DEATH WISH: STANDARDS FOR DECIDING TO WAIVE EIGHTH AMENDMENT PROTECTIONS AGAINST CRUEL AND UNUSUAL MANNERS OF EXECUTION

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INTRODUCTION

The State of Arizona executed Walter LaGrand On March 3, 1999.[1] Offered the choice between lethal injection and the gas chamber, LaGrand elected to die in the gas chamber, hoping the courts would declare the method unconstitutionally cruel and unusual.[2] The case reached the Supreme Court, which determined that LaGrand's selection of a preferred method of execution waived his Eighth Amendment claim, permitting the execution to proceed.[3] Germany, where LaGrand was born, attempted to intervene to stop the execution but failed.[4] As protests took place outside the prison, LaGrand choked on cyanide gas for an agonizing eighteen minutes.[5] The use of the gas chamber sparked outrage in Germany, received extensive news coverage in Europe, and led members of the German Parliament to call for sanctions against the United States.[6] Following the execution, the state of Arizona abandoned its use of the gas chamber.[7]

In June 2021, however, AP News reported that Arizona was renovating its gas chamber and had bought materials needed to make hydrogen cyanide gas.[8] The renewed use of cyanide gas is horrifying from a historical perspective: as the American Jewish Committee wrote in a statement following this news, "[w]hether or not one supports the death penalty as a general matter, there is general agreement in American society that a gas devised as a pesticide, and used to

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1. Roger Cohen, *U.S. Execution of German Stirs Anger*, N.Y. TIMES (Mar. 5, 1999), https://www.nytimes.com/1999/03/05/us/us-execution-of-german-stirs-anger.html (on file with the *Columbia Human Rights Law Review*).

2. *Id.*

3. Patty Machelor, *LaGrand: 18 Minutes to Die*, TUCSON CITIZEN (Mar. 4, 1999), http://tucsoncitizen.com/morgue2/1999/03/04/147996-lagrand-18-minutes-to-die/ [https://perma.cc/YM7B-BVKY].

4. *Id.*

5. *Id.*

6. Cohen, *supra* note 1; *see also* Machelor, *supra* note 3 (arguing a similar thesis).

7. Jacques Billeaud, *Arizona Refurbishes Gas Chamber in Push to Resume Executions*, AP NEWS (June 10, 2021), https://apnews.com/article/arizona-executions-business-health-government-and-politics-c3f67a6ec65959fea817b4c3193bb15e [https://perma.cc/H97N-DSTQ].

8. *Id.* So far, the renovated gas chamber remains untested—Clarence Dixon, a man sentenced to death and scheduled to be executed in May 2022, refused to select a method of execution and will be put to death via lethal injection. Jacques Billeaud, *Arizona Death-Row Prisoner Won't Be Executed in Gas Chamber*, AP NEWS (Apr. 29, 2022), https://apnews.com/article/arizona-united-states-executions-phoenix-79792a5f66d42f5d12bd03bbeade8c16 [https://perma.cc/U2D7-CAD8].

eliminate Jews, has no place in the administration of criminal justice."[9] Death by cyanide gas is gruesome and likely excruciatingly painful.[10] Unlike certain lethal injection drugs, cyanide gas does not risk the infliction of extreme pain only when administered improperly. Pain is inherent to the method of execution itself, thus making Arizona's potential revival of the method all the more worthy of constitutional consideration.[11]

As the United States experiences a shortage of lethal injection drugs due to the refusal of many European manufacturers to sell them, states are considering executing people on death row using older methods of execution (of which cyanide gas is just one),[12] as well as novel methods such as nitrogen poisoning.[13] States like South Carolina

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9. Billeaud, *supra* note 7 (quoting Press Release, American Jewish Committee, AJC Decries Arizona Plan to Use Zyklon B for Prisoner Executions (June 7, 2021), https://www.ajc.org/news/ajc-decries-arizona-plan-to-use-zyklon-b-for-prisoner-executions [https://perma.cc/9TU2-2Z8C]).

10. Fierro v. Gomez, 865 F. Supp. 1387, 1396–97 (N.D. Cal. 1994), *aff'd*, 77 F.3d 301 (9th Cir.1996) (citations omitted), *cert. granted, judgment vacated*, 519 U.S. 918 (1996), and *vacated sub nom.* Fierro v. Terhune, 147 F.3d 1158 (9th Cir. 1998); *see also* Roberta M. Harding, *The Gallows to the Gurney: Analyzing the (Un)constitutionality of the Methods of Execution*, 6 B.U. PUB. INT. L.J. 153, 165 (1996) ("[T]he condemned inmate's breathing efforts resembled those of 'a choking man with a rope cutting off his windpipe . . . . He could get no air in the chamber.' . . . 'there is evidence of extreme horror, pain and strangling. The eyes pop. The skin turns purple and the victim begins to drool.'"); *see also* discussion *infra* Part II.B.3.

11. Peter S. Adolf, *Killing Me Softly: Is the Gas Chamber, or Any Other Method of Execution, "Cruel and Unusual Punishment?"*, 22 HASTINGS CONST. L.Q. 815, 831–35 (1995).

12. *See* Maurice Chammah & Tom Meagher, *How the Drug Shortage Has Slowed the Death-Penalty Treadmill*, THE MARSHALL PROJECT (Apr. 12, 2016), https://www.themarshallproject.org/2016/04/12/how-the-drug-shortage-has-slowed-the-death-penalty-treadmill [https://perma.cc/33MD-QC6Q] (describing possible reasons for the drug shortage, including activist involvement in alerting European drug companies of the drugs' use, and outlining current state execution practices and consideration of methods such as firing squad, electric chair, and gas chamber); *see also* Peter Wade, *S.C. Death Row Prisoners Will Soon Have to Choose Between Firing Squad or Electrocution*, ROLLING STONE (May 6, 2021), https://www.rollingstone.com/politics/politics-news/s-c-death-row-prisoners-will-soon-have-to-choose-between-firing-squad-or-electrocution-1166157/ [https://perma.cc/QL22-GUM9] (describing South Carolina's law providing a choice between electrocution and firing squad as a response to the shortage of lethal injection drugs).

13. *See* Denise Grady & Jan Hoffman, *States Turn to an Unproven Method of Execution: Nitrogen Gas*, N.Y. TIMES (May 7, 2018), https://www.nytimes.com/2018/05/07/health/death-penalty-nitrogen-executions.html (on file with the *Columbia Human Rights Law Review*) (discussing the authorization of execution

will now give people on death row a choice between electrocution and the firing squad if lethal injection is unavailable.[14] Alabama approved the use of nitrogen gas in 2018, joining Mississippi and Oklahoma.[15] Many states' statutes describing methods of capital punishment allow for alternative methods such as electrocution, lethal gas, hanging, and death by firing squad.[16] Consequently, challenges to the constitutionality of various methods of execution as cruel and unusual punishment are increasingly likely. The question remains: Can individuals waive the right to be free from cruel and unusual punishment if, given a choice between multiple methods of execution, they opt for a method of execution that courts otherwise would find to be cruel and unusual?

Although in *Stewart v. LaGrand*, the Supreme Court allowed LaGrand's execution to proceed, it did not actually resolve the question of waiver of Eighth Amendment rights. Instead, it declined to reach the issue, ruling that LaGrand (1) should have raised the issue on direct

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by nitrogen gas by Alabama, Mississippi, and Oklahoma and comparing death by nitrogen poisoning to death by lethal injection); *see also* Lee Hedgepeth, *Alabama Will Be Ready to Execute Death Row Inmates by Nitrogen Suffocation 'Within Months*,' CBS 42 (Jan. 26, 2022), https://www.cbs42.com/alabama-news/alabama-will-be-ready-to-execute-death-row-inmates-by-nitrogen-suffocation-within-months/ [https://perma.cc/HS3H-GRES] (describing the creation of Alabama's nitrogen execution protocol).

14. Laurel Wamsley, *With Lethal Injections Harder to Come By, Some States are Turning to Firing Squads*, NPR (May 19, 2021, 5:00 AM), https://www.npr.org/2021/05/19/997632625/with-lethal-injections-harder-to-come-by-some-states-are-turning-to-firing-squad [https://perma.cc/AX55-3RTQ] ("South Carolina's Republican governor signed a bill into law last week that sounds like it's from a different century: Death row inmates must choose whether to be executed by the electric chair or a firing squad if lethal injection drugs are unavailable."). What would have been South Carolina's first firing squad execution was temporarily stayed by the South Carolina Supreme Court pending litigation questioning the constitutionality of the proposed methods; the capital defendant "maintained in a written statement that he was forced to make a decision by a deadline set by state law and still found both options unconstitutional." The Associated Press, *South Carolina's Planned Execution by Firing Squad is on Hold for Now*, NPR (Apr. 20, 2022, 2:38 PM), https://www.npr.org/2022/04/20/1093812483/firing-squad-execution-blocked-south-carolina [https://perma.cc/B239-LPS9].

15. Michael Balsamo, *New Rule Could Allow Gas, Firing Squads for US Executions*, AP NEWS (Nov. 27, 2020), https://apnews.com/article/international-news-executions-cc1b22bda846df0b331597a3b65010bb [https://perma.cc/Z8YB-NQEL].

16. *Methods of Execution*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/methods-of-execution [https://perma.cc/72PU-RXTN].

appeal[17] and (2) could not raise the claim in post-appeal federal habeas corpus proceedings because any ruling would constitute a new rule of law barred by the Court's habeas corpus anti-retroactivity rule from *Teague v. Lane*.[18] Because the Court's ruling applies only in the habeas corpus context, the question remains whether—if asserted pre-appeal—the exercise of state opt-in or opt-out rules governing the method of execution can constitutionally act as waivers of the Eighth Amendment protection against cruel and unusual execution.[19]

To date, scholarly consideration of the issue left open in *Stewart v. LaGrand*—whether the Constitution allows states to treat a person on death row's forced selection of a method of execution as a waiver of the protection against cruel and unusual methods of execution—has focused on the need to protect society's interest in barring cruel and unusual state executions, whether or not the death-sentenced individual challenges them.[20] This Note asks a different question: If a person chooses to be executed in what otherwise would

17. Stewart v. LaGrand, 526 U.S. 115, 119 (1999) ("In addition, Walter LaGrand's claims are procedurally defaulted . . . . At the time of Walter LaGrand's direct appeal, there was sufficient debate about the constitutionality of lethal gas executions that Walter LaGrand cannot show cause for his failure to raise this claim.").

18. *Id.* ("To hold otherwise, and to hold that Eighth Amendment protections cannot be waived in the capital context, would create and apply a new procedural rule in violation of Teague v. Lane, 489 U.S. 288 (1989).").

19. *See* Jeffrey L. Kirchmeier, *Let's Make A Deal: Waiving the Eighth Amendment by Selecting a Cruel and Unusual Punishment*, 32 CONN. L. REV. 615, 641–42 (2000) ("[T]he Court indicated that it could reach a different result if a case were to reach the Court . . . from a direct appeal rather than from habeas review and if the issue were not defaulted. . . . [T]he choice issue . . . remains open until . . . addresse[d] . . . in a different procedural posture.").

20. *See, e.g.*, *id.* at 642 (describing the "Supreme Court's own Eighth Amendment analysis," which "indicates a strong societal interest in the ban on cruel and unusual punishments that should not be waived by one individual," and distinguishes "such Eighth Amendment waivers . . . from waivers of other constitutional rights [because they] . . . provide no benefits and are a detriment to society"); *see also* Jules Epstein, *Mandatory Mitigation: An Eighth Amendment Mandate to Require Presentation of Mitigation Evidence, Even When the Sentencing Trial Defendant Wishes to Die*, 21 TEMP. POL. & CIV. RTS. L. REV. 1, 27 (2011) ("[T]he Court has never countenanced an explicit and direct waiver of the right to be free of a punishment that society deems intolerable . . . . [I]t has barred defendant waivers of individual rights both when they conflict with a broader, societal need, and even when the right is particularly individual-focused."); *see also* Russell L. Christopher, *The Irrelevance of Prisoner Fault for Excessively Delayed Executions*, 72 WASH. & LEE L. REV. 3, 68 (2015) ("*LaGrand* may not seriously threaten the fundamental principle that waiver cannot transform an unconstitutional punishment into a constitutional punishment.").

constitute an unconstitutionally cruel and unusual manner, what are the practical difficulties and implications of such a choice? Given the proliferation of state decisions to put capitally-sentenced individuals to a choice between previously abandoned older methods and/or experimental newer methods, the courts almost certainly will have to review the practical application of accompanying waivers of constitutional rights. This Note addresses that timely question.

Part I of this Note outlines existing legal frameworks for (1) evaluating whether a particular method of execution violates the Eighth Amendment; (2) waiving Eighth Amendment rights generally; (3) waiving one's Eighth Amendment right to be free from cruel and unusual methods of execution, providing an overview of existing scholarship regarding Eighth Amendment waiver; and (4) applying the knowing, voluntary, and intelligent standard. Part II identifies four reasons why the knowing, voluntary, and intelligent standard that applies to capitally-sentenced individuals' decisions to waive remaining judicial review of their death sentences in order to hasten their execution may not suffice as the standard for waivers of the right to be free from cruel and unusual methods of execution: (1) emphasizing the spectator's experience may obscure the risk of pain; (2) enough may not be known about existing methods of execution to make a "knowing" choice; (3) there are difficulties associated with the timing of execution decisions and available medical advice; and (4) a masochistic choice may not be truly voluntary, given psychological factors at play. Part III assesses ways to moderate the constitutional difficulties inherent in allowing waivers of Eighth Amendment protections against cruel and unusual methods of execution—requiring a searching review of the knowledge, voluntariness, and intelligence of such a choice under a clear and convincing evidence standard with the government bearing the burden of proof—before suggesting that the difficulties in implementing such a solution should lead the courts to decline to allow waivers of the right not to be tortured to death under any circumstances.

I. Challenging Methods of Execution and Waiving Eighth Amendment Rights

Part I.A outlines the Supreme Court's standards for determining whether the Eighth Amendment bars particular methods of execution as cruel and unusual punishment. Part I.B examines the legal standards governing waiver of Eighth Amendment protections generally and, in particular, the question of waiver of the Eighth Amendment right to be free from cruel and unusual methods of

execution. Part I.C outlines the Supreme Court's current definition of the knowing, voluntary, and intelligent standard.

A. Eighth Amendment Analysis of Methods of Execution

Methods of execution have evolved significantly in the United States over the course of our nation's history.[21] Since the adoption of the Constitution, states have used death by hanging, immolation (burning alive), firing squad, electrocution, lethal injection, and lethal gas as official methods of execution.[22] As noted by the Supreme Court in 2019 in *Bucklew v. Precythe*, the Eighth Amendment protection against cruel and unusual punishment does not promise a painless execution;[23] rather, it protects against "long disused (unusual) forms of punishment that intensified the sentence of death with a (cruel) 'superadd[ition]' of 'terror, pain, or disgrace.'"[24]

The Supreme Court has reviewed the constitutionality of only a small number of methods of execution and has never found one to be unconstitutional.[25] Nevertheless, the Court has articulated the standard for determining whether a method of execution is cruel and unusual.[26] The determination is not categorical—it requires a comparison of multiple methods.[27] The appellant must show that a different method of execution other than the one proposed is "feasible, readily implemented, and [would] in fact significantly reduce a substantial risk of severe pain."[28] In doing so, the appellant is not limited to the options available in a given state, but may argue for a method being used in a different state if this method is "feasible" and

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21. Andrew Fulkerson & Carl Kinnison, *Lethal Injection: Where Do We Go After Glossip v Gross?*, 52 CRIM. L. BULL. 923, 924–30 (2016) (citing STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 44–46, 71 169, 178–180, 186–89, 192, 196, 198–201 (2002)) (describing the evolution of methods of execution in the United States).

22. *Id.*

23. Bucklew v. Precythe, 139 S. Ct. 1112, 1124 (2019) ("[T]he Eighth Amendment does not guarantee a prisoner a painless death—something that, of course, isn't guaranteed to many people, including most victims of capital crimes." (citing Glossip v. Gross, 576 U.S. 863, 869 (2015))).

24. *Id.* (quoting Baze v. Rees, 553 U.S. 35, 48 (2008)).

25. *Id.*

26. *Bucklew*, 139 S. Ct. at 1125–26.

27. *Id.* at 1126 ("*Glossip* expressly held that identifying an available alternative is 'a requirement of *all* Eighth Amendment method-of-execution claims' alleging cruel pain.").

28. Baze v. Rees, 553 U.S. 35, 52 (2008). Although *Baze* was a plurality decision, this standard was held to control in Glossip v. Gross, 576 U.S. 863, 877 (2015).

"readily implemented."[29] The showing that the method is "readily implemented" must be "sufficiently detailed to permit a finding that the State could carry it out 'relatively easily and reasonably quickly.'"[30] The Court has also stated that "traditionally accepted methods of execution—such as hanging, the firing squad, electrocution, and lethal injection—are [not] necessarily rendered unconstitutional as soon as an arguably more humane method like lethal injection becomes available."[31]

The bar for finding a method of death unconstitutionally cruel and unusual is high. One overview of challenges to methods of execution concludes that "it seems that the court recognizes that death is a messy business and so long as the state is not purposefully torturing the prisoner during the execution process, unintentional pain and suffering during the execution will be tolerated."[32] Still, the drug shortages that recently have plagued states' ability to carry out executions and the resulting interest in previously abandoned methods of execution, along with proposed experimentation with new methods such as nitrogen gas, likely will force the courts to continue grappling with the issue. Although the availability of newer methods does not "necessarily render[] [older methods] unconstitutional,"[33] the courts likely will continue to be asked to determine whether *particular* methods, when compared directly to more humane alternatives proposed by appellants, "superadd terror, pain, or disgrace."[34]

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29. *Bucklew*, 139 S. Ct. at 1128–29.

30. *Id.* at 1129 (citing McGehee v. Hutchinson, 854 F.3d 488, 493 (8th Cir. 2017) and Arthur v. Comm'r, Ala. Dep't of Corr., 840 F.3d 1268, 1300 (11th Cir. 2016)).

31. *Id.* at 1125. The Court goes on to note that "[t]here are . . . many legitimate reasons why a State might choose, consistent with the Eighth Amendment, not to adopt a prisoner's preferred method of execution." *Id.* (internal citations omitted). It cites as examples *Glossip*, in which Oklahoma's choice of lethal injection drug was found not to be unconstitutional when the drugs suggested by Petitioners were not able to be procured by the state, and *Baze*, in which "preserving the dignity of the procedure" by preventing convulsions during death was upheld as a legitimate interest in choosing a method of execution, among others. *Id.* (citing *Baze*, 553 U.S. at 57). The Court also stated in *Bucklew* that wanting "not to be the first to experiment with a new, 'untried and untested' method of execution" is a legitimate reason not to adopt a new method. *Bucklew*, 139 S. Ct. at 1118.

32. Fulkerson & Kinnison, *supra* note 21.

33. *Bucklew*, 139 S. Ct. at 1125.

34. *Id.* at 1124.

B. Waiver of Eighth Amendment Rights and the Right to Be Free from a Cruel and Unusual Manner of Execution

Can Eighth Amendment protections be waived by defendants, and would waiver apply in the context of potentially cruel and unusual methods of execution? Part I.B.1 explores Eighth Amendment waiver generally, and Part I.B.2 examines the Supreme Court doctrine and scholarship addressing waiver in the context of unconstitutional manners of execution.

1. Waiver of Eighth Amendment Rights

The Eighth Amendment's protections against cruel and unusual punishment may be waived in some, but not all, contexts. For example, if an individual fails to raise an Eighth Amendment objection to the procedures used to sentence them to die at trial or on appeal as required by state procedural rules[35] or in a first federal habeas corpus petition, they waive the right to raise it subsequently.[36] These kinds of waivers do not require a finding that the waiver was personal to the defendant—who generally will be bound by their lawyers' failure to make timely and appropriate objections—much less that the waiver be knowing, intelligent, or voluntary.[37]

On the other hand, a defendant convicted of a crime such as rape may not under any circumstances elect to be executed, as the Court has held that capital punishment for the crime of rape is

35. Kirchmeier, *supra* note 19, at 631 n.127 (citing Coleman v. Thompson, 501 U.S. 722, 752 (1991) for the proposition that "an attorney error in failing to file a state habeas appeal on time was not 'cause' to excuse petitioner's procedural default"; citing Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977) for the proposition that "federal courts will not consider claim unless certain requirements are met where defendant's counsel failed to object to constitutional violation at trial"; and citing Herrera v. Collins, 506 U.S. 390, 427 (1993) (Scalia, J., concurring) for the notion that "there is no constitutional right to judicial consideration of newly discovered evidence of innocence brought forth after conviction").

36. Kirchmeier, *supra* note 19, at 631 n.126 (2000) (discussing the application of this strict waiver rule to Eighth Amendment cases in subsequent cases (citing McCleskey v. Zant, 499 U.S. 467, 502–03 (1991)).

37. *Id*. at 632, n.129 (describing the "deliberate bypass" rule created by Fay v. Noia, 372 U.S. 391, 438 (1963) that "allowed federal habeas petitioners to seek relief even if they procedurally defaulted state court remedies if the petitioner had not deliberately bypassed the state procedures"—a rule which was not followed in Wainwright v. Sykes, 433 U.S. 72, 87 (1977), in which the Court "required a federal habeas petitioner to show 'cause and prejudice' or 'actual innocence' before a federal court would review claims that were procedurally defaulted in the state courts").

disproportional and unconstitutional.[38] Similarly, defendants may not agree to be incarcerated in a constitutionally deficient facility, even if this choice were willingly and voluntarily made in exchange for an inducement.[39] Some punishments are inherently cruel and unusual, and the State may not impose them on individuals, regardless of the individual's wishes.

At other times, waivers of Eighth Amendment rights may be accepted, but only upon proof that the waiver was knowing, intelligent, and personal to the defendant. The Supreme Court has held, for example, that a capital defendant's choice to die by waiving the automatic right to appeal to a state appellate court, which is assured by most states' laws, must be personal, voluntary, knowing, and intelligent in order to preclude further judicial review.[40] In a 5-4 decision in *Gilmore v. Utah*, the Supreme Court rejected a "next friend" federal habeas corpus petition challenging Gary Gilmore's waiver of further appeals, concluding that Gilmore had made a knowing and intelligent decision to give up the right to further appeal;[41] the Court has applied this standard in subsequent cases.[42] The courts have further clarified the standard, allowing next friend petitions to proceed against the seeming will of a capitally-sentenced individual if that individual lacks a "rational and factual understanding of the

38. Steven G. Gey, *Contracting Away Rights: A Comment on Daniel Farber's "Another View of the Quagmire"*, 33 FLA. ST. U. L. REV. 953, 956 (2006) ("The Court's absolutist phrasing of the right to be free from cruel and unusual punishments could not be overridden by a contractual deal between a state and a prisoner convicted of rape who would prefer death to the (constitutionally permissible) punishment of life imprisonment.").

39. *Id.* ("Along the same lines, the state could not circumvent the Court's Eighth Amendment prison conditions rulings by bargaining with prisoners to consent to imprisonment in a facility whose conditions fell short of the Eighth Amendment minimum, in exchange for a shorter term of imprisonment.").

40. Kirchmeier, *supra* note 19, at 632 ("In the Eighth Amendment context, the voluntary, knowing and intelligent waiver standard does apply to capital defendants who desire to be executed and waive the right to appeal and the right to present mitigating evidence at trial.").

41. Gilmore v. Utah, 429 U.S. 1012 (1976); Kirchmeier, *supra* note 19, at 632 (discussing same). *See also* discussion *infra* Part III.C.

42. *See* Hammett v. Texas, 448 U.S. 725, 725 (1980) ("In the absence of any issue as to petitioner's competence to withdraw the petition filed against his will, there is no basis under Rule 60 for denying this motion."); Lenhard v. Wolff, 444 U.S. 807, 810 (1979) (Marshall, J., dissenting) ("The majority of this Court assumes that Bishop's conduct [in choosing not to present mitigating evidence or pursue appeals] waives the possibility of a challenge to his execution.").

consequences of his decision" to abandon appeals and proceed with an execution.[43]

2. Waiver of One's Eighth Amendment Right to Be Free from a Cruel and Unusual Manner of Execution

Can a defendant waive their right to be free from cruel and unusual methods of punishment? Part I.B.2.a examines the Supreme Court's *Stewart v. LaGrand* decision, and Part I.B.2.b provides a brief overview of scholarship in this area.

a. Supreme Court Doctrine: *Stewart v. LaGrand*

In *Stewart v. LaGrand*, the Court seemed to hold that LaGrand waived his right to be free from execution in a cruel and unusual manner.[44] However, as noted above, the Court did not solely premise its waiver finding on LaGrand's selection of a method of execution, but rather on his objection to that waiver in the context of a federal habeas corpus petition (as opposed, for example, to a state direct appeal or state post-conviction proceeding); any decision would require a new rule of federal constitutional law of the sort the Supreme Court has declined to issue in federal habeas corpus proceedings.[45] The Court's discussion of the issue was brief and without the benefit of full briefing

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43. John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICH. L. REV. 939, 943–46 (2005) (providing a summary of the caselaw setting the standard for competency to waive the right to appeal in a capital case and concluding that "a defendant is competent to waive his appeals and permit the state to carry out the death sentence if he has a rational and factual understanding of the consequences of his decision. . . . assuming of course that the waiver is knowing, intelligent and voluntary").

44. Stewart v. LaGrand, 526 U.S. 115, 119 (1999) ("By declaring his method of execution, picking lethal gas over the State's default form of execution—lethal injection—Walter LaGrand has waived any objection he might have to it.")

45. *Id.* ("To hold otherwise, and to hold that Eighth Amendment protections cannot be waived in the capital context, would create and apply a new procedural rule in violation of Teague v. Lane, 489 U.S. 288 (1989)."). Kirchmeier provides a helpful analysis of the significance of this sentence: "[B]ecause *LaGrand* came to the Court on habeas, the Court cited *Teague v. Lane* for the proposition that [a finding that Eighth Amendment rights could not be waived] would not benefit LaGrand because it would be a new rule," as *Teague v. Lane* holds that "a defendant may not benefit from a 'new rule' of law in federal habeas corpus proceedings if the new rule was announced after the defendant's conviction became final." Kirchmeier, *supra* note 19, at 640–41.

and argument, in the context of emergency rulings on motions associated with efforts to stay LaGrand's impending execution:[46]

> By declaring his method of execution, picking lethal gas over the state's default form of execution—lethal injection—Walter LaGrand has waived any objection he might have to it. To hold otherwise, and to hold that Eighth Amendment protections cannot be waived in the capital context, would create and apply a new procedural rule in violation of *Teague v. Lane*[.]

In his analysis of *LaGrand*, Jeffrey L. Kirchmeier notes that *Teague v. Lane* only applies in the habeas corpus context.[47] Under *Teague*, new rules do not apply to convictions that are already final, so a ruling that the Eighth Amendment right to be free from cruel and unusual manner of execution was not waivable would not benefit LaGrand.[48] Kirchmeier highlights the limitations of the holding, stating that "the Court indicated that it could reach a different result if a case were to reach the Court on a certiorari grant from a direct appeal rather than from habeas review and if the issue were not defaulted"; as a result, the question "remains open until the Court addresses the issue in a different procedural posture."[49] Further, as other commentators have noticed, the Court focused on LaGrand's repeated choice to die by lethal gas, despite being offered a chance to reconsider, which suggests the possibility of a different outcome in a case in which a capitally-sentenced individual tries to change their mind and is not allowed to do so.[50] Ronnie Lee Gardner, a person

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46. Kirchmeier, *supra* note 19, at 640 ("[T]he issue did not receive full briefing and argument before the Court. Perhaps the Court devoted little effort to the issue because of the time constraints dictated by Walter LaGrand's execution, which was scheduled for only hours after the Court's decision."). In addition, Kirchmeier highlights that since the Court concluded that the issue was procedurally defaulted, there was less incentive to analyze the issue in greater depth. *Id.*

47. Kirchmeier, *supra* note 19, at 640–41.

48. *Id.* at 641. Kirchmeier also notes two flaws in this reasoning: (1) the Court did not consider whether one of the *Teague* exceptions applied to this case, and (2) LaGrand arguably was not asking for a new rule since *Dear Wing Jung v. United States*, 312 F.2d 73 (9th Cir. 1962), was, in Kirchmeier's view, more on point than *Johnson* and would have supported LaGrand's case. *Id.* Additionally, lower court decisions had reached the opposite conclusion regarding the waivability of Eighth Amendment rights in this context. *Id.* at 640–41.

49. *Id.* at 641–42.

50. Christopher Q. Cutler, *Nothing Less Than the Dignity of Man: Evolving Standards, Botched Executions and Utah's Controversial Use of the Firing Squad*, 50 CLEV. ST. L. REV. 335, 395 (2003) ("[T]he *LaGrand* Court emphasized . . . that the defendant affirmatively elected to die by lethal gas, even when afforded a second opportunity to change his mind. One commentator opined that the Supreme Court

incarcerated on Utah's death row who tried to change his mind several times between the firing squad and lethal injection, demonstrates the possibility of such a case.[51]

b. Scholarship

In the years since the *LaGrand* decision, scholars have advanced numerous arguments both for and against the waivability of the Eighth Amendment right to be free from cruel and unusual methods of execution. Some have argued that the Eighth Amendment protection from cruel and unusual punishment serves societal functions and protects individual liberties, and so should not be waivable by the individual.[52] As articulated by Justice Marshall in his dissent in *Gilmore v. Utah*, "the Eighth Amendment . . . expresses a fundamental interest of society in ensuring that state authority is not used to administer barbaric punishments."[53] The Eighth Amendment also protects the public from exposure to gruesome state killings that might undercut their faith in the government.[54]

Scholars have supported this argument by analogizing to First Amendment Rights—rights that likely cannot be waived. The courts base First Amendment protections against establishing a state religion on societal values, a "defendant [likely] could not waive First Amendment rights . . . give[n] . . . the options of prison or attending the

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probably viewed LaGrand's choice of the gas chamber and subsequent constitutional challenge as a mere delay tactic . . . .").

51. *Id.* at 396 ("Gardner first chose the firing squad, fearing that 'lethal injection would leave him flopping on a gurney' . . . . Gardner later decided that he would prefer lethal injection. . . . A state district court later refused to let him again switch to the firing squad.").

52. *See, e.g.*, Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 869 (1987)

("Hornbook law states that a defendant can waive rights personal to himself but not those in which the government maintains an interest. Certainly the government has a substantial interest in preventing the 'illegal execution of a citizen.'"); *see also* Jane L. McClellan, Comment, *Stopping the Rush to the Death House: Third-Party Standing in Death-Row Volunteer Cases*, 26 ARIZ. ST. L.J. 201, 216 (1994) ("The state also has a strong interest in ensuring that trial and sentencing proceedings are fair and that only death-deserving defendants receive the death penalty.").

53. Gilmore v. Utah, 429 U.S. 1012, 1019 (1976) (Marshall, J., dissenting).

54. Kirchmeier, *supra* note 19, at 647–49 ("[T]he public still reads and hears reports about executions . . . . For example, Americans who read about the July 1999 electric chair execution of Allen Davis—where blood gushed from his mask and oozed through his chest strap—may think less of themselves and their government.").

judge's church every week. . . . The ban on cruel and unusual punishments, as well as the Establishment Clause of the First Amendment, are unique because they help 'define who we are as a nation.'"[55]

Other observers have analyzed the question considering the irreversibility of decisions in the death penalty context, arguing that they deserve greater protections.[56] Other differences between death and non-death cases have been noted as well, including that death penalty volunteerism is different from other criminal waivers because capital defendants by definition do not receive a lesser sentence in the way that defendants waiving rights in criminal contexts frequently do.[57]

On the other side of the issue, some advocate for judicial enforcement of waivers of Eighth Amendment rights as a recognition of the dignity of capital defendants and their ability to decide for themselves how they would like to die.[58] The emphasis on dignity and choice cuts both ways: others argue that, from a retributive perspective, allowing a capital defendant to select their punishment contradicts the underlying rationale for capital punishment that the defendant's offenses create a moral imperative to annihilate their personal freedoms by taking their life.[59]

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55. *Id*. at 645–46.

56. Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 174 (1999) ("[T]he irrevocability of the sentence justifies greater oversight than would be acceptable in noncapital cases."); White, *supra* note 53, at 867–68 ("The irrevocability of the death penalty further complicates the process. . . . [A] decision to elect execution may have speedy and irrevocable consequences.").

57. King, *supra* note 57, at 174 ("[U]nlike the noncapital defendant who when pleading guilty might at least expect sentencing concessions in return for his waiver, the death volunteer receives no lesser penalty in exchange for his promise to forego trial or death-sentencing procedures, so prophylactic protection may be justified out of concern for the defendant.").

58. *See, e.g.*, Blume, *supra* note 43, at 951–52 (2005) ("One federal judge, for example, has said that it is completely rational for a death-row inmate to 'forgo the protracted trauma of numerous death row appeals,' and that not honoring such a decision 'den[ies the defendant's] humanity.'"); *see also* McClellan, *supra* note 53, at 215 ("Inmates enjoy a right to personal autonomy and bodily integrity as enunciated in the so-called 'right to die' cases.").

59. G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness, and Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860, 904 (1983) ("Even the State's interest in retribution is diluted in the volunteer context. To the extent that execution is sought only because the inmate considers it less painful than life imprisonment, the State's interests in retribution are probably better served by requiring life imprisonment."). This point

All of this previous scholarship focuses primarily on *whether* individuals can waive their Eighth Amendment protections against death by cruel and unusual methods of execution. This Note addresses the question from a different perspective: how, as a practical matter, such waivers ought to occur. Assuming capitally-sentenced individuals may constitutionally choose to be executed in a cruel and unusual manner, what standards should courts apply in determining whether a valid waiver has occurred? Although the Supreme Court obliquely referenced the familiar knowing, voluntary, and intelligent standard by citing its prior *Johnson v. Zerbst* decision,[60] this Note highlights a number of challenges the diligent application of that standard would entail in the context of "method of execution" choices. Illustrating contexts in which the standard is applied in a semi-rote manner, the Note proposes rigorous procedures more appropriate to the context of State-imposed death, and then concludes by considering whether even those steps would sufficiently solve the problem.

C. Knowing, Voluntary, and Intelligent Standard

When evaluating the decision of a person on death row to abandon appeals, courts consider whether the decision is (1) knowing, (2) voluntary, (3) intelligent, and (4) whether the incarcerated person is mentally competent.[61] The determination typically hinges on the

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was also made by Justice Stevens, who wrote in his dissent in *Baze v. Rees* that the requirement of painlessness, "while appropriate and required by the Eighth Amendment's prohibition on cruel and unusual punishment, actually undermines the very premise on which public approval of the retribution rationale is based." Baze v. Rees, 553 U.S. 35, 81 (2008) (Stevens, J., dissenting). Thomas E. Robins highlights the tension between these values, discussing the "intellectual quagmire" that results from aspiring to an evolving standard of decency while valuing retribution. Thomas E. Robins, *Retribution, the Evolving Standard of Decency, and Methods of Execution: The Inevitable Collision in Eighth Amendment Jurisprudence*, 119 PENN ST. L. REV. 885, 885 (2015).

60. Stewart v. LaGrand, 526 U.S. 115, 119 (1999). *LaGrand* presumably cites *Johnson v. Zerbst* for the proposition that a waiver is "ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

61. Meredith Martin Rountree, *Criminals Get All the Rights: The Sociolegal Construction of Different Rights to Die*, 105 J. CRIM. L. & CRIMINOLOGY 149, 157 (2015) (citing Godinez v. Moran, 509 U.S. 389, 400–01 (1993)) (knowing, voluntary, intelligent, and competent). This standard mirrors the evaluation that the court makes when accepting a guilty plea. Typically, this examination amounts to a series

defendant's mental competency, which places the bar for the first three prongs fairly low.[62] As articulated in the Supreme Court's decision in *Rees v. Peyton,* the standard is whether the incarcerated person had the "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises."[63] Courts subsequently have grappled with the question of whether a prisoner is competent if they are able to apply logical reasoning to the decision but are emotionally affected by severe depression.[64] In *Godinez v. Moran*, the Supreme Court held that an incarcerated person is competent if they have "sufficient present ability to consult with [their] lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against [them]."[65]

The perfunctory analysis courts apply to the test's first three prongs—knowledge, voluntariness, and intelligence—is insufficient when applied to the selection of a cruel and unusual method of execution. Subjecting oneself to extreme pain is a more barbaric act than simply consenting to die, warranting greater constitutional protection for the individual and raising greater moral implications for the State and for society. The minimum criteria for accepting the premise that we, as a society, would inflict a cruel and unusual manner of death on a person should be that the person has all relevant legal and medical information and that the court is satisfied that the decision is truly informed and considered. The next Part explores the

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of statements made by the defendant confirming the knowing, voluntary, and intelligent nature of their waiver—namely, that they have received advice from counsel, understand the consequences, and have not been coerced. *Id.*; *see also* Rees v. Peyton, 384 U.S. 312, 314 (1966) (defining competency).

62. Rountree, *supra* note 62, at 157–58; *see also* J.C. Oleson, *Swilling Hemlock: The Legal Ethics of Defending a Client Who Wishes to Volunteer for Execution*, 63 WASH. & LEE L. REV. 147, 168–69 (2006) ("The *Dusky* and *Rees* standards are low thresholds for a defendant to clear. Even Colin Ferguson, who represented himself at trial by spewing rambling conspiracy theories . . . was found competent. '[S]hort of severe mental instability or sheer idiocy,' the defendant is found competent.").

63. Rees v. Peyton, 384 U.S. 312, 314 (1966).

64. Godinez v. Moran, 509 U.S. 389 (1993); Rountree, *supra* note 62, at 158–59 (discussing same).

65. Rountree, *supra* note 62 at 159 (citing *Godinez*, at 396–97). The test focuses on "what a defendant knows, not on what he feels," meaning that "it is entirely possible for a clinically depressed but non-psychotic defendant to waive his appeals and to volunteer for execution." Oleson, *supra* note 63, at 169–70.

factors keeping defendants from making knowing, voluntary, and intelligent choices with regard to methods of execution.

II. Applying the Knowing, Voluntary, and Intelligent Standard to Waiver of the Eighth Amendment Right to be Free from Cruel and Unusual Methods of Execution

This Part examines the application of the knowing, voluntary, and intelligent standard to waiver of the right to be free from cruel and unusual methods of execution. Part II.A explains this Note's focus on the experience of the capitally-sentenced individual, rather than the experience of the public who view executions. Part II.B addresses our current lack of understanding about many of the methods of execution being considered by states as substitutes to lethal injection. It argues that this lack of knowledge of the likelihood of pain associated with various methods prevents capital defendants from being able to make a knowing choice. In doing so, it provides a brief overview of existing scholarship on death by lethal injection, electrocution, lethal gas, and firing squad. Part II.C considers the issues of timing and medical advice as factors in making a thoughtful and informed (knowing) decision. Finally, Part II.D examines the question of voluntariness in the context of a masochistic—and thus arguably irrational—decision.

A. Choosing a Perspective from Which to Assess Methods of Death

This Note examines various methods of execution through the lens of risk of pain to the capital defendant; however, much death penalty literature centers instead on the spectator's experience. The injection of a paralytic agent in the traditional three-drug cocktail used in lethal injection, for example, makes the execution more palatable for the public; in doing so, it also makes it impossible to tell from external signals what the incarcerated person is feeling.[66] The muscle-contracting effects of electrocution can serve the same function.[67] Viewed the other way, one of the common criticisms of execution by firing squad is that it is "messy,"[68] likely because of the graphic nature

66. *See* discussion *infra* Part II.B.1.

67. *See* discussion *infra* Part II.B.2.

68. Deborah W. Denno, *The Firing Squad As "A Known and Available Alternative Method of Execution" Post*-Glossip, 49 U. MICH. J.L. REFORM 749, 786–87 (2016) (quoting Wood v. Ryan, 759 F.3d 1076, 1103 (9th Cir. 2014), *vacated*, 573 U.S. 976 (2014) (Kozinski, C.J., dissenting from denial of rehearing en banc)).

of the death for spectators.[69] To what degree do we strive for a death that is less horrifying to watch, instead of one that is less horrifying to endure?

> Meir Dan-Cohen addressed this point, writing:
>
> First, objections to various forms of punishment are rife with such adjectives as *horrible* or *gruesome*, which do not refer to the victim's experience but to the spectator's. One result of invoking the criteria these adjectives represent is that an execution that is less agonizing to the inmate but more shocking to the spectator, such as beheading, is banned in favor of harsher forms of execution, such as the electric chair, that have the opposite effects. As to the second example, one reliable measure of harshness is the offender's own preference. But in a number of cases, courts have overruled the offender's preference, such as when sex offenders were denied the option of castration, which they preferred to a long prison term, on the ground that castration violates the Eighth Amendment whereas a lengthy prison term does not. In neither of these instances do judgments of impermissible punishment align along a dimension of severity, where severity measures the suffering or the deprivation visited on the offender.[70]

The Supreme Court has addressed the function of a paralytic drug in obscuring signs of distress as a legitimate State interest. In *Baze v. Rees*, the plurality concluded that "[t]he Commonwealth [of Kentucky] has an interest in preserving the dignity of the procedure,

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69. C.J. Kozinski went on to write, "firing squads can be messy, but if we are willing to carry out executions, we should not shield ourselves from the reality . . . . If we, as a society, cannot stomach the splatter from an execution carried out by firing squad, then we shouldn't be carrying out executions at all." *Wood*, 759 F.3d at 1103 (Kozinski, C.J., dissenting from denial of rehearing en banc). This criticism was recently echoed by a defense attorney in a case in which capital defendants in Oklahoma argued for a firing squad as a constitutional alternative to Oklahoma's three-drug method of lethal injection, which they argued was unconstitutional. Defense attorney Jim Stronski is quoted as saying, "While it may be gruesome to look at, we all agree it will be quicker," highlighting the tension between the experience of the capital defendant and the experience of the spectator in selecting methods of execution. Sean Murphy, *Oklahoma death row inmates seek firing squad as alternative*, AP NEWS (Jan. 10, 2022), https://apnews.com/article/executions-oklahoma-oklahoma-city-f34f4966f70f688182de191f0d4a621f [https://perma.cc/EUZ4-8JNK].

70. Meir Dan-Cohen, *On the (Im)morality of the Death Penalty*, 23 BERKELEY J. CRIM. L. 194, 200 (2018).

especially where convulsions or seizures could be misperceived as signs of consciousness or distress."[71] Justice Stevens addressed this point in his concurring opinion, writing that "[w]hatever minimal interest there may be in ensuring that a condemned inmate dies a dignified death, and that witnesses to the execution are not made uncomfortable by an incorrect belief (which could easily be corrected) that the inmate is in pain, is vastly outweighed by the risk that the inmate is actually experiencing excruciating pain that no one can detect."[72] In arguing that the "dignity" of the execution is a valid State interest, the Court arguably privileges the palatability of the method of death over its painlessness.

Some would argue that it is mainly the capital defendant that has a substantial interest in a painless—or close to painless—death, and that the State's interest centers only on the perspective of the spectator. However, the State and the public do have a substantial interest in the painlessness of executions. The humanity of our executions reflects the level of barbarism our society sanctions;[73] to inflict excruciating pain on a person reflects poorly on our societal moral framework, regardless of whether that pain is visible to us. Our communal condemnation of hit-and-run drivers, and the outrage that many Americans felt over individuals exposed to COVID-19 who refused to quarantine, underscore how pervasive this attitude is in our culture: failing or refusing to see the consequences of one's actions for another person does not negate moral culpability.[74] Additionally,

71. Baze v. Rees, 553 U.S. 35, 57 (2008). The Court cited *Baze* for this proposition in 2019. Bucklew v. Precythe, 139 S. Ct. 1112, 1125 (2019).

72. *Baze*, 553 U.S. at 73 (Stevens, J., concurring).

73. Kirchmeier, *supra* note 19, at 648–49 (discussing the negative effects of torturous killing on the public and describing a debate in the House of Lords in which Lord Chancellor Gardiner stated that punishment should be "consistent with our self respect"). Kirchmeier also highlights Justice Marshall's dissents in *Gilmore v. Utah*, *Lenhard v. Wolff*, and *Whitmore v. Arkansas*, in which Marshall emphasizes "the harm that imposing such a punishment causes to our basic societal values and to the integrity of our system of justice." *Id.* at 633–34 (quoting Whitmore v. Arkansas, 495 U.S. 149, 173 (1990) (Marshall, J., dissenting)).

74. Interestingly, the experiences of prison guards involved in executions support this point; guards frequently feel a stronger emotional impact when less directly involved in the act of killing and closer proximity to those ultimately impacted. PENAL REFORM INT'L, PRISON GUARDS AND THE DEATH PENALTY 2 (2015), https://cdn.penalreform.org/wp-content/uploads/2015/04/PRI-Prison-guards-briefing-paper.pdf [https://perma.cc/7EGK-WY67] ("[M]oral disengagement has . . . an inverse relationship to proximity to the killing of the prisoner. Guards sitting with the victim's family found it harder to disengage than those actually touching the prisoner, and guards who handle prisoners have been reported to bear

knowing that the State inflicts excruciating pain on individuals undercuts the legitimacy of State executions by eroding public support.[75] For these reasons, the Eighth Amendment is frequently analyzed against the backdrop of current social standards.[76] As the Court stated in *Trop v. Dulles*, the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[77] Surely, "decency" centers on the humanity of the execution for the individual undergoing it, and not the palatability for spectators. For these reasons, this Note focuses on the experience of the capital defendant.

B. Not Enough is Known About Current Methods of Execution

It is impossible to know how much pain an individual feels during an execution. By definition, executed persons cannot be questioned about the experience, forcing doctors and other experts to have to speculate about the effect. This Section explores what is currently known about the level of pain associated with death by lethal injection, electrocution, lethal gas, and firing squad, as well as the potential for human error and other factors that affect the ability to make a knowing decision when electing these methods of execution.

1. Lethal Injection

Lethal injection is the standard method of execution in most states with capital punishment.[78] Although the traditional three-drug cocktail may be of diminishing interest going forward given how often constitutional challenges to it have failed and given its current unavailability, remaining questions about it illustrate the difficulty of assuring that a choice to be executed using lethal injection is truly knowing. The traditional three-drug cocktail is made up of an

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a heavier mental burden than those shooting them."). Some guards experience symptoms of post-traumatic stress disorder. *Id.*

75. Kirchmeier, *supra* note 19, at 647–49.

76. *Id.* at 643 ("Unlike the analysis used regarding other rights, the Eighth Amendment analysis used by the Court to evaluate each punishment is based, in large part, on current societal standards, illustrating the public's interest in the Eighth Amendment.").

77. Trop v. Dulles, 356 U.S. 86, 101 (1958) (arguing that denaturalization as punishment violates the Eighth Amendment).

78. DEATH PENALTY INFO. CTR., *supra* note 16 (describing the "predominance of lethal injection as the preferred means of execution in all states in the modern era" and providing a list of states for which this is the case).

anesthetic, which is injected first.[79] A second drug further anesthetizes and paralyzes the incarcerated person before the third drug stops the heart.[80] The paralysis the second drug induces keeps the subject from manifesting pain, no matter how intense it may be, notwithstanding the failure of the painkilling drug to become or remain effective while the second and third drugs are administered.[81] An oft-cited study published in *The Lancet* found that it is possible for the sedative sodium thiopental that often is administered as the first drug in the three-drug cocktail to wear off before death.[82] The study's conclusions have sparked debate[83] over how to measure concentrations of sodium thiopental in the blood and how different concentrations affect consciousness of pain. These conclusions only highlight scientists' lack of consensus or confidence as to incarcerated people's level of consciousness at the time the other drugs suffocate them and induce heart failure.

Human error by non-medical technicians often used in lethal injections adds to the variability and uncertainty of the risk of pain in any given case. Such error can take a number of forms, including improper mixing of drugs, erroneous calculation of dosage based on a prisoner's body weight, failure to administer the full amount, faulty timing between administration of anesthesia and the fatal drug, or

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79. Fulkerson & Kinnison, *supra* note 21, at 932–33 ("[In] 1977 . . . Oklahoma adopted the first lethal injection legislation in the world. . . . The three drugs included the sedative sodium thiopental, pancuronium bromide as a paralytic agent, and potassium chloride to stop the heart. . . . The three-drug protocol . . . was in use in almost all death penalty states by 2009.").

80. *Id.*

81. Adam Liptak, *Critics Say Execution Drug May Hide Suffering*, N.Y. TIMES (Oct. 7, 2003), https://www.nytimes.com/2003/10/07/us/critics-say-execution-drug-may-hide-suffering.html (on file with the *Columbia Human Rights Law Review*) ("Pancuronium bromide paralyzes the skeletal muscles but does not affect the brain or nerves. A person injected with it remains conscious but cannot move or speak.").

82. Leonidas G. Koniaris et al., *Inadequate Anesthesia in Lethal Injection*, 365 LANCET 1412, 1412 (2005) ("Toxicology reports from Arizona, Georgia, North Carolina, and South Carolina showed that post-mortem concentrations of thiopental in the blood were lower than that required for surgery in 43 of 49 executed inmates (88%); 21 (43%) inmates had concentrations consistent with awareness.").

83. *See* Mark JS Heath et al., *Inadequate Anaesthesia in Lethal Injection for Execution*, 366 LANCET 1073 (2005) (highlighting factors such as the diffusion of thiopental into surrounding tissue in the hours after death and ambiguity about the thiopental concentration necessary to prevent consciousness as flaws in the study).

failure properly to inject into a vein.[84] The American Medical Association's (AMA) code of ethics does not allow members to aid in executions,[85] increasing the risk of error by ensuring that these essentially medical procedures are not administered by professionals.[86] In the absence of any certainty as to the likelihood or degree of pain associated with a particular execution, or of the usual error or failure rates,[87] it is impossible for a capital defendant to make a truly knowing decision.

In recent years, the traditional three-drug cocktail has begun to be replaced by a new kind of lethal injection. In 2019, the Department of Justice followed the lead of several states[88] and

84. The Associated Press, *Once Humane, Lethal Injection Now Under Fire*, NBC NEWS (Sept. 29, 2007, 3:04 AM), https://www.nbcnews.com/id/wbna21037401 [https://perma.cc/C779-RSG4] ("The executioner could inaccurately calculate the dosage needed for an inmate of a given body weight. Or the executioner could fail to administer the full amount, mix the drug improperly, or wait too long between giving the anesthesia and the lethal substance."). Other examples of recent human error include a doctor involved in "dozens" of executions who "was quoted recently as saying he was dyslexic and occasionally altered the amounts of anesthetic given," and an execution in Florida in which the executioner "mistakenly pushed clear through [the capital defendant's] veins and into the flesh of his arm." *Id.*; *see also* Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 137 app. 1, tbl.9 (2002) (listing and describing botched executions by lethal injection performed in the 1980s-2000s).

85. *Code of Medical Ethics Opinion 9.7.3*, AMA, https://www.ama-assn.org/delivering-care/ethics/capital-punishment [https://perma.cc/T2ZK-NUPK] (stating that, "as a member of a profession dedicated to preserving life when there is hope of doing so, a physician must not participate in a legally authorized execution" and defining physician participation as falling into at least one of "the following categories: (a) Would directly cause the death of the condemned. (b) Would assist, supervise, or contribute to the ability of another individual to directly cause the death of the condemned. (c) Could automatically cause an execution to be carried out on a condemned prisoner").

86. *Id.* Some physicians do choose to participate in executions, despite the AMA's ethical prescriptions; their names are typically confidential. Lee Black & Robert M. Sade, *Lethal Injection and Physicians: State Law vs Medical Ethics*, 298 JAMA 2779 (2007).

87. According to one estimate, 7.12% of executions performed by lethal injection between 1890-2010 were botched. DEATH PENALTY INFO. CTR., *Botched Executions*, https://deathpenaltyinfo.org/executions/botched-executions [https://perma.cc/E4J7-R9GA] (citing AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA'S DEATH PENALTY (2014)). However, as noted above, the use of a paralytic agent makes it more difficult to determine whether the procedure worked as intended.

88. DEATH PENALTY INFO. CTR., *Overview of Lethal Injection Protocols*, https://deathpenaltyinfo.org/executions/lethal-injection/overview-of-lethal-

announced that federal executions would use the new single-drug method, in which a large quantity of one kind of drug is administered.[89] One method is to use a large dose of pentobarbital, which functions "essentially [like] an overdose," causing the central nervous system to "shut down."[90] However, since the available supply of pentobarbital in the United States is limited as a result of the same drug shortages plaguing the use of the three-drug cocktail, states like Texas have used versions of pentobarbital made by compounding firms;[91] compounding firms are not regulated with the same stringency as large drug manufacturers, which can lead to shorter-lasting drugs which fail more often.[92] Texas executed eleven people in 2018 using this method, and in their final moments, five said they felt their bodies burning.[93] Midazolam, another option for single-drug executions, is designed to function as a sedative; however, some anesthesiologists believe the drug's properties as a painkiller are deficient, leaving capital defendants to experience the full force of its excruciating side-effects as Clayton Lockett did in 2014.[94] Single-drug lethal injections thus create several additional risks. These risks, such as the questionable strength, shelf-life, and time to take effect (caused in part by increased use of compounding firms)[95], prevent a fully knowing waiver.

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injection-protocols [https://perma.cc/PYV8-GBZW] ("Eight states have used a single-drug method for executions—a lethal dose of an anesthetic . . . . Six other states have at one point or another announced plans to use a one-drug protocol, but have not carried out such an execution . . . .").

89. Susie Neilson, *Lethal Injection Drugs' Efficacy And Availability For Federal Executions*, NPR (July 26, 2019, 7:11 PM), https://www.npr.org/2019/07/26/745722219/lethal-injection-drugs-efficacy-and-availability-for-federal-executions [https://perma.cc/PKY5-JCYK].

90. *Id.*

91. *Id.*

92. Chris McDaniel, *Inmates Said The Drug Burned As They Died. This Is How Texas Gets Its Execution Drugs*, BUZZFEED NEWS (Nov. 28, 2018, 5:09 PM), https://www.buzzfeednews.com/article/chrismcdaniel/inmates-said-the-drug-burned-as-they-died-this-is-how-texas [https://perma.cc/MN4Q-QTJH].

93. *Id.*

94. Neilson, *supra* note 90. In Clayton Lockett's case, the inability to find an appropriate vein, the lack of appropriate needles and tape, and the fact that the drugs took effect later than anticipated left Lockett to die in agony; "[h]e was declared dead of a heart attack more than an hour after being strapped to the gurney." Ariane de Vogue, *New Documents Reveal Botched Oklahoma Execution Details*, CNN (Mar. 16, 2015, 6:33 PM), https://www.cnn.com/2015/03/16/politics/clayton-lockett-oklahoma-execution/index.html [https://perma.cc/9YTX-DGXU].

95. Compounding firms either have been or will be used to create lethal injection drugs by at least ten states. DEATH PENALTY INFO. CTR., *supra* note 89

2. Electrocution

No studies answer the questions of whether death by electrocution is painful and whether it is instantaneous.[96] As with lethal injection, the method of execution itself likely keeps observers from discerning signs of pain that might well be present. Electrical current causes the muscles to contract, which can prevent a person from showing outward signs of distress, despite the potentially excruciatingly painful effects described below.[97]

Descriptions of post-mortem burns indicate, however, that if death is not immediate, it is indeed likely to be excruciatingly painful.[98] Studies and observations have suggested that death is not always instantaneous. Factors affecting the time between electric shock and time of death include skin resistance, skull thickness/resistance, type of electrode used, and type/amount of conductive solution used.[99] Studies also indicate that electrocution can lead to painful conditions

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("At least ten states have either used or intend to use compounding pharmacies to obtain their drugs for lethal injection.").

96. Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death Over the Century*, 35 WM. & MARY L. REV. 551, 642 (1994). Indeed, this notion seems doubtful: "Given that a human being can survive being struck by a lightning bolt that potentially carries a charge of 300,000 volts, an electric chair designed to induce 'instantaneous' death seems destined to fail when operating at less than one percent of that voltage and a lower amperage." Timothy S. Kearns, *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, 220 (2005).

97. Denno, *supra* note 97, at 640 (describing the common thought that "the failure of the convict to move is a sign that [they] cannot feel pain," when in fact they "cannot move because all of [their] muscles are contracted maximally," which is "[a] physiological effect that in itself is enormously painful and further prevents the prisoner from crying out or providing other outward signs of other massively painful effects of electrocution such as third degree burns and an enormous heating up of bodily fluids throughout the body").

98. *Id.* at 643–45.

99. *Id.* at 642 ("These differing effects are due to a range of factors: (1) skin resistance . . . (2) skull thickness and resistance . . . (3) the type of electrode used for stimulation; and (4) the type and amount of conductive solution used."). The idea that different bodies react differently to electrical current is also discussed in electrical safety training materials available on the website of the U.S. Department of Labor's Occupational Safety and Health Administration. *Train-the-Trainer: Basic Electricity Safety*, https://www.osha.gov/sites/default/files/2019-04/Basic_Electricity_Materials.pdf [https://perma.cc/CL2R-CULL] ("[T]he damage that the current of electricity can do depends on different factors: the intensity of the voltage, the length of the exposure, the muscle structure of the individual, and other different conditions. People with less muscular tissue are usually affected at lower levels of electric current.").

such as "boiling body fluids, asphyxiation, and cardiac arrest," as well as "third and fourth degree burns where the electrodes come in contact with their scalps and legs."[100] Although some experts believe that electrocution incapacitates the central nervous system too quickly for it to register pain,[101] others dispute this conclusion given the insulative components of the skull that protect the brain from the most intense impacts of the electric shock and thus arguably allow the brain to register pain for a period of time before losing consciousness.[102]

Death by electrocution is thought to occur by asphyxia and cardiac arrest, which can leave the electrocuted person painfully gasping for air.[103] However, the exact cause of death is unclear. Additionally, it may be that the intense damage to the nervous system which leads to asphyxia and cardiac arrest also affects the brain's capacity to register pain.[104] Even if that is so, the amount of pain a person suffers seems to be related to the incarcerated person's personal "physiological resistance,"[105] making it difficult for the executioner to calculate the correct voltage and duration to make death brief and relatively painless.

Though perhaps less publicized in recent years than botched executions by lethal injection, there is also a risk of error in executing an incarcerated person using electrocution. Accounts of botched electrocutions in the 1980s and 1990s include repeated attempts to kill the person after the initial attempt(s) failed, as well as electrodes catching on fire, which leaves people alive but with severe burns.[106] The details of people's physiological responses to these burns and to the shocks themselves are gruesome and graphic.[107]

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100. Denno, *supra* note 97, at 637.

101. *Id.* at 639.

102. *Id.* at 639–40. Denno concludes that "no study has offered tangible evidence that suggests that an electrocuted person may lose consciousness and all sense of pain immediately." *Id.* at 640.

103. *Id.* at 638.

104. *Id.* at 638–39 ("What really causes death is unclear . . . . Thus, necropsy reports show that the electric chair does not cause death by a fatal abnormality of heart rhythm, but by massive electrical damage to the nervous system.").

105. *Id.* at 642–43.

106. *Id.* at 665–74; *see also* Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 137–38 app. 1, tbl.8 (2002) (listing botched electrocutions performed in the 1970s-1990s and describing flaming electrodes, sparks and smoke emanating from capital defendants' bodies, and repeated attempts to kill the capital defendants).

107. Deborah W. Denno, *supra* note 97, at 665–74 (providing detailed accounts of botched executions in which capital defendants' skin turned black and produced

Given all of these uncertain variables, how is a capital defendant to ascertain the likelihood of excruciating pain from electrocution, much less to compare it to that associated with other execution methods? As it stands, if a person on death row chooses to be electrocuted, they cannot know how their body will react; whether or not mistakes will be made; whether, if everything goes according to plan, the subjective experience will be excruciatingly painful; and how likely it is that things will tortuously deviate from plan. These considerations seriously undercut the possibility of knowing waiver.

3. Lethal Gas

As discussed above, cyanide gas is a method of execution previously used, abandoned, and now being reconsidered by the state of Arizona. California also used this form of execution into the 1990s, generating litigation in the District Court for the Northern District of California about the effects of cyanide gas. In that case, *Fierro v. Gomez*, expert witnesses presented fundamentally different depictions of the experience of death by breathing cyanide gas.[108] Plaintiffs' experts[109] described the effects of the method as follows:

> [C]yanide-induced oxygen deprivation is experienced by the inmate as "intense suffocation" and "air hunger." During an execution by lethal gas, an inmate may lose and subsequently regain consciousness several times, drifting in and out of conscious experience of the suffocating effects of cyanide gas.
>
> In addition, . . . lactic acid, which builds up in the cell, creat[es] a painful condition known as acidosis. . . . [T]his pain is similar to the pain accompanying intense physical activity or a heart attack.
>
> . . . [C]yanide inhalation can lead to tetany, a painful sustained muscular contraction or spasm. Tetany may be manifested by . . . muscular contractions so severe that the body is "arched

smoke or flames; in which they moaned or continued breathing for extended periods of time; and in which blood ran from their eyes and noses, among other accounts).

108. Fierro v. Gomez, 865 F. Supp. 1387 (N.D. Cal. 1994), *aff'd*, 77 F.3d 301 (9th Cir. 1996), *cert. granted*, *judgment vacated*, 519 U.S. 918 (1996), and *vacated sub nom*. Fierro v. Terhune, 147 F.3d 1158 (9th Cir. 1998).

109. Four experts testified for plaintiffs: Kent R. Olson, M.D., a medical toxicologist; John Friedberg, M.D., a neurologist with expertise in determining levels of consciousness and pain; Richard Traystman, Ph.D., an expert on hypoxia; and Robert Kirschner, M.D., a pathologist. *Id.* at 1393–94.

> backwards like a bridge," with contractions of sufficient force to "compress and fracture the vertebrae." Other possible manifestations of tetany include 1) carpal pedal spasm, in which the muscles of the hands and feet contract so severely that they bend and twist in an unnatural and painful manner; and 2) "sardonic smile," in which the lip muscles are pulled tightly away from the teeth. To a conscious person, tetany is extremely painful.
>
> . . . [C]yanide-induced oxygen debt causes the body to release very large amounts of adrenaline. . . . This adrenaline discharge is painful, especially in association with the intense muscle activity and acidosis caused by cyanide poisoning.[110]

Defendants' experts,[111] on the other hand, testified that cyanide gas causes the person to lose consciousness quickly as a result of several simultaneous physiological responses, and that it limits the ability of the nerves to transmit pain messages to the brain.[112] They testified that these effects happen before any of the painful effects described above can begin,[113] making this a fast and relatively painless death. The difference in findings between these two sets of experts highlights the uncertainty in the scientific community, and thus the difficulty with finding that a choice to be killed using cyanide gas is knowing. If scientists cannot agree, how can a capital defendant make a truly knowing choice?

Nitrogen is another kind of lethal gas to which states are turning. Its use is specifically provided for in Alabama's and Mississippi's manner of execution statutes,[114] and as an alternative method in Oklahoma if lethal injection is deemed unconstitutional.[115]

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110. *Id.* at 1396–97 (citations omitted).

111. Two experts testified for defendants: Dr. Steven Baskin, a toxicologist with expertise in the effects of cyanide, and Alan Hall, M.D., a doctor of emergency medicine and medical toxicology. *Id.* at 1394–95.

112. *Id.* at 1397.

113. *Id.*

114. ALA. CODE § 15-18-82.1(b) (2022) ("A person convicted and sentenced to death for a capital crime at any time shall have one opportunity to elect that his or her death sentence be executed by electrocution or nitrogen hypoxia."); MISS. CODE. ANN. § 99-19-51(1) (2022) ("[T]he manner of inflicting the punishment of death shall be by one of the following: . . . (b) nitrogen hypoxia . . . .").

115. OKLA. STAT. tit. 22, § 1014(B) (2022) ("If the execution of the sentence of death as provided in subsection A of this section is held unconstitutional by an appellate court of competent jurisdiction or is otherwise unavailable, then the sentence of death shall be carried out by nitrogen hypoxia.").

Nitrogen deprives the body of oxygen, causing one to lose consciousness quickly.[116] Accidental deaths, medical studies on animals, and the use of nitrogen gas in veterinary euthanasia all indicate that this method of death is both quick and painless.[117] The differences between the effects of cyanide gas and nitrogen introduce an interesting hypothetical: What would happen if a capital defendant were to select "lethal gas" at a time when nitrogen was being used by the state, and the state were then to substitute this method for cyanide gas? Moreover, how is a capital defendant to make an informed choice, given the differences between various methods of death by "lethal gas"?

4. Firing Squad

South Carolina recently revived another method of execution: death by firing squad.[118] Four states currently use firing squads as an alternative manner of execution.[119] The most comprehensive set of accounts of death by firing squad[120] comes from Utah, which has carried out all three executions by firing squad in the United States since the 1970s.[121] The Utah protocol involves strapping the person to a chair with a target over their heart and having five gunmen shoot at the same time.[122]

Again, there is insufficient evidence to determine whether death by firing squad is painful.[123] Experimentation with

116. Kevin M. Morrow, *Execution by Nitrogen Hypoxia: Search for Scientific Consensus*, 59 JURIMETRICS J. 457, 470–71 (2019). This is not unique to nitrogen; other physiologically inert gases function similarly, causing death by replacing oxygen. Grady & Hoffman, *supra* note 13. A United States Chemical Safety and Hazard Investigation Board report indicated that a person can lose consciousness in one to two breaths. *Id.*

117. Morrow, *supra* note 117, at 470–71. This is not a unanimous consensus in the medical community, however; some doctors have concerns about whether nitrogen inhalation can cause feelings of suffocation. Grady & Hoffman, *supra* note 13.

118. Wamsley, *supra* note 13.

119. DEATH PENALTY INFO. CTR., *supra* note 16.

120. Denno, *supra* note 69, at 781–84.

121. DEATH PENALTY INFO. CTR., *supra* note 16.

122. Denno, *supra* note 69, at 781–84. Interestingly, the Utah State Prison's Execution Procedures seem to consider the guilt felt by executioners, and specify that one of the gunmen should be given a rifle with a blank round; since the gunmen are not told whose rifle contains the blank, this process mitigates guilt for the execution. *Id.* The firing squad is thus arguably more humane not only for the capital defendant, but for the executioners as well.

123. *Id.* at 785–87. Denno provides a brief summary of existing scholarship in a footnote, referring to Martin R. Gardner, *Executions and Indignities—An Eighth*

electrocardiograph measurements taken during an execution in 1938 indicates that death occurred approximately 15 seconds after shooting, and the most comprehensive study of past executions to date in the United States and abroad indicates that death by firing squad likely causes significantly less pain than other methods, [124] except perhaps for the guillotine.[125]

There is at least some possibility of human error in the form of missed shots caused by bad marksmanship, misaligned weapons, or failure to restrain the person to assure that they—or the target—do not move.[126] However, the firing squad is arguably the most humane method of execution practiced in the United States. Despite this, it is only allowed in four states, none of which use it as the primary method of execution.[127] Society's focus on the palatability of death to spectators,

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Amendment Assessment of Methods of Inflicting Capital Punishment, 39 OHIO ST. L.J. 96, 123 (1978) ("It is not certain whether death by firing squad causes physical pain."); Harold Hillman, *The Possible Pain Experienced During Execution by Different Methods*, 22 PERCEPTION 745, 745 (1993) ("It is difficult to know how much pain the person being executed [by firing squad] feels or for how long, because many of the signs of pain are obscured by the procedure or by physical restraints, but one can identify those steps which are likely to be painful."). *Id.* at 785, n.257. Denno notes that "[b]ooks on this topic do not discuss pain or physical suffering," citing VINCENT J.M. DI MAIO, GUNSHOT WOUNDS: PRACTICAL ASPECTS OF FIREARMS, BALLISTICS, AND FORENSIC TECHNIQUES (1999) as an example of a book which does not provide an explanation of the physical pain involved in death by firing squad. *Id.*

124. *Id.* at 786 ("British scientist Harold Hillman concluded that the firing squad had among the lowest levels of potential pain. . . . He graded shooting as having either 'little' to 'moderate' pain in contrast to hanging, electrocution, lethal gas, or even beheading, all of which he classified as causing 'severe' pain.").

125. Robert J. Sech, *Hang 'Em High: A Proposal for Thoroughly Evaluating the Constitutionality of Execution Methods*, 30 VAL. U. L. REV. 381, 417 (1995) ("By severing the head from the rest of a prisoner's body, the guillotine caused a prisoner to be executed rapidly. No risk of a lingering death existed. Presumably, there was very little pain involved in the process, for all neurological functioning ceased at the moment the severing occurred.").

126. Denno, *supra* note 69, at 787 ("Of the 144 civilian firing squad executions that have been recorded, only two—the executions of Wallace Wilkerson and Eliseo Mares—had any reported problems. . . . [S]uch issues would not exist today . . . .").

127. DEATH PENALTY INFO. CTR., *supra* note 16 (listing Mississippi, Oklahoma, Utah, and South Carolina as states in which death by firing squad is allowed; in South Carolina, the primary method of execution is electrocution, and the primary method of execution is lethal injection in the other three states). The guillotine has never been used in the United States, despite its probable painlessness and reliability. Julian Davis Mortenson, *Earning the Right to Be Retributive: Execution Methods, Culpability Theory, and the Cruel and Unusual Punishment Clause*, 88 IOWA L. REV. 1099, 1139 (2003) ("Despite its historical association with totalitarian

rather than on the experience of the person being executed, may contribute to the under-utilization of one of the more humane methods of execution.

C. Making Informed and Thoughtful Decisions

A decision to waive one's Eighth Amendment right to be free from cruel and unusual execution may not be fully knowing if it is made too quickly or without proper information. This Section addresses the timing, number of opportunities, and informed nature of such waivers.

State statutes that offer people on death row a choice of manner of death typically provide a timeframe in which to decide, after which the choice defines the state's applicable method of execution, and waives further reconsideration of or objection to the method of execution chosen.[128] In California, the timeframe is ten days after an execution warrant is issued;[129] in Alabama, it is thirty days after the Alabama Supreme Court has affirmed the sentence.[130] Given the complexity of the topic and the myriad uncertainties outlined above, these limited time windows seem questionable in order for a capital defendant to make an informed choice. Moreover, the average time between sentencing and execution for individuals executed in 2019 was twenty-two years,[131] meaning that—even assuming a slow-moving

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repression, the guillotine works with extreme reliability, kills in faster than 'thousandths of a second,' and appears to cause no pain.").

128. *See, e.g.*, S.C. CODE ANN. § 24-3-530(A) (2021) ("The election for death by electrocution, firing squad, or lethal injection must be made in writing fourteen days before each execution date or it is waived."); FLA. STAT. § 922.105(2) (2005) ("The election for death by electrocution is waived unless it is personally made by the person in writing and delivered to the warden of the correctional facility within 30 days after the issuance of mandate pursuant to a decision by the Florida Supreme Court affirming the sentence of death . . . .").

129. CAL. PENAL CODE § 3604(b) (2016) ("If a person under sentence of death does not choose either lethal gas or lethal injection within 10 days after the warden's service upon the inmate of an execution warrant . . . the penalty of death shall be imposed by lethal injection.").

130. ALA. CODE § 15-18-82.1(b) (2021) ("The election for death by electrocution . . . . [and t]he election for death by nitrogen hypoxia [are] waived unless [they are] personally made . . . within 30 days after the certificate of judgment pursuant to a decision by the Alabama Supreme Court affirming the sentence of death.").

131. Tracy L. Snell, *Capital Punishment, 2019 – Statistical Tables*, U.S. DEP'T OF JUST. BUREAU OF JUST. STAT. NCJ 300381 (June 2021), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cp19st.pdf [https://perma.cc/G5HY-J7K2].

appeals process—the time between final affirmation of the sentence and the execution can be years.

The Court stated in its discussion of Walter LaGrand's case that LaGrand was given two opportunities to make his decision: after his initial decision, he was given the chance to change his mind by the governor.[132] Though no direct claim was made by the Court about the significance of this fact, the fact that the Court highlights the second opportunity in the context of a fairly short opinion gives it greater weight. Presumably, the Court assumes that if a defendant is given the opportunity to change their mind, their decision is undoubtedly knowing, voluntary, and intelligent. This assumption is questionable because while the second chance given to LaGrand extended the timeframe of his decision, it did not address his inability to determine the chance of excruciating pain presented by existing methods of execution.

When waiving the right to appeal in a guilty plea, defendants have the opportunity to speak with counsel;[133] indeed, judges frequently ask whether the defendant has been advised by counsel before accepting a guilty plea.[134] Attorneys are able to translate technical information which the defendant may struggle to find and interpret, providing clear explanations and thoughtful advice. This advice is considered crucial in deciding to waive rights in the context of plea bargaining. In the context of the irrevocable decision of how one should die, one should similarly receive the advice of a doctor, who could explain the benefits and risks of each option. This is standard practice in medical contexts when a patient must decide between

132. Stewart v. LaGrand, 526 U.S. 115, 119 (1999) ("On March 1, 1999, Governor Hull of Arizona offered Walter LaGrand an opportunity to rescind this decision and select lethal injection as his method of execution. Walter LaGrand, again, insisted that he desired to be executed by lethal gas.").

133. Annotation, *Plea of Guilty Without Advice of Counsel*, 149 A.L.R. 1403 (1944) ("So far as the Federal courts are concerned . . . it may now be regarded as settled that under [the Sixth A]mendment denial of the advice of counsel to one pleading guilty in a criminal case is a violation of his constitutional rights."). The A.L.R. annotation also provides a lengthy overview of state law on this topic, pointing only to Pennsylvania cases as refusing to recognize such a right. *Id.*

134. *See, e.g.*, U.S. District Court for the Eastern District of Michigan, *Questions for Taking a Guilty Plea*, https://www.mied.uscourts.gov/pdffiles/Clelandrule11colloquy.pdf [https://perma.cc/76U3-BS6T] (providing a script for taking a guilty plea which asks, among other things, whether the defendant has discussed the case completely with an attorney and completely understands the attorney's advice).

treatment options and determine end of life care.[135] Just as criminal defendants are entitled to the advice of an attorney before waiving their right to appeal, they should be entitled to the advice of a doctor before deciding how to die.

It is possible that prison facilities would find it challenging to locate doctors who would feel comfortable advising capital incarcerated persons on their options, as the AMA does not consider doctors' involvement in capital punishment ethical.[136] The AMA submitted a brief to the Supreme Court in 2019, when the Court was considering *Bucklew v. Precythe*, stating that "testimony used to determine which method of execution would reduce physical suffering would constitute physician participation in capital punishment and would be unethical."[137] Whether or not this would extend to the act of advising an individual patient on their options is unclear.[138] On the one hand,

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135. *Informed Consent*, AMA, https://www.ama-assn.org/delivering-care/ethics/informed-consent [https://perma.cc/NT3D-JKJX] ("Physicians should . . . [p]resent relevant information accurately and sensitively, in keeping with the patient's preferences for receiving medical information. The physician should include information about . . . [t]he burdens, risks, and expected benefits of all options, including forgoing treatment.").

136. This ethical dilemma is described in a recent interview with Dr. Green Neal, a doctor with the South Carolina Department of Corrections, who has aided in executions in the past and who came out as the second doctor in recent years to publicly discuss his experience aiding in executions. Chiara Eisner, *The Death Chamber Doctor's Dilemma: A Physician in South Carolina Breaks His Silence*, THE STATE (May 4, 2022, 11:36 AM), https://www.thestate.com/news/state/south-carolina/article260531507.html (on file with the *Columbia Human Rights Law Review*). The profession-wide moratorium on public discourse is described as "no accident," as "[d]octors like him are stuck in a seemingly impossible predicament: They are required by state protocols to participate in executions even as they are prohibited by their profession from being involved." *Id.*

137. Tanya Albert Henry, *AMA to Supreme Court: Doctor Participation in Executions Unethical*, AMA (Aug. 22, 2018), https://www.ama-assn.org/delivering-care/ethics/ama-supreme-court-doctor-participation-executions-unethical [https://perma.cc/44M8-G8Y6].

138. Emily Pokora notes that the "only actions allowed by a physician, that are not considered 'participation in an execution' include certifying death *after* the inmate is declared dead by another person; witnessing an execution in a nonprofessional capacity; and helping to relieve acute suffering, pain, and anxiety of the inmate who is awaiting execution." Emily Pokora, *Should State Codes of Medical Ethics Prohibit Physician Participation in State-Ordered Executions?*, 37 W. ST. U. L. REV. 1, 6 (2009) (quoting AM. MED. ASS'N, *Capital Punishment*, *in* OPINIONS OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS § 2.06 (2008)). It is unclear whether advising a capital defendant could be seen as an extension of ministering to the defendant, rather than aiding in the execution itself. Despite the A.M.A.'s stance, some physicians have opposed the ban on physician participation

the doctor would not be facilitating an execution so much as aiding an individual in need; on the other, there is no medical need for execution at all, and the physician is arguably contributing to the process by providing their medical opinion. Whether or not physicians would face an ethical dilemma in delivering advice, however, is not a factor in whether capital defendants are entitled to specialized advice in choosing to waive constitutional rights. Additionally, the names of participating physicians could be made anonymous, as they are for physicians who participate in executions.[139] The right to medical advice should be a factor in determining whether a capital defendant's waiver of their right to be free from cruel and unusual methods of execution was knowing, willing, and voluntary.

D. The Voluntariness of a Masochistic Choice

Much of this Note addresses the question of knowledge, but voluntariness is also a complicated issue in the context of capital cases. If someone is suicidal, does that by definition undercut a finding of knowledge, voluntariness, and intelligence? Arguments have been made that the choice to waive appeals when facing the death penalty indicates a lack of mental competency as a rule, but this argument has been rejected by the Supreme Court.[140] The Court has not found that factors such as clinical depression and other forms of mental illness indicate that an individual is incapable of making a reasoned decision to elect the death penalty; the focus of the inquiry is instead on rational understanding.[141]

However, this logic is undercut by cases in which defendants committed murder specifically to receive the death penalty, thereby

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in executions in recent years. *See, e.g.*, Sandeep Jauhar, *Why It's O.K. for Doctors to Participate in Executions*, N.Y. TIMES (Apr. 21, 2017), https://www.nytimes.com/2017/04/21/opinion/why-its-ok-for-doctors-to-participate-in-executions.html (on file with the *Columbia Human Rights Law Review*) ("Barring doctors from executions will only increase the risk that prisoners will unduly suffer.").

139. Black & Sade, *supra* note 87 ("The identity of physicians who participate in executions is typically held confidential by state authorities.").

140. McClellan, *supra* note 53, at 231 ("Some argue that anyone who chooses to waive appeals and elects execution is incompetent. Justice Rehnquist[, however] suggested that sometimes the preservation of one's own life is not the 'highest good.' Thus, the courts . . . rejected a per se rule of incompetency for defendants who wish to waive their appeals.") (quoting Lenhard v. Wolff, 443 U.S. 1306, 1312-13 (1979)).

141. *See supra* Part I.C (discussing the standard for determining a defendant's mental competency, which is based on their capacity to rationally understand their lawyer and the proceedings against them).

rendering their deaths State-assisted suicide.[142] Moreover, if the logic behind allowing waiver is to allow individuals the dignity of choosing their own fate, then the masochism exhibited by a depressed or mentally ill person is arguably not in accordance with a sense of dignity and individual determination. Determining willingness and voluntariness when a defendant is electing to be killed in a cruel and unusual manner is all the more important because the individual is requesting a fate that is even more likely to be at odds with their self-interest. It should thus be an even more searching inquiry.

III. Fixing the Standard or Reconsidering Waiver Altogether

Can we create legal frameworks for the waiver of Eighth Amendment protections against cruel and unusual methods of execution? If so, what are the mechanisms that would need to be imposed? Part III.A argues for two solutions to the problem of knowing, voluntary, and intelligent waiver: requiring clear and convincing evidence of knowledge, voluntariness, and intelligence (including the receipt of medical advice) and giving the government the burden of proof to show knowledge, voluntariness, and intelligence. Part III.B asks a broader question: if we accept that these changes will make waiver of Eighth Amendment protection against cruel and unusual methods of execution knowing, voluntary, and intelligent, are there policy reasons that waiver should be barred nevertheless? It addresses the State's interest in preventing torturous deaths, irrespective of capital defendants' wishes, and its interest in preventing unreviewable executions. Part III.C addresses the latter interest, exploring the possibility of "next friend" standing as a solution and suggesting that additional research is necessary to fully resolve this question.

142. McClellan, *supra* note 53, at 214; *see also* White, *supra* note 53, at 877 ("Unless the reports of reputable psychiatrists are to be discounted, the case histories of defendants like James French and Gary Gilmore demonstrate that some defendants kill so that society will execute them."); Avi Brisman, *"Docile Bodies" or Rebellious Spirits?: Issues of Time and Power in the Waiver and Withdrawal of Death Penalty Appeals*, 43 VAL. U. L. REV. 459, 494 (2009) ("The 'murder/suicide' phenomenon refers to the clinically recognized syndrome in which an individual intentionally commits murder in a state with a death penalty hoping that, once caught, the State will execute him and thereby accomplish what he himself cannot bring about by his own hand.") (quoting Strafer, *supra* note 60, at 863 n.12).

A. Making Waiver Knowing, Voluntary, and Intelligent by Defining the Standard and Shifting the Burden of Proof

How do we create legal frameworks for the waiver of Eighth Amendment protections against cruel and unusual methods of execution? One possibility is to impose a high standard for determining knowledge, voluntariness, and intelligence, and to use "clear and convincing evidence" as a standard of proof. Another solution is to place the burden of proof on the government, rather than on the defendant seeking waiver. This Section will consider each of these possibilities in turn.

1. Defining the Standard

If Eighth Amendment protection against cruel and unusual methods of execution is found to be waivable, then the standard for knowledge, voluntariness, and intelligence should be high. At a minimum, a searching inquiry into the information which the defendant received, as well as their mental state in making the decision, should be necessary to accept a waiver of their Eighth Amendment rights. Medical advice regarding a defendant's options should be a part of the court's inquiry as to whether the decision was knowing; furthermore, the defendant's mental state should be examined when determining if the decision was voluntary and intelligent.

Some scholars have argued that, in the context of capital defendants' right to waive appeals, the standard of proof of the defendant's motivation should be clear and convincing evidence. John H. Blume, in his article *Killing the Willing: "Volunteers," Suicide and Competency*, argues the following:

> Arguments can be made in support of both a higher burden (beyond a reasonable doubt) and a lower burden (preponderance of the evidence). If the inmate were required to demonstrate beyond a reasonable doubt that the desire to waive his appeals was not motivated by a desire to commit suicide, there would unquestionably be fewer successful volunteers, thus reducing what in the assisted suicide context has been referred to as the "profound risks to many individuals who are ill and vulnerable." On the other hand, the standard may be so onerous that it prevents a death-row inmate who truly does accept the justness of his punishment from waiving his appeals and submitting

> to execution. The preponderance of the evidence standard is generally used in assessing competency in other areas. . . . [T]he commonly used preponderance standard is [not necessarily] inappropriate. However, given the high likelihood of suicidal motivation and the fact that a judicial decision permitting waiver will result in execution, I ultimately conclude that the higher clear and convincing evidence standard is appropriate as it reflects "the gravity with which we view the decision to take one's own life . . . and our reluctance to encourage or promote these decisions."[143]

Some have argued that, since sentencing a defendant to death requires proof beyond a reasonable doubt, the expedition of an execution should at least be held to the standard of clear and convincing evidence.[144] The desire to be killed in a cruel and unusual way is at least as weighty as the desire to waive appeals, and the same concern for problematic motivations applies. A person's statutory ability to choose their own death and the idea that they know their own mind should be balanced against the State's interest not to inflict cruel and unusual punishment, as well as its interest in determining the intentions of such a decision. Thus, the clear and convincing standard of evidence should be applied to waiver of one's Eighth Amendment right to be free from cruel and unusual manner of execution.

2. Shifting the Burden of Proof

An additional solution—perhaps in conjunction with the first—would be to place the burden of proving knowledge, voluntariness, and intelligence on the government. In order to be allowed to accept a waiver of one's right to be free from cruel and unusual methods of execution, the government would need to show that the defendant fully understood the medical ramifications of the decision, and that they made the decision of their own free will, free from emotional and rational impairments.

This argument has been made in the context of waiver of further appeals in capital cases. Some have argued for a presumption of incompetence; the burden would fall on the government to show that the defendant is competent to make this decision.[145] If imposed in the context of waiver of one's right to be free from cruel and unusual

143. Blume, *supra* note 43, at 972 (footnote omitted).

144. Christy Chandler, Note, *Voluntary Executions*, 50 STAN. L. REV. 1897, 1923 (1998).

145. *Id.* at 1922–24.

punishment, this would mean that if insufficient evidence were presented, the capital defendant would die in the manner thought to be more humane, rather than less. This would preserve the State's interest in avoiding the infliction of cruel and unusual punishment.

Others have argued for the burden to fall on the capital defendant. One scholar evaluated which party has the best information about the defendant's reasoning (the defendant); which party is less likely to be right in the majority of cases (the defendant, as he believes suicidal ideation motivates the majority of appeal waiver cases); and the cost of being wrong, arguing that this factor is inconclusive because monetary cost and the moral cost of loss of human life point to different results.[146] Using this framework, the burden should fall on the capital defendant to prove competency, as the majority of factors point to this result.[147]

Applying this framework to waiver of one's right to be free from cruel and unusual methods of execution, the defendant would have the best information about their own reasoning. It is difficult to determine which party is most likely to be right, given the lack of data regarding why defendants might choose a cruel and unusual method of execution. For some, it may stem from a desire to be punished for their crimes, and for others it may result from depression, hopelessness, clinical conditions, or even protest of the method of execution. This factor is inconclusive. With regard to the final factor, each comparison of methods is likely to be different in terms of pecuniary cost, but the societal and moral value of avoiding the infliction of cruel and unusual punishment is undoubtedly high, and so the burden should fall on the government. This framework thus does not yield a conclusive answer.

This Note advocates for the view that the third factor is the most persuasive; the burden of proof should be viewed as a tool that determines which kind of "error" we are most comfortable with. The erroneous infliction of cruel and unusual punishment is arguably worse than the erroneous infliction of a more humane punishment undesired by the defendant. Therefore, the burden of proof should fall on the government.

The recommendations explored above are, in some ways, an ethical compromise. Arguably, the decision to waive one's right to be free from cruel and unusual methods of execution can never *truly* be knowing, given how little experts know about the options. There is a discrepancy between the ideals of the standard—that everyone makes

146. Blume, *supra* note 43, at 971–72.
147. *Id.*

a truly knowing choice of their own free will—and the much less probing standard that is likely to be implemented in practice. Some might argue that we routinely accept less than "truly" knowing decisions from defendants in the criminal legal system, and that the responsibility of the courts is simply to determine competency and lack of coercion. However, the phrase "death is different" became a maxim for a reason. Perhaps more than in any other area of the law, it is unacceptable to institute a low bar in determining whether someone can waive their right to die at the hands of the State in a way that is not cruel and unusual.

B. Policy Reasons for Barring Cruel and Unusual Methods of Execution, Even if Elected by the Capital Defendant

The solutions proposed above assume a decision by the courts that one can waive one's Eighth Amendment right to be free from cruel and unusual methods of execution. However, regardless of the theoretical possibility of making a knowing, voluntary, and intelligent choice, there are policy reasons that indicate waiver of one's right to be free from cruel and unusual methods of execution should be barred. The first is the State's—and society's—interest in preventing torturous executions, regardless of capital defendants' wishes, in order to reflect the values of our society. The second is to prevent unreviewable executions by finding that waiver bars review.

1. The State has a Substantial Interest in Preventing Torturous Executions, Regardless of Capital Defendants' Willingness to be Tortured

The capital defendant's right to self-determination is just one interest in the question of whether one can choose to die in a cruel and unusual way. Both the State and society at large have interests in preventing cruel and unusual methods of execution, and the knowledge, voluntariness, and intelligence of the defendant's waiver do not affect these interests.

As discussed above, the prevention of cruel and unusual methods of punishment is for the benefit of society as well as of the capital defendant. It is crucial to the integrity of our criminal legal

system, as emphasized by Justice Marshall,[148] reflecting not only the dignity of the defendant but the dignity of our culture. On an emotional level, executions can be traumatic to watch—the very reason the court often focuses on spectator palatability over the defendant's pain.[149] Executions create trauma for the family of the condemned; the witnesses; the executioners; and, to some degree, the public when reading about the graphic details of State-sanctioned death.[150]

Additionally, the prevention of cruel and unusual punishment helps maintain the legitimacy—whatever degree of legitimacy one might perceive it to be—of executions by the government. The Pew Research Center's 2021 survey of public opinion about the death penalty found that 39% of Americans oppose it, and 15% are strongly opposed.[151] Additionally, 78% of Americans acknowledge that there is a risk of innocent defendants being wrongfully executed, 56% believe that Black people are more likely to be executed than white people for committing similar crimes, and 63% do not believe the death penalty is effective at deterring future crime.[152] Cruel and unusual methods of execution do not just raise procedural and moral questions; they also threaten the legitimacy of the death penalty at a time when public support is not guaranteed. If the courts are not inclined to find that the death penalty is unconstitutional, then there is practical value in ensuring that executions are humane for the sake of social and political stability.

One could argue that, if a capital defendant chooses an excruciating death, these concerns are mitigated: it is not immoral to kill someone in the manner in which they choose, and therefore should be less traumatic to all involved and should not undercut the validity of capital punishment. However, this argument is short-sighted in that it assumes a high tolerance for human suffering so long as it accords

148. Whitmore v. Arkansas, 495 U.S. 149, 173 (1990) (Marshall, J., dissenting) ("A defendant's voluntary submission to a barbaric punishment does not ameliorate the harm that imposing such a punishment causes to our basic societal values and to the integrity of our system of justice.")

149. *See supra* Part II.A (discussing the Supreme Court's emphasis on the graphic nature of an execution from the perspective of spectators).

150. *See supra* Part II.A (discussing the Supreme Court's emphasis on the graphic nature of an execution from the perspective of executioners, the public, and others impacted).

151. *Most Americans Favor the Death Penalty Despite Concerns About Its Administration*, PEW RSCH. CTR. (June 2, 2021), https://www.pewresearch.org/politics/2021/06/02/most-americans-favor-the-death-penalty-despite-concerns-about-its-administration/ [https://perma.cc/5KWN-WMC8].

152. *Id.*

with a philosophical framework. For spectators, the defendant's family, and the executioner, the trauma lies largely in the act itself; watching a person experience intense pain is inherently traumatizing. This applies also to the public, many of whom do not believe in the death penalty and are concerned about the possible innocence of some capital defendants.[153] For many, a cruel and violent act does not become morally acceptable because the victim consented; it is the act itself that is reprehensible. The consent of capital defendants thus does not nullify the State and societal interests in preventing cruel and unusual methods of execution.

2. The State has an Interest in Preventing Unreviewable Executions

In addition to raising important moral, philosophical, and social questions, waiver of one's right to be free from cruel and unusual punishment also raises a pressing procedural issue: whether waiver creates a work-around for states. If a state gives defendants a choice between two methods of execution and defendants waive their right to be free from cruel and unusual punishment by making a choice, then the state effectively side-steps the question of the constitutionality of the method that is not the default choice.[154] Worse still, if a state passes a statute which does not name a default method, then defendants cannot challenge either method of execution, as both would be elected rather than automatically chosen as a default.[155] California's previous method of death statute was of the former type, with a default option of lethal gas; if a defendant chose lethal injection, they would waive their claim, but they could still challenge the constitutionality of lethal gas.[156] California amended its statute in 1996, and it now presents two options—lethal gas and lethal injection—and by presenting this choice,

153. *Id.*

154. *Constitutional Law. Eighth Amendment. Ninth Circuit Holds California's Lethal Gas Method of Execution Unconstitutional.* Fierro v. Gomez, *77 F.3d 301 (9th Cir.),* vacated*, 117 S. Ct. 285 (1996).*, 110 HARV. L. REV. 971, 971 n.4 (1997) ("Under the old statute, even if the prisoners had the option to choose lethal injection, if they refused to choose, they then would be put to death by lethal gas by default. Thus, a prisoner in this situation would have standing to challenge the lethal gas method.") (citation omitted).

155. *Id.* ("[Under California's statute] if a prisoner chooses lethal gas, then he has no standing to challenge the method's constitutionality because he could have chosen lethal injection . . . if a prisoner chooses lethal injection, then he has no standing to challenge lethal gas . . . .").

156. *Id.*

forces capital defendants to waive their right to appeal.[157] What does it mean to make a knowing, voluntary, and intelligent choice if presented with two potentially unconstitutional options with no avenue for judicial review?

If waiver is to be viable, it needs to be reviewable. The following Section briefly addresses the issue of review if a capital defendant chooses not to—or is statutorily barred from—challenging the constitutionality of their chosen method of execution, with the understanding that a complete examination of this topic will require further scholarship.

C. Challenging Executions of Capital Defendants Who Waive Their Eighth Amendment Right to be Free from Cruel and Unusual Execution

If a capital defendant cannot challenge their chosen method of execution, who can? A complete analysis of various mechanisms for ensuring judicial review is beyond the scope of this Note, but this Section briefly explores the possibility of "next friend" standing.

A person who is close to the capital defendant may have standing to file a habeas corpus petition as a "next friend," provided they can show that (1) they have a close relationship with the capital defendant and are defending the defendant's interests, and (2) the capital defendant cannot appear themselves.[158] Individuals with sufficiently close relationships frequently include immediate family members, legal guardians, and attorneys; concerned citizens or advocacy organizations are generally not sufficiently close as to satisfy the first prong of the test.[159] Examples of situations which might satisfy the second prong—inability to appear oneself—include mental incompetency, language difficulties, illiteracy, or inability to access the courts as a result of disability or geographic distance from court or from defense counsel, among other reasons.[160] As discussed above, the Court has not found persuasive the argument that seeking death is an

157. *Id.*

158. BRIAN R. MEANS, POSTCONVICTION REMEDIES § 9:7, Westlaw (database updated Aug. 2022).

159. *Id.*

160. *Id.*

inherently irrational decision,[161] so a potential "next friend" would need to ground their reasoning on something more solid.

"Next friend" standing is inherently limited in its close relationship requirement—which precludes similarly situated death row inmates—and its requirement that capital defendants be unable to appear themselves. The "classic Catch-22" of "next friend" standing is that "the petitioner must have standing to intervene to show incompetency, but the petitioner must show incompetency to have standing."[162] This solution thus does not solve the reviewability problem posed by waiver of Eighth Amendment protections against cruel and unusual methods of execution, as it does not ensure review for all capital defendants. This Note offers the question as a topic of future scholarship in order to ensure that waiver does not create a work-around for states to avoid judicial review of potentially cruel and unusual methods of execution.

CONCLUSION

Given the difficulties with applying the knowing, voluntary, and intelligent standard in a meaningful way in the context of choosing a method of execution, should we allow waiver of Eighth Amendment protections from cruel and unusual methods of execution? This Note proposes several possible procedural changes—namely, defining the standard and shifting the burden of proof to the government. However, these changes may not completely address the problem, as articulated above. Moreover, there are policy reasons for barring cruel and unusual methods of execution; government and societal interests support the prevention of extreme pain to defendants, and the reviewability problem introduced by waiver is not entirely solved through "next friend" petitions. There is thus no way to allow waiver of Eighth Amendment protections against cruel and unusual methods of execution in a way that aligns with our constitutional, social, and moral values.

There is an additional troubling question presented by the potential impossibility of making a "knowing" choice to waive one's Eighth Amendment right against cruel and unusual execution: If the choice can never be knowing, then how can we, as a society, impose these methods of death at all? The difficulty underlying this question

161. *See supra* Part II.D (explaining that the Supreme Court rejected the argument that the choice to waive appeals when facing the death penalty indicates a lack of mental competency as a rule).

162. McClellan, *supra* note 53, at 240.

is that doctors, who would be the best candidates to run studies—such as the electrocardiograph conducted during an execution by firing squad in 1938—are ethically bound to avoid participating in capital punishment. One answer is that, as long as the medical establishment refuses to participate in capital punishment, we should halt executions to avoid imposing sentences we do not fully understand. This is perhaps the answer that is the most in line with our societal values of requiring knowing, voluntary, and intelligent waiver of rights. It is also in line with the idea that punishment should be proportional—how can a form of execution be proportional if we do not fully understand the fate that we are inflicting? This Note does not take a position on whether the death penalty is moral or advisable, but simply highlights a shortcoming of our current system.

Assuming that executions will continue, an alternate solution would be to take a multi-faceted approach: (1) conduct research to the extent possible, given the limitations of the involvement of medical professionals; (2) ensure proper training of all individuals performing execution to minimize the risk of human error; (3) select methods, such as nitrogen gas, which all but neutralize the risk of human error; (4) ensure that extensive reporting is done of each execution to add to existing knowledge; and (5) disallow the selection of cruel and unusual methods of execution by capital defendants. These practices would not only begin to address issues of knowledge, voluntariness, and intelligence in the context of waiver, but would make capital punishment more humane and consistent throughout the country.