note 3, at 73-74 (stating that the motivation of family and friends of victims to watch a killer's death may be "vengeful fantasy," a desire for closure and psychological betterment, a sense of justice and safety in the world, or any combination thereof). For these reasons, families of murder victims have largely led the legal movement to permit themselves and others like them access to witness executions. *Id.* at 73.

⁶⁶ See Vidmar & Ellsworth, *supra* note 38, at 1264-66 (section titled "Levels of Death Penalty Attitudes"). "[S]ome people may favor the *idea* of capital punishment without realizing or without accepting its implications." *Id.* Another camp, advocates of maximum pain, would intentionally implement retribution without pity or dignity in executions, in part to make the gruesomeness of the death penalty enterprise, and not merely the likelihood of death sentences, a deterrent of violent crimes. See Gardner, *supra* note 61, at 117. They would add that the death penalty ought to be excruciating, if not humiliating as well, for the convict and that, as the likelihood of severe punishment is relaxed, deterrence

Along these same lines, condemned criminals are enabled to seek post-conviction relief, wherein courts attempt to enforce method-of-execution constitutional limits on the behavior of government agents.⁶⁷

Deterrence is, like retribution, a paramount penological objective for the death penalty.⁶⁸ In theory, deterrence dissuades people from committing crimes punishable by death by instilling fear of execution where otherwise stiff fines or life imprisonment would be the harshest punishments under law.⁶⁹ This “intimidation” aspect of deterrence is intended to affect every segment of society, except for condemned criminals themselves, whom the state has manifestly chosen not to rehabilitate.⁷⁰ Aside from its conceded inapplicability to death row

loses its value. *Id.* Fledgling deterrence of the public could be attributed in part to increased legal avenues for prisoners, frequently permitted stays of execution, a dramatic increase in commutation of death sentences by state governors, and juries’ reluctant use of the death penalty, each of which cause most people to forget the connection between the crime and punishment. *See Furman*, 408 U.S. at 277, 279, 300 (Brennan, J., concurring); COYNE & ENTZEROETH, *supra* note 18, at 25-26. In 1984, the chance of a murderer receiving capital punishment was about 1 in 1000. COYNE & ENTZEROETH, *supra*, at 26. This all, of course, incorrectly presupposes that the criminal element, those prone to intentional or cold-blooded crimes, are in close proximity as witnesses to be personally affected by capital punishment. *Id.* Additionally, deterrence is based on a rational connection between choices and consequences, whereas evidence suggests that many violent offenders are irrational, believing they cannot be caught or perceiving no connection between crime and punishment. *Id.* Factors such as these can make the infliction of the sentence so hit-or-miss that even violent offenders cannot help but be optimistic about their chances of survival. *Id.* *See infra* notes 71-72 and accompanying text.

⁶⁷ *See, e.g., Muhammad v. Close*, 540 U.S. 749 (2004) (stating that both petition for habeas corpus and Section 1983 actions are avenues available to imprisonment-related complaints).

⁶⁸ *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (deterrence noted as one of “two principal social purposes” of the death penalty). *But see Furman v. Georgia*, 408 U.S. 238, 300-03 (1972) (Brennan, J., concurring) (finding that no evidence other than the purported “common human experience” shows that capital punishment is any more of a deterrent than imprisonment to the criminal himself or to others).

⁶⁹ *Gregg*, 428 U.S. at 185-87 (acknowledging that valuation of deterrence is complex, the Court deferred to the legislature, because they are in the better position to study its penological value). To the degree deterrence is plausible, its effectiveness is allegedly not minimized by repeated failures in (electrocution) executions, since or as long as such failures are too random to be predicted. *Second Electrocution Attempt*, *supra* note 25, at 349. “Sparing the lives of even a few prospective victims by deterring their murderers is more important than preserving the lives of convicted murderers because of the possibility, or even the probability, that executing them would not deter others.” COYNE & ENTZEROETH, *supra* note 18, at 16 (quoting van den Haag, *supra* note 61, at 1662).

⁷⁰ CARTER & KREITZBERG, *supra* note 31, at 10 (describing intimidation and arguing that deterrence aimed at the particular offender is called “specific deterrence”). Some have argued that execution specifically deters prisoners by incapacitation. *Id.* That is, death guarantees that that one person will never commit a crime again. *Id. E.g., Ernest van den Haag, The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662 (1986). “The death penalty

inmates, capital punishment's effectiveness as a deterrent of others remains a significant source of academic debate.⁷¹ At the very least, deterrence varies according to the sentiments of decency in and among public sectors.⁷²

In order to venerate the aims of retribution and deterrence, in 1996 Congress enacted the Antiterrorism and Effective Death Penalty Act ("AEDPA") to eliminate undue delays between capital sentencing and punishment.⁷³ With rare exception, the AEDPA prevents death row

is our harshest punishment. It is irrevocable: it ends the existence of those punished, instead of temporarily imprisoning them." *Id.* The U.S. Supreme Court, however, has never ranked specific deterrence as a penological interest alongside the other aims of deterrence. *Gregg*, 428 U.S. at 183 n.28; *see also* CARTER & KREITZBERG, *supra*, at 11.

⁷¹ *E.g.*, *Gregg*, 428 U.S. at 184-85; *see infra* note 72.

⁷² *Gregg*, 428 U.S. at 185. According to a 1996 survey of academic criminological society presidents in this country, 84% believe the death penalty is ineffective as a deterrent to murder. *Facts about the Death Penalty*, DEATH PENALTY INFORMATION CENTER, September 27, 2006, www.deathpenaltyinfo.org/factsheet.pdf (last visited October 2, 2007) [hereinafter DEATH PENALTY INFORMATION CENTER]. The evidence suggests that most people with calloused and violent predispositions, who may eventually become capital punishment's best candidates, are not measurably deterred even in jurisdictions where violent offenders are repeatedly sentenced to death. *Id.*; COYNE & ENTZEROTH, *supra* note 18, at 26. "We may nevertheless assume safely there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly, is a significant deterrent." *Id.* Common use of the death penalty has in fact been tied to increased violence and brutalization among the public. COYNE & ENTZEROTH, *supra*, at 26-28 (citing, in part, Raymond Bonner & Ford Fessenden, *States With No Death Penalty Share Lower Homicide Rates*, N.Y. TIMES, Sept. 22, 2000, at A1) (noting, among other things, a negative correlation between capital punishment and murder rates in ten out of twelve non-death penalty states when compared to the national per-capita rates). Likewise, a 2004 FBI Uniform Crime Report explained that where capital punishment is used without the least hesitation, particularly in the South, the murder rate nonetheless remains the highest, whereas the opposite is true, on both accounts, as to the Northeast. *Facts about the Death Penalty*, *supra*.

⁷³ The AEDPA provides, in relevant part, the following:

(b) A stay of execution granted pursuant to subsection (a) shall expire if—

- (1) a State prisoner fails to file a habeas corpus application under section 2254 within the time required in section 2263;
- (2) before a court of competent jurisdiction, in the presence of counsel, unless the prisoner has competently and knowingly waived such counsel, and after having been advised of the consequences, a State prisoner under capital sentence waives the right to pursue habeas corpus review under section 2254; or
- (3) a State prisoner files a habeas corpus petition under section 2254 within the time required by section 2263 and fails to make a substantial showing of the denial of a Federal right or is denied relief in the district court or any subsequent stage of review

inmates from utilizing more than one successive habeas corpus challenge to the validity or duration of their death sentences.⁷⁴ Congress' specific intent for the AEDPA was to thwart eleventh hour appeals for stay of execution by inmates on the eve of their executions.⁷⁵

C. *Section 1983 and its Capital Punishment Applicability*

Only recently has Section 1983 jurisprudence crossed paths with habeas corpus jurisprudence.⁷⁶ This section explores how the legitimate penological interests requirement in death penalty cases generally has manifested in Section 1983 civil rights cases. That exploration in turn brings into focus the facts and laws surrounding present-day death row conditions of confinement cases which confront the courts.

Although Section 1983 provides no affirmative substantive rights, a qualified Section 1983 claimant can use this cause of action to enforce various substantive rights guarantees that were allegedly deprived under "color" of law.⁷⁷ Shortly after its enactment following the Civil

(c) If one of the conditions in subsection (b) has occurred, no Federal court thereafter shall have the authority to enter a stay of execution in the case, unless the court of appeals approves the filing of a second or successive application under section 2244(b).

Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§ 2262(b)-(c) (2000). Habeas limitations found in the AEDPA operate similarly to claim preclusion: if the judicial review requested goes to the merits of something previously not discussed on its merits, there is no second and subsequent habeas petition problem which would invoke the Act, in which case an inmate may proceed on alternative Section 1983 claims as well. *Id.* See generally *Green v. White*, 223 F.3d 1001 (9th Cir. 2000).

⁷⁴ 28 U.S.C. § 2262(b); see also *Muhammad v. Close*, 540 U.S. 749, 750-51 (2004) (describing how an implicit or hybrid habeas claim requires an inmate to exhaust state or federal channels before being permitted to bring a federal court habeas action, pursuant to 28 U.S.C. § 2254(b)(1)(A)).

⁷⁵ *Nelson v. Campbell*, 541 U.S. 637, 649 (2004). A common law rule, not specifically from the AEDPA, states that "[e]quity must take into consideration the State's strong interest in proceeding with its judgment and . . . attempt[s] at manipulation." *Id.* There is a strong equitable presumption against a stay of execution where the inmate appears to have needlessly delayed bringing his Section 1983 claim. *Id.* at 650.

⁷⁶ *Muhammad v. Close* was the first case to apply Section 1983 and habeas corpus jointly while also maintaining their distinctiveness. 540 U.S. 749 (2004). See *infra* notes 99-102 and accompanying text.

⁷⁷ See 42 U.S.C. § 1983 (2000). A prima facie case for civil rights violations under Section 1983 requires: (1) a natural person as petitioner; (2) a deprivation of federal constitutional or statutory rights; and (3) that said deprivation was caused by a defendant acting "[u]nder [c]olor of [s]tate [l]aw." ROSALIE BERGER LEVINSON & IVAN E. BODENSTEINER, CIVIL RIGHTS LEGISLATION AND LITIGATION, II-43 (2006); see also *Crawford v. Britton*, 523 U.S. 574 (1998) (rejecting a heightened pleading requirement of culpability or intent in Section 1983 actions, saying that such a requirement depends on the underlying substantive right being alleged). For an in-depth treatment of Section 1983's Eighth Amendment precedent, see

War, Section 1983 was relegated to virtual disuse for almost a century, having been successfully alleged prior to *Monroe v. Pape* in 1961 on only twenty-one occasions in all the nation's courts combined.⁷⁸ In contrast, Section 1983 litigation is presently common fare for allegations of abuse of federal law by the federal government, municipalities, and public officials—a turnaround owing largely to increased vindication of Fifth and Fourteenth Amendment Due Process and Equal Protection rights on which Section 1983's legislative history is based.⁷⁹

1. Practices Leading to Death Row Inmates' Section 1983 Eighth Amendment Claims

In the rights-restrictive context of prisons and execution chambers, Eighth Amendment Section 1983 cases have, for the most part, recognized the same penological objectives criteria as the Supreme Court set forth in the First Amendment conditions of confinement case *Pell v. Procunier*.⁸⁰ *Pell* stated that inmates retain whatever rights are not inconsistent with their status as prisoners or with legitimate penological objectives.⁸¹ Accordingly, there are just three legitimate penological

generally IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, *STATE & LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY*, § 1.13 (1987).

⁷⁸ 365 U.S. 167 (1961); LEVINSON & BODENSTEINER, *supra* note 77, at II-43; Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951).

⁷⁹ LEVINSON & BODENSTEINER, *supra* note 77, at II-43. Section 1983 is part of the "Reconstruction [Legislation]," 42 U.S.C. §§ 1981-86, though it originated in the Ku Klux Klan Act of 1871. *Id.* Given its origin in Fourteenth Amendment rights and the explicit legislative intent to attack civil rights violations under color of law, it has long been clear that Section 1983 is a valid abrogation of states' Eleventh Amendment sovereign immunity, if only for provisions enacted pursuant to Section 5 of the Fourteenth Amendment. *E.g.*, *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000).

⁸⁰ 417 U.S. 817, 822 (1974).

⁸¹ *Id.* For example, a prisoner always retains the First Amendment right to communicate about conditions of confinement (or any other matter), absent a narrowly tailored compelling concern for content-neutral regulation, and even then a convict must have adequate alternative means of communicating with a reasonable audience of his or her choice. *Id.* at 825-26. Aside from the fact that the government may not practice discrimination against the public based on viewpoint, if it makes public access available into a correctional environment, admittance is within the professional discretion of the Department of Corrections, which may invite specific members of the public only if doing so would be in the best interests of prisoner rehabilitation (that is, the prisoner's best interests and correctional system's best interests). *Id.* at 823, 825. This demonstrates that, in most ways, correctional facilities are necessarily more rights-restrictive than courtrooms, for both the public and convicts themselves. *E.g.*, *id.* at 826 (permitting reasonable time, place, and manner restrictions limiting access and communication insofar as necessary to further significant government interests). In *Pell*, California's Department of Corrections Manual Section 415.071 denied the press interviews with individual inmates. *Id.* at 820. The rule came in reaction to major disciplinary problems which resulted when various

objectives recognized in conditions of confinement sufficient to warrant legislative deference: the deterrence of crime, rehabilitation of prisoners, and internal security within correctional facilities.⁸²

Even so, to effectuate the penological goals of capital punishment, most states authorize executions by only succinct statutes and grant their Departments of Correction broad discretion to handle the bulk of implementation.⁸³ The typical state death penalty statute provides the

inmates started gaining media attention. *Id.* at 821. Thus, the Court accepted that those deemed best able to aid in prisoner rehabilitation included clergy, family, or legal counsel, but not, for instance, criminal co-conspirators. *Id.* at 827. Likewise, the Court in *Houchins v. KQED* announced that the right to gather news within jails by way of audio tape or video recordings can be denied because it would constitute “an implied special right of access to government-controlled sources of information.” 438 U.S. 1, 7-8 (1978) (explaining that the “government-controlled sources of information” referred to are *not* prisoners, but rather the prison facilities). Said the Court:

The media are not a substitute for or an adjunct of government and, like the courts, they are “ill-equipped” to deal with problems of prison administration. . . . The public importance of conditions in penal facilities and the media’s role of providing information afford no basis for reading into the Constitution a right of the public or the media to enter these institutions, with camera equipment, and take moving and still pictures of inmates for broadcast purposes.

Id. at 9. *But see* *Richmond Newspapers v. Virginia*, 448 U.S. 555, 597-98 (1980) (describing a presumption of openness for the public and press at trials).

⁸² *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (analyzing only these three interests as the possible “legitimate policies and goals of the corrections system”). *See* *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981) (indicating that in an Eighth Amendment case, “the goals” of “the penal function,” as distinct from other functions of the criminal system, are: retribution (“to punish justly”), deterrence (“to deter future crime”), and rehabilitation (“to return imprisoned persons to society with an improved change of being useful, law-abiding citizens”). Safety or security has, under First Amendment precedent in *Section 1983*, been considered a legitimate penological objective, insofar as it places conditions on inmates’ confinement which advance the goal of internal safety within prison facilities. *Pell*, 417 U.S. at 823. A recent Eighth Amendment derivative of the interest in prison institutional safety is execution chamber security, for the benefit of the execution team. *See* *Workman v. Bredesen*, 486 F.3d 896, 909-10 (6th Cir. 2007) (discussing certain protocols in the execution chamber in furtherance of a legitimate penological interest in security and safety). Security is paramount in the execution chamber, since a violent criminal might recklessly pursue whatever remaining opportunities for self-preservation are left before he is scheduled to die. *Id.* Another, broader correlation is deterrence as protection for society and crime prevention in the aggregate. *See* *Furman v. Georgia*, 408 U.S. 238, 304-05 (1972) (Brennan, J., concurring) (discussing societal safety).

⁸³ *E.g.*, IND. CODE. 35-38-6-1 (2006) “Execution of death sentence; specified time and date; executioner”:

- (a) The punishment of death shall be inflicted by intravenous injection of a lethal substance or substances into the convicted person:
 - (1) in a quantity sufficient to cause the death of the convicted person; and
 - (2) until the convicted person is dead.

common name of the preferred procedure to be used, lethal injection or electrocution for instance, followed by an alternate method that can be chosen at the prisoner's timely election or if the preferred method is held unconstitutional.⁸⁴ Next, most death penalty statutes offer basic guidelines as to what type of lethal injection chemicals (or electric current) should be used to execute a person.⁸⁵ Finally, these statutes generally give state prison officials the direction to "kill them until they're dead" so to speak.⁸⁶ Beyond these basic guidelines, legislatures

(b) The death penalty shall be inflicted before the hour of sunrise on a date fixed by the sentencing court. However, the execution must not occur until at least one hundred (100) days after the conviction.

(c) The superintendent of the state prison, or persons designated by the superintendent, shall designate the person who is to serve as the executioner.

(d) *The department of correction may adopt rules under IC 4-22-2 necessary to implement subsection (a).*

Id. (emphasis added). See Ewart, *supra* note 36, at 1168-82 (offering a detailed state-by-state comparison of lethal injection policies and procedures). States and arms of state, including legislatures and correctional agencies, are themselves immune from Section 1983 action, because they have neither abrogated Eleventh Amendment sovereign immunity nor are they "persons" within that word's usual meaning as required in Section 1983. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984). However, if a government official violates federal law, the state action he performed is void and open to a damages action against this arm of the state. *Ex parte Young*, 209 U.S. 123, 160 (1908). Section 1983 also disallows suit against legislators or agency administrators for actions while in their law-making capacities, though suit against administrative officials is otherwise generally not barred by absolute or qualified immunity. In particular, *Edelman v. Jordan* held that when a plaintiff sues a state official alleging a violation of federal law, the federal court may award an injunction that governs the official's future conduct, but not one that awards retroactive monetary relief. 415 U.S. 651, 666-67 (1974). See *infra* note 90 (discussing liability for random and unauthorized Section 1983 violations).

⁸⁴ See, e.g., DEL. CODE ANN. tit. 11 § 4209 (Lexis 2006) ("Punishment of death shall, in all cases, be inflicted by intravenous injection If the execution of the sentence of death as provided above is held unconstitutional . . . then punishment of death shall, in all cases, be inflicted by hanging by the neck."); CAL. PENAL CODE § 3604(b) (West 2006) ("Persons sentenced to death prior to or after the operative date of this subdivision shall have the opportunity to elect to have the punishment imposed by lethal gas or lethal injection."). See *supra* note 44 (numbering the jurisdictions that currently employ each method of execution).

⁸⁵ E.g., *Murder; Sentence to Death; Administration of Punishment*, N.J.S.A. 2C:49-2 (2006). The New Jersey execution statute calls for "a lethal quantity of an ultrashort-acting barbiturate in a combination with a chemical paralytic agent in a quantity sufficient to cause death." *Id.*

⁸⁶ E.g., *id.* (requiring that "punishment shall be imposed by continuous, intravenous administration until the person is dead"). But see Gordon, *supra* note 2, at 363 (describing how statutes which authorize lethal injection without clarifying the substances, doses, or procedures to be used could be deemed "unconstitutionally vague," though no court has done so). Another possible debacle awaits states that attempt more than one successive attempt at execution. Because most statutes merely authorize a sufficient and continuous electrical current or chemical dosage to render death, if additional execution attempts are

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have tended not to enact any ancillary statute or authorize any rule or regulation to advise or assess specific capital punishment-related departmental practices.⁸⁷

Departments of Correction keep execution protocols quite confidential.⁸⁸ Most states, by statute, exempt death penalty protocols from publication as “rules” or “regulations” in the administrative code, making it difficult for death row inmates, scholars, the press, or other interested third parties to obtain a detailed description of chosen execution procedures.⁸⁹ Even without access to documentation about

not authorized by statute, they may be cruel and unusual punishments. *Second Electrocutation Attempt*, *supra* note 25, at 349 (citing LA. CODE CRIM. LAW & PROC. art. 569 (Dart 1943)).

⁸⁷ See, e.g., *Abdur’Rahman v. Bredesen*, 181 S.W.3d 292, 307 (Tenn. 2005) (citing the fact that each jurisdiction’s lethal injection methods are of the same origin and have withstood constitutional scrutiny as proof that nothing in them needs to be altered). *But see Workman v. Bredesen*, 486 F.3d 896, 899 (6th Cir. 2007) (describing Tennessee’s extraordinary efforts in 2007 to review and improve upon lethal injection procedures “[n]otwithstanding the decision of the Tennessee Supreme Court in 2005 and the decision of this court [*Abdur’Rahman*] in 2006”). See also *Morales v. Tilton*, 465 F. Supp. 2d 972, 979-80 (N.D. Cal. 2006) (ordering the state of California execution procedures to be improved to minimize the risk of cruel and unusual punishment). *Morales* was one of the first instances where a court elaborately chided the state for deficiencies in lethal injection protocols. *Id.* Particularly, cited problems by District Court Judge Fogel were:

1. Inconsistent and unreliable screening of execution team members
2. A lack of meaningful training, supervision, and oversight of the execution team
3. Inconsistent and unreliable record-keeping
4. Improper mixing, preparation, and administration of sodium thiopental by the execution team
5. Inadequate lighting, overcrowded conditions, and poorly designed facilities in which the execution team must work

Id. at 979-80 (emphasis omitted).

⁸⁸ The controlling Florida statute authorizing lethal injection (Fla. Stat. § 922.105(1) (2003)) does not specify its lethal injection procedures. *Hill v. McDonough*, 126 S. Ct. 2096, 2100 (2006). Rather, the state Department of Corrections (“DOC”) is charged with implementation. *Id.*; *Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000) (*per curiam*). Despite their duties, the Florida DOC had not, at the time of the *Hill* case, proffered rules for specific protocol and had even exempted implementation policies and procedures from Florida’s Administrative Procedures Act. *Hill*, 126 S. Ct. at 2100. See Fla. Stat. § 922.105(7). According to the district court in *Hill*, on remand, however, Florida’s full protocol had incidentally come to light and was available for review, though through no help of the DOC, due to a full evidentiary hearing that had taken place on the record in *Sims v. State* a few years earlier. *Hill v. McDonough*, 2006 WL 2556938 *3 (N.D. Fla. Sept. 1, 2006) (citing *Sims*, 754 So. 2d at 657). See also *Cooley v. Strickland*, 479 F.3d 412, 417, 424 (6th Cir. 2007) (inmate’s claim not timely due to his ample time to know or have reason to know the facts and protocol which gave rise to his specific method-of-execution challenge).

⁸⁹ E.g., *Abdur’Rahman*, 181 S.W.3d at 312. The Tennessee Supreme Court afforded great legislative deference to the discretion of its state’s department of corrections, concluding that “promulgation requirements of public notice, public hearing, attorney general

lethal injection protocol, many death row inmates have nonetheless raised Section 1983 challenges on Eighth Amendment grounds, implicating a variety of alleged procedural deficiencies in the correctional system as cruel and unusual conditions of confinement.⁹⁰ They contend, largely, that corrections officers who act as executioners are unintelligibly chosen, personally inexperienced, and otherwise poorly trained to avoid inflicting unconstitutional cruel and unusual punishment during the lethal injection procedure.⁹¹ For instance, in *Abdur'Rahman v. Bredesen*, an inmate on Tennessee's death row learned that the state's execution protocol was not standardized, but rather existed only in how-to manuals, handwritten and updated by a few correctional officials.⁹²

To be sure, several states have gleaned from one another a practice of regularly-scheduled mock-up training for executioners. Some states have or will significantly revamp their procedures in reaction to Section 1983 challenges, but a lack of official standards for execution behavior means that, despite their common origins, not all jurisdictions' lethal injection protocols are created equally.⁹³ Some state protocols have

approval, and filing with the state are simply not realistic requirements for implementing procedures that concern the intricacies and complexities of a prison environment." *Id.* See *supra* note 88; *infra* notes 194-96, 198, 200-01 (discussing difficulties in obtaining access to lethal injection protocols).

⁹⁰ *E.g.*, *Abdur'Rahman*, 181 S.W.3d at 312; *Hill*, 126 S. Ct. at 2096; *Nelson v. Campbell*, 541 U.S. 637, 643 (2004); *Reid v. Johnson*, 333 F. Supp. 2d 543 (E.D. Va. 2004); *Morales*, 465 F. Supp. 2d 972; *Taylor v. Crawford*, 2006 WL 1779035 (W.D. Mo. June 26, 2006); *Emmett v. Johnson*, 489 F. Supp. 2d 543, 546-47 (E.D. Va. 2007). In Section 1983 litigation, a claimant may challenge statutes or established state procedures subject to the *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976), balancing test, weighing the risk and severity of private deprivation against the government interest and lack of alternatives. *Zinerman v. Burch*, 494 U.S. 113 (1990). Section 1983 litigation also allows challenges to recurring violations that are not random and unauthorized, since such practices are the *de facto* policy and custom of prisons, using the *Matthews* test. *Id.* at 115 n.1; *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). Challenges to random and unauthorized violations by government officials, however, must be addressed on procedural due process grounds, not Section 1983 bases. *Parratt v. Taylor*, 451 U.S. 527 (1981). See 42 U.S.C. § 1983, *supra* note 7. *But see Burch*, 494 U.S. at 138-39. See *supra* note 83 (describing governmental immunity and its limits under Section 1983).

⁹¹ *E.g.*, *Hill*, 126 S. Ct. at 2096; *Abdur'Rahman*, 181 S.W.3d at 292; *Morales*, 465 F. Supp. 2d. at 979-80.

⁹² 181 S.W.3d 292, 312 (Tenn. 2005). John Gibeaut, *It's All in the Execution: Prosecutors Fear Limitless Civil Rights Complaints over Lethal Injection Procedures*, A.B.A. J. 17-18 (Aug. 2006) (noting that, from the defense attorney's perspective in the *Abdur'Rahman* case, these manuals are merely handwritten and amended by notes and corrections in the margins).

⁹³ *E.g.* Howard Witt, *Pain of Execution Debated*, CHI. TRIB., Jan. 21, 2004, at 8, available at 2004 WLNR 19892328 (citing David Dow, University of Houston Law School, as saying that lethal injection protocols have been largely unchanged and unscrutinized since first used

and copied among the states following the model used in Texas in 1982). *See, e.g.*, *Morales v. Tilton*, 465 F. Supp. 2d 972, 979-80 (N.D. Cal. 2006) (citing “walk-through[]” training at California’s San Quentin facility). *See Miller, supra* note 47, at 231-32 (noting a variety of problems which some states possess and others may not); *Morales*, 465 F. Supp. 2d at 979-80; *supra* note 92 (discussing adjudged problems with California’s protocol). The evidentiary basis for states’ confidence in their lethal injection protocols can be very slight. *See, e.g.*, *Abdur’Rahman v. Bredesen*, 181 S.W.3d 292, 306 (Tenn. 2005).

There was no evidence in the record that the procedures followed under the lethal injection protocol have resulted in the problems feared by the petitioner; indeed the undisputed evidence was that the *sole* lethal injection carried out in Tennessee, i.e., Robert Coe in 2000, had revealed “no significant difficulties with the process.”

Id. (emphasis added); *see also id.* at 310-11. *But see Workman v. Bredesen*, 486 F.3d 896, 899 (6th Cir. 2007); *supra* note 82 (explaining in detail the lethal injection improvements in Tennessee); *Morales*, 465 F. Supp. 2d at 979-80 (ordering various death penalty improvements); *Morales v. Hickman*, 415 F. Supp. 2d 1037, 1047-48 (N.D. Cal. 2006) (ordering the state to make one of two improvements in a timely manner to avoid a stay of execution: (1) specify that “only sodium thiopental or another barbiturate or combination of barbiturates” will be used in execution; or (2) agree to independently guarantee, by the direct observation of qualified personnel, that the inmate is indeed unconscious before the second and third chemicals are injected and this “in a manner comparable to that normally used in medical settings where a combination of sedative and paralytic medications is administered”).

In California, as most other states, a qualified person must be formally trained and experienced in general anesthesia, though that may include correctional employees. *Id.* at 1048. The identity of that person may be kept confidential in documentation and by the clothes they wear during execution. *Id.* Like California, a North Carolina court has held that an execution requires not only trained personnel to proceed but that they must also be “present and accessible to Plaintiff throughout the execution” to guarantee that the inmate is “in all respects unconscious *prior to* and *at the time of* the administration of any pancuronium bromide or potassium chloride.” *Brown v. Beck*, 2006 WL 3914717 *8 (E.D.N.C. Apr. 7, 2006). Their role is to immediately return the inmate to unconsciousness if he ever “exhibit[s] effects of consciousness.” *Id.*

Other states place security above prisoner safety in the chamber. Because prisoners can be expected to attempt to escape execution by whatever means necessary in the last moments of their lives, these states purposefully “deviate from the surgical norm of physical proximity” and allow execution personnel to be farther away from the condemned and the lethal chemical syringes for their own safety. *Workman*, 486 F.3d at 909-10. This is the situation particularly in states which view execution procedures as requiring a lower standard of care than generally expected of medical practice. *See Emmett*, 489 F. Supp. 2d at 543. To compensate for the executioners’ conceded inability to monitor Pentothal intake, Tennessee protocol, at least, now calls for there to be a television monitor in the execution chamber and a camera above the gurney where the inmate lies, for the executioner’s remote viewing. As an added measure, in Tennessee, the warden remains in the chamber and stands within a foot of the top of the gurney, having been trained to detect problems like crimped IV lines or failure of the injection to go into the inmate’s vein. *Id.* In Missouri, by contrast, non-proximity is a greater threat, as the execution team’s work from an adjacent room has always been partially obstructed by blinds, the inmate faces away from window, and the inmate’s entire body except for his face has been completely covered by a sheet. *Taylor*, 487 F.3d at 1072.

Linked to proximity, a range of other problems have been noted as well, including overcrowding in the chamber adjacent to the execution room and potential problems with

failed to specify what dosages are necessary to ensure proper lethal injection while others lack clear guidance for prison officials in the event of a botched execution.⁹⁴

The most common death row inmates' Section 1983 contests at present regard the use of a muscle relaxing, paralytic drug called pancuronium bromide, or Pavulon, in the lethal injection protocol.⁹⁵ Pavulon is the second in a three-drug sequence called for by the protocols of thirty-five states and the federal government.⁹⁶ Potentially, if inexperienced officials don't inject a sufficient amount of the first drug, a form of sodium, to render the prisoner unconscious or otherwise inject Pavulon at the wrong time interval thereafter, a death row inmate could be forced to endure the third, killing drug—a potassium chloride

positioning and testing IV bags. Henry Weinstein & Maura Dolan, *State Defends Execution Procedure*, L.A. TIMES, Nov. 10, 2006, at 3, available at 2006 WLNR 19528769.

⁹⁴ See Miller, *supra* note 47 (commenting on the three main causes of botched lethal injections); *Morales*, 465 F. Supp. 2d 792, 979-80; *Brown*, 2006 WL 3914717, at *8; *Taylor v. Crawford*, No. 05-4173-CV-C-FJG, 2006 WL 1779035 (W.D. Mo. June 26, 2006), *rev'd* 487 F.3d 1072 (8th Cir. 2007).

⁹⁵ A first drug, sodium thiopental or sodium pentothal, is a barbiturate for anesthetics. COYNE & ENTZEROTH, *supra* note 18, at 86. Given at 2000 mg, (twice what patients receive during long medical operations) it quickly makes a patient unconscious. *Id.* Pancuronium bromide ("Pavulon") is a muscle relaxant common to heart surgeries, but when given at 10 times the normal dose (100 mg), as in lethal injections, it causes paralysis and respiratory failure. *Id.* Nevertheless, because Pavulon, if used alone, would take around ten minutes to kill a person, lethal injection protocols utilize potassium chloride (used in bypass surgery to relax the heart and stop its pumping) to accomplish that result in about ten seconds. *Id.* The court in *Workman* cited state analyses of one and two-drug execution protocols which would each eliminate the use of Pavulon, but for various reasons, Tennessee refused to adopt either. *Workman*, 486 F.3d at 902-03. Disadvantages feared in the two-drug protocol included the likelihood of "involuntary movement which might be misinterpreted as a seizure or an indication of consciousness" and the fact that no other jurisdiction had experience with such a protocol from which to borrow confidence. *Id.* at 902-03, 919. A one-chemical protocol, much like the simple and less risky procedure used to euthanize animals, would simply be a massive dosage to induce cardiac arrest. *Id.* The disadvantages of such an approach would be unpredictability, the fact that it has not been tested on humans by any state, and that it is slow and might therefore result in unconstitutionally prolonged or lingering death. *Id.* Even so, there are at least three disadvantages to the three-drug protocol as well: that Pavulon requires refrigeration; that there is a chance of error in implementation; and that obtaining, storing, and safeguarding lethal injection chemicals can be complicated. *Workman*, 486 F.3d at 918 Appx. A.

⁹⁶ Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocutation and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, at 146 tbl. 11 (2002).

injection which causes muscle cramping and cardiac arrest—while simultaneously conscious and paralyzed.⁹⁷

Although courts will eventually be obliged to decide whether being put to death while conscious and paralyzed is itself cruel and unusual, thus far, most are occupied by the initial question of whether inexperienced technicians and inconclusive execution protocols create a grave risk of cruel and unusual harm.⁹⁸ What Eighth Amendment case

⁹⁷ Leonidas G. Koniaris, Teresa A. Zimmers, David A. Lubarsky, & Jonathan P. Sheldon, *Inadequate Anesthesia in Lethal Injection for Execution*, 365 THE LANCET 1412 (Apr. 16-22, 2005). The *Lancet* article has been the primary impetus for current Section 1983 claims. John Gibeaut, *A Painful Way to Die?*, A.B.A. J. 20-21 (Apr. 2006). According to Dr. Mark J. S. Heath, an expert on lethal injection commonly sought out by inmates, Pavulon paralyzes not only a person's body but his lungs as well, which means that prisoners may suffocate while the last drug causes muscle cramping and a fatal heart attack. *E.g.*, *Abdur'Rahman*, 181 S.W.3d at 300-03. Dr. Heath testified that the drug creates a "chemical veil," preventing witnesses and officials from noticing an inmate's suffering. *Id.* at 302. The plaintiff in *Hill* particularly alleged the first drug was insufficient to make a person unconscious for suffocation and death. *Hill*, 126 S. Ct. at 2100. This much was confirmed by Carol Weiher, founder and president of Anesthesia Awareness Campaign, who in 1998 was anaesthetized using Pavulon during a medical procedure but woke up in a state of paralysis, cognizant of what was going on but unable to speak or move. *Abdur'Rahman*, 181 S.W.3d at 303. *But see* *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (explaining that the opinions of experts do not determine constitutional requirements but are subservient to the better determinant of contemporary standards of decency: the public attitude); *Rhodes v. Chapman*, 452 U.S. 337, 350 (1981).

[S]uch opinions may be helpful and relevant with respect to some questions, but "they simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question." . . . Indeed, generalized opinions of experts cannot weigh as heavily in determining contemporary standards of decency as "the public attitude toward a given sanction."

Rhodes, 452 U.S. at 350; *see also infra* notes 111-12, 173, 175, 197 and accompanying text (regarding the public attitude or public interest as a factor in the propriety of injunctive relief).

⁹⁸ *E.g.*, *Hill v. McDonough*, 126 S. Ct. 2096, 2104 (2006) (remanding for a determination on the merits regarding Florida's lethal injection protocol); *Hill v. McDonough*, 2006 WL 2556938 *2-4 (N.D. Fla. Sept. 1, 2006) (deciding, without reaching the merits, that Hill's claim was untimely). The states that have had occasion to determine the constitutionality of Pavulon have returned mixed results. *See Workman*, 486 F.3d at 905-09 (stating that the methods used currently do not cause cruel and unusual harm because: (1) the Supreme Court has never invalidated any method of execution; (2) lower state and federal courts have held the same; (3) contemporary standards of decency support this conclusion; and (4) there is no wantonness or deliberate indifference in a procedure aimed at pain-avoidance); *Taylor v. Crawford*, 487 F.3d 1072, 1085 (8th Cir. 2007); *Emmett v. Johnson*, 489 F. Supp. 2d 543, 543 (E.D. Va. 2007); *Abdur'Rahman*, 181 S.W.3d at 308-09 (finding no risk of unnecessary physical and psychological suffering and thus no cruel and unusual punishment in Tennessee's lethal injection protocol even under its former version). *Contra Morales*, 465 F. Supp. 2d at 979-80; *Brown*, 2006 WL 3914717, at *8 (each conditionally barring lethal injection as unconstitutional unless and until specific changes are made).

law has developed on these conditions of confinement cases, at the Supreme Court level, is presented next.

2. Supreme Court Interpretation in Recent Death Row Inmates' Section 1983 Actions

For cruel and unusual punishment claims, the Supreme Court first delineated when conditions of confinement actions could be brought alone, without traditional habeas pleading, in the 2004 non-death penalty case of *Muhammad v. Close*.⁹⁹ *Muhammad* offered a reliable distinction between core habeas corpus actions, "hybrid[]" habeas plus Section 1983 actions, and purely Section 1983 conditions of confinement actions upon which future civil rights actions might proceed.¹⁰⁰ Citing a

The opponents of the three-drug procedure do so oppose it for various reasons. Some have deemed the use of Pavulon torturous, hence cruel and unusual by definition. Witt, *supra* note 93, at 8. Indeed, Texas, Oklahoma, Tennessee, Virginia, North Carolina, and Ohio courts have all heard arguments that Pavulon, "which does nothing to prevent the experience of pain, renders condemned inmates unable to speak, twitch or cry out in response to it." *Id.* It is undisputed that the inherent properties of the second and third chemicals, respectively, are to mask any visible signs of pain and cause extreme pain where there is improper anaesthetization. *Taylor*, 487 F.3d at 1082. Using the same rationale, it would seem that if the problem is insufficient anesthesia to make a person unconscious, the case concerns a risk of lingering death, also cruel and unusual punishment. *Id.* The agony of capital punishment is said to derive from not only the prospect of pain but also the expectation of death, exemplified in the long process of waiting (or mock executions) which are commonly used worldwide as psychological torture. COYNE & ENTZEROOTH, *supra* note 18, at 87. Other potential problems, especially in the absence of medical personnel, include injection into muscle instead of vein, a problem which once caused an inmate named James Autry to die slowly, consciously, moving around, and complaining of pain. *Id.* at 86. In a successful lethal injection procedure, on the other hand, "[t]he only physical pain, if the killing is done correctly, 'is the pain of the initial prick of the needle.'" *Id.* The execution of Lawrence Lee Buxton in 1991, for example, was one that proceeded as planned, in that all that witnesses heard was a deep breath by the prisoner, then a gurgling noise as his tongue dropped back in his mouth. *Id.*; see also *Furman v. Georgia*, 408 U.S. 238, 282 (1972) (Brennan, J., concurring).

⁹⁹ 540 U.S. 749 (2004).

¹⁰⁰ *Id.* at 750-51. Core habeas challenges are those regarding the validity of one's conviction or sentence or the duration of one's stay in prison. *Id.* at 750 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973)). Hybrid actions are where a prisoner seeks a damages remedy, which habeas does not provide, whereas the claim itself challenges the validity or duration of the sentence. *Id.* at 750 (citing *Heck v. Humphrey*, 512 U.S. 477 (1994)). The rule in *Heck* says that a claim brought under Section 1983 will be treated instead as a habeas action, subject to AEDPA rigors, where the issues are core issues of duration or validity. *Id.* According to the *Muhammad* Court, *Edwards v. Balisok* featured one such validity action in disguise, where an inmate attempted at damages and equitable relief for procedural defects in a prison's administrative processes. *Id.* at 751 (citing *Edwards*, 520 U.S. 641 (1997)). For true Section 1983 claims, which only challenge conditions of confinement, the Prison Litigation Reform Act, 42 U.S.C. § 1997e (2000), operates instead of the *Heck* rule and the

hybrid claim rule from *Heck v. Humphrey*, *Muhammad* stated that any inmate's death penalty challenge which necessarily implies the factual or legal invalidity of his death sentence is actually a successive habeas petition in Section 1983 clothing.¹⁰¹ Courts, by looking through form to substance, should treat a hybrid claim the same as a core habeas complaint rather than a conditions of confinement claim as pled.¹⁰²

Nelson v. Campbell, following closely on the heels of *Muhammad*, was the first Supreme Court case to prohibit a specific execution procedure as an unlawful condition of confinement on Eighth Amendment grounds.¹⁰³ Without solidifying the Eighth Amendment fate of "method-of-execution claims generally," that Court explained that a cut-down procedure to gain venous access for lethal injection was at best a gratuitous element of the procedure, unnecessary to Alabama's death penalty punishment.¹⁰⁴

AEDPA, merely requiring exhaustion of state administrative remedies prior to court action.
Id.

¹⁰¹ 512 U.S. 477 (1994); *Muhammad v. Close*, 540 U.S. 749, 750-51 (2004).

¹⁰² See *supra* note 100; *infra* note 108.

¹⁰³ 541 U.S. 637 (2004). David Nelson was permitted in a Section 1983 action to challenge Alabama's use of the "cut-down" procedure to access the veins of prisoners executed by lethal injection as cruel and unusual punishment, since an alternative procedure, the "central line" procedure was not unlawful in the state's lethal injection statute and was personally acceptable to him. *Id.* at 646; see *infra* note 104. Assuming *Nelson* is applicable to any conduct surrounding executions that can be described as a condition of confinement, it might invalidate, in whole or in part, Florida's secondary execution method, the electric chair. *Id.* at 647, 650. Florida's electric chair has malfunctioned on several occasions, causing unnecessary pain to its victims. Kearns, *supra* note 5, at 207. Because the state is not bound by statute to use that particular chair or electrocution whatsoever, the option to demand the state to use a substitute electric chair is viable (barring cost as a compelling countervailing government interest), and standards of decency would seem to support the same decision. Nevertheless, when the Florida Supreme Court took up this exact scenario in *Jones v. State*, 701 So. 2d 76 (Fla. 1997), it ignored evolving standards of decency and instead determined the use of a frequently malfunctioning chair was not a wanton or deliberately indifferent rendition of unnecessary pain upon the state's prisoners. *Id.* at 77.

¹⁰⁴ *Nelson*, 541 U.S. at 645-46 (emphasis omitted). While declining the defendant's argument that a ruling favorable to the death row plaintiff would flood the courts as a result, the Supreme Court refused to resolve "how to treat method-of-execution claims generally." *Id.* at 644, 649. *Hill* did the same in effect. *Hill v. McDonough*, 126 S. Ct. 2096, 2102 (2006) (avoiding the issue of method-of-execution analysis generally because *Nelson* is controlling precedent). Regarding the non-necessity of the cut-down procedure, the Court in *Nelson* said:

That venous access is a necessary prerequisite does not imply that a particular means of gaining such access is likewise necessary. Indeed, the gravamen of petitioner's entire claim is that the use of the cut-down would be *gratuitous*. Merely labeling something as part of an execution procedure is insufficient to insulate it from § 1983 attack. If as a legal matter the cut-down were a statutorily mandated part of the lethal injection protocol, or if as a factual matter petitioner were unable or unwilling to concede acceptable alternatives for gaining venous

In the wake of *Nelson*, Section 1983 represents the only cause of action in United States history, aside from a petition for writ of habeas corpus, recognized to bring death penalty claims under the Eighth Amendment.¹⁰⁵

In June 2006, the Supreme Court reaffirmed and built on *Nelson* in *Hill v. McDonough*.¹⁰⁶ *Hill* allowed a convict to challenge in advance the foreseeable risk that execution conditions or protocols using Pavulon or like paralytic agents would cause gratuitous and unnecessary pain.¹⁰⁷ The primary limitation on death penalty conditions cases, in the order

access, respondents might have a stronger argument that success on the merits, coupled with injunctive relief, would call into question the death sentence itself. . . . No Alabama statute requires use of the cut-down, . . . respondents have offered no duly-promulgated regulations to the contrary . . . [and] the State now seems willing to implement petitioner's proposed alternatives.

Nelson, 541 U.S. at 645-46. *But see* *Workman v. Bredesen*, 486 F.3d 896, 903 (6th Cir. 2007) (acknowledging that Tennessee permits the cut-down procedure where a usable vein cannot be found).

¹⁰⁵ *See* *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1879); *Muhammad*, 540 U.S. 749. *See also* *Kearns*, *supra* note 5, at 198-99 (commenting particularly on the inordinate span of time between cases actually approaching method-of-execution analysis, namely *Wilkerson* in 1879 and *Roper* in 2005).

¹⁰⁶ 126 S. Ct. 2096 (2006). In *Nelson*, the Court explained that its recognition of a valid Section 1983 action was narrow and did not specifically permit method-of-execution claims generally under Section 1983. *Nelson*, 541 U.S. at 649. In *Hill*, no limitation was stated on the availability of Section 1983 to challenge conditions of confinement (as opposed to the death sentence or duration of confinement), and only cursory heed was given to the difference from the *Nelson* case factually, namely: challenging the chemical injection sequence (*Hill*) versus challenging the surgical procedures prior to lethal injection (*Nelson*). *Hill*, 126 S. Ct. at 2102. In a strange move, perhaps because *Nelson* was controlling, the *Hill* Court also ignored the method-of-execution reasoning it used in *Roper* just one year before, deferring instead to the Eleventh Circuit's contemporary standards of decency consideration from below while leaving *Roper's* evolving standards approach unchallenged. *Id.* at 2104.

¹⁰⁷ *Hill*, 126 S. Ct. at 2102. Of the thirty-seven states which employ lethal injection as their primary statutory means of execution, all but one uses the same three-drug sequence of injected chemicals. *See* *Denno*, *supra* note 96, at 146 tbl. 11 (New Jersey uses a substitute for Pavulon). Because the Florida state legislature did not draw up particular lethal injection protocol in statute nor require its Department of Corrections to do so and because Clarence Hill was denied access to any such information, he had to base his claim upon the likelihood that the state would use the same procedures that were described in a case from five years prior, *Sims v. State*, 754 So. 2d 657 (Fla. 2000); *Hill*, 126 S. Ct. at 2100. In *Sims*, the state had actually permitted access to the detailed protocol in advance. *Hill*, 126 S. Ct. at 2100. *See supra* notes 88-89. In sum, because petitioner Hill did not challenge the sentence itself, his case did not sound in habeas under *Nelson* but in enjoining the state "from executing [Hill] in the manner they currently intend" where the anticipated protocol was alleged to cause "a foreseeable risk of . . . gratuitous and unnecessary' pain." *Hill*, 126 S. Ct. at 2102.

addressed by *Hill*, is the hybrid rule from *Heck*.¹⁰⁸ A second barrier, provided the claim is truly a “conditions” case, is the Prison Litigation Reform Act (“PLRA”).¹⁰⁹ The PLRA bars frivolous and malicious claims, claims for which no relief can be granted, claims which precede exhaustion of available state administrative channels, or claims where damages are sought from an immune public official.¹¹⁰ Lastly, if the

¹⁰⁸ See *supra* note 100 and accompanying text. *Hill* returned to the essential question of whether relief sought by an inmate would challenge the “fact” or “validity” of a sentence in purpose or effect. *Nelson*, 541 U.S. at 644. The Court in *Nelson* said, “imposition of the death penalty presupposes a means of carrying it out.” *Nelson*, 541 U.S. at 644. Under the *Heck* rule, habeas actions challenge the fact of confinement or its duration, and are bound by the AEDPA. *Hill*, 126 S. Ct. at 2101. Whether seeking injunctive or monetary relief, on the other hand, “an inmate’s challenge to the circumstances of his confinement . . . may be brought under § 1983.” *Muhammad v. Close*, 540 U.S. 749, 750 (2004). See also *Nelson*, 541 U.S. at 647, *supra* note 59. Absent a finding that inmate *Hill* challenged procedure which was necessary to the lethal injection, the Court concluded, as it had in *Nelson*, that injunctive relief would not prevent the State from implementing the sentence. *Hill*, 126 S. Ct. at 2101. Consequently, the suit as presented would not be deemed a challenge to the fact of “the sentence itself.” *Id.* The same was much less nobly ensured under habeas. In *Dawson v. Georgia*, the Georgia Supreme Court had waited for the state legislature to provide lethal injection as the preferred death penalty alternative, with electrocution at a prisoner’s election. 554 S.E.2d 137 (Ga. 2001). Only six months later did that court allow the first prisoner challenge to electrocution itself as cruel and unusual as that state employed it, something that had never been allowed when electrocution was the only statutory option, regardless of how cruel and unusual the procedure might have been. *Kearns*, *supra* note 5, at 211.

¹⁰⁹ *Nelson v. Campbell*, 541 U.S. 637, 650 (2004); see *supra* note 100. The PLRA states, in relevant part, as follows:

(a) Applicability of administrative remedies

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

(b) Failure of State to adopt or adhere to administrative grievance procedure

The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 1997a or 1997c of this title.

(c) Dismissal

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

Prison Litigation Reform Act, 42 U.S.C. § 1997e(a)-(c)(1) (2000).

¹¹⁰ *Id.* As a basic rule, Section 1983 does not require plaintiffs to exhaust state remedies. *Monroe v. Pape*, 365 U.S. 167 (1961). This continues to be true for all state judicial avenues.

action survives PLRA rigors, *Hill* instructed the trial court, on remand, to determine the inmate's likelihood of success on the merits.¹¹¹ At that stage, inmates must prove a substantial risk that gratuitous pain will be inflicted.¹¹² When each of these limitations has been surpassed, an

Id. However, in *Patsy v. Florida Board of Regents*, the Supreme Court permitted the exhaustion of state administrative channels requirement which Congress delineated in creating the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997e (predecessor to the PLRA of 1995). 457 U.S. 496 (1982). This law created a specific exhaustion requirement for adult prisoners using Section 1983 and was validated because of a specific Congressional departure from the usual non-exhaustion rule, as opposed to relying on a judicially-imposed exhaustion requirement. *Id.* Exhaustion of administrative remedies, pursuant to PLRA, is required for all prisoners seeking redress for prison circumstances or occurrences, regardless of whether they involve general circumstances of incarceration or particular episodes, and whether they allege Eighth Amendment violations based on use of excessive force or some other wrong. See 42 U.S.C.A. § 1983; Civil Rights of Institutionalized Persons Act, § 7(a); *Porter v. Nussle*, 122 S. Ct. 983 (2002).

¹¹¹ *Hill v. McDonough*, 126 S. Ct. 2096, 2103 (2006). The case has since been decided on remand, and Hill has been executed. *Hill v. McDonough*, 127 S. Ct. 34 (Sept. 20, 2006) (denying stay of execution); Brief Wire, LOS ANGELES TIMES, Sept. 21, 2006, available at 2006 WLNR 16361036 (stating that Hill had been put to death). Likelihood of success on the merits is included among the following four factors balanced when most courts determine whether to award preliminary injunctive relief: "(1) the likelihood of irreparable harm to the plaintiff if the preliminary injunction is denied, (2) the likelihood of harm to the defendant if the requested relief is granted, (3) the likelihood that the plaintiff will succeed on the merits, and (4) the public interest." *Emmett v. Johnson*, 489 F. Supp. 2d 543, 548 (E.D. Va. 2007). See, e.g., *Workman v. Bredesen*, 486 F.3d 896, 905 (6th Cir. 2007); *Brown v. Beck*, 2006 WL 3914717, at *2 (E.D.N.C. Apr. 7, 2006). In California, injunctive relief is also possible if an inmate can demonstrate "either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised by the balance of hardships tips sharply in his favor." *Morales v. Tilton*, 465 F. Supp. 2d 792, 1040 (N.D. Cal. 2006). Under the latter test, "the greater the relative hardship to the party seeking the preliminary injunction, the less probability of success must be established by the party." *Id.* For instance, the Fourth Circuit holds that the absence of meaningful retrospective remedies (for executed inmates) lessens the inmate's showing required for preliminary injunctions in cases involving Section 1983 violations. *Brown*, 2006 WL 3914717, at *6 (citing *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 362 (4th Cir. 1991) (balancing the likelihood of irreparable harms to each party)). See *Richmond Newspapers v. Virginia*, 448 U.S. 555, 571, 593, 597-98; *supra* notes 34, 64; *infra* note 172 and accompanying text (concerning the public's interest in execution).

¹¹² Likelihood of success on the merits has thus far been difficult to prove in courts which don't accept that Pavulon use substantially risks gratuitous pain. The Supreme Courts of Tennessee and Connecticut refused to believe Pavulon creates such a risk, relying, prior to *Hill*, on an old test for methods and procedures of execution challenges from *Weems v. United States*. 217 U.S. 349, 378 (1910); *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 306 (Tenn. 2005); *State v. Webb*, 750 A.2d 448 (Conn. 2000). That analysis considered: (1) if a method falls within contemporary standards of decency; (2) if a method offends the dignity of a prisoner and society; (3) if a method causes unnecessary physical pain; and (4) if a method causes unnecessary psychological suffering. *Abdur'Rahman*, 181 S.W.3d at 206. This *Weems* analysis would appear to be obsolete now that *Hill* has set forth new standards for injunctive relief in conditions cases. See, e.g., *Workman*, 486 F.3d at 905-09 (finding no likelihood of success on the merits having made four different observations on cruel and

inmate has apparently succeeded in proving cruel and unusual punishment under *Hill*.

In summary, death row inmates can now challenge not only the very validity or prolongation of their death sentences for inflicting cruel and unusual punishment in habeas cases, but also the means by which or circumstances under which they face their death penalties. These circumstances may include what procedure is used to access their veins and what preliminary chemicals are injected into them.¹¹³ To address these new claims, the Supreme Court has not attempted to adapt its traditionally relied upon method-of-execution analysis. Instead, the Court set forth a framework in *Nelson* and *Hill* specifically for conditions of confinement Section 1983 claims, without expressly attempting to reconcile the two approaches.¹¹⁴

III. ANALYSIS

While the *Hill* decision has mobilized death row inmates nationwide to test the conditions of confinement avenue for relief, both *Nelson* and *Hill* underscored the need to reconcile the approach to this fledgling Section 1983 line of cases with its longstanding predecessor, the method-of-execution jurisprudence.¹¹⁵ The Court's conceded failure to reconcile modern conditions cases with "method-of-execution claims generally" implies that *Hill's* current test for preliminary injunctive relief, while workable thus far, is simply a temporary fix.¹¹⁶ Taking this cue, the analysis that follows offers a firm resolution adopting the prevailing

unusual punishment); *Emmett*, 489 F. Supp. 2d at 552-54 (no likelihood of success on the merits); *Taylor v. Crawford*, 487 F.3d 1072, 1084-85 (8th Cir. 2007). *But see Morales*, 415 F. Supp. 2d at 1047 (preliminary injunction conditionally denied); *Brown*, 2006 WL 3914717, at *8 (preliminary injunction conditionally denied).

¹¹³ *Nelson*, 541 U.S. at 645-46 (denying use of the "cut-down" procedure for gaining venous access); *Hill*, 126 S. Ct. 2096 (remanding for determination of the constitutionality of Pavulon, the second in a three drug lethal injection sequence); *see supra* notes 104, 107 and accompanying text. Media reports that describe these Section 1983 actions as attacks on the death penalty itself are mistaken. *Workman*, 415 F. Supp. 2d at 1040. These cases are about neither death penalty's morality nor methods of execution employed, but about particular procedures implemented. *Morales*, 465 F. Supp. 2d at 973.

¹¹⁴ *See supra* Part II.B (method-of-execution analysis). *See supra* text accompanying notes 109-13 (*Hill* test for cruel and unusual punishment conditions of confinement allegations).

¹¹⁵ *See supra* notes 104, 106 (highlighting where the Court in each instance deferred on the issue of method-of-execution determinations).

¹¹⁶ *Nelson*, 541 U.S. at 645. *See supra* text accompanying notes 109-13 (*Hill* test for cruel and unusual punishment conditions of confinement allegations). *Nelson/Hill* analysis has been succeeded by several lower court cases *E.g.*, *Workman*, 486 F.3d at 905-09; *Emmett*, 489 F. Supp. 2d at 552-54; *Taylor*, 487 F.3d at 1084-85; *Morales*, 415 F. Supp. 2d at 1047; *Brown*, 2006 WL 3914717, at *8.

approach for its new jurisprudential counterpart. The proposed reconciliation, as the remainder of this Note argues, promotes the policy goals and the public interest common to each cause of action better than has been done previously.¹¹⁷ Part III.A offers a means to reconcile habeas and Section 1983 determinations. Part III.B then discusses what government interests fit within the category “penological,” as is required whenever consciously or in effect depriving prisoners’ constitutional rights.¹¹⁸ Finally, Part III.C examines which penological interests are legitimate goals within lethal injection procedures as currently applied.¹¹⁹

A. Reconciling Method-of-Execution Analysis and Section 1983 Claims

Historically, habeas and Section 1983 death penalty claims may appear to share scant common grounds for consolidation into a singular method-of-execution analysis.¹²⁰ Yet, despite disagreement within method-of-execution precedent over the objective and subjective determinants of “evolving” versus “contemporary” standards of decency, habeas and Section 1983 jurisprudence each can turn on legitimate penological objectives in Eighth Amendment adjudication.¹²¹ In each context, both Section 1983 and habeas profess to place a prisoner’s constitutional rights higher than either non-penological or illegitimate penological interests.¹²² Any distinction between the two lies

¹¹⁷ See *supra* note 29 and accompanying text (method-of-execution analysis); see *supra* notes 109-13 and accompanying text (*Hill* test for cruel and unusual punishment conditions of confinement allegations). See *infra* Part IV.

¹¹⁸ See *infra* Part III.B.

¹¹⁹ See *infra* Part III.C.

¹²⁰ Compare *supra* Part II.B (history of method-of-execution analysis in habeas), with *supra* Part II.C (history of Eighth Amendment and Section 1983 conditions of confinement actions).

¹²¹ See *supra* notes 37-43 and accompanying text (discussing the objective determinant of both evolving and contemporary standards of decency concepts—legislative enactments—and the subjective factors considered only in evolving standards of decency analysis: substantial shifts in society and international indicators). Compare *supra* Part II.B.3 (elaborating on legitimate penological objectives in method-of-execution analysis), with *supra* notes 80-82 and accompanying text (discussing the same objectives required in Section 1983 conditions of confinement actions, in First and Eighth Amendment precedent).

¹²² See *supra* notes 18, 20, 26, 55-56, 81 and accompanying text (each describing in part the principle that prisoners retain all their rights unless reasonably or non-excessively taken from them in pursuit of legitimate state penological objectives by virtue of their status as inmates).

only in what objectives are perceived to be penological and legitimate objectives.¹²³

A second conceptual barrier is anticipating what an inmate's method-of-execution challenge to a legitimate penological interest might entail, considering that the history of habeas actions, while inundated with decency and proportionality concerns, is devoid of the sort of death penalty penology determinations which *Coker* supposed to be possible.¹²⁴ Conversely, it appears that every conditions of confinement claim challenges precisely penological interests, that is, the reasons why prisons employ particular means of treating inmates.¹²⁵ Just as judicial deference is given in habeas cases where the state proffers legitimate rationale for capital punishment, there would be no apparent reason, in conditions of confinement cases, for judicial deference to be withheld if the government were to offer *Coker*-consistent legitimate penological objectives for specifically challenged death row conditions.¹²⁶

In defense of their conditions of confinement, governments might posit an array of legitimate penological objectives. Retribution and deterrence would seem to top the list, and they are potent at the sentencing phase or when considering proportionality of punishment concerns, but of them, only deterrence has been cited as a justification for

¹²³ See *Rhodes v. Chapman*, 452 U.S. 337, 350 (1981) (defining the retribution, deterrence, and rehabilitation interests in "the penal function"); see also *Pell v. Procunier*, 417 U.S. 817, 823 (1974); *Workman v. Bredesen*, 486 F.3d 896, 909 (6th Cir. 2007) (introducing the penological interests in institutional and execution chamber safety and their scope). See *supra* Parts II.B.1-2 (describing historical developments in standards of decency and proportionality method-of-execution factors).

¹²⁴ See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (describing how challenges to legitimate penological objectives would look if ever undertaken); see also *supra* note 56 (illuminating how rarely courts have considered a challenge to penological objectives through method-of-execution means).

¹²⁵ See *Pell*, 417 U.S. at 817, 822-23; *supra* Part II.B.2.

¹²⁶ See *supra* note 60 (describing federalism and legislative competence as reasons for deference). See also *Nelson*, 541 U.S. at 644.

[A] constitutional challenge seeking to permanently enjoin the use of lethal injection may amount to a challenge to the fact of the sentence itself. A finding of unconstitutionality would require statutory amendment or variance, imposing significant costs on the State and the administration of its penal system. And while it makes little sense to talk about the 'duration' of a death sentence, a State retains a significant interest in meting out a sentence of death in a timely fashion.

Id. The PLRA, similarly, provides for a check on injunctive relief of any sort, requiring that extra weight be given should the outcome have "any adverse impact on . . . the operation of a criminal justice system." *Id.* at 650 (citing 18 U.S.C. § 3626(a)(1)-(2) (2000)); see *supra* notes 26, 55-56 and accompanying text (describing the *Coker* test).

the treatment of prisoners outside the realm of death row.¹²⁷ Along with deterrence, First Amendment cases have stipulated that rehabilitation and internal prison safety are penological justifications for various conditions of confinement unrelated to the death penalty.¹²⁸ Given the death penalty context of this Note, rehabilitation will not, however, be entertained as a possible penological interest for the same reason that deterrence is not aimed at death row inmates themselves: the state has not vested an interest in the betterment of condemned persons.¹²⁹ Internal prison safety and security, on the other hand, has been pinpointed as a penological feature that might contribute to a substantial risk of gratuitous pain in the execution chamber.¹³⁰ Without hypothecating other specific, legitimate penological interests called for by lethal injection, this analysis will, consistent with *Nelson* and *Hill*, sum up institutional security and all interests other than retribution and deterrence under the heading “administrative necessity.”¹³¹

¹²⁷ See *supra* Part II.B.3 (traditional application of retribution and deterrence objectives); *Pell*, 417 U.S. at 822-23; *supra* notes 80-82 and accompanying text.

¹²⁸ See *Pell v. Procunier*, 417 U.S. 817, 822-23 (1974); *supra* notes 80-82 and accompanying text.

¹²⁹ See *supra* note 70 and accompanying text (describing how, except for believers in specific or incapacitation deterrence, the Supreme Court and academia generally do not advance the death penalty as a deterrent for death row inmates themselves).

¹³⁰ See *Pell*, 417 U.S. 817, 822-23; *supra* notes 80-82 and accompanying text (describing the penological interest in institutional safety); *Workman v. Bredesen*, 486 F.3d 896, 909-10 (6th Cir. 2007) (stating that, for security reasons, no medical personnel are permitted near the prisoner during execution in Tennessee); *supra* note 47 and accompanying text (discussing varying views in the law and medical community on the ethics and necessity of medically trained personnel in the lethal injection process). Inmates' claims to injury are strongly related to the absence or distance of medically trained personnel in their last moments, a presence so integral that, in light of the fact that leading medical organizations frown upon participation in executions, a court ordering more physician involvement is considered by some to be tantamount to banning executions. See *supra* note 93 (citing California Atty. Gen. Dane R. Gillette).

¹³¹ See *infra* Part III.C.2. Said the *Nelson* Court:

[W]e have previously concluded that a § 1983 suit for damages that would ‘necessarily imply’ the invalidity of the fact of an inmate’s conviction, or ‘necessarily imply’ the invalidity of the length of an inmate’s sentence, is not cognizable under § 1983 unless and until the inmate obtains favorable termination of a state, or federal habeas, challenge to his conviction or sentence. . . . Even so, we were careful in *Heck* to stress the importance of the term ‘necessarily.’

Nelson v. Campbell, 541 U.S. 637, 646-47 (2004) (limiting the scope of “necessity” to indispensable or otherwise hardly challengeable aspects of execution procedures). *Hill v. McDonough*, 126 S. Ct. 2096, 2102 (2006) (affirming *Nelson* despite the argument in the State’s *amici* that no component of any execution procedure could stand against the *Nelson* rule because none may be “strictly necessary”); see *supra* note 108 (explaining how the term “necessarily” applies when the state would in law or fact be unable to carry out its

B. Penological Objectives: the Conditions of Confinement Threshold

Assuming a death row inmate has made the prima facie Section 1983 showing that certain conditions of confinement create a substantial risk of serious harm, the government ought to have a basic burden of production to demonstrate those conditions were penological necessities rather than gratuitous measures.¹³² Gratuitous infliction of pain is presumably synonymous with excessive, unnecessary, and unusual

execution by any other means). Given that most states defer to Department of Corrections administration of the death penalty and that *Nelson* and *Hill* have narrowly defined what conditions of confinement are strictly necessary to states in the event of Section 1983 constitutional challenge, the term administrative necessity seems an appropriate summation of the states' rebuttal burden. See *supra* note 83.

¹³² See *Hill*, 126 S. Ct. at 2102. It is important to acknowledge that necessity, like non-wantonness, is distinctly a feature of determining penological interests and not proportionality or standards of decency. The Eighth Amendment "requires, in part, an inquiry into whether a punishment is excessive, and that inquiry has two aspects. . . . First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime." *Taylor*, 487 F.3d at 1079 (internal citations omitted). Wantonness or cruelty is a separate feature of gratuitous punishment than non-necessity and unusualness, and the former requires at least *deliberate* indifference. See *Daniels v. Williams*, 474 U.S. 327 (1986). "[I]n any given § 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right; and depending on the right, merely negligent conduct may not be enough to state a claim." *Id.* at 330. But see *Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007); *Workman v. Bredesen*, 486 F.3d 896 (6th Cir. 2007); *Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D. Cal. 2006); *supra* notes 133, 138, 163, 213-214. The prevailing test for deliberate indifference is from *Wilson v. Seiter*: first, direct, particularized harm or substantial risk of harm, that harm being a serious injury by contemporary standards of decency; second, the state defendant's culpable state of mind, which is a requirement for actual or reasonable knowledge of the wrongfulness of the condition and not necessarily maliciousness. 501 U.S. 294 (1991); see *Estelle v. Gamble*, 429 U.S. 97 (1976) (discussing active commission of deliberate indifference); *Farmer v. Brennan*, 511 U.S. 825 (1994) (requiring a prima facie showing of particularized injury; discussing passive denial as deliberate indifference); *Nelson*, 541 U.S. at 645 (vindicating a claim for gratuitous punishment as the basis for a Section 1983 claim).

Rather than address in depth the idea of deliberate indifference, the purpose of this Note is instead to explore the necessity aspect of capital punishment, and for that reason the question of whether plaintiffs can prove cruel intent, by no means an uncontroversial issue, is set aside. Some states and authorities, post-*Hill*, have said that inmates cannot prove deliberate indifference in the states' usage of various lethal injection protocols and therefore that at least the cruel component of unconstitutional punishment does not exist, others that proving intentional indifference may be impertinent if states' procedures have manifest deficiencies, and others still that the punishment is torturous, promotes lingering death, or causes psychological torture. See *supra* note 98 (noting these opposing viewpoints on the cruelty component); *supra* note 55 (torture is inherently indecent). What this Note does address is the substance of excessiveness—whether, if a practice creates substantial risks, it is justified by sufficiently tailored and legitimately necessary means to override an inmate's preservation of whatever rights are not required by legitimate penological objectives, his status as a prisoner, or the punishment itself. See *supra* notes 20, 81 and accompanying text.

infliction of pain—core behavior prohibited by the Eighth Amendment.¹³³

The essential distinction between penological objectives which validate the punishment and those which justify conditions of confinement “that do[] not purport to be punishment” is that of necessary and unnecessary pain.¹³⁴ Justifiably, the former category tends to receive deference, since a certain amount of pain and suffering inheres in being forcibly put to death.¹³⁵ In the latter category, however, deference to retained prisoners’ rights is more likely, because conditions of confinement, unlike the ultimate punishment awaiting death row inmates, are not or must not be themselves intended by states and correctional officials as instruments of cruel and unusual pain and suffering.¹³⁶ Excessive punishment is not justified by prisoner status *per se*, reflecting a presumption in favor of Eighth Amendment rights as

¹³³ See *supra* note 8 (quoting Justice Brennan’s concurrence in *Furman v. Georgia*, 408 U.S. 238, 279 (1972)); *Hill*, 126 S. Ct. at 2101-02 (methods which are not required by statute or which as a matter of fact have alternatives are not “necessary”); *Nelson*, 541 U.S. at 644-46; *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (unusual punishment is not contemplated or not standardized). See generally *supra* notes 2-15 (inferring the synonymy of the terms excessive, wanton and unnecessary infliction of pain and suffering, and unusual punishment); see *supra* note 132.

¹³⁴ 24 C.J.S. Criminal Law § 2204 (2007) (“[C]onduct that does not purport to be punishment at all must involve more than ordinary lack of due care, inadvertence, or good faith error to constitute cruel and unusual punishment.”). *Trop* offered some aid in deciphering penological interests:

If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.

Trop, 356 U.S. at 96; see *id.* at 110.

[T]he Eighth Amendment’s prohibition is directed against cruel and unusual *punishments*. It does not, by its terms, regulate the procedures of sentencing as opposed to the substance of punishment. As THE CHIEF JUSTICE has observed, “[t]he prohibition of the Eighth Amendment relates to the character of the punishment, and not to the process by which it is imposed.”

Walton v. Arizona, 497 U.S. 639, 670 (1990) (Scalia, J., concurring) (quoting, in part, *Gardner v. Florida*, 430 U.S. 349, 371 (1977) (Rehnquist, J., dissenting)).

¹³⁵ See *Louisiana ex rel Francis v. Resweber*, 329 U.S. 459, 464 (1947) (stating that unconstitutional cruelty cannot logically include “cruelty inherent in the method of punishment . . . [that being] the necessary suffering involved”); *supra* note 24.

¹³⁶ See *supra* notes 20, 80-82 and accompanying text (describing that prisoners’ rights can only be deprived for legitimate penological reasons or because of prisoner status). A Section 1983 action under *Hill* may challenge the lawful or factual validity of a condition of confinement, whereas alleging the invalidity of a punishment itself would be a hybrid claim sent to endure habeas rigors because of the *Heck* rule. See *supra* notes 100, 108.

against injurious conditions of confinement until the punishment itself begins and unless specific Section 1983 allegations are met with specific penological justification.¹³⁷

The Court in *Hill* confirmed that the punishment of death, that portion of treatment justified by retribution and deterrence interests in habeas jurisprudence, only occurs in the very last moments of an inmate's life.¹³⁸ In *Hill*, an inmate was permitted to challenge the second-to-last step of lethal injection protocol, that of Pavulon injection, as a "condition" or "circumstance" of confinement, even though Pavulon is introduced just moments before the injection of death-inducing potassium chloride or sodium thiopental.¹³⁹ *Hill* stands for the proposition that the death penalty does not begin until the causation of death itself is induced in the form of a chemical which causes cardiac

¹³⁷ See *supra* notes 80-82 and accompanying text (noting that only the First Amendment has explicitly deemed status of a prisoner among the reasons for depriving rights, though it would appear that status-worthy treatment is really a sub-part of less clearly defined legitimate penological objectives governing inmates).

¹³⁸ See *supra* notes 95-97 (describing how and when Pavulon is implemented as the last step prior to death-inducing sodium chloride injection); *Hill v. McDonough*, 126 S. Ct. 2096 (2006); *supra* notes 106-07 and accompanying text (permitting a challenge to the use of Pavulon as an unnecessary component of the Florida lethal injection protocol). See *Walton*, 497 U.S. at 670. But see *Nelson v. Campbell*, 541 U.S. 637, 644 (2004) (noting that the death penalty presupposes a means of carrying it out). *Nelson* has been taken to mean two things about normal conditions of confinement cases: (1) that deliberate indifference (intent) is required to show a Section 1983 breach of legitimate penological objectives; and (2) that the protocol for lethal injection is part of the punishment itself because it is created by a Department of Corrections with sole authority to mete out the punishment authorized by statute or a sentencing judge. *Taylor*, 487 F.3d at 1080-82 (citing *Wilson*, 501 U.S. at 300, 302). In those usual cases, the inquiry is apparently whether the risk of pain is unnecessary, rather than whether the components of the procedure are necessary. However, even *Taylor* acknowledged, as had *Nelson* and *Hill*, that the new conditions of confinement cases were unique. *Id.* at 1080-81. The situation with Pavulon is one that:

does not fit neatly within the general conditions-of-confinement context because the conduct of which [one] complains is necessary to carry out his punishment, as opposed to a mere condition of his imprisonment. . . . [T]his claim is not the typical conditions-of-confinement claim challenging prison conditions in general nor does it involve the action of a particular officer that is not part of the designated punishment for the crime.

Id. (citing *Nelson*, 541 U.S. at 644, which had difficulty categorizing this type of claim and reconciling it with traditional method-of-execution analysis). Due to the uniqueness of the situation, therefore, courts disregard the usual limitations such as specific intent and pursue whether the necessary death penalty procedures carry substantial risks. *Id.* at 1080.

¹³⁹ See *supra* notes 95-97, 106-07.

arrest.¹⁴⁰ Only the last injection, the lethal injection, constitutes the death penalty punishment.

Initially, to rebut an inmate's allegation that any other condition not purporting to be punishment was gratuitously imposed, a government defendant need only produce some conceivable penological justification for the condition of confinement imposed or omitted.¹⁴¹ *Nelson* inferred this minimal burden of penological justification when it held that gratuitous circumstances of confinement preceding the execution punishment itself might be found cruel and unusual apart from casting judgment on the validity of the death penalty as a whole.¹⁴² Method-of-execution analysis implies some threshold burden upon government officials, because standards of decency are to be balanced only against objectives befitting the modifiers "legitimate," "penological" objectives.¹⁴³ Furthermore, a showing of penological interest is the constitutional minimum expected when depriving prisoners of otherwise retained constitutional rights in First Amendment conditions of confinement cases.¹⁴⁴

Notwithstanding these numerous inquests for penological objectives alone, it must be stressed that the public official's bar is not very high; the rationale offered at this stage need only be a legally sufficient reason

¹⁴⁰ See *Louisiana ex rel Francis v. Resweber*, 329 U.S. 459, 463 (1947). This approach fits squarely within Eighth Amendment condemnation of gratuitous (meaning surplus) or unnecessary pain and suffering. *Hill*, 126 S. Ct. at 2102. Were a condition of confinement not necessitated by penological interests, it would at least be gratuitous, if not thereafter cruel pain or suffering as well. The Court in *Hill* legitimated bifurcation between necessity and cruelty when, in determining the Eighth Amendment issue, it held that the use of Pavulon was not necessary (that is, a penological necessity) to the state execution procedure and remanded for a determination on the issue of whether inmate Hill could more than likely succeed on the merits (that is, whether there was a substantial risk of gratuitous pain and suffering). 126 S. Ct. at 2100-02; see *supra* note 132 (explaining the bifurcated approach of this Note); *Workman v. Bredesen*, 486 F.3d 896, 902-03, 919 (6th Cir. 2007) (discussing the virtues and drawbacks of one, two, and three-chemical execution protocols); *infra* note 175 (explaining that the punishment only includes sodium thiopental (anesthesia) and Pavulon (muscle relaxant) to potassium chloride for other, non-punishment reasons: the former to ensure unconsciousness and the latter to mask the appearance of convulsions and prevent confusion of witnesses, to preserve the dignity of the inmate and the process, and to ensure non-resuscitation).

¹⁴¹ This framework is borrowed from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which governs Title VII intentional discrimination in the employment context and has not generally been used in Section 1983 jurisprudence; see *supra* note 132.

¹⁴² 541 U.S. 637, 645 (2004) (emphasis omitted).

¹⁴³ See *supra* note 29 (concerning the balance between decency and objectives).

¹⁴⁴ *Pell v. Procunier*, 417 U.S. 817, 822-23 (1974); see *supra* notes 80-82 and accompanying text.

for imposing a condition of confinement, not the actual reason.¹⁴⁵ Penological state interests are by definition presumed legally sufficient, because legislatures are bound by the Constitution and laws when they promulgate criminal punishments and operate correctional systems.¹⁴⁶

In response to such reasonable requirements from state defendants, government officials have nonetheless waged various doomsday assertions forecasting that conditions of confinement claims would open the floodgates to improper inmate claims.¹⁴⁷ However, the PLRA places limits on conditions of confinement claims ascribed in *Nelson and Hill* and quells the need for fear, whether in frivolous or malicious cases or where damages or injunctive relief would be otherwise inappropriate.¹⁴⁸ Indeed, a prisoner's prima facie claim must still specifically allege a substantial risk of unnecessary pain, particularized harm, and a specific condition of confinement which threatens both.¹⁴⁹ If the preliminary government burden comports with reason, precedent, and public concern, inmates will only succeed in alleging unconstitutional risks in the first instance where state defendants offer no penological justification whatsoever for the same specific feature of confinement protocol.

¹⁴⁵ See *supra* note 141; *supra* note 55 (referencing CARTER & KREITZBERG, *supra* note 18, for the proposition that a punishment must *at least* be authorized by law to be necessary); *supra* note 25 (noting Granucci, *supra* note 23, as saying necessary punishment is proven, codified punishment).

¹⁴⁶ See, e.g., *supra* note 20; *Trop v. Dulles*, 356 U.S. 86, 96 (1958). See *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981).

[C]ourts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system: to punish justly, to deter future crime, and to return imprisoned persons to society with an improved change of being useful, law-abiding citizens.

Id.

¹⁴⁷ See *Nelson*, 541 U.S. at 649; *Hill v. McDonough*, 126 S. Ct. 2096, 2102 (2006); Weinstein & Dolan, *supra* note 93.

¹⁴⁸ *Nelson*, 541 U.S. at 649-50 (speaking to an equitable presumption against manipulation and unnecessary delay by claimants); *Hill*, 126 S. Ct. at 2104; see *supra* notes 104, 106 (highlighting that this case was controlled by *Nelson* and only expanded upon it, so both applied PLRA limits under *Muhammad v. Close*, 540 U.S. 749, 749 (2004)); *supra* notes 100, 109-10, 126 and accompanying text (listing relevant PLRA provisions and the effect on Section 1983 actions).

¹⁴⁹ *Hill*, 126 S. Ct. at 2096 (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)), which deemed preliminary injunctive relief unavailable unless the aggrieved party, by a burden of persuasion, demonstrates the significant possibility of success on the merits). See *supra* notes 7, 134 (concerning the deliberate indifference standard for showing substantial risk of cruel and unusual punishment).

1. Retribution

Despite the fact that the state defendant's rebuttal burden is quite low, certain interests will not be penological in conditions of confinement situations and, thus, should not survive a facial challenge that they are gratuitous or unnecessary. Retribution, although a penological justification for capital punishment itself, cannot simultaneously be a penological justification for non-punishment conditions of confinement.¹⁵⁰ Retribution is merely a reason for bringing prisoners to a certain kind of justice.¹⁵¹ It asserts a legislative interest in the proportionality of the death sentence for various crimes and criminals rather than a legislative or correctional interest in particular conditions or practices prior to executions.¹⁵²

Moreover, retribution is too dangerous an interest to be permitted to pass this stage of conditions of confinement determination.¹⁵³ Ideally, method-of-execution analysis places ever-enlightened public standards of decency as the first line of defense against rampant invocation of the penological retribution of right.¹⁵⁴ However, society as a whole is also capable of *devolving* standards of decency and of consequently persuading the judiciary to offer a merciless solution.¹⁵⁵ A better

¹⁵⁰ See *supra* notes 80-82, 134. Retribution, while one of the goals of the penal function according to *Rhodes*, is not one of the goals of the corrections system, according to *Pell v. Procunier*, 417 U.S. 817, 822-23 (1974). *Trop* declared that penal functions are those aiming at punishment, quite apart from other legitimate interests which are non-penal in function. *Trop*, 356 U.S. at 96, 110. In *Walton*, Justice Scalia, concurring, also recognized the distinction between punishment and process. *Walton v. Arizona*, 497 U.S. 277, 670 (1990).

¹⁵¹ See *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (deeming retribution a "social purpose[]" for the death penalty).

¹⁵² See *supra* note 150; *supra* Parts II.B.2-3 (discussing proportionality and retribution under habeas).

¹⁵³ For instance, so long as retribution is justified as something the government deserves to do rather than something simply within its legitimate powers, the basis for retribution borders on some perceived divine right, which can never be trumped. Governments which believe they do not wield the sword in vain or otherwise taking "an eye for an eye" tend toward authoritarian systems of government. See COYNE & ENTZEROTH, *supra* note 18, at 31; *supra* note 62 (contrasting Biblical and theological support for "eye for an eye" governmental rights with Jesus' apparent repudiation of such behavior); DRIMMER, *supra* note 62 and accompanying text (on the idea of deserving).

¹⁵⁴ See *supra* note 29 and accompanying text (laying out method-of-execution analysis and how, according to *Coker v. Georgia*, 433 U.S. 584, 592 (1977), it generally works to measure either proportionality or legitimate penological interests against standards of decency but not proportionality and penological interests against one another).

¹⁵⁵ See, e.g., Domino & Boccaccin, *supra* note 3, at 61 (public bloodlust and desire to humiliate convicts); *Gregg*, 428 U.S. at 173 (public opinion more than anything drives standards of decency); *Furman v. Georgia*, 408 U.S. 238, 308 (1972) (noting how mob justice is often at the ready if governments' handling of executions is unsatisfactory); Ewart, *supra*

safeguard against wanton and unnecessary conditions of confinement is the concept of legitimate penological objectives itself, one that poses an independent barrier to vengeful, cruel, and unusual conditions of confinement not attendant to death itself.¹⁵⁶ Unlike standards of decency, the definition of penology does not purport to evolve or devolve at the social whim.¹⁵⁷

Furthermore, no pre-conceived penological legislative objective could be implemented if cruel, unusual, and unconstitutional on its face.¹⁵⁸ In all instances of conditions of confinement, the Eighth Amendment in its very words “cruel and unusual” implies that, were it legitimate and penological, retribution must at least be implemented by dispassionate government officials, with the end of death alone and not wanton or unnecessary pain and suffering.¹⁵⁹ Acceding accidents alone, lawful retribution does not qualify as a penological justification for alleged prisoner maltreatment prior to the actual punishment sanctioned.¹⁶⁰ Any condition of confinement which *does* purport to be

note 36, at 1162 (noting how shifts or maturation in the public mindset have carried this country from method to method of execution and from punishment to rehabilitation foci); COYNE & ENTZEROTH, *supra* note 18, at 29 (giving one example of that mob justice); Domino & Boccaccin, *supra*, at 73, 74 (hypothesizing that victims’ family members may want to observe executions in part to fulfill vengeful fantasies); Gardner, *supra* note 66, at 117 (introducing retribitional maximum pain proponents); *Richmond Newspapers v. Virginia*, 448 U.S. 555, 571 (1980) (explaining an angry public’s proclivity for “vengeful ‘self-help’”); *supra* note 22 (discussing the Kemmler execution, the first one done by electric chair, as flowing from court acquiescence to the public’s whimsical motivations).

¹⁵⁶ See *supra* notes 39, 155 (highlighting the possibility of devolved standards of decency in society, especially under contemporary standards of decency criteria).

¹⁵⁷ See *supra* notes 20, 134, 150 (providing support for the premise that penology itself is a timeless reference to a static concept within criminology). Even though generations may differ as to what interests constitute penological ones or may forfeit consideration of penological objectives altogether, the term itself is ubiquitous and inalterable.

¹⁵⁸ See *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1879). Congress or state legislatures similarly cannot constitutionally project penal, punishment-driven objectives upon non-penal, non-punishment conditions of confinement. See *Trop*, 356 U.S. at 96.

¹⁵⁹ See *Kearns*, *supra* note 5, at 228-29. “[T]he death penalty . . . must not be a celebration of horrific violence and revenge. It is supposed to be the ‘mere extinguishment of life.’” *Id.* at 299 (citing *Wilkerson*, 99 U.S. 130 and *In re Kemmler*, 136 U.S. 436, 447 (1891)). Trying to subject an executee to as much pain as his or her victims must have suffered is out of the question under the Eighth Amendment. See *Gardner*, *supra* note 61, at 117 (regarding maximum pain proponents).

¹⁶⁰ See *supra* note 65 and accompanying text (mentally detached officials). For the act to have been deliberate with a culpable mindset, the subjective recklessness showing must demonstrate actual knowledge of wrongfulness on the part of the prison official, including deliberate failure to protect an inmate if need be. *E.g.*, *McHenry v. Chadwick*, 896 F.2d 184, 188 (6th Cir. 1990). See, *e.g.*, *Williams v. Greifinger*, 97 F.3d 699, 706 (2d Cir. 1996) (holding that forcible confinement within a small cell without opportunity for exercise was particularly wrongful deliberate indifference); *supra* note 132 (about the deliberate

punishment but was not a prisoner's actual sentence, much less one that serves no penological purpose related to the status of prisoners, is gratuitous under *Nelson* and *Hill* and should bow to prisoners' retained rights.¹⁶¹

C. *Legitimate Necessity: Penological Objectives Assessed as Applied*

Once a court is satisfied that the government defendants have produced some penological justification for causing otherwise cruel and unusual conditions of confinement, that court must entertain whether the rationale was a legitimate reason for depriving prisoners' rights.¹⁶² The death row inmate would have to prove that the penological interest(s) offered were improper as applied—a mere pretext for some actual, unsavory objective motivating the condition of confinement, or else excessive and unnecessary.¹⁶³ If penological justification was the legal sufficiency of conditions imposed, then legitimacy is their factual sufficiency, a question of whether the challenged conditions of confinement are rational under the circumstances.¹⁶⁴ If the inmate

indifference standard generally); *see also* *Campbell v. Wood*, 18 F.2d 662, 687 (9th Cir. 1994) (acknowledging that accidents cannot be constitutionally prohibited). *But see supra* notes 134, 138; *infra* notes 163, 213-14.

¹⁶¹ *See supra* note 134 (discussing what purports to be punishment); *Price v. Johnston*, 334 U.S. 266, 285 (1948); *Pell v. Procunier*, 417 U.S. 817, 822, 825-26 (1974) (treatment warranted by status of prisoners); *Nelson v. Campbell*, 541 U.S. 637, 645-47 (2004); *Hill v. McDonough*, 126 S. Ct. 2096, 2102 (2006) (discussing how gratuitous means unnecessary); *supra* note 18 and accompanying text (concerning the principle of prisoners' retained rights). *See, e.g., Hill*, 126 S. Ct. 2096 (challenging usage of Pavulon as an established, or at least foreseeable, element of the Florida lethal injection protocol based on past practices in the state).

¹⁶² *See supra* notes 107, 126 (describing how the Court in *Hill* and *Nelson* distinguished circumstantially or legally necessary conditions of confinement from not strictly necessary conditions).

¹⁶³ *See supra* note 159. In an example provided by the film *THE GREEN MILE*, (Warner Bros. 1999), a corrections official, with his own emotional or financial incentives, did not wet the sponge which is placed on a prisoner's head during an electrocution to assist the electrical current, the end result being a horrifically painful and slow death. Wantonness requires deliberate indifference, and deliberate indifference of correctional officials or higher state officials requires intent to disregard a substantial risk of harm to an inmate. *Farmer v. Brennan*, 511 U.S. 825, 844-47 (1994). Nevertheless, "the other benchmark the court uses to identify Eighth Amendment violations [is] whether the punishment involves 'unnecessary and wanton infliction of pain.'" *Workman v. Bredesen*, 486 F.3d 896, 907 (6th Cir. 2007) (quoting *Nelson*, 541 U.S. at 645) (emphasis added). Unnecessary punishment, as already discussed, is synonymous with gratuitous and has no prerequisite of intent, nor is it certain that cruelty is synonymous with deliberateness and thus requires intent. *See supra* notes 23, 132; *supra* note 138 (highlighting how the court in *Taylor*, interpreting *Nelson*, believed the usual specific intent requirement should be set aside in death penalty conditions of confinement cases).

¹⁶⁴ *See supra* notes 52, 62 (noting where the Courts in *Gregg* and *Furman*, respectively, explained arbitrary jury proportionality determinations at the sentencing stage by favoring

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cannot disprove a legitimate penological interest, then the circumstances should warrant deference to the penological interest proffered.¹⁶⁵ Illegitimate penological interests in the death penalty context may be legitimate government interests for the bulk of a prisoner's confinement conditions but irrational as applied in the execution chamber and to lethal injection procedures specifically.¹⁶⁶ Deterrence is a basic penological interest to First and Eighth Amendment precedent, as is administrative necessity in conditions cases.¹⁶⁷ Each of these penological objectives nonetheless carry various arbitrary connotations in modern implementation when compared to death row inmates' rights.

1. Deterrence

Deterrence is one among many penological objectives that can be either legitimate or illegitimate as applied.¹⁶⁸ Deterrence from capital crimes has traditionally been most successful and legitimate when the public is emotionally and physically involved in capital punishment.¹⁶⁹

the death penalty over imprisonment); Kearns, *supra* note 5, at 200 (describing how the relatively small number of method-of-execution claims in over a century makes determining what is arbitrary or unreasonable in Eighth Amendment cases difficult).

¹⁶⁵ *Overton v. Bazzetta*, 539 U.S. 126, 135 (2003) (considering a valid, rational connection between a regulation and legitimate government interests behind it). The existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but the regulation need not be the least restrictive in order to survive scrutiny. *Id.* "[W]e cannot 'invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of penology.'" *Gregg v. Georgia*, 428 U.S. 153, 182-83 (1976) (quoting *Furman*, 408 U.S. at 451 (Powell, J., dissenting)). *But see Hill*, 126 S. Ct. at 2103 (not requiring the prisoner challenging a feature of execution protocol to offer a substitute, because, although in *Nelson* the inmate did offer central line procedure as an alternative to cut down procedure for venous access, *Nelson* did not require it nor heighten Section 1983 pleading requirements).

¹⁶⁶ *See supra* notes 70, 129 and accompanying text (commenting on inapplicability of special deterrence and rehabilitation state interests as applied to death row inmates, to the extent that their treatment differs from that of other prisoners). "[S]ince most offenders will eventually return to society, another paramount objective of the corrections system is the rehabilitation of those committed to its custody." *Pell v. Procunier*, 417 U.S. 817, 823 (1974) (implying that an interest in a prisoner's rehabilitation is conditioned on his or her expectable return to society).

¹⁶⁷ *Gregg*, 428 U.S. at 183 (where, in an Eighth Amendment habeas case, deterrence was called one of the primary social purposes of the death penalty); *Pell*, 417 U.S. at 822-23 (explaining that, in a First Amendment Section 1983 case, deterrence is one of the legitimate penological interests of the corrections system); *see supra* note 131 (explaining the concept of administrative necessity).

¹⁶⁸ *See supra* notes 71, 72 and accompanying text (commenting on the disputable power of capital punishment's deterrent effect in various contexts and for various audiences).

¹⁶⁹ *See Domino & Boccaccin, supra* note 3 (describing how citizen involvement has historically abated the likelihood of vigilantism). "Political and religious leaders of the day were well aware that citizen support for the execution process was essential to the

Public executions provided a lawful panacea for public anger and psychological closure following heinous crimes, a societal consolation prize for direct retribution against criminals.¹⁷⁰ Accessibility to and oversight of capital punishment was also a historically necessary precondition for responsible state governments who wanted to earn and keep the public confidence.¹⁷¹ Today, however, two of the government's own designs—private execution statutes and Pavulon in lethal injection protocols—illustrate states' tendencies to mitigate the death penalty's deterrent value.¹⁷²

Although private execution statutes divested the public of death penalty oversight only at its own request, they have simultaneously created a legal chasm between those citizens and the likelihood of their being deterred by capital punishment.¹⁷³ Even assuming that the few

maintenance of public order and law-abiding behavior. Without this support criminal and vigilante acts would possibly propagate." *Id.* at 62. "[C]rime and consequence" was an important message conveyed just prior to each scheduled public execution. *Id.* at 63. Attendees were warned not to view their task as witnesses as simply an enjoyable experience but as a social duty. *Id.*

¹⁷⁰ See Gardner, *supra* note 61, at 113-18 (considering retributive expression of moral outrage); Domino & Boccaccin, *supra* note 3, at 73-74 (highlighting initiatives led by victims' families to observe executions and their expectation of "moral closure" from viewing a criminal's death).

¹⁷¹ See generally *supra* note 34 and accompanying text (making this observation in the trial context). See COYNE & ENTZEROTH, *supra* note 18, at 30 (quoting Weisberg, *supra* note 44):

Televised executions would mark the reversal of the process . . . whereby executions have been removed further and further from the community that compels them. Through the eighteenth century, executions were atavistic spectacles performed in full public view. In the nineteenth [century] they were moved inside the prison yard and witnessed by only a few. In the twentieth century, executions moved deep inside the bowels of prisons, where they were performed ever more quickly and quietly to attract minimal notice Invisible executions shocked the sensibilities of fewer people, and dampened the momentum of the reform movement.

Id. But see Domino & Boccaccin, *supra* note 3, at 62 (noting that some, like eighteenth century activist Benjamin Rush, were convinced that public displays of discipline would lead to sympathy for the offender and criticism of government).

¹⁷² See *supra* note 35 (explaining the rise and scope of private execution statutes, or otherwise repealed public execution statutes, in more detail); *supra* notes 95-96 and accompanying text (describing how Pavulon and like chemicals operate and why their use in lethal injection is challenged); Miller, *supra* note 47, at 231-32.

¹⁷³ See *supra* note 35 and accompanying text (noting that the move from public to private executions by law was instigated by either an increasingly squeamish or decent society). The fourth factor in standards for preliminary injunction is the public interest. *Workman v. Bredesen*, 486 F.3d 896, 905 (6th Cir. 2007). "In cases where the public interest is involved, the district court must also examine whether the public interest favors the plaintiff," taking account of, in capital cases, states' strong interest in carrying out their judgments. *Morales*

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witnesses who private execution statutes permit at executions are personally dissuaded from crime, these statutes imply by precondition that only a few law-abiding citizens and public officials will be invited to attend an execution, rather than a larger and more impressionable audience.¹⁷⁴ This is not to say that privatized execution fails to serve any valuable penological purpose, just that governments have consciously sacrificed deterrence perhaps in the name of safety, other administrative necessities, or their perceptions of decency.¹⁷⁵ Deterrence is an unlikely

v. Hickman, 415 F. Supp. 2d 1037, 1040 (N.D. Cal. 2006) (citing *Beardslee v. Woodford*, 395 F.3d 1064, 1067-68 (9th Cir. 2005)). As applied in most cases, erroneously, the public interest models verbatim only contemporary standards of decency and what legislatures hold to be true. E.g., *Workman*, 486 F.3d at 906-07. See *supra* notes 41, 42 and accompanying text. Nevertheless, "evolving standards of decency that mark the progress of a maturing society . . . admits of few absolute limitations." *Taylor v. Crawford*, 487 F.3d 1072, 1080 (8th Cir. 2007). Rejection of public oversight, oversight which is in the public's best interests, ought to be the least of those limitations. Following the *Morales* decision, Governor Schwarzenegger suggested that discussions about revamping the execution system pursuant to Judge Fogel's order be kept candid, which has met with accusations of "shut[ting] Californians out of the debate over the death penalty." Bob Egelko, *Bid for Public Discussion on Executions: Newspapers File to Prohibit Secretive Alteration of System*, SF GATE, Feb. 1, 2007 (quoting Atty. Karl Olson), available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2007/02/01/BAGB8NSOEG1.DTL&hw=Bid+for+Public+Discussion+on+Executions&sn=002&sc=1000>. "Florida Gov. Jeb Bush established an 11-member commission on the same day as Fogel's ruling to meet publicly and propose changes in that state's execution methods Bush's action refuted any claim by California officials that 'the review of the lethal injection procedure can flourish only in the dark.'" *Id.* (citing and quoting Atty. Karl Olson). Moreover, California voters approved Proposition 59 in 2004, a state constitutional amendment requiring that public agency meetings and writings of public officials be open to public scrutiny. *Id.* Secrecy, it appears, is as "profoundly inimical" to the death penalty as it is to the trial process. See *Richmond Newspapers v. Virginia*, 448 U.S. 448, 593, 597-98 (1980).

¹⁷⁴ See *supra* note 35 and accompanying text. Among the limited number of witnesses permitted in the small space of most death chambers, "most states currently allow a religious delegate, a physician, several individuals designated by the offender (e.g., family members, attorneys), and others selected by a corrections official (e.g., members of the press), to view an execution, though minors and other inmates are typically barred." Domino & Boccaccin, *supra* note 3, at 63-64 (emphasis added); see John D. Bessler, *Televised Executions and the Constitution: Recognizing a First Amendment Right of Access to State Executions*, in 45 FED. COMM. L.J. 355, 362-64, 368-72, 369 (2000). As of 2000, the only states to permit families of victims to observe the death sentence in progress were California, Illinois, Louisiana, Pennsylvania, Texas, Virginia, and Washington. Domino & Boccaccin, *supra* note 3, at 66.

¹⁷⁵ See *Workman*, 486 F.3d at 902-03, 919 (discussing the virtues and drawbacks of one, two, and three-chemical execution protocols); *supra* note 95. According to the courts that have reviewed it, "the whole point of the Tennessee lethal-injection protocol is to avoid the needless infliction of pain, not to cause it. The idea is to . . . cause[] a quick and pain-free death." *Id.* at 907. Upon closer examination, however, masking involuntary movements is obviously motivated by a mixture of penological and decency interests, rather than pain-aversion. It is a means to prevent "interfe[rence] with the proper functioning of the IV equipment and [to] contribute[] to the dignity of the death process," a humane death. *Id.* at

justification for any particular condition of confinement when so very few people are permitted to observe them.

In the same manner that private execution statutes make the threat of death less credible, the paralytic agent Pavulon disengages witnesses from being deterred by the harsh reality of death.¹⁷⁶ Unlike private execution statutes, however, Pavulon is a specific condition of confinement that an inmate can challenge for substantially risking gratuitous harm.¹⁷⁷ The sole purpose of this drug is apparently to present an inmate's death in somatic form for witnesses, as more of a peaceful sleep than a potent, conscience-jarring event.¹⁷⁸ Accordingly,

909, 918. Of course, a fundamental principal of penological interests is that "[t]he State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is 'cruel and unusual,' therefore, if it does not comport with human dignity." *Furman v. Georgia*, 408 U.S. 238, 270-71 (1972). Tennessee retained Pavulon largely because it would "typically result in involuntary movement which might be misinterpreted as a seizure or indication of consciousness." *Workman*, 486 F.3d at 903. Such convulsions are "a phenomenon the State understandably wished to avoid out of respect for the dignity of the individual and presumably out of respect for anyone, including the inmate's family, watching the execution." *Id.* at 909. A side effect of respectfully fooling people is to shield them from the horror that enables deterrence. Furthermore, Pavulon is not entirely viewed as a humane additive for dignified purposes. As an added measure, Pavulon also conveniently prevents respiration, which is touted to help ensure that an inmate, though potentially suffering, doesn't retain consciousness. Henry Weinstein & Dolan, *supra* note 93, at 3.

¹⁷⁶ Lethal injections which use Pavulon make death appear "so denatured and mechanistic as to be unshocking even to most live witnesses." COYNE & ENTZEROTH, *supra* note 18, at 31. At most, to assess an inmate's stability through the fog of Pavulon-induced paralysis, some states rely on heart monitors or camera observation by medical or corrections officials sitting outside the death chamber in order to determine the nearness to and moment of a prisoner's death. *Id.* (observation by camera); Kearns, *supra* note 5, at 220, n.225 (procedures for carrying out an execution by lethal injection) (heart monitors); see *supra* note 93. According to Michael Kroll of the Death Penalty Information Center, inability to watch televised executions, like being denied personal access to executions, is one more layer of removal from the process that undermines the gravity of death by lethal injection. See DEATH PENALTY INFORMATION CENTER, *supra* note 72.

¹⁷⁷ *Hill v. McDonough*, 126 S. Ct. 2096 (2006).

¹⁷⁸ See generally ALDOUS HUXLEY, *BRAVE NEW WORLD* (Harper Collins 1932) (a novel in which soma is a drug that all of society takes to remain in a placid, blissfully ignorant frame of mind, in part to make their continual implementation of discrimination, slavery, and euthanasia more palatable). Dr. Heath of Columbia University has remarked: "It's hard to see what the role of pancuronium is in an execution." Witt, *supra* note 93, at 8. Judge Ellen Hobbs Lyle, during the course of one such Tennessee case, opined that, as a worst-case scenario, the drug was motivated by the "state's interest in demonstrating to witnesses that the death penalty procedure is painless 'The subject gives all the appearances of a serene expiration when actually the subject is feeling and perceiving excruciating painful ordeal of death by lethal injection.'" *Id.* Thus, the pancuronium bromide, according to Judge Lyle, "gives a false impression of serenity to viewers, making punishment by death more palatable." *Id.* Indeed, Attorney General Dane R. Gillette,

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even for witnesses and public officials personally observing a lethal injection, Pavulon promotes only benign and incidental effect on the criminal conscience.¹⁷⁹

Death row inmates and the public have a common interest in rejecting the supposed dignity and predictability Pavulon offers, and unresponsive legislatures ought not to be allowed the deference to sanction a procedure so illegitimately employed.¹⁸⁰ Pavulon is challenged because it induces paralysis, making it nearly impossible for execution technicians, much less the attending public, to decipher and act upon physical clues to botched executions as compared to those executions that stay within constitutional bounds.¹⁸¹ As long as Pavulon or any kind of chemical or physical veil is used, witnesses cannot observe procedural inadequacies and prompt public officials to rework alleged gratuitous deficiencies in the lethal injection protocol.¹⁸² Like private execution statutes, Pavulon marginalizes public involvement in the death penalty. To the extent that either type of device is used,

during the course of the *Morales* trial, said that use of a single drug overdose would be ugly, slow, and not pretty to watch. Weinstein & Dolan, *supra* note 93, at 3. This interest is quite different than a purported interest in preserving a prisoner's dignity. *See supra* note 177.

¹⁷⁹ In an essay titled "Reflection on the Guillotine," Albert Camus relayed what truly intentional deterrence would look like:

If the penalty is intended to be exemplary, then, not only should the photographs be multiplied, but the machine should even be set on a platform in Place de la Concorde at two p.m., the entire population should be invited, and the ceremony should be put on television for those who couldn't attend. Either this must be done or else there must be no more talk of exemplary value. How can a furtive assassination committed at night in a prison courtyard be exemplary? At most, it serves the purpose of periodically informing the citizens that they will die if they happen to kill—a future that can be promised even to those who do not kill. For the penalty to be truly exemplary, it must be frightening.

COYNE & ENTZEROTH, *supra* note 18, at 29.

¹⁸⁰ *See, e.g., supra* notes 38-39 and accompanying text (describing the advantages of an evolving standards of decency approach).

¹⁸¹ *See Morales v. Tilton*, 465 F. Supp. 2d 972, 980 (N.D. Cal. 2006); *supra* notes 93, 176 (noting that heart monitors and video cameras make it more likely that attendants will recognize execution problems, but not that those methods are better than firsthand observation); COYNE & ENTZEROTH, *supra* note 18, at 87 (describing how, in a perfectly executed lethal injection, witnesses' only physical clue in the midst of an inmate's paralysis is the sound of that person's tongue dropping back in the person's throat upon death).

¹⁸² *See supra* notes 32, 36 (public's power to affect change in standards of decency and consequently states' methods of execution). Even though the media or other witnesses are limited to word of mouth or print publication of what they have observed, documentation of botched executions can still hold governments accountable for their practices.

governments would seem to lack a penological interest in the punishment's deterrent value, much less the deterrent value that those lesser-included components such as Pavulon bring to the execution procedure.

2. Administrative Necessity

States have numerous legitimate penological interests vested in lethal injections protocol and other related conditions of confinement.¹⁸³ Legislatures themselves tend to assume some broad oversight over the death penalty, enacting statutes like the AEDPA or PLRA to maintain efficient capital punishment and restrict non-meritorious prisoner claims.¹⁸⁴ Additionally, *Hill* held that penological necessity includes lethal injection procedures which, as a matter of law or fact, are integral to the punishment.¹⁸⁵ Chief among legitimate penological interests in the death penalty is legislative deference to a Department of Correction's administration as the vehicle for effectuating the state's penological interests in death penalty particulars.¹⁸⁶ Departments of Correction in turn may authorize any lawful and administratively necessary penological decisions with the force of law.¹⁸⁷

Current circumstances, however, indicate that administrative implementation of the death penalty is marred by non-transparency, bad

¹⁸³ See *supra* note 126. Chief among state interests in their considered lethal injection protocols, or any one feature of those protocols, is saving legislative, judicial, and agency resources and costs which would incur each time all or a portion of the execution method is deemed unconstitutional. *Nelson*, 541 U.S. at 644, 650. Additionally, states' ultimate punishments may lose some of their deterrent and retributive power each time their methods are constitutionally embarrassed in the courts. See *supra* notes 60, 66, and accompanying text.

¹⁸⁴ See *supra* notes 65-67 and accompanying text (AEDPA); *supra* notes 109-10 (PLRA).

¹⁸⁵ *Hill v. McDonough*, 126 S. Ct. 2096, 2101-03. Through means of the *Heck* rule and the PLRA, the *Nelson* Court preserved habeas-like deference to states' deliberately chosen death penalty methods and protocols in conditions of confinement cases. *Nelson*, 541 U.S. at 646-650.

¹⁸⁶ E.g., IND. CODE § 35-38-6-1(d) (2006) (Indiana); *Hill*, 126 S. Ct. at 2100 (Florida); *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 306 (Tenn. 2005) (Tennessee).

¹⁸⁷ See *supra* note 186; *Nelson*, 541 U.S. at 644 ("imposition of the death penalty presupposes a means of carrying it out"). In response to the contention that Department of Corrections protocols in other states should not be considered strong evidence for contemporary standards, the court in *Abdur'Rahman* said that protocols necessarily follow from enacting legislation in which legislatures establish methods of execution. *Abdur'Rahman*, 181 S.W.2d at 306; TENN. CODE ANN. § 40-23-114(c) (West 2006) ("The department of correction is authorized to promulgate necessary rules and regulations to facilitate the implementation this section"); see also IND. CODE § 35-38-6-1(d) (enabling the Indiana Department of Corrections discretion to implement regulations consistent with its lethal injection statute); *supra* note 83.

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faith discovery, inadequate executioner training and screening, and other forms of clandestine irresponsibility which can neither legitimately purport to be penological, administrative necessity, nor to prevent serious Eighth Amendment risks to death row inmates.¹⁸⁸ The first layer of failed administrative necessity, although not the cause in fact of gratuitous conditions of confinement, is a lack of legislative oversight.¹⁸⁹ Legislatures which summarily authorize capital punishment by statute have deferred rather standardless discretion to the Departments of Correction officials who enact those punishments, disclaiming any duty of ongoing legislative and public oversight of capital punishment protocols.¹⁹⁰

The greatest need for legislative and public oversight is in areas where Departments of Correction appear inept at lethal injection implementation, aspects which no amount of regular walk-through procedures or remote video monitoring of executions alone could correct.¹⁹¹ Most noticeably, execution technicians are dependent on medical professionals or at least their own medical aptitude.¹⁹² Because much-needed medical practitioners tend to ethically recuse themselves from participating in lethal injection, corrections officials, often without

¹⁸⁸ E.g., *Morales v. Tilton*, 465 F. Supp. 2d 972, 979-80 (N.D. Cal. 2006); Miller, *supra* note 47, at 231-32; see *supra* notes 87-92 and accompanying text.

¹⁸⁹ See *Abdur'Rahman*, 181 S.W.3d at 312 (quoting one court's refusal to impose public opinion and formal requirements on lethal injection procedures which, in its understanding, only concerned inter-correctional activities); *supra* notes 88-89.

¹⁹⁰ See *supra* notes 83, 86-89, 93; Gordon, *supra* note 2, at 362-63, n.41.

¹⁹¹ See *supra* notes 93, 98, 176, 181. States which believe death row affords a lesser standard of care than in medical practice believe these measures are justified by security concerns. *Workman v. Bredesen*, 486 F.3d 896, 909-10 (6th Cir. 2007). Bureaucratization of the process makes both blame and responsibility exceedingly hard to place. The account of an execution official in charge of flipping the electric switch at the botched execution of Jesse Joseph Tafero shows that no official is independently allowed to end the procedure; even though the official noticed torture in progress, he only turned the switch on and off as directed while Tafero's head roasted. COYNE & ENTZEROTH, *supra* note 18, at 84.

¹⁹² See *supra* notes 47, 97, 130. Doctors face a dilemma: being ethically barred from participation or leaving the procedure in the hands of less competent personnel, who will likely increase the risk of needless suffering. COYNE & ENTZEROTH, *supra* note 18, at 107. Dr. Ralph Gray opted to be integral to the first lethal injection—of Charles Brooks in Texas in 1982. He even monitored Brooks' heartbeat by stethoscope. *Id.* But see *supra* note 47 (noting that, in states where the standard of care is reduced, the general consensus is that properly trained correctional officers are permitted to perform anesthesia and monitor an inmate's lethal injection in lieu of medical professionals).

medical training or guidance, have occasionally botched the technically demanding components of those executions.¹⁹³

Less obviously, states have generally not formalized their lethal injection protocols into documented rules or regulations, providing themselves some insulation from not only potential liability and embarrassment but also from greater public oversight and inmate access.¹⁹⁴ The practice of statutorily excluding lethal injection protocols from administrative publication in turn encourages correctional higher-ups to be content with under-documented and non-peer-reviewed performance criteria for lethal injection protocols.¹⁹⁵ Some protocols, as noted, are never even reproduced out of the handwritten notes of the correctional officers who use them.¹⁹⁶

These practices offend the traditions of public oversight at executions and public trials as well as the discovery needs of death row inmates.¹⁹⁷ Prisoners attempting to challenge execution protocol on

¹⁹³ See *supra* note 47 (describing why medical professionals feel it unethical to assist in capital punishment); *supra* note 130 (noting the California Attorney General's view that without willing medical personnel present, lethal injection is practically impossible); Miller, *supra* note 47, at 231-33 (describing one estimate of the number of botched executions and their causes by 2001); *supra* note 48 (discussing failed executions). Nevertheless, sometimes the interest in security and in having correctional officials at a distance seems to make sense. *Workman*, 486 F.3d at 909-10. In 1988, Raymond Landry was to be executed when his intravenous chemical lines burst and sprayed all over witnesses and technicians who were close to the inmate's body. COYNE & ENTZEROOTH, *supra* note 18, at 104.

¹⁹⁴ See *supra* notes 34, 80-82 and accompanying text. See, e.g., *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 311, 312 (Tenn. 2005).

[A] 'rule' does not include '[s]tatements concerning only the internal management of state government and not affecting private rights, privileges or procedures available to the public, nor does a 'rule' include 'statements concerning inmates of a correctional facility' [W]e have previously held that the Department of Correction's prison disciplinary procedures were not 'rules' under the UAPA Accordingly, we conclude that the procedures in the lethal injection protocol were not 'rules' adopted by the Department of Correction in violation of the UAPA and that the petitioner is not entitled to relief on this ground.

Id.; see *supra* notes 88-89 and accompanying text. But see *Richmond Newspapers v. Virginia*, 448 U.S. 555, 571, 597-98 (oversight expected in the courtroom).

¹⁹⁵ See *Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D. Cal. 2006); Miller, *supra* note 47, at 231-33; *supra* notes 87-89, 92 and accompanying text. But see *Workman*, 486 F.3d 896.

¹⁹⁶ See Gibeaut, *supra* note 92 and accompanying text.

¹⁹⁷ See *supra* notes 34, 64 and accompanying text (traditions of public oversight at executions and of oversight at trials); see also *Morales*, 465 F. Supp. 2d at 982 ("Defendants still have not fulfilled their discovery obligations."); *Workman v. Bredesen*, 486 F.3d 896, 919 (6th Cir. 2007) ("An examination of best practices from other jurisdictions . . . suggests

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Eighth Amendment grounds encounter the difficult task of obtaining access to these unpublished and unreproduced original state manuals.¹⁹⁸ If death row inmates gain access to these materials, their previously speculative fears of inexpertise and non-penological state directives may well be vindicated.¹⁹⁹ What is more, inmates may only be able to access lethal injection protocol descriptions in the manner currently intended by their State when the time left for filing a Section 1983 or habeas claim is dangerously close to the eleventh hour.²⁰⁰ At that point, courts have often dismissed claims which only temporary stays of execution could resolve without realizing that the true motivation behind late appeals, upon some deeper digging, might be the genuine lack of prior opportunities.²⁰¹

Thus, not all administrative and legislative assumptions can justly be termed legitimate penological necessities. Without formal avenues for auditing the qualifications of lay executioners, poorly performed

that accountability would be enhanced through improved documentation of these processes.”).

¹⁹⁸ See *supra* note 107. “On November 29, 2005, the Governor of Florida signed Hill’s death warrant, which ordered him to be executed on January 24, 2006. Hill requested information about the lethal injection protocol, but the department provided none.” *Hill*, 126 S. Ct. at 2100. The *Hill* court said Mr. Hill could not have access to the same procedural documents, but had to rely on the portions described in *Sims* instead. *Id.* Without the same kind of access, Hill’s complaint could do no better than requesting preliminary injunction “barring defendants from executing Plaintiff in the manner they currently intend.” *Id.*

¹⁹⁹ See *Miller*, *supra* note 47, at 231-32.

[M]any states have clandestine execution procedures. Some states allow witnesses to view executions, and these witnesses often become the reporters of botched executions . . . because of the drugs used in lethal injections, witnesses may not be able to observe that a prisoner is in severe pain.

Id.

²⁰⁰ See *supra* note 75 and accompanying text (noting the AEDPA’s purpose is to bar unduly delayed attempts at equitable relief). Compare *Hill*, 126 S.Ct. at 2100 (lethal injection execution), with *Gomez v. United States Dist. Court for Northern Dist. of California*, 503 U.S. 653 (1992) (*per curiam*) (execution by cyanide gas). When Clarence Hill was sentenced on November 29, 2005, his scheduled execution date was January 24, 2006. *Hill*, 126 S. Ct. at 2100. The Court in that case saw the delay as an abusive eleventh hour attempt to manipulate equitable remedies. *Id.* In *Gomez*, though the result was the same, the Court noted that petitioner’s claim “could have been brought more than a decade [earlier].” *Gomez*, 503 U.S. at 654.

²⁰¹ *E.g.*, *Taylor v. Crawford*, 487 F.3d 1072, 1074-75 (8th Cir. 2007) (concluding that additional time for discovery and evidentiary matters and a hearing on the merits was warranted, because when Mr. Taylor brought suit, the State’s intended procedure for lethal injection was unwritten; the district court failed to set Mr. Taylor’s hearing on the merits in a timely manner, and when the hearing was eventually held, it was held in an unjustly expedited manner).

executions could continue unabated.²⁰² Unprofessional documentation might save the states from potential embarrassment or Section 1983 challenges, but neither reason is a legitimate objective.²⁰³ Opposing these less than honorable interests is a prisoner's right of timely access to the courts, uninhibited by nontransparent protocols, as well as a tradition of public accountability whereby the people and the press act as checks on arbitrary government action and as vigilant voices for humane execution improvements.²⁰⁴ On the balance, non-transparency of death penalty operations, the access to which would otherwise legally or morally be in the prisoner and public interest, cannot be claimed as legitimate.²⁰⁵

IV. CONTRIBUTION

The approach of this Part is to adapt the aforementioned analysis into a value-added method-of-execution test for death row prisoners' Section 1983 and Eighth Amendment conditions of confinement claims. While modeled after the preeminent habeas method-of-execution analysis, the test that follows also incorporates the essential aspects of *Nelson* and *Hill* analysis, namely the hybrid rule from *Heck*, PLRA limitations, and the prima facie requirement for a substantial risk of harm, commonly determined by deliberate indifference or comparable ignorance standards.²⁰⁶ It differs from core habeas Eighth Amendment interpretations in that it addresses a death row inmate's unique showing of a substantial likelihood of success on the merits in conditions of confinement cases, overrides a death row inmate's constitutional rights

²⁰² See Miller, *supra* notes 47-48 (citing the number of known botched executions between 1993 and 2001 and their likely causes).

²⁰³ See Morales v. Tilton, 465 F. Supp. 2d 972, 980 (N.D. Cal. 2006) (noting that there is no substitute for first-hand observation, whether standardized or not, nor sufficient reason to accept substitutes).

²⁰⁴ See *supra* notes 34, 64, 197.

²⁰⁵ Compare Morales, 465 F. Supp. 2d at 981 ("At the present time Defendant's implementation of California's lethal-injection protocol lacks both reliability and transparency This is intolerable under the Constitution."), with Abdur'Rahman v. Bredesen, 181 S.W.3d 292, 311-12 (Tenn. 2005) ("The protocol instead fits squarely within two exceptions to the meaning of 'rule': statements concerning only the internal management of state government and not affecting private rights privileges or procedures available to the public and statements concerning inmates of a correctional or detention facility").

²⁰⁶ See *supra* note 29 and accompanying text (method-of-execution analysis, generally); *supra* notes 109-13 and accompanying text (describing the present *Nelson/Hill* analysis for death row inmates' Section 1983 claims); *supra* notes 132, 160 (explaining why cruel intent, while set aside for the purposes of analysis in this Note, is nevertheless important to many final determination of cruel and unusual punishment); *supra* notes 138, 163, 213-14 and accompanying text (urging the view that excessiveness assumes ignorance or non-necessity).

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only where legitimate penological objectives so suggest, and weighs only those legitimate, penological objectives against evolving standards of decency to determine whether cruel and unusual punishment has taken place.²⁰⁷ The aim of this model judicial reasoning is to increase governmental responsibility for the means they employ in executing felons.²⁰⁸ It does not unavoidably cast judgment on capital punishment itself, only on the level of discipline and expertise that capital punishment jurisdictions ought to employ, with the aid of improved public oversight.

A. *The Proposed Test: Combining Hill with Method-of-Execution Analysis*

The first requirement of the proposed test is that death row inmates' alleged conditions or circumstances of confinement challenges satisfy the basic requirements common to both the AEDPA and PLRA. If the challenge is frivolous or malicious, posits a claim for which there is no relief, names an immune defendant, is taken prior to administrative exhaustion, or commits some other basic error, it should, as in current practice, meet its early demise on the authority of either of these statutes.²⁰⁹ If the claim comes in the eleventh hour, on the other hand, courts should not presume the plaintiff is improperly motivated by earning a temporary stay of execution in contravention of the AEDPA or PLRA.²¹⁰ The court may find at a later stage in this test that the state has simply failed its discovery obligations, either by not publishing its procedures and protocols in easily accessible form or perhaps by being

²⁰⁷ See generally *supra* Part III; see *supra* note 100 and accompanying text (explaining core habeas actions, as distinct from hybrid actions and conditions of confinement actions under the *Heck* rule).

²⁰⁸ At least one post-*Hill* decision has approached the issue of death row inmates' Section 1983 claims in this way.

Defendants' implementation of lethal injection is broken, but it can be fixed California's voters and legislature repeatedly have expressed their support for capital punishment. This case thus presents an important opportunity for executive leadership Should Defendants wish to retain a three-drug protocol, which it most certainly is their right to do, they must address in a serious way the broader structural problems in implementation outlined in this memorandum.

Morales v. Tilton, 465 F. Supp. 2d 972, 974, 982, 983-84.

²⁰⁹ See *supra* notes 65-67 and accompanying text (AEDPA); *supra* notes 100, 109-10, 126 (PLRA).

²¹⁰ See *supra* notes 75, 197, 200 (comparing state interests in timely executions with inmate access to necessary discovery materials).

otherwise belligerent in withholding limited sources of information from inmates interested in physical evidence.²¹¹

Second, the plaintiff must present a prima facie case, what *Hill* called “substantial likelihood of success on the merits,” under Section 1983 and the Eighth Amendment.²¹² Proving a deprivation under color of the Eighth Amendment freedom from cruel and unusual punishment is appropriate, according to *Nelson*, when a showing of deliberate indifference to that constitutional right is made, though negligent indifference might suffice as well.²¹³ Deliberate indifference may be the infliction of improper conditions of confinement or the omission of humane conditions owed, which encompasses at least a sort of reckless ignorance.²¹⁴

The third step requires that the baseline state interests be penological interests for implementing the specifically challenged aspects of an execution procedure.²¹⁵ The state defendant only needs to produce some penology-based rationale for his actions in rebuttal of the prima facie allegations.²¹⁶ Some hybrid claims will part ways from the test at this point and be assessed instead under traditional method-of-execution analysis if the inmate challenges the one and only permissible method and protocol for a state’s executions under its laws.²¹⁷ Foreseeably, states may use this opportunity provided by *Nelson* to write one specific method into their statutes to avoid Section 1983 lawsuits.²¹⁸ But if a state has, in bad faith, authorized only one method of execution in its statute, its interest would be strictly non-penal rather than penological and still not survive this stage of this test if challenged.

²¹¹ See *supra* notes 88-89, 194-96, 198, and 200-01 (each discussing, in part, states’ efforts to conceal their lethal injection protocols).

²¹² See *supra* notes 111-12 (discussing the demonstration that might be required to show a risk of gratuitous harm).

²¹³ See *Nelson v. Campbell*, 541 U.S. 637, 643 (2004) (deliberate indifference); *supra* notes 138, 163 (something less than intent in *Taylor* and negligent indifference in *Workman*, respectively); *supra* note 133. See generally *Morales*, 465 F. Supp. 2d at 972.

²¹⁴ See *Estelle v. Gamble*, 429 U.S. 97 (1976); *Farmer v. Brennan*, 511 U.S. 825 (1994) (deliberately indifferent cruel and unusual punishment commission and by omission, respectively); *supra* note 132.

²¹⁵ See *supra* Part III.B.

²¹⁶ See *supra* notes 132, 141 and accompanying text (state’s baseline rebuttal burden of production).

²¹⁷ *Nelson*, 541 U.S. at 645. See generally *supra* notes 100, 103-04, 108 (distinguishing permissible methods from possible methods).

²¹⁸ See *Kearns*, *supra* note 5, at 211.

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Fourth, an inmate must establish that the penological interests offered were not legitimately applicable to the circumstances of confinement under review.²¹⁹ Proof that the penological interests were illegitimate under the circumstances—that is, that they were a mere pretext for cruel and unusual punishment—would mean that a prisoner retains his Eighth Amendment rights and may potentially be entitled to injunctive relief, damages, or otherwise under Section 1983, aside from remedies attendant to the Eighth Amendment substantively.²²⁰ Hybrid claims which have challenged the factual validity of the death penalty might exit the test at this point and be bound for a habeas determination; however, courts using this test may as well not force the issue, since part five of this test is the same next step as in pre-*Penry* method-of-execution analysis—*Trop* and *Roper*'s evolving standards of decency.²²¹

The final part of this test is used when the governmental justification appears to be thoroughly legitimate and penological. Unless the inmate has proven his case for negligent, reckless, or deliberate indifference previously, legitimate penological interests should earn the substantial deference usually enjoyed under comparable habeas method-of-execution analysis.²²² The legitimate penological interests are then balanced against standards of decency to determine a death row inmate's last chance for vindication.²²³ For various reasons, "evolving standards of decency" is more appropriate to this test than "contemporary standards of decency."²²⁴ Measuring legitimate penological interests that have already surpassed the rigors of parts one through four of this test against contemporary standards would tend toward a non-event—the two things are virtually indistinguishable legislative determinations in reality.²²⁵ When measuring evolving

²¹⁹ See *supra* Part III.B.

²²⁰ *Muhammad v. Close*, 540 U.S. 749, 750 (2004) (stating that injunctive and monetary relief are available under Section 1983); *Edelman v. Jordan*, 415 U.S. 651, 666-67 (1974) (further describing when retroactive monetary relief is available).

²²¹ See *supra* notes 38, 43 (highlighting the factors in *Trop/Roper* evolving standards of decency).

²²² See *supra* notes 60, 66, 126, 183 (describing rationale for deference).

²²³ See *supra* note 111 (referencing common tests of merits balanced against relative hardships).

²²⁴ See *supra* notes 38-39, 42, 173 and accompanying text (offering a basic comparison of the two frameworks, the advantages of evolving standards of decency, and its relationship to the most up-to-date and best public interests).

²²⁵ E.g., *Abdur'Rahman v. Bredesen*, 181 S.W.3d. 292, 306 (Tenn. 2005). In the case of *Pavulon*, if the state deems its usage legitimate and penological, contemporary standards would simply confirm that result, because *Pavulon* is used in all but two lethal injection death penalty jurisdictions. *Id.* That case, using a now obsolete analysis after *Hill*,

standards, however, it is at least possible that courts could bring their own judgment to bear to find a condition of confinement inherently cruel and unusual, though having technically survived the previous test as a legitimate penological interest.²²⁶

B. Some Forthcoming Implications of the Proposed Test

The proposed test implies several alterations to lethal injection as currently employed, including correctional systems' reliance on Pavulon, private execution statutes, undocumented lethal injection procedures, and inexperienced executioners. The overall goal of the test is to encourage increased governmental accountability for capital punishment by stricter enforcement in courts, statutes, rules, regulations, and lethal injection protocols themselves.²²⁷

Courts, for their part in ensuring a move towards transparency and professionalism, should, first, no longer permit retribution or deterrence to be balanced against standards of decency as legitimate penological rationale for the methods or procedures of execution employed, except to the extent that executions are indeed made so sufficiently public as to support deterrence rationale.²²⁸ Second, courts, in conjunction with other branches of government, can and should make executions more publicly accessible, because private execution statutes may be incompatible with deterrence, much less the traditions of public oversight, of retributive moral balance, and of evolving standards of decency in conditions of confinement cases.²²⁹ Third, courts can and should find unconstitutional the use of paralytic agents like Pavulon and any other gratuitous or excessive execution features leading to unusual punishment if they are also, cruelly, not remedied.²³⁰

Rather than wait for courts to exhaust the Pavulon issue, a proactive legislative commitment to professionalism in death penalty

permitted even non-legitimately justified means where most states said the means were still contemporarily decent. *Id.*

²²⁶ See *Coker v. Georgia*, 438 U.S. 584, 597 (1977); *Roper v. Simmons*, 543 U.S. 551, 563 (2005); *Atkins v. Virginia*, 536 U.S. 304, 313 (2003) (each stating that the Court's judgment "is" or "will be" "brought to bear" in Eighth Amendment cases); *supra* notes 39, 43.

²²⁷ Overall, the goal ought to be implementation of at least the "best practices" of all U.S. jurisdictions. See *Workman v. Bredesen*, 486 F.3d 896, 919 (6th Cir. 2007).

²²⁸ See *supra* Parts III.A.1, III.B.1; *supra* note 175 and accompanying text (on valuing deterrence).

²²⁹ See *supra* Part III.B.

²³⁰ See *Hill v. McDonough*, 126 S. Ct. 2096 (2006); *Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D. Cal. 2006); *Taylor v. Crawford*, 2006 WL 1779035 (W.D. Mo. June 26, 2006).

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administration can save face for jurisdictions where currently there are concealed, inadequate operations.²³¹ The potential for litigation and embarrassment can be powerful incentive to perfect humane execution procedures and accommodate public oversight, both of which enforce the traditional concept of evolving decency. States' protocols for execution should be put down in rule or regulation form to give the public easier access and fulfill discovery obligations to inmates. Better inmate access, in particular, advances both AEDPA and PLRA goals, since it would enable prisoners with meritorious claims to more clearly avoid the appearance of eleventh hour stay of execution opportunism. Additionally, all executioners should be subject to more stringent training requirements. Because medical professionals cannot be forced to participate, courts conceded that properly trained correctional officials may perform the task alone.²³² States should then focus on honing the technical skills of elite groups of dispassionate execution officials in the proficient use of standardized protocols.

V. CONCLUSION

Capital punishment, as an institution, is not remotely coming to an end in this country. Realizing that the punishment itself is as yet constitutional, many death row inmates have tried desperately to challenge the means by which they will be brought to their ends. This approach has revealed more deficiencies in execution procedures than were perhaps expected. In particular, this Note describes how Section 1983 claims disputing the conditions of prisoner confinement not only suggest that the nation's best procedures ought to be standardized in order to eliminate the substantial risk of excessive suffering, but it requires a probing inquiry into the justifications for each stage of the death penalty process. State and federal governments should subject death row inmates to only those conditions which protect the inmates' best interests and promote transparency to the public. Any feature that is not strictly necessary ought to be justified solely by legitimate

²³¹ As noted previously, Tennessee and California are states that have taken or are taking such steps semi-proactively. See *Workman*, 486 F.2d at 899 (explaining in detail the lethal injection improvements in Tennessee); *Morales*, 465 F. Supp. 2d at 974-75 (describing the court-ordered improvements in California procedure); Witt, *supra* note 93, at 8.

²³² Because an execution is not a medical procedure, and its purpose is not to keep the inmate alive but rather to end the inmate's life . . . the Constitution does not necessarily require the attendance and participation of a medical professional. However, the need for a person with medical training would appear to be inversely related to . . . reliability and transparency.

Morales, 465 F. Supp. 2d at 983.

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penological interests. For the sake of dignity and decency, and in accordance with our rules of law, we cannot abide by the inhumanity of indifference or shallow objectives which, by design or in effect, subject even our vilest offenders to worse treatment than is sanctioned by the worst punishment available under law.²³³ The only truly responsible goal for death penalty conditions of confinement is an aim of legitimate penological objectives, and it can be accomplished through a new understanding of prevailing principles which the nation's maturing standards and laws have come to rely upon.

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²³³ "The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country." Melvin Gutterman, *Prison Objectives and Human Dignity: Reaching a Mutual Accommodation*, 1992 B.Y.U. L. REV. 857 (1992) (quoting Winston Churchill, 1912).

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