William & Mary Bill of Rights Journal

Volume 28 (2019-2020)
Issue 3

Article 3

March 2020

Steps Toward Abolishing Capital Punishment: Incrementalism in the American Death Penalty

Melanie Kalmanson

STEPS TOWARD ABOLISHING CAPITAL PUNISHMENT: INCREMENTALISM IN THE AMERICAN DEATH PENALTY

Melanie Kalmanson*

While scholars seem united on the sentiment that abolition is the ultimate resting place for capital sentencing in the United States, their arguments vary as to how the system will reach that point. For example, Carol and Jordan Steiker argue that the systemic disarray of capital sentencing in the United States is a result of the U.S. Supreme Court's attempt to constitutionalize capital sentencing.[1] This Article contends that the U.S. Supreme Court's constitutional jurisprudence that has developed since 1972, when the Court reset capital sentencing in *Furman v. Georgia*,[2] has aided the Court in gradually narrowing capital punishment, as a result of the controlling "evolving standards of decency" standard.[3] Specifically, the Court has narrowed capital punishment with respect to who may be sentenced to death,[4] how sentences of death are imposed,[5] and how defendants are executed.[6] As a result, this Article contends that the "evolving standards of decency" standard paves the path toward abolition.

First, this Article shows that incrementalism has led to the current landscape of capital punishment in the United States.[7] Then, the Article contends that an incremental approach to reaching abolition is inherent in the governing "evolving standards of decency" standard and the most effective and realistic way of achieving abolition.[8] Finally, the Article proposes the next steps in this approach to eliminating the death penalty in America.[9]

---

* JD, *magna cum laude*, Florida State University (2016). Melanie Kalmanson served as a staff attorney to former Justice Barbara J. Pariente of the Supreme Court of Florida from August 2016 until January 2019. After her clerkship, she entered private practice. Also since her clerkship, Melanie has written and published several pieces on the effects of the U.S. Supreme Court's decision in *Hurst v. Florida* and the death penalty generally.

[1] *See* CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 4 (2016).

[2] *See* Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam).

[3] Atkins v. Virginia, 536 U.S. 304, 311–12 (2002) (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion)).

[4] *See, e.g.*, *id.* at 318; Ford v. Wainwright, 477 U.S. 399, 409 (1986).

[5] *See, e.g.*, Hurst v. Florida, 136 S. Ct. 616, 619 (2016).

[6] *See, e.g.*, Baze v. Rees, 553 U.S. 35, 62 (2008).

[7] *See infra* Part III.

[8] *Atkins*, 536 U.S. at 312; *infra* Part IV.

[9] *See infra* Section IV.B.

INTRODUCTION 588
I. EIGHTH AMENDMENT "EVOLVING STANDARDS OF DECENCY" FRAMEWORK 591
II. WHAT IS INCREMENTALISM? 592
A. Evolving Jurisprudence 592
B. Incremental Legislation 595
III. HOW INCREMENTALISM HAS SHAPED THE CURRENT CAPITAL PUNISHMENT SYSTEM 597
A. Defendants Who Are Eligible to Be Sentenced to Death 600
1. Mental Incapacity 600
2. Juveniles 603
B. How Defendants Are Sentenced to Death 604
C. How Defendants Are Executed 610
IV. DEFINING THE ROUTE FROM HERE TO ABOLITION VIA THE "EVOLVING STANDARDS OF DECENCY" 617
A. Why Abolition Is the Final Destination 618
B. Next Incremental Steps 621
1. Defendants Eligible for Death 621
2. Defendants Sentenced to Death 624
3. Execution Process 625
a. Drugs Used in Lethal Injection 625
b. Sick Inmates 627
c. Length of Time on Death Row 630
d. Delayed Executions 633
CONCLUSION 634

INTRODUCTION

Since capital punishment resurfaced after the U.S. Supreme Court's landmark decision in *Furman v. Georgia*, invalidating capital sentencing across the United States in 1972,[10] scholars and courts have contemplated the flaws in capital sentencing systems across the country. Most scholars predict the United States will ultimately abolish capital punishment for one reason or another.[11] Most scholars also agree that the point of abolition is getting closer and closer.[12] Society seems to support this

[10] 408 U.S. 238, 239–40 (1972).

[11] *See, e.g.*, STEIKER & STEIKER, *supra* note 1, at 4; Austin Sarat et al., *The Rhetoric of Abolition: Continuity and Change in the Struggle Against America's Death Penalty, 1900–2010*, 107 J. CRIM. L. & CRIMINOLOGY 757, 758 (2017) ("Today the United States seems to be on the road to abolishing the death penalty."). *But see* Ross Kleinstuber et al., *Into the Abyss: The Unintended Consequences of Death Penalty Abolition*, 19 U. PA. J.L. & SOC. CHANGE 185, 186 (2016) (arguing that abolition will have unintended consequences that may be harmful to defendants).

[12] *See, e.g.*, David Von Drehle, *The Death of the Death Penalty: Why the Era of Capital Punishment Is Ending*, TIME (June 8, 2015), http://time.com/deathpenalty/ [https://perma.cc

sentiment, too, as public support for capital punishment continues to decline.[13] This Article agrees that abolition is the ultimate destination for capital sentencing, even with a post-Kennedy Supreme Court; of course, the time it will take to get there is unclear and may be delayed as a result of the new makeup.[14]

While scholars seem united that abolition is the end point, their suggested paths for arriving there vary.[15] For example, Carol and Jordan Steiker (the Steikers) have shown that the Supreme Court's constitutionalization of capital sentencing produced unintended consequences on the path to abolition.[16] They argue that the Court's effort to impose constitutional safeguards in this context has exposed the impossibility of making the death penalty fair or principled, which will eventually lead to its demise.[17] Others argue that abolition is the only solution to the arbitrary and capricious way in which defendants are sentenced to death, even after *Furman*.[18] Specifically, for example, Carla Edmondson points to the "future dangerousness" consideration in many states' capital sentencing schemes as affording juries far too much discretion such that the sentencing decision is unconstitutionally arbitrary.[19]

This Article makes a new contribution to this discussion, explaining that the Court's constitutionalization of capital punishment, specifically through the Court's Eighth Amendment "evolving standards of decency" framework, has fundamentally destabilized death-penalty jurisprudence. Through this framework, the Court set the stage for abolition by creating an incremental approach to abolition, under which the Court has already begun narrowing the death penalty. Whether deliberately or not, this Article argues that courts have incrementally narrowed the death penalty since

---

/AR72-U537] (stating that the United States' "troubled [capital-sentencing] system is creeping into view").

[13] *See Gallup Poll—For First Time, Majority of Americans Prefer Life Sentence to Capital Punishment*, DEATH PENALTY INFO. CTR. (Nov. 25, 2019), https://deathpenaltyinfo.org/news/gallup-poll-for-first-time-majority-of-americans-prefer-life-sentence-to-capital-punishment [https://perma.cc/J3VS-6T5N] [hereinafter *Gallup Poll*]; *Public Opinion*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/public-opinion-polls [https://perma.cc/KSH4-EC8Z] (last visited Feb. 3, 2020).

[14] This Article only addresses capital punishment in the United States. Therefore, it should be assumed throughout that discussion is of only capital punishment in the United States. Likewise, unless otherwise noted, "Court" refers to the U.S. Supreme Court.

[15] *E.g.*, Sarat et al., *supra* note 11, at 758 ("There are, of course, many possible explanations for the changing situation of capital punishment."); *see* A.M. Kirkpatrick, *The Abolition of the Death Penalty*, 13 CRIM. L.Q. 308, 308–09 (1970) ("Society would be better served by . . . the abolition of the death sentence and the penalty of execution. Abolition will neither stop nor reduce murder, but the evidence is that it will not result in any increase in the taking of human life. . . . If this matter can be examined rationally and dispassionately there are few who will not agree that the death penalty should be completely abolished and that it will be in due course.").

[16] *See* STEIKER & STEIKER, *supra* note 1, at 4.

[17] *Id.*

[18] *See generally* Carla Edmondson, *Nothing Is Certain but Death: Why Future Dangerousness Mandates Abolition of the Death Penalty*, 20 LEWIS & CLARK L. REV. 857 (2016).

[19] *See id.* at 916–17.

the Court's decision in *Furman*. These incremental changes are a result of the efforts of abolitionists—attorneys and policymakers—who have continuously sought to undermine the constitutionality of capital sentencing from all angles.[20] The latest argument is that lethal injection—the most common method of execution in the United States today—violates the Eighth Amendment, at least in certain circumstances.[21] While the Court has granted incremental and marginal victories, it has refused opportunities to outlaw capital sentencing or executions altogether.[22]

Instead, the Court has taken a more gradual approach. This Article contends that the "evolving standards of decency" framework, which applies to Eighth Amendment jurisprudence, poses a graver threat to the death penalty than broader attacks on capital punishment. This Article explains that the constitution of the incremental approach that inheres in this guiding framework is likely the most realistic way to achieve abolition. Specifically, incrementalism—employed differently than we have seen in other contexts—will ultimately lead to the successful elimination of capital punishment by signaling, with each gradual change, a shift in society's acceptance of capital punishment. As society's acceptance of the death penalty continues to decrease,[23] the support for eliminating capital sentencing strengthens, as inhered by the "evolving standards of decency" framework under which courts may effectuate changes to Eighth Amendment jurisprudence.

This Article proceeds as follows. Parts I and II explain the necessary framework for this discussion, starting with the "evolving standards of decency" framework for Eighth Amendment jurisprudence and then the theory of "incrementalism" as a progressive approach to eliminating a contested aspect of the law.[24] Canvassing this jurisprudence on capital sentencing, Part III illuminates how incrementalism underlies the history of changes to capital sentencing since 1972.[25] Part IV contends that incrementalism, as a result of the "evolving standards of decency" framework explained in Part I, paves the route to abolishing capital sentencing.[26] Part IV also explains the likely next steps in this incremental process—between now and abolition.[27]

---

[20] *See* Sarat et al., *supra* note 11, at 758 (suggesting that abolitionists steer this progression by framing the debate).

[21] *See* Bucklew v. Precythe, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/bucklew-v-precythe/ [https://perma.cc/8LVF-5QHV] (last visited Feb. 24, 2020) (presenting the issue whether executing an inmate with rare and severe medical condition would violate the Eighth Amendment); Madison v. Alabama, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/madison-v-alabama/ [https://perma.cc/E256-3RZM] (last visited Feb. 24, 2020) (presenting the issue whether executing a defendant who no longer remembers his crime violates the Eighth Amendment).

[22] *See, e.g.*, Hidalgo v. Arizona, 138 S. Ct. 1054, 1054 (2018) (denying petition for writ of certiorari).

[23] *See* Sarat et al., *supra* note 11, at 758.

[24] *See infra* Parts I–II.

[25] *See infra* Part III.

[26] *See infra* Part IV.

[27] *See infra* Part IV.

I. EIGHTH AMENDMENT "EVOLVING STANDARDS OF DECENCY" FRAMEWORK

Based on the language of the Eighth Amendment to the U.S. Constitution,[28] the U.S. Supreme Court stated in *Atkins v. Virginia* that "[t]he Eighth Amendment succinctly prohibits '[e]xcessive' sanctions."[29] However, the question that remains unanswered is how courts should determine what constitutes "excessive."

To determine whether a punishment is excessive, the Court has explained that courts should be guided by standards "that currently prevail," or "the evolving standards of decency."[30] Quoting Chief Justice Warren's opinion in *Trop v. Dulles*, the Court wrote in *Atkins*: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[31] The Court explained "that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'"[32]

Likewise, Justice Stevens, writing for the majority in *Thompson v. Oklahoma*, explained:

> The authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments, but they made no attempt to define the contours of that category. They delegated that task to future generations of judges who have been guided by the "evolving standards of decency that mark the progress of a maturing society."[33]

Applying the "evolving standards of decency" standard in the capital-sentencing context, Justice Stevens explained that the Court "review[s] the work product of state legislatures and sentencing juries, and . . . carefully consider[s] the reasons why a civilized society may accept or reject the death penalty in certain types of cases."[34]

As Justice Stevens signaled in *Thompson*, courts, guided by the "evolving standards of decency," review Eighth Amendment challenges on a case-by-case basis, or group-by-group when the court can define a category of defendants or cases. This Article contends that the case-by-case approach to Eighth Amendment challenges,

---

[28] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[29] Atkins v. Virginia, 536 U.S. 304, 311 (2002) (quoting U.S. CONST. amend. VIII).

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

[31] *Atkins*, 536 U.S. at 311–12 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion) (alteration in original)).

[32] *Id.* at 312 (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).

[33] Thompson v. Oklahoma, 487 U.S. 815, 821 (1988) (plurality opinion) (quoting *Trop*, 356 U.S. at 101).

[34] *Id.* at 822.

which was likely an organic result of the Court's decision-making process rather than an explicit choice, produced an incremental atmosphere in which the Court has dissected the death penalty over time, rather than reviewed holistically the validity of death as a punishment.[35] Part II explains in-depth the theory and history of incrementalism.

II. WHAT IS INCREMENTALISM?

Before explaining how incrementalism underlies the evolution of capital punishment in the United States since 1972, it is important to understand incrementalism generally. Incrementalism is defined as "a model of the policy process" by which "[p]olicies are made . . . through a pluralistic process of partisan mutual adjustment in which a multiplicity of participants focus on proposals differing only incrementally from the status quo."[36] With incrementalism, "[s]ignificant policy change occurs, if at all, through a gradual accumulation of small changes."[37]

In fact, incrementalism has been the key to several legal revolutions in this country.[38] Recognizing that radical change in the law is difficult to obtain and requires support from several players with differing viewpoints, leaders seeking to effect change use incremental steps to reach the ultimate goal.[39] This can be seen in several contexts, both through evolving jurisprudence and legislative changes, as explained, in turn, below.

A. Evolving Jurisprudence

The incremental approach to achieving jurisprudential change involves selecting key cases that, if successful, will accomplish a step toward the ultimate goal.[40] Key cases present a favorable plaintiff whose claim presents the specific circumstances that will likely garner support of a majority of the reviewing court to make the intended

---

[35] That being said, Justice Breyer and other Justices have continuously argued that the Court should reconsider the validity of death as a punishment. *See, e.g.*, Glossip v. Gross, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting) ("I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution.").

[36] Michael Hayes, *Incrementalism and Public Policy-Making*, OXFORD RES. ENCYCLOPEDIAS (Apr. 2017), http://politics.oxfordre.com/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-133 [https://perma.cc/4A4F-ZLDQ].

[37] *Id.*

[38] *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[39] *See* Brown v. Board *at Fifty: "With an Even Hand,"* LIBR. CONGRESS, https://www.loc.gov/exhibits/brown/brown-brown.html [https://perma.cc/K687-ATQK] (last visited Feb. 24, 2020) [hereinafter Brown *at Fifty*].

[40] *See, e.g.*, *How States Abolish the Death Penalty*, INT'L COMM'N AGAINST DEATH PENALTY, https://icomdp.org/cms/wp-content/uploads/2013/04/Report-How-States-abolition-the-death-penalty.pdf [https://perma.cc/JKY2-UQBD] (stating that while some countries "proceeded directly to full abolition," others took "intermediary steps," or an incremental approach, when the direct approach is impractical).

jurisprudential change.[41] Both Thurgood Marshall and Ruth Bader Ginsburg employed this approach in leading the charge toward racial equality and gender equality, respectively, under the U.S. Constitution.

In the 1950s, Thurgood Marshall, working for the National Association for the Advancement of Colored People (NAACP), led an incremental attack against "the doctrine of 'separate but equal'" from the U.S. Supreme Court's opinion in *Plessy v. Ferguson*.[42] The end goal: racial equality in the law and desegregation of the school system.[43] After addressing graduate and professional schools in *Sweatt v. Painter*[44]—where the U.S. Supreme Court held that "a segregated law school for Negroes could not provide them equal education opportunities" as those offered to white students[45]—Marshall gradually led the Court to determining that segregation violated the U.S. Constitution "in five separate cases gathered together under" *Brown v. Board of Education of Topeka*.[46] With each case, Marshall helped the Court take one step toward the ultimate goal—complete desegregation—which he ultimately accomplished in *Brown*, where the Court determined that "segregation of children in public schools solely on the basis of race . . . deprive[s] the children of the minority group of equal educational opportunities."[47]

Building on what Marshall started, Ruth Bader Ginsburg, the pioneer of gender equality in the 1970s, similarly employed an incremental strategy in leading the fight for gender equality under the Fourteenth Amendment.[48] As co-founder and director of the American Civil Liberties Union (ACLU) Women's Rights Project,[49] Ginsburg recognized that immediately rendering women equal to men under the law would face opposition from, or seem too radical for, a majority of the U.S. Supreme Court at the time.[50] As a result, Ginsburg strategically selected cases that would

---

[41] *See, e.g.*, LINDA HIRSHMAN, SISTERS IN LAW: HOW SANDRA DAY O'CONNOR AND RUTH BADER GINSBURG WENT TO THE SUPREME COURT AND CHANGED THE WORLD 94 (2015).

[42] *See* 163 U.S. 537 (1896), *overruled by Brown*, 347 U.S. 483; Brown *at Fifty*, *supra* note 39.

[43] Brown *at Fifty*, *supra* note 39.

[44] 339 U.S. 629 (1950).

[45] *Brown*, 347 U.S. 483, 493 (1954) (addressing *Sweatt*).

[46] Brown *at Fifty*, *supra* note 39.

[47] *Brown*, 347 U.S. at 493. *See generally* Bolling v. Sharpe, 347 U.S. 497 (1954) (applying the holding of *Brown* to the school district in D.C.); Stephen J. Dubner, *In Praise of Incrementalism*, FREAKONOMICS (Oct. 26, 2016), http://freakonomics.com/podcast/in-praise-of-incrementalism/ [https://perma.cc/RD8F-3QYL].

[48] Ginsburg's efforts in this regard have been summarized and detailed in many works. *See generally* HIRSHMAN, *supra* note 41. This Article merely gives an overview of Ginsburg's work.

[49] *Id.* at 56–58; *Ruth Bader Ginsburg*, HIST., https://www.history.com/topics/womens-history/ruth-bader-ginsburg [https://perma.cc/YL73-UFWE] (last visited Feb. 24, 2020); *Tribute: The Legacy of Ruth Bader Ginsburg and WRP Staff*, ACLU, https://www.aclu.org/other/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff [https://perma.cc/6VTR-XTQJ] (last visited Feb. 24, 2020) [hereinafter *Tribute*].

[50] *See* HIRSHMAN, *supra* note 41, at 70–71.

incrementally lead the Court to this goal.[51] Ginsburg explained her strategic choice of cases, stating: "Not all feminist issues should be litigated now . . . because some are losers, given the current political climate, and could set back our efforts to develop favorable law."[52]

Starting with *Reed v. Reed*[53] in 1971, for which Ginsburg authored the ACLU's brief,[54] the Court "invalidated an Idaho statute that automatically gave preference to men for appointment as administrator of a deceased person's estate."[55] After *Reed*, a law discriminating on the basis of sex passed constitutional muster as long as it "fairly and substantially advance[d] the legislature's purpose in passing it."[56] While this standard was "better than the low standard of mere rationality [it was] not close to Ginsburg's aspiration to have the Court treat distinctions based on sex the same as race" by reviewing them under strict scrutiny.[57]

Two years later, Ginsburg presented the Court with *Frontiero v. Richardson*,[58] in which a male plaintiff—with whom the Justices could easier identify—had been denied spousal benefits from his wife's "work in the uniformed forces because he failed to prove economic dependency on his wife, a condition not required for wives of male members to qualify for the same benefits."[59] Presenting a male plaintiff helped Ginsburg demonstrate that "sex-based distinctions harm men and women" alike.[60] Linda Hirshman explains that, at conference, "seven justices voted to strike down the air force scheme."[61]

Even more pertinent to Ginsburg's goal, Justice Brennan had come to agree with Ginsburg that strict scrutiny was the proper standard of review for gender discrimination.[62] But Brennan could not get a majority.[63] Ultimately, *Frontiero* was a "near miss at getting the standard of review changed."[64] Although Ginsburg did not prevail in *Frontiero*, the facts forced the Court to consider harm to a male rather than a female caused by gender discrimination.[65]

Ginsburg again presented a male plaintiff in *Weinberger v. Wiesenfeld*,[66] a single father whose wife had passed away challenging "a provision in the Social Security

---

[51] *See id.* at 59.
[52] *Id.* at 64.
[53] 404 U.S. 71 (1971).
[54] *See* HIRSHMAN, *supra* note 41, at 55.
[55] *Tribute*, *supra* note 49.
[56] HIRSHMAN, *supra* note 41, at 70.
[57] *Id.*; *see id.* at 76.
[58] 411 U.S. 677 (1973).
[59] *Tribute*, *supra* note 49.
[60] *Id.*
[61] HIRSHMAN, *supra* note 41, at 75.
[62] *Id.*
[63] *Id.* at 76.
[64] *Id.* at 77.
[65] *Id.*
[66] 420 U.S. 636 (1975).

Act that denied to widowed fathers benefits afforded to widowed mothers."[67] On the government's appeal, the U.S. Supreme Court reviewed the constitutionality of this provision of the Social Security Act.[68] In a huge victory for women's rights—although still not reaching equalization between sex and race—the Court held, citing *Frontiero*, that the "gender-based classification" in the Social Security Act violated the Due Process Clause of the Fourteenth Amendment.[69] This conclusion signaled, as Ginsburg originally intended, that gender stereotypes have no place in the law and should be reviewed with heightened scrutiny.[70]

Marshall's and Ginsburg's approaches to achieving racial and gender equality under the law exemplify how incrementalism has been successfully employed in shifting jurisprudence toward the ultimate goal. In addition to effectuating jurisprudential change, this country has seen incrementalism employed in legislative changes—most notably in abortion, as the next Section explains.

B. Incremental Legislation

Another way in which incrementalism has been employed in the United States is through incremental legislation, inching toward the ultimate goal. The most notable example of this is the way in which the pro-life movement approached its goal of banning abortion after the U.S. Supreme Court's 1973 decision in *Roe v. Wade* protected the right to abortion under the Fourteenth Amendment.[71] But incremental abortion legislation was employed both before *Roe*—broadening the right to abortion—and after *Roe*—narrowing the right to abortion.[72]

Before *Roe*, "the political process . . . had been slowly liberalizing the laws state by state."[73] In fact, Ginsburg (before joining the Court) criticized *Roe* for being too radical and hindering the incremental political process that was broadening the right to abortion.[74] While she agreed with the bottom line—legalizing or protecting abortion—Ginsburg contended that an "incremental strategy" to abortion legislation would have "avoided or minimized" the backlash by abortion opposition that *Roe* caused.[75]

---

[67] *Tribute*, *supra* note 49; *accord Ruth Bader Ginsburg*, *supra* note 49. Hirshman writes: "Had Stephen Wiesenfeld not existed, Ruth Bader Ginsburg might have had to invent him." HIRSHMAN, *supra* note 41, at 94.

[68] HIRSHMAN, *supra* note 41, at 95–97 (discussing the process for the Court to accept jurisdiction in *Weinberger*).

[69] *Weinberger*, 420 U.S. at 653.

[70] *See* HIRSHMAN, *supra* note 41, at 101; *see also* United States v. Virginia, 518 U.S. 515, 533–34 (1996).

[71] 410 U.S. 113 (1973).

[72] *See* MARY ZIEGLER, AFTER *ROE*: THE LOST HISTORY OF THE ABORTION DEBATE 58–91 (2015).

[73] HIRSHMAN, *supra* note 41, at 81.

[74] *Id.*

[75] *Id.*; *see id.* at 62.

Perhaps, as Ginsburg predicted, the Court's decision in *Roe* marked a turning point in the incremental strategy for abortion legislation. After *Roe*, incremental legislation worked in the opposite direction—narrowing the right to abortion. For example, "[w]ithin a year of the *Roe* decision, Missouri passed its first post-*Roe* anti-abortion law."[76] Although the Supreme Court invalidated the Missouri law, the anti-abortion, or pro-life, "movement would keep passing laws, looking for holes in the *Roe* decision and for any legal method to restrict abortion."[77]

These efforts were reignited when the Court decided *Planned Parenthood of Southeast Pennsylvania v. Casey* fourteen years after *Roe*, affirming the central holding of *Roe* but changing the framework for reviewing the constitutionality of abortion restrictions.[78] After *Casey*, the pro-life movement employed an incrementalist strategy to further limit women's access to abortion. "Incrementalists lobbied state legislatures to pass laws that the Supreme Court might actually uphold," focusing "on middle-ground restrictions."[79] Once incrementalism gained momentum, "pro-lifers across the ideological spectrum generally viewed it as a useful tool for limiting access to abortion."[80]

While some pro-life supporters believed that the incremental approach would eventually lead to a successful challenge against *Roe v. Wade*,[81] absolutists viewed the incrementalism approach as a "waste of scarce movement resources" that advanced "compromise regulations," which undermined the ultimate goal of eliminating abortion altogether.[82] In other words, those who view anything but abolition a failure thought that incrementalism was not aggressive enough in the fight against abortion.[83]

Perhaps the absolutists were correct. The U.S. Supreme Court's 2016 decision in *Whole Woman's Health v. Hellerstedt*, which invalidated Texas's extremely restrictive abortion legislation—House Bill 2(HB2)—indicates that the pro-life, incremental

---

[76] *Id.* at 150. This bill "allowed doctors, nurses, and hospitals to refuse to perform an abortion when it violated their moral, ethical, or religious beliefs." *Id.* The bill also required "informed consent by the woman considering an abortion, her spouse if married, and the consent of the parents of an unmarried minor under the age of eighteen" and "banned abortions performed after twelve weeks of pregnancy that involved the injection of a saline solution into the mother's womb." *Id.*

[77] *Id.* at 151.

[78] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 833–34 (1992); *see also* HIRSHMAN, *supra* note 41, at 195 (explaining more about the "undue burden" standard).

[79] ZIEGLER, *supra* note 72, at 59; *see* Editorial, *An Ohio Bill Would Ban All Abortions. It's Part of a Bigger Plan.*, N.Y. TIMES (Mar. 25, 2018), https://www.nytimes.com/2018/03/25/opinion/ohio-abortion-ban-bill.html?smid=fb-nytimes&smtyp=cur [https://nyti.ms/2pEqKcX] [hereinafter *Ohio Bill*] ("[E]ven if the bill doesn't become law, it could pave the way for other, somewhat less extreme measures to pass, seeming reasonable by comparison.").

[80] ZIEGLER, *supra* note 72, at 59.

[81] *Ohio Bill*, *supra* note 79.

[82] ZIEGLER, *supra* note 72, at 60.

[83] *See id.*

approach to eliminating abortion was not necessarily successful.[84] *Hellerstedt* made clear that the Court's view on abortion has not changed much since its 1992 decision in *Casey*, as the Court merely applied the "undue burden" standard from *Casey* to invalidate HB2.[85] Although, some scholars speculated and we may now be seeing the effects of a new wave of incrementalism in abortion legislation and a rise in litigation seeking to overturn *Roe* in light of Kennedy's retirement in 2018.[86] Regardless of one's views on the strategy's success, it is clear that the pro-life movement employed incrementalism in anti-abortion legislation,[87] similarly to Marshall's and Ginsburg's approaches to racial and gender equality, respectively.

Having explained the ways in which incrementalism has been successfully employed in other contexts, Part III applies this background and explains how incrementalism underlies the changes courts have implemented in capital sentencing since the Supreme Court's 1972 decision in *Furman v. Georgia*, which instituted modern capital sentencing.[88]

III. HOW INCREMENTALISM HAS SHAPED THE CURRENT CAPITAL PUNISHMENT SYSTEM

Today, defendants are sentenced to the ultimate punishment—death—for capital crimes, which, in most jurisdictions, involve the purposeful killing of another human being, or first-degree murder.[89] Not every defendant convicted of a capital crime,

---

[84] 136 S. Ct. 2292, 2300 (2016).

[85] *Id.*

[86] *See, e.g.*, Julie Hirschfeld Davis, *Departure of Kennedy, 'Firewall for Abortion Rights,' Could End* Roe v. Wade, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/06/27/us/politics/kennedy-abortion-roe-v-wade.html [https://nyti.ms/2lFnXOi]; Li Zhou, *10 Legal Experts on the Future of* Roe v. Wade *After Kennedy*, VOX (July 2, 2018, 7:00AM), https://www.vox.com/2018/7/2/17515154/kennedy-retirement-roe-wade [https://perma.cc/LH57-AETE]; *see also* Amy Howe, *Justices Grant Stay, Block Louisiana Abortion Law From Going Into Effect*, SCOTUSBLOG (Feb. 7, 2019, 10:46 PM), https://www.scotusblog.com/2019/02/justices-grant-stay-block-louisiana-abortion-law-from-going-into-effect/ [https://perma.cc/WYQ4-U76Q]. Indeed, oral argument is scheduled for March 4, 2020, in *June Medical Services, LLC v. Gee*, in which the Supreme Court will review the Fifth Circuit Court of Appeals' decision upholding a Louisiana statute requiring physicians who perform abortions to have admitting privileges at a local hospital. *June Medical Services LLC v. Gee*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/june-medical-services-llc-v-gee-3/ [https://perma.cc/4JJ7-DSYD] (last visited Feb. 24, 2020).

[87] For more on the history of both sides' strategy with abortion legislation and the abortion debate in general, see generally MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA: ROE V. WADE TO THE PRESENT (Cambridge UP 2020).

[88] 408 U.S. 238, 239–40 (1972) (finding that the death penalty violated the Eighth and Fourteenth Amendments in three different cases).

[89] *See* STEIKER & STEIKER, *supra* note 1, at 11 ("The scope of first-degree murder to this day centers on the original Pennsylvania definition, which focused on 'deliberate and premeditated'

however, is sentenced to death. Before a defendant convicted of a capital crime is sentenced to death, courts and juries must consider several factors, and ultimately determine that the defendant's crime is among the "worst of the worst."[90] But this multi-consideration process has not always stood between defendants and the death penalty.

As this Part explains, the list of factors that determine which capital defendants are sentenced to death has continuously evolved since 1972. This Part demonstrates how incrementalism—in a different form than it has been employed in the contexts explained in Part II—underlies our current system of capital punishment. The guiding standard for Eighth Amendment jurisprudence inherently contemplates incrementalism by indicating an ever-evolving society.[91] Thus, by its own terms, the "evolving standards of decency" framework benefits from an incremental approach.

Constrained by this incremental standard, courts have opted for incremental changes when faced with Eighth Amendment challenges to capital sentencing.[92] This Article contends that such incremental changes will ultimately lead to the final abolition of capital sentencing when the proper foundation for doing so exists—namely, the jurisprudential foundation, political atmosphere, and societal support.[93]

Before 1972, capital sentencing was the "Wild, Wild West"; there were "no rules."[94] Under that regime, it was unclear what jurisdiction controlled the imposition of capital sentences and executions, and standards or regulations for imposing and executing the death penalty were minimal.[95] As a result, the *Furman* Court invalidated the death penalty in all fifty states, determining that the way states sentenced defendants to death was unconstitutionally arbitrary.[96] Four years later, however, pressured by pro–death penalty activists, the Court reinstituted capital sentencing.[97]

After *Furman*, several states reenacted the death penalty through capital sentencing schemes that aimed to minimize arbitrariness. They did so by requiring either the jury or trial judge to make fact-based findings, such as aggravating factors,

---

murder and murder committed in the course of other serious felonies."). Defendants used to be subjected to death for a much broader array of crimes, as Carol and Jordan Steiker explain. *See id.* at 9–11.

[90] *E.g.*, Kearse v. State, 770 So. 2d 1119, 1138 (Fla. 2000) (Anstead, J., dissenting). Carol and Jordan Steiker also explain the history of jury involvement. *See* STEIKER & STEIKER, *supra* note 1, at 11–12.

[91] *See* Trop v. Dulles, 356 U.S. 86, 100–01 (1957) (plurality opinion) (indicating that the Eighth Amendment should be considered under "evolving standards of decency").

[92] *See How States Abolish the Death Penalty*, *supra* note 40, at 33 (discussing how some countries "proceeded directly to full abolition," others take "intermediary steps," or an incremental approach, when the direct approach is impractical).

[93] *See* Sarat et al., *supra* note 11, at 759.

[94] *See, e.g.*, STEIKER & STEIKER, *supra* note 1, at 7 (listing some of the varying early capital offenses ranging from murder to cursing near a child and man-stealing).

[95] *See id.* at 6–8.

[96] *See* Furman v. Georgia, 408 U.S. 238, 240 (1972) (per curiam); *see also* STEIKER & STEIKER, *supra* note 1, at 2–3.

[97] STEIKER & STEIKER, *supra* note 1, at 2.

before sentencing the defendant to death.[98] Other states repealed the death penalty or eliminated death as a viable punishment altogether.

In fact, we continue to see states repealing capital punishment or, for some other reason, rendering death a non-viable punishment—even in the past few years. As of March 2018, death is not a viable punishment in nineteen states.[99] Since then, numerous states have considered bills proposing abolition,[100] and several states actually have repealed the death penalty.[101] As of January 2020, death was not a viable punishment in twenty-five states.[102]

Other decreases in capital sentencing, this Article contends, resulted from incrementalism driven by the "evolving standards of decency" standard that controls Eighth Amendment jurisprudence. As pro-lifers intended with their "middle-ground [abortion] restrictions,"[103] the Supreme Court has incrementally limited capital punishment through a series of cases. These changes, which usually begin in the states,[104] can generally be split into three categories, each of which is addressed below: (1) which defendants are eligible to be sentenced to death; (2) how sentences of death are imposed; and (3) how defendants are executed.

Other scholars present varied explanations for these changes. For example, the Steikers argue that these changes resulted from the Supreme Court's failed attempt to constitutionally regulate capital sentencing, which ultimately destabilized the system.[105] Others argue these changes were a result of the Court attempting to implement its constitutional standards and ensure that capital punishment is employed in a way that is consistent with defendants' other fundamental rights.[106] This Article

---

[98] Aggravating factors are characteristics of the crime that make it "worse," whereas mitigating circumstances, cumulatively referred to as mitigation, are characteristics of the crime—usually the defendant's background and character—that make the defendant seem less deserving of the death penalty. *See, e.g.*, 1973 Fla. Laws 20–21.

[99] *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/documents/FactSheet.pdf [https://perma.cc/URU2-UXCG] (last visited Feb. 24, 2020); *see* STEIKER & STEIKER, *supra* note 1, at 18; Sarat et al., *supra* note 11, at 758.

[100] *See* Sylvia Krohn, *Numerous States Consider Repeal of the Death Penalty*, AM. BAR ASS'N (May 10, 2019), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2019/spring/numerous-states-consider-repeal-of-the-death-penalty/ [https://perma.cc/7982-KRFY]; *Recent Legislative Activity*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/recent-legislative-activity [https://perma.cc/93XG-CE8F] (last visited Feb. 24, 2020).

[101] *See State by State*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state [https://perma.cc/73VN-2FQE] (last visited Feb. 24, 2020).

[102] *Id.*

[103] ZIEGLER, *supra* note 72, at 59.

[104] *See* STEIKER & STEIKER, *supra* note 1, at 8; *see also* U.S. CONST. amend. X.

[105] STEIKER & STEIKER, *supra* note 1, at 4.

[106] *See, e.g.*, Edmondson, *supra* note 18, at 859 (discussing the Court's concern with arbitrary jury decisions and the legitimacy of death penalty); Sarat et al., *supra* note 11, at 760 (stating that death penalty opposition has shifted from a moral framework to a focus on sentencing and procedural concerns).

contextualizes these changes as the path toward abolition through an incremental process that inheres in the Court's "evolving standards of decency" framework.

A. Defendants Who Are Eligible to Be Sentenced to Death

The first aspect of capital sentencing that the Court has narrowed since *Furman* is *who* may be sentenced to death, or the category of defendants eligible for death. When *Furman* was decided, anyone could be sentenced to death after being convicted of a capital crime so long as the sentence of death was imposed in a way that was not considered arbitrary.[107]

Today, only defendants who were at least eighteen years of age at the time of their crime and of sufficient intellectual ability—and, of course, prosecuted in a state that has the death penalty—are eligible for death.[108] This Section explains the litigation that led to the U.S. Supreme Court's decisions rendering certain groups of individuals ineligible for death—namely, defendants who have some sort of mental incapacity and juveniles, or defendants who were under the age of eighteen at the time of the crime.

1. Mental Incapacity

First, the U.S. Supreme Court determined it violates the Eighth Amendment to execute defendants who prove their mental incapacity.[109] This includes defendants who are insane and those who have intellectual disabilities.[110] Between 1972 and 2002, the mental capacity requirement for death eligibility transpired from no restriction to sane and not intellectually disabled.[111] This change shifted the death penalty to focus on defendants who not only committed first-degree murder, but did so with the mental capacity to appreciate the criminality and gravity of his or her actions.[112] In theory, it is this understanding of one's actions and conscious choice to nevertheless commit the crime that renders the defendant deserving of the ultimate punishment.

In 1986, the Court relied on the Eighth Amendment to declare in *Ford v. Wainwright* what every "State in the Union" had already determined: executing an insane prisoner is against the moral code of "civilized societies."[113] The Court explained that this "rule" was deeply rooted in society:

---

[107] *See* Furman v. Georgia, 408 U.S. 238, 242 (1972) (Douglas, J., concurring).

[108] *See generally* Roper v. Simmons, 543 U.S. 551 (2005) (holding that the death penalty is unconstitutional if applied to defendants under eighteen years of age); Atkins v. Virginia, 536 U.S. 304 (2002) (holding that the death penalty was unconstitutional when applied to defendants with intellectual disabilities).

[109] *See generally Roper*, 543 U.S. 551.

[110] *See Atkins*, 536 U.S. at 321; Ford v. Wainwright, 477 U.S. 399, 409–10 (1986) (stating death penalties against the criminally insane are unconstitutional).

[111] *See Atkins*, 536 U.S. at 321.

[112] *See id.*

[113] *Ford*, 477 U.S. at 408–09.

> This ancestral legacy has not outlived its time. Today, no State in the Union permits the execution of the insane. It is clear that the ancient and humane limitation upon the State's ability to execute its sentences has as firm a hold upon the jurisprudence of today as it had centuries ago in England. The various reasons put forth in support of the common-law restriction have no less logical, moral, and practical force than they did when first voiced. For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life. Similarly, the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently shared across this Nation. Faced with such widespread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane.[114]

Thus, *Ford* is a clear example of how "evolving standards of decency that mark the progress of a maturing society," or "contemporary values," of which the Court considers the states' actions evidence, drive Eighth Amendment jurisprudence.[115]

The Court again relied on the "evolving standards of decency" standard to hold in *Atkins v. Virginia* "that the mentally retarded should be categorically excluded from execution."[116] Again, societal acceptance was key in the Court adopting this change. Similar to how states had already barred insane inmates from execution before the Court declared that doing so was unconstitutional, the Court observed that a "large number of States prohibit[ed] the execution of mentally retarded persons"[117]—now known as persons with intellectual disabilities.[118] In fact, the Court determined that "a national consensus [had] developed against" the execution of intellectually disabled defendants.[119] Thus, consistent with this consensus, the Court held in *Atkins* that the Eighth Amendment categorically prohibits sentencing intellectually disabled defendants to death.[120] Further explaining its holding in *Atkins*, the Court wrote in *Hall v. Florida*:

---

[114] *Id.* at 408–10 (internal citations omitted).

[115] *Id.* at 406 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

[116] *Atkins*, 536 U.S. at 318.

[117] *Id.* at 315.

[118] *See, e.g.*, *Intellectual Disability and the Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/intellectual-disability-and-death-penalty [https://perma.cc/3NVJ-L2HV] (last visited Feb. 24, 2020) (discussing *Atkins*' effect on people with intellectual disabilities).

[119] *Atkins*, 536 U.S. at 316; *accord* Hall v. Florida, 134 S. Ct. 1986, 1992 (2014).

[120] *Atkins*, 536 U.S. at 321.

> No legitimate penological purpose is served by executing a person with intellectual disability. To do so contravenes the Eighth Amendment, for to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being. "[P]unishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution." Rehabilitation, it is evident, is not an applicable rationale for the death penalty. As for deterrence, those with intellectual disability are, by reason of their condition, likely unable to make the calculated judgments that are the premise for the deterrence rationale. They have a "diminished ability" to "process information, to learn from experience, to engage in logical reasoning, or to control impulses . . . [which] make[s] it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." Retributive values are also ill-served by executing those with intellectual disability. The diminished capacity of the intellectually disabled lessens moral culpability and hence the retributive value of the punishment.[121]

Since then, the Supreme Court has explained that "States have some flexibility, but not 'unfettered discretion,'" in enforcing *Atkins*.[122] As a result, states vary in how they address defendants in this category.[123] The functioning definition of intellectual disability has three parts: (1) "significantly subaverage intellectual functioning"; (2) "deficits in adaptive functioning (the inability to learn basic skills and adjust behavior to changing circumstances)"; and (3) "onset of these deficits during the developmental period."[124] While a defendant must prove the existence of all three factors, the Court recently made clear in *Moore v. Texas* that a court's determination of whether a defendant is intellectually disabled should be informed by the medical community, and courts should not overemphasize any of these factors to the detriment of another.[125]

Although the prevalence of intellectual disability in capital defendants is unclear for several reasons,[126] it is clear that the constitutional bar to executing intellectually

---

[121] *Hall*, 134 S. Ct. at 1992–93 (alterations in original) (internal citations omitted).

[122] Moore v. Texas, 137 S. Ct. 1039, 1052–53 (2017) (quoting *Hall*, 134 S. Ct. at 1998); *see* U.S. CONST. amend. X.

[123] *See, e.g.*, *Disparities in Determinations of Intellectual Disability*, DEATH PENALTY INFO. CTR. (Feb. 2, 2015), https://deathpenaltyinfo.org/node/6040 [https://perma.cc/PWE3-X3GC] (listing various success rates across states for defendants raising intellectual disability claims); *Intellectual Disability and the Death Penalty*, *supra* note 118.

[124] *Hall*, 134 S. Ct. at 1994.

[125] *Moore*, 137 S. Ct. at 1050.

[126] These reasons likely include the number of defendants who are intellectually disabled and do not raise an *Atkins*-related claim, as well as the seemingly high rate of unsuccessful

disabled defendants further narrowed the pool of eligibility for the death penalty.[127] It is also clear that society has embraced this standard, as states continue to introduce and pass legislation restricting the execution of defendants with intellectual disabilities.[128]

2. Juveniles

Next, the Supreme Court has narrowed the pool of eligibility for death with respect to juveniles. In *Thompson v. Oklahoma*, the Supreme Court explained that "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult" based on the "obvious" reasons of "[i]nexperience, less education, and less intelligence," which make the juvenile "less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult."[129] In other words, the Court explained that a juvenile's "irresponsible conduct is not as morally reprehensible as that of an adult" for the same "reasons . . . juveniles are not trusted with the privileges and responsibilities of an adult."[130]

As with changes related to mental capacity, the Court followed the states' lead in making changes to capital sentencing regarding juveniles. When *Thompson* was decided, the Court explained that state laws fell into three categories: (1) fourteen states did not authorize capital punishment at all, (2) nineteen states authorized capital punishment without setting a "minimum age . . . in the death penalty statute,"[131] and (3) the remaining states authorized capital sentencing and "expressly established a minimum age in their death penalty statutes," which "require[d] that the defendant have attained at least the age of 16 at the time of the capital offense."[132] The Court found that the current state laws, which defined a "juvenile" as a defendant who "ha[d] attained at least the age of 16 at the time of the capital offense,"[133] represented current societal standards.[134] Thus, the Court held that "the Eighth and Fourteenth Amendments prohibit the execution of" juveniles, or persons "under 16 years of age at the time of [the] offense."[135]

---

claims. *See* John H. Blume et al., *A Tale of Two (and Possibly Three)* Atkins*: Intellectual Disability and Capital Punishment Twelve Years After the Supreme Court's Creation of a Categorical Bar*, 23 WM. & MARY BILL RTS. J. 393, 396–98 (2014) (explaining filing and success rates since *Atkins*).

127 *See* Ian Freckelton, *Offenders with Intellectual and Developmental Disabilities: Sentencing Challenges After the Abolition of Execution in the United States*, 23 PSYCHIATRY, PSYCHOL. & L. 321, 332 (2016).

128 *Recent Legislative Activity*, *supra* note 100.

129 Thompson v. Oklahoma, 487 U.S. 815, 835 (1988).

130 *Id.*

131 *Id.* at 826–27; *see* BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 115 (2014) (explaining that Alabama had a high rate of juveniles sentenced to death).

132 *Thompson*, 487 U.S. at 829.

133 *Id.*

134 *Id.* at 830.

135 *Id.* at 838.

Several years after *Thompson*, again reviewing state laws from around the country in *Roper v. Simmons*, the Court extended that the meaning of "juvenile" in this context includes defendants who committed the crime between sixteen and eighteen years of age.[136] In *Roper*, the defendant was seventeen when he "committed murder" but turned eighteen "[a]bout nine months later."[137] Under *Thompson*, because he was seventeen at the time of the crime, the defendant "was outside the criminal jurisdiction of [his state's] juvenile court system."[138] As a result, "[h]e was tried as an adult," convicted, and "the trial judge imposed the death penalty."[139]

Determining that society's standards of decency had evolved to determine "that the death penalty is [a] disproportionate punishment for offenders under 18,"[140] the Supreme Court determined that Roper's sentence violated the Eighth and Fourteenth Amendments and affirmed the Missouri Supreme Court's judgment setting aside his sentence of death. Thus, the Court in *Roper* broadened the definition of juvenile, as used in the capital sentencing context, and further narrowed the pool of eligibility for the death penalty.[141]

One may argue that capital punishment maintains full support when imposed against an offender of sufficient mental capacity. However, as the next Section explains—using Florida as an example—comparing the way in which defendants were sentenced to death just after *Furman* and the process by which defendants are sentenced to death today suggests that the "evolving standards of decency" has also narrowed other aspects of the death penalty since *Furman*.[142]

B. How Defendants Are Sentenced to Death

In a matter of fifty years, the requirements for sentencing a defendant to death in Florida have transformed from nearly nothing to comprehensive, mandating a jury's unanimous determination on every fact necessary to impose a sentence of death, including the final recommendation for death.[143] Unlike the changes related to *who*

---

[136] 543 U.S. 551, 568 (2005).

[137] *Id.* at 556.

[138] *Id.* at 557.

[139] *Id.* at 557–58.

[140] *Id.* at 575.

[141] *See id.* at 578–79.

[142] It is important to note that Alabama is an exception here. As of January 2020, Alabama is the only state in the country that does not statutorily require a jury's unanimous recommendation for death before a defendant may be sentenced to death.

[143] *See* Fla. Stat. § 921.141 (2019). Florida's current statute is consistent with the Supreme Court of Florida's decision in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017). However, during the editing process of this Article, in January 2020, the Supreme Court of Florida receded from *Hurst*. In *State v. Poole*, 2020 WL 370302 (Fla. 2020), the Court held that the jury's unanimous recommendation for death is *not* required to meet the constitutional mandates of the Sixth Amendment. Despite *Poole*, Florida's capital sentencing scheme has not changed, and the news has reported that Florida's Legislature does not intend to revise the statute in light of *Poole*. *See, e.g.*, News Service of Florida, *Florida Senate*

may be sentenced to death, which were based on the Cruel and Unusual Punishment Clause of the Eighth Amendment, these changes—relating to the capital sentencing process—are generally based on the Sixth Amendment's guarantee of a right to trial by jury[144] because the choice to sentence a defendant to death starts with the jury. The jury recommends to the trial court that the defendant be sentenced to death, and the trial judge then imposes the final sentence.[145]

Before *Furman*, death was a mandatory punishment once a defendant was convicted of certain capital crimes.[146] Upon conviction, the trial court automatically imposed a sentence of death without any further findings.[147] After *Furman*, which held that capital sentencing statutes needed "safeguards sufficient to ensure that the penalty would be applied reliably and not arbitrarily,"[148] states including Florida reenacted capital sentencing schemes that aimed to make the process more selective and, therefore, less arbitrary.[149]

Under Florida's post-*Furman* legislation, only "offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution'" were eligible for death.[150] As mentioned above, Florida's new statute delineated "aggravating circumstances" and "mitigating circumstances," which the jury was to weigh in making its ultimate sentencing recommendation.[151] Under Florida's post-*Furman* statute, capital defendants could be sentenced to death upon the following findings: (a) a majority of the twelve-member jury (seven members) voted to recommend a sentence of death; and (b) the judge determined that (i) the aggravation outweighed the mitigation, and (ii) death was appropriate.[152]

However, just because the jury made these findings did not guarantee a defendant would be sentenced to death. The jury and trial court always had the option to

---

Won't Consider Death Penalty Changes in 2020 Session, SUN SENTINEL (Jan. 30, 2020), https://www.sun-sentinel.com/news/politics/fl-ne-nsf-senate-death-penalty-20200130-lgbf276sj5ay5clctnuknju4cq-story.html [https://perma.cc/V84P-H4JH]. If that changes and the Legislature amends Florida's capital sentencing statute in light of *Poole*, Florida will join Alabama as an outlier in capital sentencing. However, that would not change the argument herein that constitutional standards related to capital sentencing have contributed to the incremental approach toward abolition.

144 *See* U.S. CONST. amends. VI, VIII. *See generally* Ring v. Arizona, 536 U.S. 584 (2002); Melanie Kalmanson, *Distinguishing Proper Procedure of Improper Punishment* (Apr. 1, 2019) (unpublished manuscript) (on file with author).

145 *See, e.g.*, 1973 Fla. Laws 20–21 (showing how Florida had the jury make a recommendation on the death sentence to the judge).

146 *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 286–87 (1976).

147 *See id.*

148 Glossip v. Gross, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting).

149 *See, e.g.*, Provence v. State, 337 So. 2d 783, 786 (Fla. 1976), *cert. denied*, 97 S. Ct. 2929 (1977).

150 Roper v. Simmons, 543 U.S. 551, 568 (2005) (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)).

151 1973 Fla. Laws 21–22.

152 *See id.* at 20–21.

exercise mercy and sentence the defendant to life.[153] Upon review, the Supreme Court of Florida held that this new statute satisfied the constitutional mandates of *Furman*.[154] Thus, Florida continued with capital sentencing, executing fifty-one defendants between 1976 and June 2002,[155] when the U.S. Supreme Court decided *Ring v. Arizona*.[156]

In *Ring*, the U.S. Supreme Court clarified that capital defendants are entitled to a jury determination that the State has proven beyond a reasonable doubt each factor necessary to impose a sentence of death.[157] Since *Ring*, several states have abolished capital punishment.[158] Most states that retained capital punishment after *Ring* enacted statutes requiring a jury's unanimous recommendation for death before the trial court could impose a sentence of death.[159] Other states, including Florida, determined that *Ring* did not compromise the validity of their existing statute and made no changes to their capital sentencing scheme in light of *Ring*.[160]

Florida maintained its capital sentencing scheme under which a twelve-member jury could recommend death by a mere majority and the trial court made findings on aggravating factors and mitigating circumstances after the jury recommended

---

[153] Mercy is a juror's ability to—despite having found that all of the elements for capital punishment have been proven beyond a reasonable doubt, as required by the Sixth and Eighth Amendment of the U.S. Constitution—determine that death, for any other reason, is not an appropriate sentence. *See, e.g.*, *id.* at 21 (stating if the court did not sentence death, then they were to sentence life imprisonment).

[154] State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973), *cert. denied*, 94 S. Ct. 1950 (1974).

[155] *Execution List: 1976–Present*, FLA. DEP'T CORRECTIONS, http://www.dc.state.fl.us/ci/execlist.html [https://perma.cc/F3M9-KFY3] (last visited Feb. 24, 2020) [hereinafter *Execution List*].

[156] 536 U.S. 584 (2002).

[157] *Id.* at 589; *see* Apprendi v. New Jersey, 530 U.S. 466, 477 (2000). Courts look to state statutes to determine what the necessary facts are. *See generally Ring*, 536 U.S. 583.

[158] *See States with and Without the Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/states-and-without-death-penalty [https://perma.cc/A7CW-RUHF] (last visited Feb. 24, 2020). Specifically: Connecticut, Delaware, Illinois, Maryland, New Jersey, New Mexico, and New York have abolished the death penalty since *Ring*. *Id.* In addition, four states—Colorado, Pennsylvania, Washington, and Oregon—have imposed gubernatorial moratoria since *Ring*. *Id.* After *Hurst*, Delaware also abolished the death penalty. *State by State*, *supra* note 101. Also, since 2018, as explained above, even more states have made these changes. *See supra* notes 101–02 and accompanying text.

[159] *See State Developments, Post*-Ring, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-developments-post-ring [https://perma.cc/MS9N-RY28] (last visited Feb. 24, 2020); *Supreme Court Declares Defendants Have a Right to Jury Determination of Eligibility for Death Sentence*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/us-supreme-court-ring-v-arizona [https://perma.cc/B8XB-GJUZ] (last visited Feb. 24, 2020).

[160] *See, e.g.*, Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), *cert. denied*, 123 S. Ct. 662 (2002); King v. Moore, 831 So. 2d 143 (Fla. 2002) (stating that *Ring* does not effect the Florida death penalty as the U.S. Supreme Court has upheld its constitutionality several times), *cert. denied*, 537 U.S. 1067 (2002).

death.[161] In some cases, trial courts even imposed sentences of death when the jury did not recommend death—referred to as a judicial override.[162] Notwithstanding, capital defendants continuously and unsuccessfully challenged the constitutionality of Florida's capital sentencing scheme in light of *Ring*.[163]

Fourteen years after *Ring*, in *Hurst v. Florida*, the U.S. Supreme Court finally reviewed the constitutionality of Florida's capital sentencing scheme in light of *Ring*.[164] Vindicating the argument that capital defendants had raised for years, the Supreme Court determined that *Ring* applied to Florida's capital sentencing scheme,[165] and violated the Sixth Amendment by failing to require the jury "to find each fact necessary to impose a sentence of death."[166] The Court made clear that "[a] jury's mere recommendation [for death] is" insufficient to protect capital defendants' constitutional right to a trial by jury,[167] explaining:

> Although Florida incorporates an advisory jury verdict that Arizona lacked, we have previously made clear that this distinction is immaterial: "It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona."[168]

Ultimately, the Supreme Court declared that Florida's capital sentencing scheme was unconstitutional and remanded to the Supreme Court of Florida for "further proceedings."[169]

---

[161] *See State Developments, Post*-Ring, *supra* note 159 (discussing Florida's retention of a judge determined death penalty system).

[162] *See, e.g.*, Patton v. State, 878 So. 2d 368, 377 (Fla. 2004); *see also* Asay v. State, 210 So. 3d 1, 29 (Fla. 2016) (Labarga, C.J., concurring), *cert. denied*, 138 S. Ct. 41 (2017).

[163] *See, e.g.*, Globe v. State, 877 So. 2d 663, 673–74 (Fla. 2004); *Patton*, 878 So. 2d at 377; Duest v. State, 855 So. 2d 33, 48–49 (Fla. 2003); *Bottoson*, 833 So. 2d at 694–95; *King*, 831 So. 2d at 144–45; *see also* Gaskin v. State, 218 So. 3d 399, 402, 404 (Fla. 2017) (Pariente, J., concurring in part and dissenting in part).

[164] Hurst v. Florida, 136 S. Ct. 616, 620–21 (2016).

[165] *Id.* at 622.

[166] *Id.* at 619.

[167] *Id.*

[168] *Id.* at 622 (quoting Walton v. Arizona, 497 U.S. 639, 648 (1990)). Likewise, the Supreme Court overruled its former decisions in *Spaziano v. Florida*, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989). "[T]o the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty." *Hurst*, 136 S. Ct. at 624.

[169] *Hurst*, 136 S. Ct. at 624.

On remand in *Hurst*, the Supreme Court of Florida determined that *Hurst v. Florida*, in conjunction with the Eighth Amendment to the U.S. Constitution and provisions of the Florida Constitution, "requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found unanimously by the jury."[170] Further, "based on Florida's requirement for unanimity in jury verdicts, and under the Eighth Amendment," the Supreme Court of Florida held "that in order for the trial court to impose a sentence of death, the jury's recommended sentence of death must be unanimous."[171] Quite similar to how the U.S. Supreme Court relied on state legislation in making changes to Eighth Amendment jurisprudence, the Court looked to other state legislation for guidance, noting:

> The vast majority of capital sentencing laws enacted in this country provide *the clearest and most reliable evidence that contemporary values* demand a defendant not be put to death except upon the unanimous consent of the jurors who have deliberated upon all the evidence of aggravating factors and mitigating circumstances.[172]

After *Hurst*, the Florida legislature enacted a new capital sentencing statute, essentially codifying the Florida Supreme Court's opinion in *Hurst*. This new statute required the jury to unanimously make each of the necessary findings identified in Florida's capital sentencing statute, including the final recommendation. By adopting this new statute, Florida joined "[t]he vast majority of" other states that still employ capital punishment.[173]

After Florida amended its capital sentencing statute post-*Hurst*, Delaware and Alabama were the only states that did not require unanimity in the jury's final recommendation for death.[174] Since *Hurst v. Florida*, the Delaware Supreme Court

---

[170] Hurst v. State, 202 So. 3d 40, 44 (Fla. 2016), *cert. denied*, 137 S. Ct. 2161 (2017). Based on Florida's specific statute, the Court explained: "In capital cases in Florida, these specific findings required to be made by the jury include the existence of each aggravating factor that has been proven beyond a reasonable doubt, the finding that the aggravating factors are sufficient, and the finding that the aggravating factors outweigh the mitigating circumstances." *Id.* As explained in note 143, *supra*, although the Supreme Court of Florida has receded from *Hurst*, the statute that resulted from *Hurst* remains the controlling sentencing statute in Florida. For more on changes in the Supreme Court of Florida's jurisprudence since *Hurst* and potential forthcoming changes, see generally Melanie Kalmanson, *Storm of the Decade: The Aftermath of* Hurst v. Florida *& Why the Storm Is Likely to Continue*, U. MIAMI L. REV. CAVEAT (2020).

[171] *Hurst*, 202 So. 3d at 44.

[172] *Id.* at 61 (emphasis added).

[173] *Id.* Again, it is unclear whether Florida will rejoin Alabama or not after the Supreme Court of Florida's decision in *Poole*. Regardless, the overarching argument here regarding incrementalism in the death penalty, which led to *Hurst* in the first place, remains. *See supra* note 143.

[174] *Hurst*, 202 So. 3d at 72 (Pariente, J., concurring).

has determined that Delaware's capital sentencing scheme, like Florida's, also violated the U.S. Constitution.[175] Unlike Florida, however, the Delaware Supreme Court determined that all sentences of death imposed under the unconstitutional statute would be reduced to sentences of life imprisonment without parole.[176] The Delaware legislature has not reenacted the death penalty, leaving Delaware without a mechanism to impose capital sentences.[177] Thus, Alabama, which requires that only ten of twelve jurors vote for a sentence of death,[178] is now the only state in the United States that does not require a jury's unanimous recommendation before a trial judge may impose a sentence of death.

As the evolution of capital sentencing in Florida shows, states—as a result of the U.S. Supreme Court's developing jurisprudence—have gradually narrowed capital punishment via the sentencing process. In Florida, the capital sentencing process has developed from one in which the State needed merely seven jurors' recommendations for death—a bare majority of the twelve-member jury—to one in which the State must convince each of twelve jurors that:

> (1) each aggravating factor was proven beyond a reasonable doubt,
> (2) the aggravating factors proven beyond a reasonable doubt are sufficient for a sentence of death,
> (3) the aggravating factors proven beyond a reasonable doubt outweigh the mitigation, and
> (4) death is an appropriate punishment.[179]

Naturally, these changes have caused and will further cause a decrease in the number of sentences of death imposed in Florida.[180]

---

[175] Rauf v. Delaware, 145 A.3d 430, 433–34 (Del. 2016).

[176] *See generally id.*; *Methods of Execution*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/methods-execution [https://perma.cc/8DXU-EJXQ] (last visited Feb. 24, 2020).

[177] *See Rauf*, 145 A.3d at 433–34.

[178] ALA. CODE § 13A-5-46(f) (1981); *see, e.g.*, Clark v. Dunn, No. 16-0454-WS-C, 2018 WL 264393, at *1 (S.D. Ala. Jan. 2, 2018).

[179] Of course, under this new scheme, jury overrides are unconstitutional. Also, between the jury's third and fourth finding in the capital sentencing process is the concept of mercy. As the Supreme Court of Florida explained in *Hurst*, "[I]t [is] the finding by the jury of all the elements necessary for conviction of murder that subject[s] the defendant to the ultimate penalty, unless mercy [is] expressed in the verdict of the jury as allowed by law." 202 So. 3d at 56. Thus, under a system in which the jury must unanimously vote to recommend death, any juror can "save" the defendant from death for any reason by voting to recommend a sentence of life imprisonment without parole instead of death; the juror's reason for doing so must not be explained. *Id.* at 57–58.

[180] *See, e.g.*, Laura C. Morel, *Far Fewer Florida Killers Are Sentenced to Die After Courts Require Unanimous Juries*, TAMPA BAY TIMES (Apr. 12, 2018), https://www.tampabay.com/news/courts/criminal/Far-fewer-Florida-killers-are-sentenced-to-die-after-courts-require

The final way in which courts have refined the death penalty since the pre-*Furman* Wild, Wild West is how defendants are executed. Again, society—or the "evolving standards of decency"—motivated these changes, which are explained below.

C. How Defendants Are Executed

Historically, challenges to execution methods brought to the U.S. Supreme Court under the Cruel and Unusual Punishment Clause of the Eighth Amendment have been unsuccessful.[181] "Our society has nonetheless steadily moved to more humane methods of carrying out capital punishment."[182] Specifically, society has proxied the development from "[t]he firing squad, hanging, the electric chair, and the gas chamber" to "today's consensus on lethal injection."[183]

One of the original methods of execution was the firing squad.[184] When this method was used, the inmate was "bound to a chair with leather straps across his waist and head, in front of an oval-shaped canvas wall. The chair [was] surrounded by sandbags to absorb the inmate's blood."[185] Hooded, the inmate's heart was pinned with "a circular white cloth target."[186] Twenty feet away, five shooters "armed with .30 caliber rifles loaded with single rounds" except one, who was "given blank rounds," aimed "his rifle through a slot in the canvas and fire[d] at the inmate."[187]

In 1878, the U.S. Supreme Court held that the firing squad did not violate the Eighth Amendment's protection against cruel and unusual punishment.[188] Three executions have been completed via firing squad since 1976, all of which occurred in Utah.[189]

-unanimous-juries_167160363 [https://perma.cc/MVX8-87VG]; Jake Stofan, *Number of Criminals Sentenced to Death in Florida Declining*, WJHG (Apr. 13, 2018, 6:34PM), https://www.wjhg.com/content/news/Number-of-criminals-sentenced-to-death-in-Florida-declining-479733503.html [https://perma.cc/235F-5CCT].

[181] *See* Baze v. Rees, 553 U.S. 35, 62 (2008).

[182] *Id.*

[183] *Id.* (citation omitted); *accord* STEIKER & STEIKER, *supra* note 1, at 13 ("[T]he gallows . . . were replaced with other, more technically complex modes of execution. . . . The replacement of the gallows with other, purportedly more humane execution methods was the fourth wave of death penalty reform, and it is still continuing today.").

[184] Deborah W. Denno, *The Firing Squad as "A Known and Available Alternative Method of Execution" Post*-Glossip, 49 U. MICH. J.L. REFORM 749, 778 (2016).

[185] *Firing Squad*, DEATH PENALTY CURRICULUM, https://deathpenaltycurriculum.org/student/c/about/methods/firingsquad.htm [https://perma.cc/NE32-8SPZ] (last visited Feb. 24, 2020).

[186] *Id.*

[187] *Id.*; *Cruel and Unusual*, MORE PERFECT (June 2, 2016), https://www.wnycstudios.org/story/cruel-and-unusual [https://perma.cc/BNR7-C4UH] (describing the work of Reprieve, a legal organization working on death penalty cases, to limit access to drugs used for execution).

[188] Wilkerson v. Utah, 99 U.S. 130, 134–35 (1878).

[189] Denno, *supra* note 184, at 788; *Methods of Execution*, *supra* note 176; *see* Von Drehle, *supra* note 12 (showing the number of executions by method since 1700, of which 130 were due to firing squad). If you include the number of executions before 1976, "American firing squads have executed 144 inmates." Denno, *supra* note 184, at 778.

The most recent was Ronnie Lee Gardner in 2010.[190] Today, three states—Mississippi, Oklahoma, and Utah—allow execution by firing squad if lethal injection becomes unconstitutional or unavailable; and, in Utah, defendants sentenced after May 3, 2004, may choose firing squad over lethal injection.[191] There have been no botched executions by firing squad since 1976.[192] However, "[o]nly Utah ever fully embraced the firing squad, so a national consensus on it never formed."[193]

Hanging was the primary method of execution until the 1890s.[194] It "was once used in almost every state and territory."[195] Under this method, the defendant's "hands and legs are secured, he or she is blindfolded, and the noose is placed around the neck, with the knot behind the left ear. The execution takes place when a trap-door is opened and the [defendant] falls through."[196] As the defendant falls, the defendant's weight "cause[s] a rapid fracture-dislocation of the neck."[197] Three executions have been completed via hanging since 1976,[198] the last of which was in January 1996 in Delaware.[199] Today, one state—New Hampshire—allows execution by hanging if it is the only constitutional or available method.[200] The overall rate of botched executions

---

[190] Alexander Vey, *No Clean Hands in a Dirty Business: Firing Squads and the Euphemism of "Evolving Standards of Decency,"* 69 VAND. L. REV. 545, 574 (2016).

[191] Denno, *supra* note 184, at 781–82 (citations omitted); *Methods of Execution*, *supra* note 176.

[192] *Botched Executions*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/botched-executions [https://perma.cc/S6VU-YMBJ] (last visited Feb. 24, 2020); *see* Denno, *supra* note 184, at 753–54 (explaining that the firing squad guarantees a "certain death"); *see also* Denno, *supra* note 184, at 791 ("In Justice Sotomayor's words, it is 'more reliable' as well as 'relatively quick and painless.'" (quoting Glossip v. Gross, 135 S. Ct. 2726, 2796 (2015) (Sotomayor, J., dissenting))); Vey, *supra* note 190, at 575 ("[T]his process has been remarkably difficult to botch."). However, there were a couple botched executions by firing squad before 1976. *See* Denno, *supra* note 184, at 787; Vey, *supra* note 190, at 575.

[193] Vey, *supra* note 190, at 576.

[194] *Hanging*, DEATH PENALTY CURRICULUM, https://deathpenaltycurriculum.org/student/c/about/methods/hanging.htm [https://perma.cc/3HDK-5JG6] (last visited Feb. 24, 2020).

[195] Vey, *supra* note 190, at 564.

[196] *Hanging*, *supra* note 194.

[197] *Id.*; *accord* Vey, *supra* note 190, at 563–64 (describing another hanging process).

[198] *Methods of Execution*, *supra* note 176; *see* Von Drehle, *supra* note 12 (showing the number of executions by method since 1700, of which, 9,183 were due to hanging).

[199] *Hanging*, *supra* note 194.

[200] *See Methods of Execution*, *supra* note 176; *see also* Mark Berman, *Washington Supreme Court Strikes Down States Death Penalty, Saying It Is "Arbitrary and Racially Biased,"* WASH. POST (Oct. 11, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/10/11/washington-supreme-court-strikes-down-states-death-penalty-saying-it-is-arbitrary-and-racially-biased/ [https://perma.cc/C24F-2WFN]. While Delaware and Washington allow execution by hanging on the books, both states' supreme courts have ruled capital punishment generally unconstitutional. *Id.*; *see also* Erik Eckholm, *Delaware Supreme Court Rules State's Death Penalty Unconstitutional*, N.Y. TIMES (Aug. 2, 2018), https://www.nytimes.com/2016

by hanging is 3.12%.[201] "Near the end of the nineteenth century, botched hangings, combined with changing public sensibilities," or evolving standards of decency, "turned American public opinion against the use of hanging."[202]

In 1924, Nevada introduced the use of lethal gas in executions.[203] Under this method, the defendant "is strapped to a chair in an airtight chamber. Below the chair rests a pail of sulfuric acid."[204] Once the execution team has left the chamber, "the room is sealed. The warden then gives a signal to the executioner who . . . releases crystals of sodium cyanide into the pail," which causes a "chemical reaction that releases hydrogen cyanide gas."[205] Once the defendant dies, "an exhaust fan sucks the poison air out of the chamber" so the execution team may enter.[206]

"In 1970, lethal gas was the second most widely used method of execution, following the electric chair."[207] At that time, "lethal gas was the sole method of execution" in ten states.[208] States using lethal gas for execution used one of several gases, including nitrogen and cyanide, to "cause hypoxia, an oxygen deficiency that causes death."[209] Eleven executions have been completed via lethal gas since 1976,[210] the last of which occurred in 1999.[211] Today, seven states—Alabama, Arizona, California, Mississippi, Missouri, Oklahoma, and Wyoming—allow execution by lethal gas, four of which—Alabama, Mississippi, Oklahoma, and Wyoming—allow it only if lethal injection is deemed unconstitutional or becomes otherwise unavailable.[212] Indeed, "after failing to obtain lethal injection drugs"[213] in March 2018, "Oklahoma . . . decided to use inert gas inhalation as the primary method for death penalty executions."[214]

/08/03/us/delaware-supreme-court-rules-states-death-penalty-unconstitutional.html [https://nyti.ms/2aLHeKf].

[201] *Botched Executions*, *supra* note 192.

[202] Vey, *supra* note 190, at 564.

[203] *Gas Chamber*, DEATH PENALTY CURRICULUM, https://deathpenaltycurriculum.org/student/c/about/methods/gaschamber.htm [https://perma.cc/T3KS-5LAS] (last visited Feb. 24, 2020).

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] Fierro v. Gomez, 865 F. Supp. 1387, 1405 (N.D. Cal. 1994).

[208] *Id.*

[209] Nicole Chavez, *Texas 'Ice Pick Killer' Executed with Lethal Injection Wanted a Firing Squad or Gas Death*, CNN (June 29, 2018), https://www.cnn.com/2018/06/28/us/texas-danny-bible-execution/index.html [https://perma.cc/NQC6-JT9U]; *see Fierro*, 865 F. Supp. at 1396.

[210] *Methods of Execution*, *supra* note 176; *see* Von Drehle, *supra* note 12 (showing the number of executions by method since 1700, of which fifty-nine are due to gas).

[211] *Gas Chamber*, *supra* note 203.

[212] *Methods of Execution*, *supra* note 176.

[213] Timothy Williams, *Oklahoma Turns to Gas for Executions Amid Turmoil over Lethal Injection*, N.Y. TIMES (Mar. 14, 2018), https://www.nytimes.com/2018/03/14/us/oklahoma-nitrogen-executions.html [https://nyti.ms/2GuKMxG].

[214] Chavez, *supra* note 209.

However, "[t]he gas chamber is widely viewed as an antiquated mode of execution, causing a slow, painful, and inhumane death."[215] In fact, some courts have indicated that execution by lethal gas, at least as employed by some states, is unconstitutional under the Eighth Amendment.[216] The overall rate of botched executions by lethal gas is 5.4%.[217]

By 1994, states started moving "away from use of the gas chamber as a means of execution."[218] Between lethal gas and the current method of lethal injection, states used electrocution (known as the "electric chair") as the primary method of execution.[219] "New York built the first electric chair in 1888."[220] Under this method, the defendant "is usually shaved and strapped to a chair with belts that cross" the defendant's "chest, groin, legs, and arms. A metal skullcap-shaped electrode is attached to the scalp and forehead over a sponge moistened with saline."[221] Blindfolded, the defendant is given "[a] jolt of between 500 and 2000 volts. . . . This process continues until the prisoner is dead."[222]

Electrocution is responsible for the highest number of modern executions[223]—161 executions since 1976[224]—and arguably the worst botched executions.[225] Despite the horror of botched executions by electrocution, the overall rate of botched executions by electrocution is fairly low at 1.92%.[226] Today, nine states—Alabama, Arkansas, Florida, Kentucky, Mississippi, Oklahoma, South Carolina, Tennessee, and Virginia—allow execution by electrocution.[227] "The supreme courts of Georgia (2001) and Nebraska (2008) have ruled that the use of the electric chair violates their state constitutional prohibitions against cruel and unusual punishment."[228] In addition, justices on the Supreme Court of Florida argued in 1999, based on information from several botched executions, that execution by electrocution was

---

[215] Fierro v. Gomez, 865 F. Supp. 1387, 1407 (N.D. Cal. 1994).

[216] *See* LaGrand v. Stewart, 173 F.3d 1144, 1149 (9th Cir. 1999); Fierro v. Gomez, 77 F.3d 301, 309 (9th Cir. 1996).

[217] *Botched Executions*, *supra* note 192.

[218] *Fierro*, 865 F. Supp. at 1405.

[219] *See, e.g.*, Provenzano v. Moore, 744 So. 2d 413, 437 (Fla. 1999).

[220] *Electrocution*, DEATH PENALTY CURRICULUM, https://deathpenaltycurriculum.org/student/c/about/methods/electrocution.htm [https://perma.cc/V4SS-FJM8] (last visited Feb. 24, 2020); *accord* Michael H. Reggio, *History of the Death Penalty*, PBS, https://www.pbs.org/wgbh/pages/frontline/shows/execution/readings/history.html [https://perma.cc/G3BC-VPLF].

[221] *Electrocution*, *supra* note 220.

[222] *Id.*

[223] *Botched Executions*, *supra* note 192.

[224] *Methods of Execution*, *supra* note 176; *see* Von Drehle, *supra* note 12 (showing the number of executions by method since 1700, of which 4,439 are due to electrocution).

[225] *See* Vey, *supra* note 190, at 566.

[226] *Botched Executions*, *supra* note 192.

[227] *Methods of Execution*, *supra* note 176; *see also* STEIKER & STEIKER, *supra* note 1, at 16.

[228] *Methods of Execution*, *supra* note 176.

unconstitutional.[229] "When the Supreme Court agreed to hear an Eighth Amendment challenge to Florida's use of electrocution, the governor called a special session of the Florida legislature to craft a lethal injection protocol, cutting off the challenge."[230] States then transitioned from electrocution to lethal injection, which remains the primary method of execution across the country.[231]

Texas became the first state to use lethal injection in 1982.[232] Florida adopted lethal injection as the primary method of execution in 2000.[233] By 2008, the federal government and "[t]hirty-six States that sanction[ed] capital punishment ha[d] adopted lethal injection as the preferred method of execution."[234] At that time, most states and the federal government used the following three-drug protocol: (1) an anesthetic, usually sodium thiopental; (2) a paralytic agent, pancuronium bromide; and (3) potassium chloride, in varying amounts, which "stops the heart and causes death."[235] Until 2009, most states still used this protocol.[236] Based on information that the second and third drugs cause pain, the first drug is critical in ensuring that the lethal injection process does not violate the Eighth Amendment.[237]

After 2009, due to difficulty in accessing drugs, states started finding other options for the first drug.[238] In 2010, states began using pentobarbital as the first drug.[239] Oklahoma was the first to use pentobarbital in an execution; since then, thirteen other states have used pentobarbital in executions.[240] In addition, eight states have used midazolam as the first drug, the first of which was Florida in 2013.[241]

---

[229] *See* Provenzano v. Moore, 744 So. 2d 413, 431, 435 (Fla. 1999) (Shaw, J., dissenting); *id.* at 450–51 (Pariente, J., dissenting).

[230] Vey, *supra* note 190, at 566.

[231] *See, e.g.*, *Provenzano*, 744 So. 2d at 450 (Pariente, J., dissenting); *Methods of Execution*, *supra* note 176.

[232] *See State by State Lethal Injection Protocols*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/lethal-injection/state-by-state-lethal-injection-protocols [https://perma.cc/QF88-YC55] (last visited Feb. 24, 2020); *see also Cruel and Unusual*, *supra* note 187 (discussing the history and invention of the lethal injection execution method).

[233] *See* Schwab v. State, 973 So. 2d 427, 429 (Fla. 2007) (Pariente, J., concurring).

[234] Baze v. Rees, 553 U.S. 35, 53 (2008).

[235] *Id.* at 73; *Overview of Lethal Injection Protocols*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/lethal-injection/overview-of-lethal-injection-protocols [https://perma.cc/YV27-AK7A] (last visited Feb. 24, 2020).

[236] *State by State Lethal Injection Protocols*, *supra* note 232.

[237] *See, e.g.*, *Schwab*, 973 So. 2d at 429 (Pariente, J., concurring) ("[I]f the inmate is not fully unconscious before pancuronium bromide is administered there is a high probability that an inmate will suffer unnecessary pain."); *see also Cruel and Unusual*, *supra* note 187 (discussing the history and invention of the lethal injection execution method).

[238] *See* STEIKER & STEIKER, *supra* note 1, at 15–16; *Cruel and Unusual*, *supra* note 187 (discussing the shortage of certain drugs used in lethal injection protocols).

[239] *State by State Lethal Injection Protocols*, *supra* note 232.

[240] *Id.*

[241] *Id.*

In 2017, Florida became the first state to use etomidate as the first drug in its lethal injection protocol.[242] The "pharmacology of etomidate is described by the drug insert as follows":

> Etomidate is a hypnotic drug without analgesic activity. Intravenous injection of etomidate produces hypnosis characterized by a rapid onset of action, usually within one minute. Duration of hypnosis is dose dependent but relatively brief, usually three to five minutes when an average dose of 0.3mg/kg is employed.[243]

"The most frequent adverse reactions associated with use of intravenous etomidate are transient venous pain on injection and transient skeletal movements, including myoclonus,"[244] which is a "sudden, involuntary jerking of a muscle or group of muscles."[245] The first defendant executed in Florida after this change, Mark Asay, challenged Florida's new protocol shortly before his execution.[246] Denying this claim, the Supreme Court of Florida determined that Asay neither "demonstrated that he [was] at substantial risk of serious harm" nor identified "a known and available alternative method of execution that entails a significantly less severe risk of pain."[247]

Other states have moved to a one-drug protocol, in which the defendant is injected with only "a lethal dose of an anesthetic."[248] Some argue that the one-drug protocol is favorable to the three-drug protocol for various reasons.[249] Ohio became the first state to implement a one-drug method in 2009, using sodium thiopental.[250]

---

[242] Asay v. State, 224 So. 3d 695, 703 (Fla. 2017); Tracy Connor, *Florida Executes Mark James Asay with Experimental Injection*, NBC NEWS (Aug. 24, 2017), https://www.nbcnews.com/storyline/lethal-injection/florida-plans-execute-mark-james-asay-experimental-injection-n795531 [https://perma.cc/3CRV-4KLZ].

[243] *Asay*, 224 So. 3d at 701.

[244] *Id.* (quoting what is stated on the "drug insert").

[245] *Myclonus Fact Sheet*, NAT'L INST. NEUROLOGICAL DISORDERS & STROKE, https://www.ninds.nih.gov/Disorders/Patient-Caregiver-Education/Fact-Sheets/Myoclonus-Fact-Sheet [https://perma.cc/WYU6-QB6M] (last visited Feb. 24, 2020).

[246] *Asay*, 224 So. 3d at 699.

[247] *Id.* at 701–02.

[248] *Overview of Lethal Injection Protocols*, *supra* note 235.

[249] *See, e.g.*, Schwab v. State, 973 So. 2d 427, 429 (Fla. 2007) (Pariente, J., concurring); Paul Lewis, *Report Urges One-Drug Lethal Injection to Avoid Botched US Executions*, GUARDIAN (May 7, 2014), https://www.theguardian.com/world/2014/may/07/oklahoma-lethal-injection-execution-drugs-constitution-animals [https://perma.cc/CF9F-83F3]; Josh Sanburn, *Creator of Lethal Injection Method: "I Don't See Anything that is More Humane,"* TIME (May 15, 2014), http://time.com/101143/lethal-injection-creator-jay-chapman-botched-executions/ [https://perma.cc/K9FH-FX2H].

[250] *State by State Lethal Injection Protocols*, *supra* note 232.

Since then, seven other states have adopted one-drug protocols, while six other states have "announced plans to use a one-drug protocol, but have not carried out such an execution."[251]

Despite the general consensus that lethal injection is the most humane method of execution to date, it is not unheard of for defendants to request other methods of execution, or for defendants to suffer pain during execution by lethal injection.[252] In fact, the Death Penalty Information Center reports that lethal injection has the highest rate of botched executions across the several methods—7.12%.[253]

Even in light of the U.S. Supreme Court's insistence that the Eighth Amendment does not protect defendants from a pain-free execution—most recently in *Bucklew v. Precythe*—the evolution of how defendants are executed in the United States indicates that anti–death penalty actors have been incrementally successful in shifting laws toward the most humane way to maintain capital punishment.[254] This process "is still continuing today."[255] Society remains the driving force behind this evolution, as the Eighth Amendment standard suggests. As one author explained:

> [T]hese evolving standards are, like the rest of the Bill of Rights, intended to protect *people*, and not merely society, from government, safeguarding the individual from imposition of cruelty by the state. In this way, "standards of decency" are properly considered as the bounds of what the state may acceptably impose on our fellow human beings. Such concerns are particularly important for death row inmates, who are "among the most despised members of any community," and thus lack access to the protections of the political process. Regardless of their crimes, they remain human beings, protected by the Constitution, which is sometimes forgotten when discussing the death penalty.[256]

As the developments in the method of execution reveal, and Part IV further explains, the "evolving standards of decency" standard, rather than destabilizing the death penalty as the Steikers argue, actually created a coherent vehicle by which courts can ultimately reach abolition.

---

[251] *Overview of Lethal Injection Protocols*, *supra* note 235.

[252] *See* STEIKER & STEIKER, *supra* note 1, at 15; *see also, e.g.*, Richard Gonzales, *Tennessee Death Row Inmates Request Death by Firing Squad*, NPR (Nov. 5, 2018), https://www.npr.org/2018/11/05/664548834/tennessee-death-row-inmates-request-death-by-firing-squad [https://perma.cc/RHR2-EWAT].

[253] *Botched Executions*, *supra* note 192; *accord* STEIKER & STEIKER, *supra* note 1, at 15.

[254] 139 S. Ct. 1112 (2019).

[255] STEIKER & STEIKER, *supra* note 1, at 13; *accord id.* at 16.

[256] Vey, *supra* note 190, at 553–54 (footnotes omitted).

IV. DEFINING THE ROUTE FROM HERE TO ABOLITION VIA THE "EVOLVING STANDARDS OF DECENCY"

As explained and illustrated above, the controlling "evolving standards of decency" standard for Eighth Amendment jurisprudence has produced an incremental decrease in capital punishment since the U.S. Supreme Court's landmark decision in *Furman*. While other authors contend that the Court's jurisprudence since *Furman* has frustrated the path to abolition, or created new reasons for abolition based on the system's failure to satisfy the demands set forth in *Furman*,[257] this Article contends that the "evolving standards of decency" framework is a vehicle by which the system will reach abolition. The framework, by inducing incremental changes in capital sentencing, will continue to inject uncertainty into capital sentencing as society continues to develop—ultimately leading to abolition.

Not only is this incremental process inherent in the guiding "evolving standards of decency" framework, it is practically more realistic. Eliminating a much narrower, confined capital punishment, of which society understands the limitations, is more achievable in a system of constrained courts that seek to avoid radical outcomes—especially the current U.S. Supreme Court.[258] In other words, it is much more likely that societal support—which this Article has shown is necessary for the Court to justify a change under the Eighth Amendment's "evolving standards of decency" standard—for eliminating capital sentencing will exist when the pool of eligibility has been sufficiently narrowed. Such sufficient narrowing is, of course, the natural result of incrementalism "encourag[ing] small changes within existing institutional and jurisdictional shapes"[259] rather than a system in which any defendant convicted of a serious crime could be sentenced to death at the trial court's whim, as in the pre-*Furman* Wild, Wild West.

This Part explains why abolition is likely the end point for capital sentencing as a result of the "evolving standards of decency" framework and, more importantly, defines probable next steps in the incremental process to reaching abolition.

---

[257] *See, e.g.*, Sarat et al., *supra* note 11.

[258] *See, e.g.*, Courtney C. Alonzo, *The Strategic Justice: The Judicial Philosophy of Chief Justice John Roberts*, EREPOSITORY SETON HALL U. 1, 2 (2015), https://scholarship.shu.edu/student_scholarship/819/ [https://perma.cc/YX5F-MZDB]; Robert Barnes, *Roberts Emphasizes High Court's Restraint, Independence*, WASH. POST (May 7, 2016), https://www.washingtonpost.com/politics/courts_law/chief-justice-says-independence-and-restraint-should-be-high-courts-guiding-lights/2016/05/07/c42fdf5c-139d-11e6-8967-7ac733c56f12_story.html [https://perma.cc/UZ4E-TW7P]; *see also* Petition for Writ of Certiorari at 30, Bucklew v. Precythe, 139 S. Ct. 1112 (2019) (No. 17-8151), https://www.supremecourt.gov/DocketPDF/17/17-8151/39073/20180315165447252_BucklewIFPPete-file.pdf [https://perma.cc/4H3F-R8ME] (using to its advantage the narrowness of the as-applied appeal to urge the Court to rule on the merits).

[259] SCOTT H. AINSWORTH & THAD E. HALL, ABORTION POLITICS IN CONGRESS: STRATEGIC INCREMENTALISM AND POLICY CHANGE 34 (2011).

A. Why Abolition Is the Final Destination

Before discussing *how* incrementalism will likely lead to abolition, it is important to establish *why* abolition, rather than a refined system of regulation, is the ultimate end point. Of course, multiple factors will affect the successful abolition of capital punishment.

For years, Justices on the U.S. Supreme Court have expressed their views that capital sentencing no longer comports with the Eighth Amendment.[260] Most notably, dissenting in *Glossip v. Gross* in 2015, Justice Breyer, joined by Justice Ginsburg, explained how "changes that have occurred during the past four decades. . . . lead [him] to believe that the death penalty, in and of itself, now likely constitutes a legally prohibited 'cruel and unusual punishmen[t].'"[261] Breyer stated that evidence shows that the death penalty is not only unreliable but arbitrarily imposed and unnecessarily delayed, despite the Court's best efforts in *Furman*.[262]

Similarly, while not united on the path toward abolition, scholars seem united on the sentiment that abolition is the ultimate resting place for capital sentencing.[263] Most of the arguments supporting abolition present moral[264] and pragmatic[265] rationales.[266] While liberals generally rely on the former, conservatives have recognized

---

[260] *See* Von Drehle, *supra* note 12.

[261] 135 S. Ct. 2726, 2756 (2015) (Breyer, J., dissenting) (alteration in original).

[262] *Id.*

[263] *See* STEIKER & STEIKER, *supra* note 1, at 5; John D. Bessler, *The Abolitionist Movement Comes of Age: From Capital Punishment as a Lawful Sanction to a Peremptory, International Law Norm Barring Executions*, 79 MONT. L. REV. 7, 13 (2018) ("[T]here is now a global infrastructure to fight capital punishment.").

[264] The moral-based arguments for abolition are intuitive. By definition, the death penalty is irreversible. Similarly, some argue that there is no humane way to kill defendants, especially considering the prevalence of botched executions that remains today. Further, evidence suggests that the death penalty provides neither any deterrent effect nor finality to victims' families who arguably have the greatest interest in seeing that the defendant receive the most extreme punishment. *See, e.g.*, STEIKER & STEIKER, *supra* note 1, at 3; *Innocence*, NAT'L COALITION TO ABOLISH DEATH PENALTY, http://www.ncadp.org/pages/innocence [https://perma.cc/24JU-HG2S] (last visited Jan. 5, 2020).

[265] Pragmatically, the death penalty is "slow, costly and uncertain." Von Drehle, *supra* note 12; *see* David J. Burge, *Death Penalty Too Costly, Inefficient*, AJC (May 7, 2015), https://www.myajc.com/news/opinion/death-penalty-too-costly-inefficient/WqTj0pDjQzmnOikkPuVkHO/?ecmp=ajc_social_twitter_2014_sfp#bd9c24e5.3828699.735725 [https://perma.cc/YTB8-F3X4] ("[T]he appeals and clemency process in death penalty cases takes considerable time, effort and expense."). As a result of the extended appellate process, capital defendants often spend decades on death row awaiting execution. STEIKER & STEIKER, *supra* note 1, at 1. In fact, the Steikers report that execution is only the third leading cause of death to death row defendants. *Id.* Likewise, capital punishment is expensive. *See id.* at 1–2; Von Drehle, *supra* note 12.

[266] *See* Mark Berman, *After Florida Prosecutor Says She Won't Seek Death Penalty, Governor Reassigns Case of Slain Police Officer*, WASH. POST (Mar. 16, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/03/16/after-florida-prosecutor-says-she-wont-seek-death-penalty-governor-reassigns-case-of-slain-police-officer [https://perma.cc/8AHZ-DTNC];

the latter for supporting arguments against retaining capital punishment.[267] Also, one author writes that arguments supporting abolition have, in recent years, shifted from morality to practicality.[268]

One key element in justifying abolition, which is inherent to the "evolving standards of decency" standard, is societal support. Society's progression toward rejecting capital punishment altogether is critical; currently, the law—having developed incrementally to this point—would support the change. Indeed, while some may dispute whether abolition is the endpoint or whether incrementalism will lead to such result,[269] it seems clear that abolition is where society and, therefore, the courts are headed.

In fact, this progression is already evident.[270] A 2017 Gallup poll reported a "trend toward diminished death penalty support as many states have issued moratoria on executions or abolished capital punishment."[271] Specifically, the report showed that support for the death penalty had fallen "to a level not seen in 45 years"—the lowest since 1972, the year *Furman* was decided.[272] Only 55% of Americans supported the death penalty for convicted murders in October 2017,[273] down 5% from October 2016.[274] Between 1994, when support for capital punishment peaked at 80%, and 2016, support for the death penalty dropped 20%.[275] In November 2019, support for the death penalty reached an all-time low with a majority of Americans

---

Five Reasons to Abolish the Death Penalty, AMNESTY INT'L (May 8, 2019), https://www.amnesty.org.au/5-reasons-abolish-death-penalty/ [https://perma.cc/ST2N-48R4]; Frances Robles & Alan Blinder, *Florida Prosecutor Takes a Bold Stand Against Death Penalty*, N.Y. TIMES (Mar. 16, 2017), https://www.nytimes.com/2017/03/16/us/orlando-prosecutor-will-no-longer-seek-death-penalty.html [https://nyti.ms/2m7axgQ]; *Why the Death Penalty Should Be Abolished*, INT'L COMM. AGAINST DEATH PENALTY, http://www.icomdp.org/arguments-against-the-death-penalty/ [https://perma.cc/GEQ7-MLDF]; *see also, e.g.*, Sean McElwee, *It's Time to Abolish the Death Penalty*, HUFFPOST (Sept. 7, 2013), https://www.huffingtonpost.com/entry/abolish-death-penalty_b_3557782.html [https://perma.cc/EQ5J-Y6R3].

[267] *See, e.g.*, Burge, *supra* note 265.

[268] Sarat et al., *supra* note 11, at 760.

[269] *See* AINSWORTH & HALL, *supra* note 259, at 34 ("Achieving a nonincremental goal may require thinking big, and incrementalism typically encourages the opposite."); *cf.* ZIEGLER, *supra* note 72, at 59.

[270] *See* STEVENSON, *supra* note 131, at 249 ("In many states, the number of exonerations exceeded the number of executions . . . .").

[271] Jeffrey M. Jones, *U.S. Death Penalty Support Lowest Since 1972*, GALLUP (Oct. 26, 2017), http://news.gallup.com/poll/221030/death-penalty-support-lowest-1972.aspx [https://perma.cc/TBN5-ANEQ].

[272] *Id.*; *see* J. Baxter Oliphant, *Support for Death Penalty Lowest in More than Four Decades*, PEW RES. CTR. (Sept. 29, 2016), http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades/ [https://perma.cc/G45H-UYZU]; *see also Public Opinion*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/public-opinion-polls [https://perma.cc/3R72-FZAR] (last visited Feb. 24, 2020).

[273] Jones, *supra* note 271.

[274] *See id.*

[275] *See id.*

saying "life imprisonment is a better approach for punishing murder than . . . the death penalty."[276]

In addition to American society, evidence suggests that the global trend is toward abolition.[277] Amnesty International reports that 106 countries—a "majority of the world's states"—have abolished capital sentencing.[278] Even more striking, "the United States is . . . the only Western democracy that still retains the death penalty."[279] Not only that, but presently, the United States is "one of the top five executioners in the world, along with China, Iran, Saudi Arabia, and Iraq."[280] Thus, some would argue that the United States, by retaining the death penalty, is behind global standards on human rights.[281] Indeed, several scholars argue that international human rights provides the foundation for abolition.[282] However, considering the United States' hesitancy to accept international human rights standards in other contexts,[283] it seems unlikely that it will be keen on protecting the international human rights of convicted murderers.

When society rejects capital punishment, the courts will come to meet society. Of course the composition of the U.S. Supreme Court affects when and how change will occur, and each Justice's vote plays a critical role in the outcome *and* reasoning of each opinion.[284] Likewise, recent changes in the Court may frustrate any progress toward abolition.[285] However, as Justice Ruth Bader Ginsburg explained, when the

---

[276] *Gallup Poll*, *supra* note 13.

[277] *See Five Reasons to Abolish the Death Penalty*, *supra* note 266.

[278] *Id.*

[279] STEIKER & STEIKER, *supra* note 1, at 22.

[280] *Id.*

[281] Several scholars advance the argument that international human rights is the path to abolishing capital sentencing; however, it is much more likely that federal courts will adopt a new rule under the U.S. Constitution than under international human rights standards. *See generally* Melanie Kalmanson, Note, *Filling the Gap of Domestic Violence Protection: Returning Human Rights to U.S. Victims*, 43 FLA. ST. U. L. REV. 1359 (2016) (explaining in another context the courts' hesitancy to adopt new rules based on international standards).

[282] *See, e.g.*, Bessler, *supra* note 263, at 19–20.

[283] *See, e.g.*, Kalmanson, *supra* note 281 (discussing the United States's reluctance to adopt international standards in cases concerning domestic violence protection).

[284] *See, e.g.*, HIRSHMAN, *supra* note 41, at 75–76 (explaining how each Justice's vote changed the outcome of *Reed v. Reed*, 404 U.S. 71 (1971), and how the composition of the Supreme Court affected the result of *Frontiero v. Richardson*, 411 U.S. 677 (1973).

[285] *See* Adam Liptak, *Confirming Kavanaugh: A Triumph for Conservatives, but a Blow to the Court's Image*, N.Y. TIMES (Oct. 6, 2018), https://www.nytimes.com/2018/10/06/us/politics/conservative-supreme-court-kavanaugh.html [https://nyti.ms/2RuSzRi]. *But see, e.g.*, Adam Liptak, *Kavanaugh May Hold Key Vote in His First Death Penalty Case*, N.Y. TIMES (Nov. 6, 2018), https://www.nytimes.com/2018/11/06/us/politics/supreme-court-death-penalty-kavanaugh.html [https://nyti.ms/2yUqdbw] (suggesting that Kavanaugh may not vote with conservatives on some death penalty issues).

pendulum of American politics swings too far one way, it seems to eventually swing back the other way.[286]

Considering how instrumental each Justice's vote becomes in creating new law, stare decisis is also critical in developing jurisprudence that supports—almost requires—abolishing capital sentencing. As with the racial and gender equality movements, the need for stare decisis comports with the incremental approach. Each incremental decision toward the goal helps create a jurisprudential foundation upon which the Court may ultimately rely in determining that the law compels abolition, at the correct time. In other words, once the law is sufficiently developed, skeptical Justices will feel almost bound by, or at least secure in, precedent to make the move to abolition rather than undoing all of the precedent implementing the incremental changes.

Thus, each incremental change induced by the "evolving standards of decency" standard becomes a building block in the foundation that will ultimately uphold, or require, abolition. Once the law has sufficiently narrowed capital sentencing to the absolute "worst of the worst," the ultimate decision to abolish capital sentencing will be much less shocking and more acceptable to society and the courts. To that end, the next Subsection explains additional incremental changes that can be made to further move the law toward building the foundation for abolition.

B. Next Incremental Steps

Similar to the incremental changes we have already seen, the next steps in the incremental approach to abolishing capital punishment will likely relate to: (1) which defendants are eligible for death; (2) which defendants are actually sentenced to death; and (3) the execution process.

1. Defendants Eligible for Death

The first way in which the U.S. capital punishment system may be further narrowed through the "evolving standards of decency" standard is by continuing to limit the defendants who are eligible for the death penalty. One way this may occur is by expanding the definition of "juvenile" based on new science.

The process of garnering courts' acceptance of this argument has already started in the courts. For example, in his last appeal to the Supreme Court of Florida before his February 22, 2018, execution,[287] Eric Branch, who was twenty-three years old

---

[286] *See 'Pendulum' Will Swing Back, Says Supreme Court Judge*, BBC NEWS (Feb. 23, 2017), https://www.bbc.com/news/av/world-us-canada-39065541/pendulum-will-swing-back-says-supreme-court-judge [https://perma.cc/4G8E-J6HC] ("Supreme Court Justice Ruth Bader Ginsburg says the U.S. is 'not experiencing the best of times'—but the 'pendulum' will spring back.").

[287] *Eric Branch Yells 'Murderers!' During His Execution for Killing College Student in 1993*, ORLANDO SENTINEL (Feb. 22, 2018), http://www.orlandosentinel.com/news/os-florida-execution-eric-scott-branch-0222-story.html [https://perma.cc/H626-DUAX].

at the time of his crimes,[288] "argue[d] for an expansion of" the U.S. Supreme Court's decision in *Roper v. Simmons* "on the basis that newly discovered evidence—in the form of scientific research with respect to development of the human brain, as well as the evolution of state and international law—mandates that individuals who committed murder in their late teens and early twenties be treated like juveniles."[289] Branch argued that this new science supports a finding that some individuals' brains do not fully develop until their early twenties.[290] The Supreme Court of Florida denied the claim, stating, in pertinent part: "unless the United States Supreme Court determines that the age of ineligibility for the death penalty should be extended, we will continue to adhere to *Roper*."[291]

Later in 2018, Florida death row defendant, Kevin Foster, who was eighteen at the time of his crime,[292] also raised this issue. Foster argued, in pertinent part, that his death sentence violated the Eighth Amendment under the "evolving standards of decency," based on a new "consensus within the scientific community regarding the development of the adolescent brain and cognitive functioning."[293] Regarding the new science, Foster's brief to the Supreme Court of Florida explained:

> Evidence as to the general consensus now existing throughout the scientific community regarding the cognitive development of the adolescent brain in youths aged 18–21 constitutes newly discovered evidence based upon new scientific information and data that was not part of any previously existing compilation.
>
> . . . Scientific advances can give rise to newly discovered evidence claims predicated upon new advancements in testing methods or technologies that did not exist at the time of trial, but were later used to test evidence introduced at the original trial. The flaws inherent in the science used to assess cognitive development and its impact on an 18–21-year-old defendant's decision-making processes were not fully developed and/or acknowledged at the time of Mr. Foster's trial or during his evidentiary hearing in postconviction. Mr. Foster's claim here is premised upon the recognition of the general consensus within the scientific community regarding the development of the adolescent brain and the manner in which that consensus has influenced and shaped

---

[288] *See* Juliana Rose Pignataro, *Who Is Eric Scott Branch? Florida to Execute Man Convicted of College Student's 1993 Rape, Murder*, NEWSWEEK (Feb. 22, 2018), http://www.newsweek.com/florida-execute-eric-branch-murder-816514 [https://perma.cc/6L8Q-8K92].

[289] Branch v. State, 236 So. 3d 981, 985 (Fla. 2018).

[290] *Id.*

[291] *Id.* at 987.

[292] Brief of Appellant at 22, Foster v. State, 235 So. 3d 290 (Fla. 2018) (No. SC18-860).

[293] *Id.* at 7, 22–23.

> courts' determination as to the applicability of the death sentence to defendants under 21 years old under the Eighth Amendment's "evolving standards of decency." Mr. Foster's evidence regarding the emerging science of adolescent brain development, considered along with all of the evidence introduced in his case, both at trial and in postconviction, establishes that the Eighth Amendment prohibits the application of the death penalty in his case.[294]

Finally, referring to this new science as evidence of evolution in the standards of decency, Foster argued:

> Evolving standards of decency *today* counsel that adolescents aged 18–21 years old do not possess the requisite culpability to be sentenced to death. Newly developed science in the field of adolescent brain development establishes that emerging adolescents—those who are in their late teens and early twenties—are more comparable to juveniles than adults who possess fully developed brains.[295]

In essence, Foster argued that new science indicates that a person may be "juvenile," as the concept is understood under the law, until twenty-one years old. Acknowledging that the Florida Supreme Court indicated in *Branch* its adherence to the U.S. Supreme Court's direction on this issue and recognizing that the U.S. Supreme Court still had not yet addressed this issue, Foster nevertheless argued that the court had the authority to grant relief on this theory.[296]

The Supreme Court of Florida did not address this issue. But it is likely only a matter of time until the U.S. Supreme Court hears this issue. If the Court accepts this new science as proof, or views this new science as evidence of society's understanding that at least some persons do not reach the capacity of an adult until later than eighteen years old, the "evolving standards of decency" framework would compel the Court to shift the line drawn in *Roper*, thereby narrowing the pool of eligibility for death. Specifically, under Branch's argument, the definition of juvenile would move from eighteen to twenty-one, thereby adding those who are between eighteen and twenty-one years old at the time of their crimes and can prove diminished culpability to the list of defendants excluded from capital sentencing. In other words, there would no longer be a strict cutoff at the defendant's eighteenth birthday. Rather, the defendant—who was between the age of eighteen and twenty-one at the time of the crime—would have the opportunity to show that he or she should not be eligible for the death penalty based on diminished culpability.

---

[294] *Id.* at 24–25 (internal citations omitted).
[295] *Id.* at 26.
[296] *Id.* at 26–27.

This change would be significant because statistics indicate that a significant portion of capital offenders are young at the time of their crimes. For example, 79.8% of murder/manslaughter defendants in Florida were between seventeen and fifty years of age at the time of the offense.[297] The majority—56.5%—of the offenders in that category were between the age of twenty and twenty-nine at the time of their offenses.[298] Therefore, this new definition of juvenile, if adopted by the courts, would noticeably limit the pool of persons eligible for death.[299] As a result, society's acceptance of the death penalty would decline.

2. Defendants Sentenced to Death

Second, it is likely that fewer defendants, of those who are eligible for death, will actually be sentenced to death. As explained above, Alabama is currently the only state in the country that does not statutorily require a jury's unanimous requirement for death.[300]

Naturally, with states requiring unanimity in the jury's final recommendation for death, states will impose fewer sentences of death because it is more difficult to obtain twelve votes for death than it is to obtain seven or even ten votes.[301] In fact, out of Florida's almost 400 death row inmates in January 2016, when the U.S. Supreme Court decided *Hurst v. Florida*, only 17.5% were sentenced to death after a jury unanimously recommended a sentence of death.[302] Florida has already seen a decrease in death sentences since it required unanimity in the jury's final recommendation for death.[303]

This difficulty in obtaining unanimous jury recommendations indicates that society's acceptance of the death penalty is lower than otherwise suggested when states did not require unanimity. The unanimity requirement will likely force some jurors to reconsider their recommendations in the sentencing phase because their one vote for life could mean the difference for the defendant—a situation that occurred much less frequently before the unanimity requirement. Likewise, as Florida continues to see the effects of this change, society's acceptance of the death penalty is likely to continue to decline—again steering the guiding framework toward abolition. As society begins to disfavor capital punishment more, obtaining unanimous jury recommendations for death will become even more difficult.

---

[297] Melanie Kalmanson, *The Difference of One Vote or One Day: Reviewing the Demographics of Florida's Death Row After* Hurst v. Florida, 74 MIAMI L. REV. (forthcoming 2020) (manuscript at 12 & tbl.1).

[298] *Id.* (manuscript at 26–27).

[299] *See, e.g.*, *id.* (manuscript at 26).

[300] After *Poole*, Florida does not constitutionally require unanimity. As explained above, it remains to be seen whether Florida will amend its capital sentencing statute.

[301] *See* Stofan, *supra* note 180.

[302] Kalmanson, *supra* note 281, at 27.

[303] *See, e.g.*, Stofan, *supra* note 180.

Thus, juries—as a function of society—play a large role in driving societal support for capital sentencing. The fewer death sentences juries impose, the more likely societal support is to decrease. In other words, courts and society seem to steer each other in making incremental changes.

3. Execution Process

Finally, the aspect of capital sentencing that seems to be the most unrefined is the actual execution process. Starting with the drugs used in lethal injection and ending with the specific time of execution, this Section explains aspects of the execution process that can be changed to better protect defendants' rights and narrow capital punishment even after sentencing.

a. Drugs Used in Lethal Injection

First, as to the drugs used in lethal injection, some judges have expressed their belief that these drugs cause pain that amounts to "cruel and unusual punishment" under the Eighth Amendment. For example, in 2015, Justice Sotomayor—joined by Justices Ginsburg, Breyer, and Kagan—dissented in *Glossip v. Gross*, arguing that "rocuronium bromide and potassium chloride," which Oklahoma used in its lethal injection protocol and were "intended to paralyze the inmate and stop his heart," respectively, are torturous because they "caus[e] burning, searing pain."[304] Sotomayor also found that the petitioners had "presented ample evidence showing that the State's planned use of [midazolam] pose[d] substantial, constitutionally intolerable risks."[305]

Likewise, the dissenting judges on the Supreme Court of Florida considered a similar issue. In 2017, the Supreme Court of Florida denied Mark Asay's request for discovery to attempt to prove his claim that Florida's revised lethal injection protocol—which replaced midazolam with etomidate—violated the Eighth Amendment because it "create[d] a substantial risk of harm" to defendants.[306] At that time, "etomidate ha[d] never been used in a lethal injection anywhere in the United States."[307] Justice Barbara J. Pariente dissented, arguing that Asay should have been granted access to the requested documents in light of the real concern that etomidate would cause unnecessary harm to defendants during executions.[308] Based on these concerns, courts could further limit the drugs that states use in lethal injection.

Even assuming that states maintain the ability to use the drugs currently implemented in lethal injection, states have faced difficulty in accessing these drugs for years. Drug manufacturers started objecting to the use of their products "to kill

---

304 135 S. Ct. 2726, 2780–81 (2015) (Sotomayor, J., dissenting).

305 *Id.* at 2781.

306 Asay v. State, 224 So. 3d 695, 705 (Fla. 2017) (Pariente, J., dissenting).

307 *Id.*

308 *Id.* at 707–08. Several defendants since *Asay* have unsuccessfully raised similar concerns.

people."[309] Thus, it is almost certain that states will continue having trouble accessing lethal injection drugs. Indeed, some anti–death penalty activists aim to continuously reduce states' access to lethal injection drugs.[310] As a result, two things could happen: (1) an increase in defendants claiming that the state is using expired drugs, as has already started in some states,[311] and (2) more states instituting one-drug protocols.

First, it is likely that, with restricted access to execution drugs, states' supply of lethal injection drugs will start to expire. "Drug manufacturers are required by law to put an expiration date on drugs in the United States, and after that date they cannot guarantee the drug's effectiveness or safety,"[312] which, of course, is crucial for the state complying with the Eighth Amendment when conducting executions.

Indeed, in 2017, Arkansas scheduled seven executions in a period of eleven days to beat the expiration of its drug supply.[313] "Officials blame[d] the packed April execution schedule on the drug shortage," which caused states to "scrambl[e] for replacement chemicals and, in some cases, has caused them to contemplate other methods of execution."[314] In 2017, South Carolina also had an execution scheduled for which it did not have a sufficient supply of drugs because the drugs were either expired or unavailable.[315]

Likewise, defendants have started raising claims that their execution will violate the Eighth Amendment because the state is likely to use expired drugs. For example, in his last appeal before his execution, Florida death row inmate, Eric Branch, argued that it was likely the state would use expired drugs in his execution.[316] The

---

[309] Mark Berman, *With Lethal Injection Drugs Expiring, Arkansas Plans Unprecedented Seven Executions in 11 Days*, WASH. POST (Apr. 7, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/04/07/with-lethal-injection-drugs-expiring-arkansas-plans-unprecedented-seven-executions-in-11-days/?utm_term=.236aee3af076 [https://perma.cc/PE96-A5GU]; *see, e.g.*, Madison Park & Tina Burnside, *South Carolina Lacks the Lethal Injection Drugs Needed to Execute Inmate*, CNN (Nov. 22, 2017), https://www.cnn.com/2017/11/22/us/south-carolina-execution-drugs/index.html [https://perma.cc/GD3J-VJRC]; *see also* Jolie McCullough, *Will Texas Have to Push Back the Expiration Dates on Its Lethal Injection Drugs?*, TEX. TRIB. (May 17, 2018), https://www.texastribune.org/2018/05/17/texas-lethal-injection-drugs-are-set-expire-upcoming-executions/ [https://perma.cc/4FU8-8Z3P].

[310] *See Cruel and Unusual*, *supra* note 187 (describing the work of Reprieve, a legal organization working on death penalty cases, to limit access to drugs used for execution).

[311] *See, e.g.*, Branch v. State, 236 So. 3d 981, 985 (Fla. 2018) (explaining that the defendant argued "that the [department of correction's] supply of execution drugs may be expired"); Hannon v. State, 228 So. 3d 505, 511–12 (Fla. 2017).

[312] Berman, *supra* note 309.

[313] *Id.*; *accord* Astrid Galvan, *Arizona Faces Drug-Expiration Deadline for Executions*, SEATTLE TIMES (Apr. 26, 2016), https://www.seattletimes.com/nation-world/arizona-faces-drug-expiration-deadline-for-executions/ [https://perma.cc/4KTB-2U22] (explaining that Arizona's supply of the execution drug midazolam might expire before a lawsuit suspending all execution in the state is decided).

[314] Berman, *supra* note 309.

[315] Park & Burnside, *supra* note 309.

[316] *Branch*, 236 So. 3d at 984.

problem with these claims is that the state, specifically the department of corrections, is afforded a great amount of deference when a defendant challenges the execution protocol, or the state's ability to follow the protocol.[317] Likewise, defendants are oftentimes denied access to records that would assist them in proving these claims.[318]

Also as a result of restricted access to lethal injection drugs, states may begin instituting one-drug protocols to lessen the number of drugs they must obtain to conduct executions. However, even then, states will likely face difficulty in accessing drugs necessary to conduct executions.

b. Sick Inmates

Second, courts are likely to eventually bar states from, or at least limit states in, executing ill inmates.[319] Florida's execution protocol, for example, indicates that states are at least aware of the dangers posed in executing ill inmates, as the protocol requires the execution team to review the inmate's medical file and "determine whether there are any medical issues that could potentially interfere with the proper administration of the lethal injection process."[320]

Despite this recognition, states are experiencing botched executions, specifically those of ill inmates.[321] The increasing age of the death row population likely contributes to this issue.[322] According to data from the Justice Department, "12.2 percent of death-row inmates were 60 or older" in 2013, up from 5.8% in 2007.[323]

---

[317] *See, e.g.*, *id.* at 985 ("[T]his Court has stated that it will presume 'the DOC will act in accordance with its protocol and carry out its duties properly. This same presumption would extend to presume that *the DOC will obtain viable versions of the drugs it intends to use and confirm before use that the drugs are still viable, as the protocol requires.*'" (quoting Muhammad v. State, 132 So. 3d 176, 206 (Fla. 2013))); Hannon v. State, 228 So. 3d 505, 512 (Fla. 2017).

[318] *See* Asay v. State, 224 So. 3d 695, 700 (Fla. 2017) (denying records sought to prove claim of harm in Florida's new lethal injection protocol); *see also Branch*, 236 So. 3d at 985; *Hannon*, 228 So. 3d at 512.

[319] *Cf.* STEIKER & STEIKER, *supra* note 1, at 15 ("[I]t can be difficult for nonprofessionals to maintain adequate sedation . . . [for] inmates whose veins may be compromised by drug use, old age, or poor health").

[320] FLA. DEP'T OF CORR., EXECUTION BY LETHAL INJECTION PROCEDURES (Jan. 4, 2017), https://files.deathpenaltyinfo.org/legacy/files/pdf/ExecutionProtocols/FloridaProtocol01.04.17.pdf [https://perma.cc/4RUK-U3XR].

[321] *See, e.g.*, Sandee LaMotte, *Death Row Inmate Sues After 'Botched' Execution*, CNN (Mar. 7, 2018), https://www.cnn.com/2018/03/07/health/alabama-execution-lawsuit/index.html [https://perma.cc/UL86-3S4R] (covering botched execution of Doyle Lee Hamm in Alabama).

[322] *See* Mark Berman, *Alabama Executes Walter Moody, the Oldest Inmate Put to Death in the Modern Era*, WASH. POST (Apr. 19, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/04/19/he-was-convicted-of-bombing-a-federal-judge-now-alabama-plans-to-make-him-the-oldest-inmate-executed-in-modern-history/?utm_term=.cbdf4cc6875d [https://perma.cc/K92U-3VPP] ("[A]ging produces certain issues that complicate executions, including health problems.").

[323] *Id.*

For example, in early 2018, the execution of Doyle Lee Hamm in Alabama was called off after the execution team unsuccessfully attempted for hours to insert the IV necessary for lethal injection.[324] Members of the execution team reportedly "stuck Hamm repeatedly in the lower legs, ankles and groin before the state called off the procedure."[325] Before the execution, Hamm and his attorneys "had argued for months that" using lethal injection on Hamm would amount to cruel and unusual punishment because "Hamm's veins had become severely compromised by lymphatic cancer and 'years of intravenous drug use.'"[326] Hamm instead requested that the lethal drugs be orally injected.[327] Hamm's attorney explained the after effects of the botched execution, stating that "the IV personnel almost certainly punctured Doyle's bladder, because he was urinating blood for the next day. They may have hit his femoral artery as well, because suddenly there was a lot of blood gushing out."[328] In addition, Hamm had "pain going from the lower abdomen to the upper thigh" and was "limping badly . . . and terribly sore."[329]

Russell Bucklew was scheduled to be executed in Missouri on March 20, 2018. Just before his scheduled execution, the U.S. Court of Appeals for the Eighth Circuit denied Bucklew's federal action arguing "that execution by Missouri's lethal injection protocol . . . would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments as applied to him because of his unique medical condition."[330] The Eighth Circuit explained Bucklew's medical condition as follows:

> Bucklew has long suffered from a congenital condition called cavernous hemangioma, which causes clumps of weak, malformed blood vessels and tumors to grow in his face, head, neck, and throat. The large, inoperable tumors fill with blood, periodically rupture, and partially obstruct his airway. In addition, the condition affects his circulatory system, and he has compromised peripheral veins in his hands and arms.[331]

As a result of his medical condition, Bucklew argued, with supporting evidence, that it would be impossible for the state "to execute him without substantial risk of

---

[324] *See* LaMotte, *supra* note 321; Chandrika Narayan, *Alabama's Aborted Execution Was 'Botched and Bloody,' Lawyer Says*, CNN (Feb. 28, 2018), https://www.cnn.com/2018/02/27/us/alabama-aborted-execution/index.html [https://perma.cc/UAD8-EYLN]; *see also Botched Executions*, *supra* note 192.

[325] Narayan, *supra* note 324.

[326] *Id.*; *see Botched Executions*, *supra* note 192.

[327] Narayan, *supra* note 324.

[328] *Id.*

[329] *Id.*

[330] Bucklew v. Precythe, 883 F.3d 1087, 1089–90 (8th Cir. 2018).

[331] *Id.* at 1090.

severe pain and needless suffering."[332] Determining that Bucklew failed to establish both prongs of the *Glossip*/*Baze* standard, the Eighth Circuit denied Bucklew's claim.[333]

Bucklew filed a petition for a writ of certiorari in the U.S. Supreme Court. On the day of his scheduled execution, the Court granted Bucklew's application for a stay of execution.[334] After holding oral argument in November 2018,[335] the Supreme Court issued a decison affirming the Eighth Circuit's decision.[336]

Considering Bucklew's plead for a stay as a delay tactic,[337] the Supreme Court held that "the Eighth Amendment does not guarantee a prisoner a painless death."[338] Rather, the Supreme Court explained, the Eighth Amendment's protection against cruel and unusual punishment only "come[s] into play" when "the risk of pain associated with the State's method is 'substantial when compared to a known and available alternative.'"[339] Thus, because Bucklew failed to provide a "feasible and readily implemented alternative to the State's chosen method" and "failed to present any evidence suggesting that [any viable alternative] would significantly reduce his risk of pain" the Court denied Bucklew relief.[340] Shortly after the Court's decision, the state of Missouri rescheduled Bucklew's execution. Bucklew was executed on October 1, 2019.[341]

In June 2018, Texas defendant Danny Paul Bible "asked authorities to carry out his execution using gas or a firing squad."[342] Sixty-six at the time of his execution, Bible "appealed all the way up to the Supreme Court, arguing that he was 'very weak and sick' and that his veins were not capable of sustaining the infusion of lethal injection drugs, making them likely to 'blow.'"[343] His attorneys argued that "the likelihood of a botched execution was very high due to [Bible's] declining health, adding that he would suffer serious pain."[344] After his claims were denied,

---

[332] *Id.* at 1091.

[333] *Id.* at 1097.

[334] Bucklew v. Precythe, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/bucklew-v-precythe/ [https://perma.cc/USF6-Q372] (last visited Feb. 24, 2020).

[335] *Id.*

[336] Bucklew v. Precythe, 139 S. Ct. 1112 (2019).

[337] *See* Melanie Kalmanson, *Somewhere Between Death Row and Death Watch: The Procedural Trap Capital Defendants Face in Raising Execution-Related Claims*, U. PA. J.L. & PUB. AFFAIRS (forthcoming 2020). *See generally Bucklew*, 139 S. Ct. 1112.

[338] 139 S. Ct. at 1124.

[339] *Id.* at 1125 (quoting Glossip v. Gross, 135 S. Ct. 2726, 2735 (2015)).

[340] *Id.* at 1133.

[341] Holly Yan & Steve Almasy, *Missouri Inmate Executed Despite Activists' Concerns He Could Suffer Because of His Rare Disease*, CNN (Oct. 1, 2019), https://www.cnn.com/2019/10/01/us/missouri-execution-russell-bucklew-rare-disease-trnd/index.html [https://perma.cc/2BRD-C56W].

[342] Chavez, *supra* note 209.

[343] *Id.* There have been instances in which the execution team has had trouble finding the inmate's veins to enter the IV necessary for lethal injection—oftentimes caused by the defendant's former intravenous drug use. *See Botched Executions*, *supra* note 192.

[344] Chavez, *supra* note 209.

Bible was executed by lethal injection.[345] Witnesses reported that, "[a]fter receiving the lethal injection, Bible breathed heavily for about two minutes, shaking from Parkinson's tremors as he muttered 'it hurts.'"[346]

Based on cases like Hamm's, Bucklew's, and Bible's, a rule precluding the execution of ill inmates seems likely. While these defendants were not granted relief, there are strong suggestions that their execution caused pain and, therefore, threatened an Eighth Amendment violation.[347] While these cases were likely still too early for any change, especially considering the recent changes on the Court, it is likely that one of the next steps in the incremental approach to abolition is for courts to bar, or at least restrict, the execution of inmates whose illness could cause them to suffer severe pain during execution.

Having discussed how the pool of eligibility and execution process may be refined, the next two discussions turn to discuss how the waiting periods on death row that most defendants face, which likely constitute Eighth Amendment violations, are another aspect of capital punishment that could be refined as part of the incremental approach to abolition.

c. Length of Time on Death Row

Before execution, defendants spend years, sometimes decades, on death row, oftentimes enduring multiple appeals.[348] This delay between sentencing and execution can usually be explained by one or both of the following: (1) the length of the appellate process, which was explained earlier, and (2) executive discretion in selecting defendants for execution. As to the latter, the process by which states select death row inmates for execution is anything but uniform.[349] "The relative few who are killed continue to be selected by a mostly random cull."[350] Regardless of the reason, it is possible that courts will eventually adopt the view that a defendant spending an extended period of time on death row awaiting execution amounts to an Eighth Amendment violation.

---

[345] *Id.*

[346] *Id.*

[347] *See id.*; Narayan, *supra* note 324.

[348] STEIKER & STEIKER, *supra* note 1, at 1; *see, e.g.*, *Execution List*, *supra* note 155; *see also* Branch v. State, 236 So. 3d 981, 988 (Fla. 2018); Johnson v. State, 27 So. 3d 11, 27 (Fla. 2010); Knight v. State, 746 So. 2d 423, 437 (Fla. 1998).

[349] Even in Florida, where the state legislature enacted a statute to ensure the uniform and systemic processing of death sentences through execution, defendants have no way of knowing or predicting when their execution will be scheduled. *See, e.g.*, Hannon v. State, 228 So. 3d 505, 509 (Fla. 2017); Bolin v. State, 184 So. 3d 492, 502 (Fla. 2015); Mann v. State, 112 So. 3d 1158, 1162 (Fla. 2013); Ferguson v. State, 101 So. 3d 362, 366 (Fla. 2012); Gore v. State, 91 So. 3d 769, 780 (Fla. 2012). Rather, the governor has "absolute discretion" in choosing inmates for execution and scheduling the selected inmate's execution. *Gore*, 91 So. 3d at 780.

[350] Von Drehle, *supra* note 12.

Defendants have argued for years that the length of time they spend on death row amounts to cruel and unusual punishment under the Eighth Amendment.[351] While this argument has been unsuccessful, several judges have expressed their agreement with this claim. U.S. Supreme Court Justice Breyer, dissenting in *Glossip v. Gross*, joined by Justice Ginsburg, explained that "[t]he problems of reliability and unfairness" in capital punishment "almost inevitably lead to" the "independent constitutional problem" of "excessively long periods of time that individuals typically spend on death row, alive by under sentence of death."[352] He wrote that "unless we abandon the procedural requirements that assure fairness and reliability" in capital sentencing, "we are forced to confront the problem of increasingly length delays in capital cases," which he calculated to be "an additional 37.5 years" on death row "before being executed."[353] Justice Breyer argued that this delay is unconstitutional for two reasons: (1) "it 'subjects death row inmates to decades of especially severe, dehumanizing conditions of confinement'" and (2) it "undermines the death penalty's penological rationale."[354]

As to the former, which is most pertinent here, Justice Breyer explained that this uncertainty manifests in several forms—prolonged delay of execution, revocation of warrants, etc.[355] He explained that "it is well documented that . . . prolonged solitary confinement produces numerous deterious harms," which is then exacerbated by "uncertainty as to whether a death sentence will in fact be carried out."[356] Justice Breyer noted that the Court recognized in 1890 in *In re Medley* that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it."[357]

Likewise, in his 2013 book, former Justice Wells of the Supreme Court of Florida wrote that he "did a great deal of research into the specifics of the processing of individual death-penalty cases" because he "wanted to understand why those cases took so long from trial to being finally adjudicated."[358] He writes that he was "very concerned about the length of time these inmates were maintained on death row, which is a special and very limiting type of confinement," and agreed with "Breyer's dissenting opinion in *Ellege v. Florida* stating that such confinement for years, because of its length and unique pressures, could become cruel and unusual punishment."[359] Indeed, in the Florida Supreme Court's decision in *Knight v. State*, Justice Wells wrote:

---

[351] *See* Glossip v. Gross, 135 S. Ct. 2726, 2764 (2015) (Breyer, J. dissenting).

[352] *Id.*

[353] *Id.* at 2764–65.

[354] *Id.* at 2765 (citation omitted).

[355] *See id.* at 2766–67 (citing numerous works discussing these constitutional concerns).

[356] *Id.* at 2765.

[357] *Id.* at 135 S. Ct. at 2766 (quoting *In re* Medley, 134 U.S. 160, 172 (1890)); *see* STEVENSON, *supra* note 131, at 244.

[358] CHARLEY WELLS, INSIDE *BUSH V. GORE* 10 (2013).

[359] *Id.* (citation omitted).

> While I agree that the length of time Knight has been on death row does not create a constitutional impediment to his execution, I do again state my view that such an extended time period to finally adjudicate these cases is totally unacceptable and is this Court's and the State's prime responsibility to correct[.] The murders in this case were committed in July 1974; Knight was convicted of the murders in April 1975. The courts and the State must be able to do better, and any explanation of why we are unable to do so is insufficient.[360]

Justice Wells explained that he "thought the state had an obligation to have the inmate's case processed within a reasonable period of time so that the inmate would either be executed or removed from that type of confinement."[361]

Upon determining that the length of time some defendants spend on death row amounts to cruel and unusual punishment, courts could reduce the extended period of time defendants spend awaiting execution in two ways. First, as Justice Wells suggested, the Court could designate a period of time that amounts to cruel and unusual punishment, at which point the defendant's sentence is commuted to life to minimize any further harm.[362] For example, a court could hold that a defendant awaiting execution on death row for thirty-five years or more amounts to cruel and unusual punishment. Under this new rule, defendants' sentences of death would be commuted to life imprisonment without the possibility of parole once thirty-five years passed since the defendant's sentencing.

Second, courts could determine that once a defendant's guaranteed appeals are completed or waived, the governor must schedule the defendant's execution within a finite period of time.[363] While the absence of a system for selecting defendants for execution could be seen as a benefit to defendants—an expansion of life by delaying execution—it is clear that the absence of any warning or information as to when one will be executed causes severe mental anguish.[364] Such psychological harm likely outweighs any benefit of a theoretically delayed execution.

Even past the appellate process and selection for execution, there is a final portion that courts could find amounts to cruel and unconstitutional punishment, as discussed below.

---

[360] Knight v. State, 746 So. 2d 423, 439–40 (Fla. 1998) (Wells, J., concurring in part and dissenting in part) (citation omitted).

[361] WELLS, *supra* note 358, at 10.

[362] *Id.*

[363] In fact, some states, such as Florida, have enacted statutes that provide these guidelines. But it is clear that these statutes are not followed. For a deeper discussion on the warrant process, see generally Kalmanson, *supra* note 337.

[364] *See In re* Medley, 134 U.S. 160, 172 (1890); STEVENSON, *supra* note 131, at 244.

d. Delayed Executions

Finally, courts could find that the time between the defendant's scheduled and actual execution, which is often hours,[365] amounts to cruel and unusual punishment. For example, Governor Scott of Florida on September 1, 2017, signed a warrant scheduling Cary Michael Lambrix's execution for October 5, 2017, at 6:00 PM.[366] As a result of the short warrant period, Lambrix still had several petitions—seeking the Court's review of the Supreme Court of Florida's denial of relief—and applications for a stay of execution pending at the U.S. Supreme Court, on the day of execution.[367] Some of Lambrix's petitions had been filed days before the scheduled execution.[368] Likely because of the number of petitions pending and the short period of time the U.S. Supreme Court had to review the material, the cases remained pending at 6:00 PM, when Lambrix's execution was scheduled.[369] Ultimately, Lambrix was not executed until 10:10 PM—over four hours after his execution was originally scheduled.[370]

Similarly, the execution of William Rayford in Texas on January 30, 2018, was delayed for more than two hours "while the U.S. Supreme Court considered . . . last-day appeals from Rayford's lawyers."[371] The actual execution process took only thirteen minutes.[372]

More recently, eighty-five-year-old Walter Leroy Moody, Jr., who was the oldest inmate to be executed in modern times, waited over two hours before his execution began in Alabama on April 19, 2018.[373] Moody's execution was scheduled for 6:00 PM,

---

[365] *See generally* Kalmanson, *supra* note 337.

[366] Lambrix v. Jones, 227 So. 3d 550, 551–52 (Fla. 2017).

[367] *See No. 17-5539*, SUP. CT. U.S., https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-5539.html [https://perma.cc/8JE4-QJ9Y]; *No. 17-6202*, SUP. CT. U.S., https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-6202.html [https://perma.cc/HC8A-YBYY]; *No. 17-6290*, SUP. CT. U.S., https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-6290.html [https://perma.cc/EL4T-GD89].

[368] *No. 17-6202*, *supra* note 367.

[369] *Id.*

[370] Associated Press, *Florida Executes Man Convicted of Double Murder*, WCTV (Oct. 5, 2017), http://www.wctv.tv/content/news/Lambrix-to-be-executed-Thursday-449322703.html [https://perma.cc/E3CT-HXC2]. Also in Florida, the execution of Patrick Hannon was delayed almost three hours after the scheduled time. *See* Josh Solomon, *Victim's Relative Waves Goodbye as Patrick Hannon Executed*, TAMPA BAY TIMES (Nov. 8, 2017), http://www.tampabay.com/news/publicsafety/crime/victim-s-relative-waves-goodbye-as-Patrick-Hannon-executed_162451581/ [https://perma.cc/ZW76-7WGP].

[371] *Texas Executes Dallas Man for Ex-Girlfriend's 1999 Slaying*, CBS NEWS (Jan. 31, 2018), https://www.cbsnews.com/news/texas-execution-william-rayford-killing-ex-girlfriend-dallas/ [https://perma.cc/5YP5-UENU]; *accord Texas Executes William Rayford*, DEATH PENALTY NEWS (Jan. 31, 2018), https://deathpenaltynews.blogspot.com/2018/01/texas-executes-william-rayford.html [https://perma.cc/E4YG-P27J].

[372] *Texas Executes Dallas Man for Ex-Girlfriend's 1999 Slaying*, *supra* note 371.

[373] Berman, *supra* note 322.

but the U.S. Supreme Court issued a temporary stay around 5:45 PM.[374] When Moody's "appeals finally came to a[n] . . . end"[375] with the U.S. Supreme Court denying relief, the execution began at 8:16 PM.[376] Moody was pronounced dead at 8:42 PM—almost three hours after his scheduled execution.[377]

These executions make clear that the uncertainty as to one's death that Justice Breyer discussed in *Glossip* extends until the moment of execution, exacerbating the psychological harm and torture suffered by the defendant. One could argue that just the anguish of waiting for hours awaiting one's death alone serves the penological purpose of the death penalty—requiring one to confront and contemplate his or her own death as a result of his or her crimes. Of course, the lack of an actual execution would not serve the public policy justification for providing finality and vindication to the victim's family. Nevertheless, it seems that this undue delay between the scheduled and actual execution—oftentimes caused by unfettered executive discretion in signing warrants and scheduling executions—could be determined a violation of the Eighth Amendment.[378]

CONCLUSION

While the practice has lasted centuries, scholars are united on the sentiment that capital sentencing in the United States will likely be abolished at some point in the not-so-distant future. However, scholars continue to debate how we will reach this destination.

As this Article explained, the answer seems to be hiding in the history of capital sentencing—incrementalism. Just as the current capital sentencing landscape has been refined since 1972 when the U.S. Supreme Court decided *Furman v. Georgia*, there are several ways in which the system may be further refined through gradual changes to slowly approach the ultimate abolishment of capital sentencing. This Article defined those changes—further limiting the pool of defendants eligible to be sentenced to death, reducing the number of defendants actually sentenced to death, and refining the way executions are conducted. Implementing these gradual changes will affect other factors that will also lend to the successful abolishment of capital sentencing, including societal support, which is inherent in the guiding standard for reviewing whether capital sentencing violates the Eighth Amendment. With each of these changes, the system will get closer an closer to the inevitable abolition.

---

[374] Kent Faulk, *Walter Leroy Moody Executed for 1989 Bombing that Killed Judge Robert Vance*, AL.COM (Apr. 19, 2018), https://www.al.com/news/birmingham/index.ssf/2018/04/execution_of_alabamas_oldest_d.html [https://perma.cc/GR43-LJ6R].

[375] Berman, *supra* note 322.

[376] Faulk, *supra* note 374.

[377] *Id.*

[378] For more on reasons behind the delay in executions—specifically the process by which defendants are forced to litigate last minute warrant- and execution-related claims—see generally Kalmanson, *supra* note 337.