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SANDRA DAY O’CONNOR COLLEGE OF LAW
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EDITOR INTRODUCTION

The 2015 Law Journal for Social Justice Symposium, “Contemporary Discrimination” focused on current concerns regarding civil rights and civil liberty. Discussions ranged from the political legislative process, resistance in enforcement of civil rights judgments, and sexual orientation employment discrimination. Panelists included politicians, scholars from diverse backgrounds, practicing attorneys and community organizers.

Drawing on broader considerations, this issue features articles analyzing an array of concerns in the criminal, civil and international tribunals. The first article, *You Have Your Whole Life in Front of You...Behind Bars*, written by Rachel Forman, begins this issue by discussing a need to ban life without parole sentences for juvenile non-homicide offenders. Inalvis M. Zubiaur, in *Death Row: Mentally Impaired Inmates and the Appeal Process*, continues the focus on sentencing by engaging concerns regarding capital punishment. Next, in *Injection and the Right of Access*, Timothy F. Brown argues for increased access to lethal injection procedures to understand its constitutionality. Shifting consideration to the civil sphere, Victor D. Lopez & Eugene T. Maccarrone raise issues about privacy, due process, public policy and the basic fairness of traffic enforcement by camera, in *Traffic Enforcement by Camera*. Beginning the focus on international concerns, *Fictitious Labeling*, by Efe Ukala, discusses “recommendations that may help curb constitutional issues resulting from deportation.” Brittany Fink, in *Increase Quota, Invite Opportunities, Improve Economy*, proposes amendments to the DREAM Act that extend the path to citizenship.” Katharine Villalobos then focuses on the sociology of immigration in *The Crucible*, using historical examples to discuss the War on Terror. *Falling Through the Cracks* by Marissa N. Goldberg changes the focus to international law and unique considerations of women in the drug trade industry. Finally, *Seeking Truth in the Balkans* by Erin K. Lovall and June E. Vutrano concludes the issue by discussing the role of international law in seeking justice following the wars in the Balkans. Together these articles analyze issues that raise important questions about fairness and civil rights in the domestic and international contexts.

Special thanks to the entire staff of the Law Journal for Social Justice, who helped create this edition.

Kristyne Schaaf-Olson
2014-2015 Editor-in-Chief
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LETHAL INJECTION AND THE RIGHT OF ACCESS: THE INTERSECTION OF THE RIGHT AND FIRST AMENDMENTS

By Timothy F. Brown*

Introduction

The Spring and Summer of 2014 witnessed renewed debate on the constitutionality of the death penalty after a series of high profile legal battles concerning access to lethal injection protocols and subsequent questionable executions. Due to shortages in the drugs traditionally used for lethal injection, States changed their lethal injection protocols to shield information from the prisoners and the public. Citing public safety concerns, States refused to release information concerning the procurement of the drugs to the public. Such obstruction hinders the public's ability to consider the cruelty of the punishment imposed and creates the potential for unconstitutional execution. Within the coming years, the Supreme Court will be faced with deciding the extent of the public's right of access to government proceedings and that right's effect on lethal injections.

The State of Ohio executed Dennis McGuire on January 19, 2014.¹ The execution of McGuire involved the use of a new drug to administer the lethal injection.² Rather than the traditional three-drug cocktail of sodium thiopental, pancuronium bromide, and potassium chloride,³ Ohio opted to use only two drugs: "midazolam, a sedative and anesthetic, and hydromorphone, a painkiller and morphine derivative."⁴ Officials expected the change of drugs would not prolong the typical five-minute execution.⁵

* Assistant Prosecutor/Special Deputy Attorney General at the Essex County Prosecutor's Office, New Jersey. This article is dedicated to my grandmother, Rosemary McCarron Flannery, Esq., who was a true inspiration for me. I would like to thank Prof. Thomas J. Healy at Seton Hall for his help throughout the writing process. I would also like to thank my family for their immense support.

¹ Matt Ford, *Can Europe End the Death Penalty in America*, THE ATLANTIC (Feb. 18, 2014), <http://www.theatlantic.com/international/archive/2014/02/can-europe-end-the-death-penalty-in-america/283790/>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Lawrence Hummer, *I Witnessed Ohio's Execution of Dennis McGuire. What I Saw Was Inhumane*, THE GUARDIAN (Jan. 22, 2014, 1:51 PM), <http://www.theguardian.com/>

After strapping McGuire to a gurney, the prison officials inserted an IV into his arm before injecting him with the lethal drugs.⁶ Three minutes into his execution, McGuire told his family members present at his execution that he loved them.⁷ A minute later, his stomach began to swell, as if he had a sudden hernia.⁸ Then for the next eleven minutes, McGuire gurgled as if struggling for breath and clenched his fists.⁹ One witness described McGuire's death "much like a fish lying along the shore puffing for that one gasp of air that would allow it to breathe."¹⁰ Once the loud breathing sounds subsided, medical technicians listened for a heartbeat for four minutes before the warden pronounced McGuire dead.¹¹ All told, the typical five minute execution took about twenty-five minutes from the time the drugs were injected to the time McGuire was pronounced dead.¹² Ohio postponed an execution scheduled for the next week so that the state could reevaluate its lethal injection procedure in light of McGuire's execution.¹³

A week prior to McGuire's execution, the State of Oklahoma executed Michael Lee Wilson.¹⁴ Like Ohio, Oklahoma did not use the typical three-drug cocktail for Wilson, substituting sodium thiopental for pentobarbital.¹⁵ Although he showed no outward signs of pain, twenty seconds after the administering of the injection, Wilson called out: "I feel my whole body burning."¹⁶

On July 23, 2014, Arizona executed Joseph R. Wood, III.¹⁷ Instead of the typical five to ten minute procedure, Mr. Wood's execution lasted an

commentisfree/2014/jan/22/ohio-mcguire-execution-untested-lethal-injection-inhumane.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Hummer, *supra* note 5.

¹² Erica Goode, *After a Prolonged Execution in Ohio, Questions over 'Cruel and Unusual'*, NY TIMES (Jan. 17, 2014), http://www.nytimes.com/2014/01/18/us/prolonged-execution-prompts-debate-over-death-penalty-methods.html?hp&_r=0.

¹³ *Id.*

¹⁴ Gary Strauss, *Ohio Killer's Slow Execution Raises Controversy*, USA TODAY (Jan. 16, 2014, 8:18 p.m.), <http://www.usatoday.com/story/news/nation/2014/01/16/ohio-killer-executed-with-new-lethal-drug-combo/4512651/>.

¹⁵ Ford, *supra* note 1.

¹⁶ *'I Feel My Whole Body Burning,' Says Oklahoma Death Row Inmate During Execution*, FOX NEWS (Jan. 10, 2014), <http://www.foxnews.com/us/2014/01/10/feel-my-whole-body-burning-says-oklahoma-death-row-inmate-during-execution/>.

¹⁷ Erik Eckholm, *Arizona Takes Nearly 2 Hours to Execute Inmate*, NY TIMES (July 23, 2014), <http://www.nytimes.com/2014/07/24/us/arizona-takes-nearly-2-hours-to-execute-inmate.html>.

astonishing hour and fifty-seven minutes.¹⁸ During the procedure, Mr. Wood coughed, gurgled, and gasped over 600 times for air.¹⁹ State officials have maintained the appropriateness of the medical procedures involved in the execution.²⁰ The initial, physical autopsy of Wood indicated that the IVs were “perfectly placed” and “the catheters in each arm were completely within the veins and there was no leakage of any kind... anything that was put through the IVs went into the veins.”²¹ Questions remain about the actual drugs used in the proceeding. Arizona had used the new two-drug cocktail of the midazolam and hydromorphone previously in the McGuire execution.²² However, execution logs indicate that Wood was actually injected with a dosage fifteen times more than the dosage required in the most up-to-date Arizona execution protocols.²³

Common to these recent executions has been the alteration of the typical three-drug cocktail due to shortages of the drug sodium thiopental.²⁴ Most of the bulk-suppliers of sodium thiopental are companies within the European Union, which openly supports the abolition of the death penalty throughout the world.²⁵ In 2011, the EU prohibited the export of sodium thiopental to countries that administer lethal injections.²⁶ As a result, the states that administer the lethal injection have had to find new means of securing the drugs necessary to carry out the sentences. Some states, such as Missouri, have sought the use of local pharmacists to create a compound to use during lethal injections.²⁷ Others have relied upon stockpiled reserves of sodium thiopental, which typically has a four-year shelf life.²⁸

¹⁸ *Id.*

¹⁹ Michael Kiefer, *Reporter Describes Arizona Execution: 2 Hours, 640 Gasps*, THE ARIZ. REPUBLIC (July 26, 2014, 10:01 a.m.), <http://www.azcentral.com/story/news/arizona/politics/2014/07/24/arizona-execution-joseph-wood-eyewitness/13083637/>.

²⁰ *Department of Corrections Statement of Review of July 23 Execution*, ARIZ. DEP'T OF CORR. (July 24, 2014), <https://corrections.az.gov/article/department-corrections-statement-review-july-23-execution>.

²¹ *Id.*

²² Eckholm, *supra* note 17.

²³ Fernanda Santos, *Executed Arizona Inmate Got 15 Times Standard Dose, Lawyers Say*, NY TIMES (Aug. 1, 2014), <http://www.nytimes.com/2014/08/02/us/executed-arizona-man-given-15-times-standard-dose-lawyers-say.html>.

²⁴ Dustin Volz, *No Drugs, No Executions: Is This the End of the Death Penalty?*, THE ATLANTIC (Oct. 28, 2013), <http://www.theatlantic.com/national/archive/2013/10/no-drugs-no-executions-is-this-the-end-of-the-death-penalty/280916/>.

²⁵ Ford, *supra* note 1.

²⁶ *Id.*

²⁷ Volz, *supra* note 24.

²⁸ Ford, *supra* note 1.

In the face of this drug shortage, the death penalty states have become increasingly secretive about where they have received their drugs. The states hide behind various statutes and regulations that shield the identity of the executioner from the public. They claim that the identity of the drug manufacturer, whether a compounding pharmacy or a pharmaceutical company, counts as part of the instrumentalities of the execution.²⁹ To release such information could hinder later attempts by the states to acquire more of the drugs due to outside pressures on the companies not to do business with the state.³⁰ Accordingly, the states argue that the public and the condemned inmate do not have a right to the information.

This article does not attempt to argue for the abolition of the death penalty and accepts Chief Justice Roberts' assertion that because "[c]apital punishment is constitutional...it necessarily follows that there must be a means of carrying it out."³¹ However, the constitutionality of capital punishment is governed by the Eighth Amendment's prohibition of cruel and unusual punishment, which "draw[s] its meaning from evolving standards of decency that mark the progress of a maturing society."³² This article argues for increased access to lethal injection procedures in order to enable the public to have a true understanding of the constitutional boundaries of lethal injections under the Eighth Amendment. By denying the public access to all of the information surrounding executions, the states ensure the failure of Justice Marshall's hypothesis that a well-informed public would reject the death penalty.³³

The concept of the informed citizenry has its basis in the First Amendment.³⁴ This article will explore the use of the First Amendment as a tool in death penalty litigation. In particular, it will explore the viability of using First Amendment Right of Access jurisprudence to maneuver around states' attempts to limit the information surrounding executions. A First Amendment claim can be helpful in two regards: 1) its success can delay the execution; and 2) it can gain information for a subsequent Eighth Amendment claim.

Part I recounts the history of capital punishment in the American justice system, explaining how executions evolved from public events involving hangings to secretive affairs involving lethal injection. Part II explores the Supreme Court's Eighth Amendment jurisprudence, with a

²⁹ *In re Lombardi*, 741 F.3d 888, 890 (8th Cir. 2014); *see also* *Schad v. Brewer*, No. CV-13-2001-PHX-ROS, 2013 U.S. Dist. LEXIS 145387 (D. Ariz. Oct. 7, 2013).

³⁰ *In re Lombardi*, 741 F.3d at 894.

³¹ *Baze v. Rees*, 553 U.S. 35, 48 (2008).

³² *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

³³ *Gregg v. Georgia*, 428 U.S. 153, 232 (1976) (Marshall, J., dissenting).

³⁴ Anthony Lewis, *A Public Right to Know about Public Institutions: The First Amendment as Sword*, 1980 SUP. CT. REV. 1, 3 (1980).

particular focus on capital punishment. Part II also considers how the Marshall Hypothesis should guide Eighth Amendment capital punishment claims. Part III of the article focuses on the concept of the First Amendment Right of Access. The idea of a public right of access to government proceedings has its roots in the notion that a well-informed citizenry is essential for proper regulation of democratic governments. Part III moreover analyzes the way the Supreme Court has interpreted the right of access in cases concerning prison inmates. Part IV describes recent attempts by condemned prisoners to use the First Amendment Right of Access to delay their executions and gather information for potential Eighth Amendment violations.

Finally, the article concludes by arguing that condemned men and women should first bring suits based upon the First Amendment prior to any Eighth Amendment claim. Recent decisions have severely limited the use of the Eighth Amendment as a starting point for litigation because the inmates often lack the requisite information to make out a valid Eighth Amendment claim.³⁵ The inmate can use the First Amendment as a sword to gain information needed to win a subsequent Eighth Amendment claim.

I. CAPITAL PUNISHMENT IN THE UNITED STATES

One need look only to the early written legal codes to see the death penalty was an entrenched aspect of Western Civilization and its concept of justice. As the power of the centralized state grew, the public execution served as a reminder of the state's ultimate control over the individual's life. The early public executions enabled the state to "display the majestic, awesome power of sovereignty as it was materialized on the body of the condemned."³⁶ These early public executions ensured that citizens knew their place within society as a whole. "Executions were designed to make the state's dealing in death majestically visible to all. Live, but live by the grace of the sovereign; live, but remember that your life belongs to the state: these were the messages of the state killing of an earlier era."³⁷ The public aspect of these executions also sought to deter others from committing the same offense, reminding viewers of the consequences of trespassing against the law.³⁸

Although various means of execution have existed throughout history, death by hanging became the most popular means of public execution

³⁵ *In re Lombardi*, 741 F.3d at 896.

³⁶ Austin Sarat, *Killing Me Softly: Capital Punishment and the Technologies for Taking Life*, in PAIN, DEATH, AND THE LAW 43, 49 (Austin Sarat ed., 2001).

³⁷ *Id.* at 50.

³⁸ GEORGE RYLEY SCOTT, THE HISTORY OF CAPITAL PUNISHMENT 41 (1950).

within the English system and as such took hold in the American colonies.³⁹ Scholars believe that hanging as a form of execution arrived in England by way of the invading Germanic tribes of the fifth century C.E.⁴⁰ Hanging is a simple means of execution, one that required little expertise.⁴¹ The executioner needed only a length of rope to create the noose and a tree from which to hang the rope.⁴² Upon hoisting the condemned up with the rope, gravity set to work as the condemned died from asphyxiation.⁴³

While hanging provided an easy and accessible means for the state to execute convicts, the death penalty in England was not a common sentence until around the Tudor Age.⁴⁴ William the Conqueror, who reigned from 1066-1087, used the death sentence rarely, reserving it mostly for cases involving treason.⁴⁵ Nearly five hundred years later, during the reign of Henry VIII, executions occurred at a rate of no less than two thousand a year.⁴⁶

As previously mentioned, executions at this time were extremely public affairs: theater for the common folk.⁴⁷ By the Eighteenth Century, a well-orchestrated display followed the conviction of a criminal. Upon pronouncement of his or her sentence, the condemned was executed the subsequent morning, provided the next morning was not a Sunday.⁴⁸ In London, the condemned were originally dragged three miles through the city streets to the place used for hangings.⁴⁹ Often the condemned died along the route as onlookers and passersby hurled refuse and beat the condemned, preventing the public from viewing the ultimate spectacle.⁵⁰ Consequently, the condemned was placed on an exposed cart as he or she traveled the three miles to the site of execution.⁵¹ The original site in London consisted of trees from which the noose was hung.⁵² Eventually, a portable scaffold was developed and used at the prison, which was

³⁹ Ellyde Roko, Note, *Executioner Identities: Toward Recognizing a Right to Know Who Is Hiding Beneath the Hood*, 75 *FORDHAM L. REV.* 2791, 2796 (2007).

⁴⁰ TIMOTHY V. KAUFMAN-OSBORN, *FROM NOOSE TO NEEDLE: CAPITAL PUNISHMENT AND THE LATE LIBERAL STATE* 63 (2002).

⁴¹ Roko, *supra* note 39, at 2796-97.

⁴² KAUFMAN-OSBORN, *supra* note 40, at 63.

⁴³ *Id.*

⁴⁴ SCOTT, *supra* note 38, at 38.

⁴⁵ *Id.* at 37.

⁴⁶ *Id.* at 38.

⁴⁷ Sarat, *supra* note 36, at 49.

⁴⁸ SCOTT, *supra* note 38, at 40.

⁴⁹ KAUFMAN-OSBORN, *supra* note 40, at 69.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² SCOTT, *supra* note 38, at 41.

constructed outside the prison walls for the public to observe the execution.⁵³ In 1760, a scaffold with a trapdoor was developed so that when the executioner triggered it, the bottom fell away, allowing gravity to pull the condemned down and the noose to cause suffocation.⁵⁴ By 1783, executioners developed a scaffold with a trapdoor, which permitted the execution of up to ten people simultaneously.⁵⁵

Public executions became must-attend events in communities. People flocked to towns for the chance to see an execution. One early Nineteenth Century contemporary describes witnessing the events surrounding an aborted execution in Pennsylvania:

After the execution of Lechler had gratified the people about York and Lancaster with the spectacle of his death, and had produced its proper complement of homicide and other crimes, a poor wretch was condemned to suffer the same fate in another part of the State of Pennsylvania, where the people had not yet been indulged with such a spectacle. They therefore collected by the thousands and tens of thousands. The victim was brought out. All the eyes in the living mass that surrounded the gibbet were fixed on his countenance, and they waited with strong desire, the expected signal for launching him into eternity. There was a delay. They grew impatient; it was prolonged, and they were outrageous; cries like those which preceded the tardy rising of the curtain in a theater were heard. Impatient for delight they expected in seeing a fellow-creature die, they raised a ferocious cry. But, it was at last announced that a reprieve had left them no hope of witnessing his agonies, their fury knew no bounds; and the poor maniac—for it was discovered that he was insane—was with difficulty snatched by the officers of justice from the fate which the most violent among them seemed determined to inflict. This most awful and humiliating instance of the degrading depth to which human nature may descend, occurred at a place called Orwigsburgh, in Pennsylvania, and Mr. Livingston declares the picture by no means overcharged, the name of the rescued maniac was Zimmerman.⁵⁶

⁵³ KAUFMAN-OSBORN, *supra* note 40, at 76.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ SCOTT, *supra* note 38, at 54.

At the last public execution in Philadelphia in 1837, an estimated 20,000 people attended with the hope of seeing James Moran hang.⁵⁷

The first half of the Nineteenth Century witnessed the formation of a number of reform movements in the United States, including the death penalty abolition movement. Growing out of the prison reform movement, the abolitionists believed the death penalty to be another example of inhumane treatment of prisoners.⁵⁸ The first major victory for the abolitionists occurred in 1847 when Michigan became the first state to abandon the use of capital punishment.⁵⁹

As death penalty abolitionists began to gain momentum, proponents for the death penalty sought to remove the public aspect of the sentence. States began to pass private execution laws in which the execution would occur within the prison walls in the presence of a selected group of witnesses.⁶⁰ Abolitionists opposed these measures because they believed that if executions took place in private, the public would not fully understand the consequences of a death sentence.⁶¹ The great social reformer Horace Greely believed that private executions “subtracted much of the force” from the abolitionist cause.⁶² Nevertheless, in 1833, Rhode Island became the first state to enact a private execution law.⁶³ By 1849, when Michigan abolished the death penalty, fifteen states had enacted private execution statutes.⁶⁴ The passage of the private execution laws did not completely eliminate public executions. Executions were a local affair governed in many states by the local county sheriff.⁶⁵ It was not until state governments took control from the county sheriffs in the early Twentieth Century that public executions faded into history.⁶⁶ The last recorded public execution occurred on May 21, 1937 in the town of Galena, Missouri.⁶⁷

The latter half of the Nineteenth Century saw a movement to find more humane means to execute prisoners. *Wilkerson v. Utah*, one of the first challenges to capital punishment heard by the Supreme Court, upheld

⁵⁷ John D. Bessler, *Televised Executions and the Constitution: Recognizing a First Amendment Right of Access to State Executions*, 45 FED. COMM. L.J. 355, 359 (1993).

⁵⁸ Nicholas Levi, Note, *Veil of Secrecy: Public Executions, Limitations on Reporting Capital Punishment, and the Content-Based Nature of Private Execution Laws*, 55 FED. COMM. L.J. 131, 136 (2002).

⁵⁹ SCOTT, *supra* note 38, at 72.

⁶⁰ Bessler, *supra* note 57, at 362.

⁶¹ *Id.* at 361.

⁶² Levi, *supra* note 58, at 141.

⁶³ *Id.* at 139.

⁶⁴ *Id.* at 140.

⁶⁵ Bessler, *supra* note 57, at 363.

⁶⁶ *Id.* at 365.

⁶⁷ *Id.*

the use of a firing squad to execute a man convicted of first-degree murder.⁶⁸ While recognizing the limits imposed by the Eighth Amendment, the Court found “that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included” in the ban on cruel and unusual punishment.⁶⁹ The use of a firing squad, however, was more of an outlier among execution methods, as hanging remained the more popular method.⁷⁰

In 1885, New York authorized a commission to discover “whether the science of the present day” could not find a less barbaric means to execute prisoners. After a thorough two-year study, which considered every known method of execution, the commission suggested the use of the electric chair.⁷¹ The commission considered the possibility of using some form of lethal injection, but decided the procedure was impractical.⁷² Moreover, medical professionals feared the use of hypodermic needles would create an unwanted association between the practice of medicine and executions.⁷³ In 1890, after the Supreme Court ruled in favor of the use of the electric chair,⁷⁴ William Kemmler became the first condemned prisoner executed by it.⁷⁵ Thereafter, the electric chair gained acceptance as a humane means of executing prisoners. By 1913, fifteen states had adopted the electric chair as the primary method of execution.⁷⁶ By 1949, the total number of states authorizing the use of the electric chair had increased to twenty-six.⁷⁷

Unlike hanging, which at its most rudimentary form required a rope and a tree, the electric chair required more skill from the executioner to carry out the procedure. Mainly the executioner needed familiarity with electricity.⁷⁸ A contemporary newspaper account described the method by which the electrical current would flow into Mr. Kemmler’s body:

Then come two switches, one for short circuiting the current, the other the fatal switch which carries the current to the wires connecting with the body of the condemned

⁶⁸ 99 U.S. 130 (1878).

⁶⁹ *Id.* at 134-35.

⁷⁰ Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 *FORDHAM L. REV.* 49, 63 (2007).

⁷¹ *Id.*

⁷² Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 *IOWA L. REV.* 319, 373 (1997).

⁷³ *Id.*

⁷⁴ *In re Kemmler*, 136 U.S. 436 (1890).

⁷⁵ Denno, *supra* note 70, at 62.

⁷⁶ Denno, *supra* note 72, at 365.

⁷⁷ *Id.*

⁷⁸ Roko, *supra* note 39, at 2797.

man. Two wires at the top connect with a dynamo 1,000 feet away in the north wing of the prison. One of the wires at the bottom will be connected with the metal cap to be worn on the head and the other will be adjusted to the base of Kemmler's spine.⁷⁹

The medical report of the first execution by electricity asserted: "the important fact remains that unconsciousness was instantly effected, and death was painless."⁸⁰ The report also lauded the humaneness of execution by electricity in contrast to hanging:

Compared with hanging, in which death is frequently produced by strangulation, with every indication of conscious suffering for an appreciable time on the part of the victim, execution by electricity is infinitely preferable, both as regards the suddenness with which death is effected and the expedition with which all the immediate preliminary details may be arranged. By the latter method the fatal stroke renders its victim unconscious in an infinitesimal fraction of a second, so small as to be beyond the power of the human mind to estimate, while, at the same time, it disintegrates the nerve tissues and blood to an extent which insures an absoluteness of death in a shorter space of time than is possible by any other known method. In other words, it is the surest, quickest, most efficient, and least painful method that has yet been devised.⁸¹

Despite these accolades for execution by electricity, the author of the report, Dr. C.E. Spitzka, preferred the guillotine as a primary means of execution.⁸²

The next advance in execution technology involved the adoption of lethal gas. In 1921, Nevada became the first state to adopt lethal gas execution and end executions by hanging and firing squad.⁸³ Although lethal gas never surpassed the electric chair in popularity, by 1955 eleven

⁷⁹ Associated Press, *Kemmler's Death Chamber: How the Electric Current Is To Be Transmitted To His Body*, N.Y. TIMES (April 26, 1890), <http://query.nytimes.com/mem/archive-free/pdf?res=F50E1FF73E5F10738DDDAF0A94DC405B8085F0D3>.

⁸⁰ *Killing by Electricity: Official Story of the Execution of Kemmler*, N.Y. TIMES (Oct. 9, 1890), <http://query.nytimes.com/mem/archive-free/pdf?res=F10711FE3A5F10738DDDA00894D8415B8085F0D3>.

⁸¹ *Id.*

⁸² *The Kemmler Execution: Dr. C.E. Spitzka Tells Doctors and Lawyers All About It*, N.Y. TIMES (Nov. 11, 1890), <http://query.nytimes.com/mem/archive-free/pdf?res=FB0B13F63A5F10738DDDA80994D9415B8085F0D3>.

⁸³ Denno, *supra* note 72, at 366.

states used lethal gas as their execution method of choice.⁸⁴ The promotion of lethal gas was short lived. By 1994, states no longer viewed the gas chamber as an acceptable means of execution.⁸⁵

In the aftermath of *Gregg v. Georgia*,⁸⁶ which reopened the death penalty after a four-year moratorium, states looked to technological advances yet again to find a more humane execution method.⁸⁷ States settled on execution by lethal injection because of the proposed humane and economic benefits of the method.⁸⁸ The first state to authorize lethal injection as a form of execution was Oklahoma in 1977.⁸⁹ By 1982, when the first execution by lethal injection was performed, five states had adopted the method.⁹⁰ As of 2015, lethal injection is the primary method of execution in thirty-two states in addition to the United States military and the federal government.⁹¹

As states passed legislation authorizing lethal injection, they faced the problem of finding executioners with enough medical training to carry out the procedure. The medical profession openly opposed doctor participation in lethal injection and threatened sanctions against members who participated.⁹² When New Jersey authorized lethal injection, the state hired Fred A. Leuchter, Jr. to construct a lethal injection machine that would remove the need for medical specialists in administering the drug.⁹³ Leuchter was not himself a medical expert, but was self-taught in the intricacies of “the execution business” after entering the “business” in 1979.⁹⁴ Leuchter advised sixteen states on execution equipment and sold his lethal injection machine for an estimated \$25,000 to four states— Illinois, Delaware, Missouri, and New Jersey.⁹⁵ In late 1990, information surfaced that Leuchter held a bachelor’s degree in history and was not a licensed engineer.⁹⁶ Massachusetts charged Leuchter “with fraudulently practicing engineering,” to which he pled guilty.⁹⁷

⁸⁴ *Id.* at 367.

⁸⁵ *Id.*

⁸⁶ 428 U.S. 153 (1976).

⁸⁷ Denno, *supra* note 72, at 374.

⁸⁸ *Id.*

⁸⁹ Denno, *supra* note 70, at 65.

⁹⁰ Denno, *supra* note 72, at 375.

⁹¹ *Methods of Execution*, DEATH PENALTY INFO. CTR., <http://www.deathpenalty.info.org/methods-execution> (last visited Aug. 30, 2015).

⁹² *Id.*

⁹³ KAUFMAN-OSBORN, *supra* note 40, at 181.

⁹⁴ Michael deCourcy Hinds, *Making Execution Humane (or Can It Be?)*, N.Y. TIMES (Oct. 13, 1990), <http://www.nytimes.com/1990/10/13/us/making-execution-humane-or-can-it-be.html?action=click&module=Search®ion=searchResults&pagewanted=2>.

⁹⁵ *Id.*

⁹⁶ *An ‘Expert’ on Executions Is Charged with Fraud*, N.Y. TIMES (Oct. 24, 1990),

States often leave the specifics of the actual lethal injection protocol to the discretion of the prison administration. Wyoming's lethal injection statute provides information meant to guide corrections officials during the execution by listing the types of permitted drugs for the injection.⁹⁸ In contrast, South Dakota has left much of the decision to the warden of how to administer the lethal injection.⁹⁹ For the most part, states are hesitant to release all information about the execution protocols unless faced with litigation.¹⁰⁰ The states will often cite fears of prison security and the need to protect drug manufacturers from potential harassment from abolitionist groups.¹⁰¹ While the states may differ on the minute details, the traditional lethal injection consisted of a three-drug cocktail: first sodium thiopental, next pancuronium bromide, and finally potassium chloride.¹⁰² Chief Justice Roberts explained the effects of the drugs:

The first drug, sodium thiopental...is a fast-acting barbiturate sedative that induces a deep, comalike unconsciousness when given in the amounts used for lethal injections. . . . The second drug, pancuronium bromide...is a paralytic agent that inhibits all muscular-skeletal movements and, by paralyzing the diaphragm, stops respiration. . . . Potassium chloride, the third drug, interferes with the electrical signals that stimulate the contractions of the heart, inducing cardiac arrest The proper administration of the first drug ensures that the prisoner does not experience any pain associated with the paralysis and cardiac arrest caused by the second and third drugs.¹⁰³

Once the condemned inmate is led into the execution chamber, the executioners fasten him or her "to a gurney... insert a catheter into a vein, and inject a nonlethal solution. After the reading of a death warrant, a lethal mixture is injected by one or more executioners or, depending upon

<http://www.nytimes.com/1990/10/24/us/an-expert-on-executions-is-charged-with-fraud.html>.

⁹⁷ *Id.*

⁹⁸ Denno, *supra* note 70, at 94.

⁹⁹ *Id.* at 95.

¹⁰⁰ *Id.*

¹⁰¹ See *In re Lombardi*, 741 F.3d 888 (8th Cir. 2014); *Landrigan v. Brewer*, 625 F.3d 1132 (9th Cir. 2010) (Dissent from denial of hearing en banc); *Schad v. Brewer*, No. CV-13-2001-PHX-ROS, 2013 U.S. Dist. LEXIS 145387 (D. Ariz. Oct. 7, 2013).

¹⁰² Denno, *supra* note 70, at 78.

¹⁰³ *Baze*, 553 U.S. at 44 (citations omitted).

the state, by a machine.”¹⁰⁴ From the first administration of the sodium thiopental, the execution should last around five minutes.¹⁰⁵

Recently, states have had to reconsider the three-drug cocktail due to shortages of the first drug—sodium thiopental. Hospira, the only U.S. manufacturer of sodium thiopental, stopped production of the drug in 2011 because it opposed the use of the drug in executions.¹⁰⁶ When states attempted to switch to pentobarbital as a substitute, the only American licensed maker of the drug, the Danish company Lundbeck, Inc., announced a new distribution system of the drug designed to keep the drug out of the execution chamber.¹⁰⁷ By the end of 2011, the European Union banned the export of “products which could be used for the execution of human beings by means of lethal injection,” including ‘short and intermediate acting barbiturate anesthetic agents’ like pentobarbital and sodium thiopental, among others.”¹⁰⁸ In response to the shortage of sodium thiopental, Missouri considered using the drug propofol as a substitute because of its similar qualities to sodium thiopental.¹⁰⁹ Unlike sodium thiopental, which is no longer a widely accepted anesthetic in the medical community,¹¹⁰ propofol is still used by doctors for medical procedures.¹¹¹ However, Missouri decided not to pursue that avenue because of fears propofol would suffer the same fate from the European Union as sodium thiopental.¹¹²

States have also looked to new drug combinations in an effort to find alternatives to the traditional three-drug lethal injection. Ohio, Oklahoma, Arizona, and Florida have begun to use a two-drug combination of “hydromorphone, an opioid painkiller that suppresses breathing, and midazolam, a sedative.”¹¹³ However, the States differ in regards to the actual dosage administered during the execution. Florida uses 500

¹⁰⁴ Denno, *supra* note 72, at 379.

¹⁰⁵ See Hummer, *supra* note 5.

¹⁰⁶ Andrew Welsh-Huggins, *States: Death-Penalty Drug Scramble, Higer Cost*, BLOOMBERG BUS. WK. (July 9, 2011, 2:14PM), <http://www.businessweek.com/ap/financialnews/D9OC9L100.htm>.

¹⁰⁷ *Id.*

¹⁰⁸ Ford, *supra* note 1.

¹⁰⁹ *In re Lombardi*, 741 F.3d at 890.

¹¹⁰ Ford, *supra* note 1.

¹¹¹ *In re Lombardi*, 741 F.3d at 890-91.

¹¹² *Id.*

¹¹³ Fernanda Santos & John Schwartz, *A Prolonged Execution in Arizona Leads to a Temporary Halt*, NY TIMES (July 24, 2014), http://www.nytimes.com/2014/07/25/us/a-prolonged-execution-in-arizona-leads-to-a-temporary-halt.html?hp&action=click&pgtype=Homepage&version=HpSumSmallMediaHigh&module=second-column-region®ion=top-news&WT.nav=top-news&_r=0.

milligrams of midazolam and Oklahoma uses 100 milligrams.¹¹⁴ Both Ohio's and Arizona's protocols call for 50 milligrams of the drug.¹¹⁵ Texas uses only one drug for lethal injection purposes: pentobarbital.¹¹⁶

The recent drug shortage directly affects state policies. First, as is the case when supply is limited and the demand great, states have faced increased costs for the execution drugs.¹¹⁷ Second and more importantly, states have begun to use compounding pharmacies to supply the drugs needed for lethal injections.¹¹⁸ When using the compounding pharmacies, the states sought the help of laws protecting the identity of members of the execution team, arguing that the compounding pharmacies are members of the execution team.¹¹⁹ By denying access to information concerning the drug manufacturers, the states have transformed the execution from a public event, demonstrating the power of the state to uphold the community's sense of justice, to a completely private and secretive event, hiding from the public one of the most tremendous powers of the state—the power over life and death.

The recent shortages have also led some states to take questionable methods to acquire the necessary drugs. In 2011, the Drug Enforcement Administration seized Georgia's cache of sodium thiopental.¹²⁰ The legality of the importation of the drug from the United Kingdom concerned federal authorities.¹²¹ Georgia bought the drugs from the British company Dream Pharma, which apparently "operated out of the back of a London driving school."¹²² In response to the importation problems, the Food and Drug Administration declared that "in 'defer[ence] to law enforcement' agencies, henceforth it would exercise its

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Manny Fernandez & John Schwartz, *Confronted on Execution, Texas Proudly Says It Kills Efficiently*, NY TIMES (May 12, 2014), <http://www.nytimes.com/2014/05/13/us/facing-challenge-to-execution-texas-calls-its-process-the-gold-standard.html?ref=us&module=Ribbon&version=origin®ion=Header&action=click&contentCollection=U.S.&pgtype=article>.

¹¹⁷ Welsh-Huggins, *supra* note 106.

¹¹⁸ Elisabeth A. Semel, *End Secrecy in Lethal Injections*, CNN OPINION, http://www.cnn.com/2014/01/15/opinion/semel-lethal-injection/index.html?hpt=hp_c2 (last updated Jan 16, 2014, 11:31 AM).

¹¹⁹ Jeremy Kohler, *ACLU Sues to Lift Secrecy over Missouri Execution Team*, ST. LOUIS POST-DISPATCH (Oct. 23, 2013, 11:30 PM), http://www.stltoday.com/news/local/crime-and-courts/aclu-sues-to-lift-secrecy-over-missouri-execution-team/article_62046041-7d01-5584-a82c-b17a7322bdc3.html.

¹²⁰ Kathy Lohr, *Georgia May Have Broken Law By Importing Drug*, NAT'L PUB. RADIO (Mar. 17, 2011, 12:01 AM), <http://www.npr.org/2011/03/17/134604308/dea-georgia-may-have-broken-law-by-importing-lethal-injection-drug>.

¹²¹ *Id.*

¹²² *Id.*

‘enforcement discretion not to review [shipments of sodium thiopental] and allow processing through [Customs’] automated system for importation.’¹²³ Death row inmates from Arizona, California, and Tennessee sued the FDA for violation of the Food, Drug, and Cosmetic Act¹²⁴ when it failed to sample and examine imported misbranded sodium thiopental for use in lethal injections.¹²⁵ The Circuit Court for the District of Columbia upheld a district court order requiring the FDA to enforce the Food, Drug, and Cosmetic Act but vacated the order requiring the FDA to seize the drugs already held by the states because the states were not a named party to the suit.¹²⁶ In particular, the DC Circuit found the FDA was required to:

(1) sample “any drugs” that have been “manufactured, prepared, propagated, compounded, or processed” in an unregistered establishment and (2) examine the samples and determine whether any “appears” to violate the prohibitions listed in § 381(a)(1)-(3). If, “from the examination of such samples or otherwise,” the FDA finds an apparent violation of the Act, then it must (3) “refuse[] admission” to the prohibited drug.¹²⁷

As foreign markets from which to acquire the drugs have dried up, states have become increasingly hesitant to release any information about how they have obtained the drugs. Recent federal cases such as *Landrigan v. Brewer*,¹²⁸ *In re Lombardi*,¹²⁹ and *Schad v. Brewer*¹³⁰ show how far the states are willing to go in order to limit access to information regarding lethal injection drugs. In particular, the states have attempted, with varying success, to deny access to the name of the manufacturer and information as to how the state acquired the drug.¹³¹ As will be discussed in subsequent sections, the information concerning the drugs is vital for the defendant seeking to make a valid Eighth Amendment claim. By denying access to the information, the states have forced defense lawyers to find new arrows for their quiver of legal arguments and pushed Eighth Amendment “cruel and unusual punishment” litigation towards the realm of First Amendment Right of Access.

¹²³ *Cook v. FDA*, 733 F.3d 1, 4 (D.C. Cir. 2013).

¹²⁴ 21 U.S.C.A § 381(a).

¹²⁵ *Cook*, 733 F.3d at 1.

¹²⁶ *Id.* at 12.

¹²⁷ *Id.* at 10.

¹²⁸ 625 F.3d 1132 (9th Cir. 2010).

¹²⁹ 741 F.3d 888 (8th Cir. 2014).

¹³⁰ *Schad v. Brewer*, No. CV-13-2001-PHX-ROS, 2013 U.S. Dist. LEXIS 145387 (D. Ariz. Oct. 7, 2013).

¹³¹ *Id.* at *6-7.

II. THE EVOLUTION OF THE EIGHTH AMENDMENT

Any analysis of the Eighth Amendment begins with the language itself. The text provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”¹³² Of particular interest, the ban on “cruel and unusual punishments” has been the crux of all arguments concerning the death penalty.¹³³ However, the addition of that phrase to the Amendment was viewed as “constitutional boilerplate” and generated little debate during ratification.¹³⁴ The phrase “cruel and unusual punishment” comes word-for-word from the English Bill of Rights, adopted after the Glorious Revolution in 1689.¹³⁵ While the language appears on its face fairly straight forward, the Supreme Court’s definition and understanding of “cruel and unusual” has evolved over time.

One of the first Supreme Court cases to deal with the “cruel and unusual punishment” clause was *Wilkerson v. Utah*.¹³⁶ A jury convicted Wilkerson of first-degree murder.¹³⁷ Subsequently, the trial judge sentenced him to “be publicly shot until [he was] dead.”¹³⁸ Wilkerson challenged the use of a firing squad. At the time, federal law had limited the sentencing power of federal courts to imposing death by hanging only.¹³⁹ The Utah Territory enacted legislation in 1852, which authorized execution by firing squad, hanging, or beheading.¹⁴⁰ In 1876, the territorial legislature passed a new statute that punished first degree murder with death but did not prescribe the means of execution from which the judge was to choose.¹⁴¹ Wilkerson attempted to argue that the limits placed on federal judges superseded state methods.¹⁴² The Court rejected that argument noting that traditionally capital punishment had been carried out in courts-martial by either shooting or hanging.¹⁴³

Next, the Court addressed concerns about the constitutionality of using a firing squad under the Eighth Amendment. While attempting to

¹³² U.S. CONST. amend. VIII.

¹³³ See *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972).

¹³⁴ Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted*”: *The Original Meaning*, 57 CAL. L. REV. 839, 840 (1969).

¹³⁵ *Id.*

¹³⁶ 99 U.S. 130 (1879).

¹³⁷ *Id.* at 130.

¹³⁸ *Id.* at 131 (internal quotations omitted).

¹³⁹ *Id.* at 132-33.

¹⁴⁰ *Id.* at 132.

¹⁴¹ *Id.*

¹⁴² *Wilkerson*, 99 U.S. at 133.

¹⁴³ *Id.* at 134.

outline “cruel and unusual,” the Court noted “[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted.”¹⁴⁴ At a minimum, unnecessarily cruel punishments, such as being hanged, drawn, and quartered, are not permitted under the Eighth Amendment.¹⁴⁵ The Court held that the sentencing judge was within his power to sentence Wilkerson to death by firing squad because the sentence did not pass over to the realm of cruel and unusual.¹⁴⁶ One should note the importance the Court placed upon the military’s use of a firing squad to justify imposing the same sentence on Wilkerson.¹⁴⁷ The Court implicitly looked to what society deemed an appropriate method of execution, finding justification in its use by the military.

A few years after deciding the constitutionality of the firing squad, the Court determined for the first time the constitutionality of the electric chair. *In re Kemmler*¹⁴⁸ involved New York State’s attempt to become the first state to execute a man by electricity. William Kemmler had been sentenced to death for the murder of Matilda Zeigler.¹⁴⁹ Kemmler simply argued that the use of electricity for his execution violated the prohibition of “cruel and unusual” punishment.¹⁵⁰ The lower courts deferred to the judgments of the New York legislature that had determined “that the use of electricity as an agency for producing death constituted a more humane method of executing the judgment of the court in capital cases.”¹⁵¹ Building off the definition used in *Wilkerson*, the Court went on to describe the parameters of the “cruel and unusual” clause:

Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life.¹⁵²

Ultimately, the Court upheld New York’s statute authorizing the electric chair under a highly deferential standard toward both the state legislature and the state courts.¹⁵³ The Court reasoned that the legislature had apprised itself of all of the facts necessary to determine that the

¹⁴⁴ *Id.* at 135-36.

¹⁴⁵ *Id.* at 136.

¹⁴⁶ *Id.* at 137.

¹⁴⁷ *Id.* at 133.

¹⁴⁸ 136 U.S. 436 (1890).

¹⁴⁹ *Id.* at 441.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 443.

¹⁵² *Id.* at 447.

¹⁵³ *In re Kennler*, 136 U.S. at 449.

electric chair constituted a humane mode of execution.¹⁵⁴ By relying on the legislative findings of the New York legislature, the Court gave a nod towards the use of social mores as a means for defining “cruel and unusual” punishment. Indeed, the stimulus for using the electric chair grew out of a belief that hanging was a barbarous relic of the Dark Ages.¹⁵⁵ “Cruel and unusual,” therefore, could change based upon legislative findings.

The next two cases of significance in terms of Eighth Amendment jurisprudence did not actually involve the death penalty. First, *Weems v. United States*,¹⁵⁶ involved a case arising from the then-United States Territory of the Philippine Islands. Weems, a member of the Coast Guard, had falsified public documents in order to embezzle government funds.¹⁵⁷ Upon his conviction, Weems was sentenced to a minimum of “confinement in a penal institution for twelve years and one day, a chain at the ankle and wrist of the offender, hard and painful labor, no assistance from friend or relative, no marital authority or parental rights or rights or property.”¹⁵⁸ Weems argued that his sentence constituted cruel and unusual punishment.¹⁵⁹ After discussing the nature of the punishment, the Court asserted that a cornerstone of the American penal system “is a precept of justice that punishment for crime should be graduated and proportioned to offense.”¹⁶⁰ The Court attempted to give deference to the penalty because the legislature had duly enacted the statute authorizing the penalty.¹⁶¹ However, the Court could not reconcile the statute with the Eighth Amendment’s ban on cruel and unusual punishment.¹⁶² *Weems* demonstrates the Supreme Court’s first steps towards accepting the concept of proportionality within the definition of “cruel and unusual.”

The second case was *Trop v. Dulles* in which the Court declared unconstitutional a statute authorizing the denationalization of convicted military deserters.¹⁶³ While serving as a private in the Army during World War II, Trop was confined to a stockade in Casablanca.¹⁶⁴ Trop escaped but returned the next day.¹⁶⁵ A court-martial convicted him of desertion

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 444.

¹⁵⁶ 217 U.S. 349 (1910).

¹⁵⁷ *Id.* at 357-58.

¹⁵⁸ *Id.* at 366.

¹⁵⁹ *Id.* at 362.

¹⁶⁰ *Id.* at 367.

¹⁶¹ *Weems*, 217 U.S. at 378.

¹⁶² *Id.* at 382.

¹⁶³ 356 U.S. 86 (1958).

¹⁶⁴ *Id.* at 87.

¹⁶⁵ *Id.*

and “sentenced him to three years at hard labor, forfeiture of all pay and allowances and a dishonorable discharge.”¹⁶⁶ In addition, he was stripped of his status as an American citizen.¹⁶⁷ After the war, upon denial of a passport application, Trop challenged the last aspect of his sentence.¹⁶⁸

After declaring the authorizing statute penal in nature, the Court analyzed the denationalization of Trop in light of the Eighth Amendment.¹⁶⁹ Although desertion during time of war is punishable by death, the Court stated, “the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination.”¹⁷⁰ On the contrary, the Court used the opportunity presented by Trop’s case to add more defined boundaries to the ambiguity present in the Eighth Amendment. The Court stated:

The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect.¹⁷¹

Here, the Court fully embraced the concept of proportionality in determining the constitutionality of a punishment; but couches the terms in ensuring humane punishment. The Court further declared that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”¹⁷² The definition of cruel and unusual punishment changes as the values of society evolve. In adopting this view, the Court embraced the ambiguity in attempting to define the Seventeenth Century phrase in terms of Twentieth Century life.

One should also note in particular that the Court rejected denationalization because “[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.”¹⁷³ The Court makes clear that when interpreting the Eighth Amendment the Court will consider the international consensus with regards to particular punishments. In so doing, the Court gave the Eighth Amendment a universal application. While the Eighth Amendment is

¹⁶⁶ *Id.* at 88.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Trop*, 356 U.S. at 99.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 100.

¹⁷² *Id.* at 101.

¹⁷³ *Id.* at 102.

rooted in the dignity of men, it is not stagnant, because society's definition of cruel and unusual continuously evolves. At the same time, "dignity of men" cannot be defined only by a strictly American perspective. The Court recognized that the concept of human dignity transcends national borders, requiring comparison in order for the country to judge properly its ever-changing social mores.

In 1972, the Supreme Court issued a fractured decision that, for the first time, called into question the validity of the death penalty as a means of punishment. *Furman v. Georgia*¹⁷⁴ contained a concise *per curiam* opinion that held that "the imposition and carrying out of the death penalty in [the underlying] cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."¹⁷⁵ Nine separate opinions followed the five-four decision. Of the five Justices who concurred with the decision, only two held capital punishment to constitute cruel and unusual punishment: Justices Brennan and Marshall, leaving the door open for a constitutionally acceptable system by which a state could impose the death penalty.

Of the various opinions, Justice Marshall's presents an interesting theory on public support for capital punishment. In what has become known as the "Marshall Hypothesis,"¹⁷⁶ Justice Marshall contended that Americans would reject capital punishment if they knew all of the facts surrounding its application.¹⁷⁷ Before introducing his theory on public attitudes on capital punishment, Justice Marshall provided a history of the formation of the "cruel and unusual" clause and the Court's interpretation.¹⁷⁸ Justice Marshall then discussed the constitutionality of capital punishment by downplaying past decisions on the legitimacy of capital punishment:

The fact, therefore, that the Court, or individual Justices, may have in the past expressed an opinion that the death penalty is constitutional is not now binding on us. . . . There is no holding directly in point, and the very nature of the Eighth Amendment would dictate that unless a very recent decision existed, *stare decisis* would bow to changing values, and the question of the constitutionality of

¹⁷⁴ 408 U.S. 238 (1972).

¹⁷⁵ *Id.* at 239-40.

¹⁷⁶ See, e.g., Sarat & Vidmar, *Public Opinion, The Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171 (1976); Carol S. Steiker, *The Marshall Hypothesis Revisited*, 52 HOW. L.J. 525 (2009).

¹⁷⁷ *Furman*, 408 U.S. at 369.

¹⁷⁸ *Id.* at 315-16.

capital punishment at a given moment would remain open.¹⁷⁹

According to Justice Marshall, because the interpretation of the “cruel and unusual punishment” clause relies upon the “evolving standards of decency that mark the progress of a maturing society,” current public perception of “cruel and unusual” outweighs any prior Court decision.¹⁸⁰

In order to guide his analysis on the constitutionality of the death penalty, Justice Marshall put forth four reasons for finding a punishment unconstitutional, similar to those advocated by Justice Brennan.¹⁸¹ In the first category, Justice Marshall placed “punishments that inherently involve so much physical pain and suffering that civilized people cannot tolerate them,” which at the time of the adoption of the Eighth Amendment were outlawed.¹⁸² Next, Justice Marshall identified “punishments that are unusual, signifying that they were previously unknown as penalties for a given offense.”¹⁸³ The third category comprised penalties that are “excessive and serve[] no valid legislative purpose”¹⁸⁴ because “[t]he entire thrust of the Eighth Amendment is... against that which is excessive.”¹⁸⁵ The fourth and final category consisted of punishments invalidated because “popular sentiment abhors it.”¹⁸⁶ Since capital punishment had enjoyed validity since the founding of the country, Justice Marshall focused his inquiry on whether capital punishment fell within one of his two remaining categories.¹⁸⁷ Eventually, Justice Marshall concluded that the death penalty does not serve a valid penological purpose and in fact “is an excessive and unnecessary punishment that violates the Eighth Amendment.”¹⁸⁸

Justice Marshall continued his analysis by discussing public opinion of capital punishment. A proper gauge of the public’s opinion on the death penalty requires the public to know all of the information surrounding it:

...[T]he question with which we must deal is not whether a substantial portion of American citizens would today, if

¹⁷⁹ *Id.* at 329-30.

¹⁸⁰ *Id.* at 329 (quoting *Trop*, 356 U.S. at 101).

¹⁸¹ Alan I. Bigel, *Justices William J. Brennan, Jr. and Thurgood Marshall on Capital Punishment: Its Constitutionality, Morality, Deterrent Effect, and Interpretation by the Court*, 8 NOTRE DAME J.L. ETHICS & PUB. POL’Y 11, 121 (1994).

¹⁸² *Furman*, 408 U.S. at 330.

¹⁸³ *Id.* at 331.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 332 (internal quotations omitted).

¹⁸⁶ *Id.* at 332.

¹⁸⁷ *Id.* at 332-33.

¹⁸⁸ *Furman*, 408 U.S. at 358-59.

polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in the light of all information presently available.¹⁸⁹

Justice Marshall recognized that the public has very little information concerning capital punishment and would seem to base most of its ideas concerning capital punishment on a perceived need for retribution.¹⁹⁰ Justice Marshall pointed to the great depth of discrimination in the death penalty's application—against minorities, the poor, even based upon gender.¹⁹¹ Moreover, the public failure to recognize the death penalty's finality has led to the deaths of people later discovered to be innocent.¹⁹² Finally, the public does not know the effect the death penalty has on the legal system as a whole by sensationalizing certain crimes and impeding prison reform.¹⁹³ If the public had knowledge of the flaws inherent in capital punishment, Justice Marshall believed the public would “find it shocking to [its] conscience and sense of justice.”¹⁹⁴

Justice Marshall's theory assumes first that the public has complete access to all the information surrounding capital punishment, and second that if the public lacks immediate access, the government would willingly provide all of the information. In order for the average citizen to become enlightened about the cruel and unusual elements of the death penalty, the government must share the information. Otherwise, the public remains ignorant, relying on its “desire for retribution.”¹⁹⁵ If the definition of “cruel and unusual punishment” relies upon society's evolving standards of decency, the public must stay informed as to the types of punishments imposed to ensure the punishments remain within society's evolving standards. Similarly, if as Justice Marshall suggests, complete information on all aspects of the death penalty helps society define “cruel and unusual,” then public access to information concerning the death penalty becomes key to the evolution of the definition. By limiting access to information, the government stalls the evolution of the definition of “cruel and unusual punishment,” freezing a supposed fluid standard at a particular moment in time.

The death penalty in the United States lasted until the Court decided *Gregg v. Georgia*¹⁹⁶ four years later. In another fractured decision, Justice Stewart announced the opinion of the Court upholding Georgia's

¹⁸⁹ *Id.* at 362.

¹⁹⁰ *Id.* at 363.

¹⁹¹ *Id.* at 364-66.

¹⁹² *Id.* at 367.

¹⁹³ *Furman*, 408 U.S. at 368-69.

¹⁹⁴ *Id.* at 369.

¹⁹⁵ *Id.* at 363.

¹⁹⁶ 428 U.S. 153 (1976).

reworked death penalty statute that created a bifurcated jury process to determine whether or not to impose the death penalty.¹⁹⁷ Unlike Justice Marshall in *Furman*, Justice Stewart found guidance in past decisions, focusing on the method used to execute the prisoner rather than the constitutionality of the death penalty as a whole.¹⁹⁸

Although Justice Stewart accepted the evolving nature of the Eighth Amendment, he did not apply it to the punishment of death, but limited its application to the method of execution.¹⁹⁹ Still, Justice Stewart applied a two-part test: “First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime.”²⁰⁰ Nevertheless, the Court must defer to the decisions of the legislature:

We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.²⁰¹

As representatives of the people, the legislature stands in a good position to know the public’s opinion of the death penalty. The Court also looked to the United States’ history and noted the imposition of the death penalty since the country’s beginning.²⁰² Moreover, concerns of the death penalty’s discriminatory application are rectified through “a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.”²⁰³ Justice Stewart’s deference to the legislature and reliance on history limits the definition of “cruel and unusual” in a way that does not question the sentence, but rather, the method for imposing the sentence. The death penalty itself, because of its historical acceptance, does not face scrutiny under the evolving standards of decency.

Justice Marshall’s dissent in *Gregg* reiterated his position in *Furman*. For Justice Marshall, the enactment of new death penalty legislation post-*Furman* does not indicate public support.²⁰⁴ Once again, the crux of Justice Marshall’s argument lies with the need for the public to have all the information about the death penalty: “But if constitutionality of the death penalty turns, as I have urged, on the opinion of an *informed*

¹⁹⁷ *Id.* at 162-70.

¹⁹⁸ *Id.* at 170.

¹⁹⁹ *Id.* at 171.

²⁰⁰ *Id.* at 173 (citations omitted).

²⁰¹ *Id.* at 175.

²⁰² *Gregg*, 428 U.S. at 177.

²⁰³ *Id.* at 195.

²⁰⁴ *Id.* at 232.

citizenry, then even the enactment of new death statutes cannot be viewed as conclusive.”²⁰⁵ Citing a study about public perception of the death penalty after the enactment of the new statutes, Justice Marshall argued that the average citizen still lacked full knowledge of capital punishment.²⁰⁶ Similarly, Justice Marshall questioned the need for the death penalty when an alternative—life imprisonment—exists.²⁰⁷ Finally, Justice Marshall criticized what he saw as a punishment based solely on retribution.²⁰⁸

Once again, Justice Marshall focused on the ignorance of the public in forming its opinion. According to Justice Marshall, the public’s ignorance kept its focus on an antiquated mode of punishment. Widespread dissemination of information concerning the procedures used to execute prisoners would humanize the process, making it more real to the average citizen. Information concerning alternatives to execution, such as lifetime imprisonment, would offer the public more humane and less antiquated means of punishing criminals. Such information could conceivably sway public opinion against the death penalty, creating a vocal majority for abolishment within the country.

In the years following *Gregg v. Georgia*, the Court accepted the basic premise of the death penalty as constitutional, but limited its application to certain procedures and certain classes of offenders. The Burger Court “indicated that states may enact capital statutes provided that application is limited to clearly defined classes of murder, and that due process requirements have been followed.”²⁰⁹ An early case during the Rehnquist Court explained the state of the Eighth Amendment with regards to capital punishment:

First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decision maker’s judgment as to whether the circumstances of a particular defendant’s case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer’s consideration of any relevant circumstances that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer’s discretion,

²⁰⁵ *Id.* (emphasis original).

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 238.

²⁰⁸ *Gregg*, 428 U.S. at 239.

²⁰⁹ Bigel, *supra* note 179, at 71-2.

but must allow it to consider any relevant information offered by the defendant.²¹⁰

This analysis shifts the focus from the constitutionality of the death penalty itself to the application of the death penalty. While societal attitudes may change and impact how to administer the death penalty, society's attitude toward the punishment itself, on a general scale, does not matter. Post-*Gregg*, the Court limited the application of the death penalty, striking down its use as a punishment for rape of an adult woman²¹¹ as well as the rape of a minor;²¹² declaring the execution of mentally retarded offenders unconstitutional;²¹³ and barring the execution of offenders who committed their offense while still a minor.²¹⁴ In each decision, the Court envisioned the Eighth Amendment as allowing the death penalty but with specific limitations for its use.

More recently, in *Baze v. Rees*,²¹⁵ the Court addressed the constitutionality of a particular method for executing an offender. In this case, death row inmates from Kentucky challenged the constitutionality of the state's lethal injection protocol.²¹⁶ The inmates argued, "because of the risk that the protocol's terms might not be properly followed, resulting in significant pain" the procedures violated the Eighth Amendment.²¹⁷ Ultimately, the Court rejected the petitioner's claims. Writing for a plurality, Chief Justice Roberts addressed the general proposition of capital punishment:

Capital punishment is constitutional... it necessarily follows that there must be a means of carrying it out. Some risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure. It is clear, then that the Constitution does not demand the avoidance of all risk of pain in carrying out executions.²¹⁸

Once again, the inquiry accepts the constitutionality of the death penalty, leaving in dispute only the method through which to challenge the sentence.

Here, the inmates tried to have Kentucky's method declared "cruel and unusual" by comparing it to a proposed method with less of a risk for

²¹⁰ *McCleskey v. Kemp*, 481 U.S. 279, 306-07 (1987).

²¹¹ *Coker v. Georgia*, 433 U.S. 584 (1977).

²¹² *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

²¹³ *Atkins v. Virginia*, 536 U.S. 304 (2002).

²¹⁴ *Roper v. Simmons*, 543 U.S. 551 (2005).

²¹⁵ 553 U.S. 35 (2008).

²¹⁶ *Id.* at 41.

²¹⁷ *Id.*

²¹⁸ *Id.* at 47.

mishap and resulting pain.²¹⁹ The plurality rejected this argument. The possibility of pain does not rise to the level of “cruel and unusual” under the Eighth Amendment; the Amendment bars “wanton exposure to objectively intolerable risk.”²²⁰ Instead, Chief Justice Roberts provided a test for inmates proposing alternative execution procedures:

To qualify, the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. If a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State’s refusal to change its method can be viewed as “cruel and unusual” under the Eighth Amendment.²²¹

The societal views on capital punishment serve as less of a factor because the Court has acknowledged the constitutionality of the capital punishment. Instead, the burden rests on the inmate to demonstrate the procedure is unconstitutional by providing an alternative. Moreover, the inmate must show a refusal on the part of the State to change the procedures. By focusing on the procedures, the capital punishment inquiry does not address the larger constitutional question of capital punishment itself. Nevertheless, access to information still plays an important role. In order for the inmate to challenge the constitutionality of the death penalty procedure or to propose a different procedure, the inmate must first know all the facts of the State’s death penalty procedures. While public opinion is not an important factor in Chief Justice Robert’s analysis, information and access to information remains at the center of any challenge to capital punishment under the Eighth Amendment.

III. THE FIRST AMENDMENT AND THE RIGHT OF ACCESS

Of the various provisions contained in the First Amendment, the Right of Access finds its basis within the right of free speech. In pertinent part, the Amendment provides: “Congress shall make no law... abridging the freedom of speech, or of the press.”²²² The Constitution ensures that the citizens retain sovereignty over the government; as such, the citizen needs information to make the best decisions.²²³ The First Amendment

²¹⁹ *Id.*

²²⁰ *Id.* at 61-2 (quotes omitted).

²²¹ *Baze*, 553 U.S. at 52.

²²² U.S. CONST. amend. 1.

²²³ Anthony Lewis, *A Public Right to Know about Public Institutions: The First*

ensures that “[w]hen he decides an issue, he is entitled to information or opinion or doubt or disbelief or criticism which is relevant to that issue.”²²⁴ By ensuring the free flow of information to the citizenry, the Constitution provides for meaningful oversight of the government by the people and promotes accountability.

For a period of time, the Supreme Court flirted with finding a “Right of Access” to the courts via the Sixth Amendment, which ensures the right to a “speedy and public trial.”²²⁵ This issue was addressed in the 1948 Supreme Court case of *In re Oliver*,²²⁶ which involved the denial of an inmate’s habeas corpus petition by the Michigan State Supreme Court. The inmate had been convicted of contempt of court during a judge-grand jury hearing.²²⁷ At the time, Michigan had in place a grand jury system in which a judge sat as the sole fact-finder.²²⁸ The secretive nature of the grand jury led to the inmate’s conviction for contempt of court behind closed doors without the benefit of counsel.²²⁹ The Supreme Court held that this proceeding violated the inmate’s right to a public trial.²³⁰ The Court reasoned that the public trial serves “as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.”²³¹ Certain court proceedings could be held in chambers, but the majority of proceedings remained opened to the public.²³² Although a court had great powers to ensure the dignity of the court through contempt proceedings, the use of contempt still must abide by the Sixth Amendment guarantee of a public trial.²³³

While *In re Oliver* opened the door to a right to public court proceedings, *Gannett Co. v. DePasquale*²³⁴ limited the Sixth Amendment’s application to the defendant alone. During the pre-trial hearings of a murder case, local newspapers sought access to the courtroom in order to report on the proceedings.²³⁵ The Supreme Court

Amendment as Sword, 1980 SUP. CT. REV. 1, 3 (1980).

²²⁴ *Id.*

²²⁵ U.S. CONST. amend. VI.

²²⁶ 333 U.S. 257 (1948).

²²⁷ *Id.* at 259.

²²⁸ *Id.* at 262.

²²⁹ *Id.* at 259.

²³⁰ *Id.* at 278.

²³¹ *Id.* at 270.

²³² *In re Oliver*, 333 U.S. at 272.

²³³ *Id.* at 278.

²³⁴ 443 U.S. 368 (1979).

²³⁵ *Id.* at 376.

upheld the denial of access to the press because “members of the public have no constitutional right under the Sixth and Fourteenth Amendment to attend criminal trials.”²³⁶ According to the Court, the public-trial guarantee of the Sixth Amendment attaches to the individual for his or her own benefit, rather than serving as some general public right.²³⁷ The defendant, therefore, must assert a Sixth Amendment public-trial claim, not a third party. By limiting the Sixth Amendment to the individual, the Court undercuts the power of the public to serve as “an effective restraint on possible abuse of judicial power.”²³⁸ Nevertheless, the Sixth Amendment does not stand for general rights, forcing litigants to find other means for ensuring government accountability within the criminal justice system.

One of the first inklings from the Supreme Court of any type of Right of Access came in the case *Zemel v. Rusk*.²³⁹ The majority denied the appellant’s visa application to visit Cuba, finding “[t]he right to speak and publish does not carry with it the unrestrained right to gather information.”²⁴⁰ The government can restrict travel to both domestic and international areas if access “would directly and materially interfere with the safety and welfare of the area or the nation as a whole.”²⁴¹ Although the majority rejected the Right of Access argument, Justice Douglas, in his dissent, laid the basis from which later courts would construct a First Amendment Right of Access. Justice Douglas explained his theory behind the First Amendment:

The right to know, to converse with others, to consult with them, to observe social, physical, political and other phenomena abroad as at home gives meaning and substance to freedom of expression and freedom of press. Without those contacts, First Amendment rights would suffer.²⁴²

For the First Amendment to have any force, people must have access to the information. According to Justice Douglas access to the information and to different places permits the free flow of ideas. Interesting to note, in the first iteration, the right of access theory has little to do with government oversight, but the general First Amendment idea of the marketplace of ideas.

²³⁶ *Id.* 391.

²³⁷ *Id.* at 379-80.

²³⁸ *In re Oliver*, 333 U.S. at 270.

²³⁹ 381 U.S. 1 (1965).

²⁴⁰ *Id.* at 17.

²⁴¹ *Id.* at 15-16.

²⁴² *Id.* at 24 (Douglas, J. dissenting).

During the 1970s, the Supreme Court issued a series of opinions pertaining to the limits of a prisoner's First Amendment rights. In two cases decided on the same day,²⁴³ the Court deferred to prison administrators' experience when regulations touched upon inmates' First Amendment rights. In *Pell v. Procunier*, the Court upheld regulations denying reporters interviews with inmates of their choice.²⁴⁴ The Court's inquiry began with the proposition that inmates retain "those First Amendment rights that are not inconsistent with [their status as prisoners] or with the legitimate penological objectives of the corrections system."²⁴⁵ Thus, Courts must perform a balancing test in determining the constitutionality of prison regulations that impede prisoner contact.

As the basis of its decision, the Court reasoned that:

Institutional considerations, such as security and related administrative problems as well as the accepted and legitimate policy objectives of the corrections system itself, require that some limitations be placed on [visitations to prisoners]. So long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved, we believe that in drawing such lines prison officials must be accorded latitude.²⁴⁶

Since the prison officials permitted the prisoners to communicate to outside sources through letters, the Court held the regulations did not violate the First Amendment rights of the prisoners.²⁴⁷ In response to the claims brought by newspaper reporters requesting access to the prisoners, however, the Court held "[n]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public... The Constitution does not require government to accord the press special access to information not shared by members of the public generally."²⁴⁸ The Court reiterated this view in *Saxbe v. Washington Post Co.*, reasoning that because the prison policy in question did not deny access to information available to the general public, the regulations did not infringe upon the First Amendment.²⁴⁹

The two companion cases were announced with two separate dissents. In his *Pell* dissent, Justice Douglas argued for a right of access for the

²⁴³ *Pell v. Procunier*, 417 U.S. 817 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974).

²⁴⁴ *Pell*, 417 U.S. at 835.

²⁴⁵ *Id.* at 822.

²⁴⁶ *Id.* at 826.

²⁴⁷ *Id.* at 825.

²⁴⁸ *Id.* at 834.

²⁴⁹ *Saxbe*, 417 U.S. at 850.

press to gather information from inmates.²⁵⁰ While he accepted the majority's balancing test, Justice Douglas did not believe the interest in prison discipline permitted the blanket ban on interviews to reporters.²⁵¹ Justice Douglas also advocated for a reading of the Free Press Clause based upon the public need for information about public institutions and the press as the means by which the public will receive that information.²⁵² In particular, Justice Douglas noted: "Prisons... are ultimately the responsibility of the populace. Crime... is a matter of grave concern in our society and our people have a right and the necessity to know not only of the incidence of crime but of the effectiveness of the system designed to control it."²⁵³ The press needs access to the information in order to fulfill its duty to ensure an informed public.

In his *Saxbe* dissent, Justice Powell further explained the role of the press within the First Amendment: "The underlying right is the right of the public generally. The press is the necessary representative of the public's interest in this contest and the instrumentality which effects the public's right."²⁵⁴ Although neither Justice Douglas nor Justice Powell explicitly found a public right of access within the First Amendment, their dissents definitely recognize the special relationship the press has with the public. For an informed public to participate in the democratic process, the public needs access to information about the government. Through the press, the public receives the information necessary to make informed decisions. Therefore, the press needs access to government information not accessible to the general public.

Four years later, the Supreme Court decided *Houchins v. KQED, Inc.*,²⁵⁵ which arose from attempts by reporters to gain access to prisoners. After the suicide of an inmate at a county jail, the local television station sought to inspect and take pictures of the facility.²⁵⁶ When prison officials refused, the television station brought a First Amendment claim.²⁵⁷ The Court eventually rejected the claim, finding "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control... the media have no special right of access... different from or greater than that accorded the public generally."²⁵⁸

²⁵⁰ *Pell*, 417 U.S. at 841.

²⁵¹ *Id.* at 838-39.

²⁵² *Id.* at 841.

²⁵³ *Id.* at 840.

²⁵⁴ *Saxbe*, 417 U.S. at 864.

²⁵⁵ 438 U.S. 1 (1978).

²⁵⁶ *Id.* at 3.

²⁵⁷ *Id.* at 4.

²⁵⁸ *Id.* at 15-16.

The Court did recognize the important place the media has in American society. “[A]cting as the ‘eyes and ears’ of the public, they can be a powerful and constructive force, contributing to remedial action in the conduct of public business.”²⁵⁹ However, the Court did not recognize the existence of any First Amendment Right of Access. While the media could help to inform the public, reporters did not necessarily have to rely on their own inspection of the prisons or interviews of prisoners. The public had access to information through communications inmates had with family members as well as citizen task forces, which inspected the facilities.²⁶⁰

In his dissent, Justice Stevens offered a wider reading of the First Amendment. According to Justice Stevens, the First Amendment, at its core, protects the free exchange of information.²⁶¹ As such, the First Amendment has a dual purpose, protecting “not only the dissemination but also the receipt of information and ideas.”²⁶² Moreover, the free flow of information ensures the success of the American democratic system predicated upon “the existence of an informed citizenry.”²⁶³ Justice Stevens argued: “Without some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of all its substance.”²⁶⁴ With access to information about the prisons, the public can better oversee its governments. Here, Justice Stevens ties the First Amendment to the notion of public oversight of the government. The access to information enables the public to better assert its constitutional rights in the face of government violations. Constitutional rights do not disappear once individuals are imprisoned. Justice Stevens noted:

While a ward of the State and subject to its stern discipline, he retains constitutional protections against cruel and unusual punishment... a protection which may derive more practical support from access to information about prisons by the public than by occasional litigation in a busy court.²⁶⁵

Using Justice Stevens’ reasoning, the First Amendment becomes an important tool in the public’s duty to oversee the government. Through

²⁵⁹ *Id.* at 8.

²⁶⁰ *Id.* at 13.

²⁶¹ *Houchins*, 438 U.S. at 30.

²⁶² *Id.*

²⁶³ *Id.* at 31.

²⁶⁴ *Id.* at 32.

²⁶⁵ *Id.* at 37.

access to information, the public can ensure the government does not infringe upon the rights of even the least politically powerful.

With the plurality decision of *Richmond Newspapers v. Virginia*,²⁶⁶ the Supreme Court found a public right of access to government proceedings within the First Amendment. During a high profile murder trial, the judge had closed his courtroom to the public.²⁶⁷ In response, the local newspaper sued to reopen the trial.²⁶⁸ After stressing the traditionally public nature of trials in the United States, Chief Justice Burger described the First Amendment as a means to ensure government accountability. The various provisions of the First Amendment “share a common core purpose of assuring freedom of communication on matters relating to the functioning of government.”²⁶⁹ The press relates the events of a trial to the people, alerting the people to miscarriages of justice. Although the First Amendment makes no explicit mention of the Right of Access, to permit the government to limit access to proceedings would undermine the concept of freedom of speech and freedom of the press.²⁷⁰

Perhaps the more important opinion issued in *Richmond Newspapers* came from Justice Brennan. While the Chief Justice proclaimed a First Amendment Right of Access, he noted the government could limit access provided “an overriding interest” existed.²⁷¹ According to Justice Brennan, the First Amendment “has a *structural* play in securing and fostering our republican system of self-government.”²⁷² Because of the structural role of the First Amendment, the government may not interfere with “meaningful communication” that informs the public.²⁷³ In deciding Right of Access cases, Justice Brennan offered a two-part test. First, courts should consider whether there exists “an enduring and vital tradition of public entree to particular proceedings or information.”²⁷⁴ Next, courts should consider “whether access to a particular government process is important in terms of that very process.”²⁷⁵

In the context of *Richmond Newspapers*, Justice Brennan noted the long history of public trials.²⁷⁶ Under the second prong, Justice Brennan noted the important role open trials serve “in furthering the efforts of our

²⁶⁶ *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980).

²⁶⁷ *Id.* at 559.

²⁶⁸ *Id.* at 560.

²⁶⁹ *Id.* at 575.

²⁷⁰ *Id.* at 580.

²⁷¹ *Id.* at 581.

²⁷² *Richmond Newspapers*, 448 U.S. at 587.

²⁷³ *Id.* at 588.

²⁷⁴ *Id.* at 589.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

judicial system to assure the criminal defendant a fair and accurate adjudication of guilt or innocence.”²⁷⁷ Denying access to the trial undermines the entire legal system. Justice Brennan wrote:

Secrecy is profoundly inimical to this demonstrative purpose of the trial process. Open trial assure the public that procedural rights are respected, and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law. Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice.²⁷⁸

Using his test, Justice Brennan found that trials should be open to the public. Of more importance, Justice Brennan provided a method of analysis with farther reaching application. Although Chief Justice Burger relied heavily upon the tradition of public trials to justify a Right of Access, Justice Brennan looks beyond, accepting the Right of Access as a given and then moving to define the Right’s limits.

Two years later, the Court adopted Justice Brennan’s test in *Globe Newspaper Co. v. Superior Court*.²⁷⁹ However, Justice Brennan noted the limited nature of the Right of Access.²⁸⁰ The State must provide “weighty” justifications for limiting access.²⁸¹ Specifically, to deny access, the State must show that “denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.”²⁸² *Globe Newspaper Co.* involved a Massachusetts statute that limited access to all trials involving the rape of minors.²⁸³ The State argued that the statute protected minors from further trauma.²⁸⁴ While the reason provided by the State had some merit, the Court found that the statute in question went too far because of its mandatory application.²⁸⁵ The Right of Access may have limitations, but the State has a heavy burden if it seeks to limit that right.

Throughout the Right of Access line of cases, the Court never explicitly dealt with public access to the execution itself. That is not to say that the Supreme Court has never had the opportunity to address the issue. In 1890, the Supreme Court considered Minnesota’s execution

²⁷⁷ *Id.* at 593.

²⁷⁸ *Id.* at 595.

²⁷⁹ 457 U.S. 596 (1982).

²⁸⁰ *Id.* at 606.

²⁸¹ *Id.*

²⁸² *Id.* at 607.

²⁸³ *Id.* at 598-99.

²⁸⁴ *Id.* at 607.

²⁸⁵ *Globe Newspaper Co.*, 457 U.S. at 608.

authorization statute in *Holden v. Minnesota*.²⁸⁶ The statute limited the means of execution to hanging “within the walls of the jail” or “within an enclosure which shall be higher than the gallows, and shall exclude the view of persons outside.”²⁸⁷ The statute permitted the presence of select witnesses provided “no person so admitted shall be a newspaper reporter or representative.”²⁸⁸ Moreover, newspapers could not publish an account of the execution “beyond the statement of the fact that such convict was on the day in question duly executed according to law.”²⁸⁹ Such restrictions would seem incongruous with First Amendment principles; however, the challenge to the statute focused on whether a section imposing a period of solitary confinement upon the prisoner prior to his or her execution violated the Ex Post Facto Clause.²⁹⁰ Nevertheless, the Court upheld the statute because “it only prescribed the hour of the day before which, and the manner in which, the punishment of hanging shall be inflicted.”²⁹¹ The Court then proceeded to find the other regulations of the statute constitutional:

Whether a convict, sentenced to death, shall be executed before or after sunrise, or within or without the walls of the jail, or within or outside of some other enclosure, and whether the enclosure within which he is executed shall be higher than the gallows, thus excluding the views of persons outside, are regulations that do not affect his substantial rights. The same observation may be made touching the restriction...as to the number and character of those who may witness the execution, and the exclusion altogether of reporters or representatives of newspapers. These are regulations which the legislature, in its wisdom, and for the public good, could legally prescribe in respect to executions occurring after the passage of the act...²⁹²

While upholding the statute, the Court does not even consider the First Amendment implications of private executions. Indeed, the entire concept of a Right of Access has yet to enter into the Supreme Court’s jurisprudence. Although the Court validates private execution statutes, the Court does so in passing. The Court has since never broached the concept of private execution laws nor has the Court overturned *Holden*. However,

²⁸⁶ 137 U.S. 483 (1890).

²⁸⁷ *Id.* at 485-86.

²⁸⁸ *Id.* at 486.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.* at 491.

²⁹² *Id.*

the case's applicability to any Right of Access challenge to modern execution procedures would seem miniscule in light of more recent Supreme Court cases—most notably the analysis adopted by the Court in *Globe Newspaper Co.*

IV. THE FIRST AMENDMENT AS A SWORD

Two recent lower court decisions addressed the connection between the First Amendment Right of Access and the Eighth Amendment: *In re Lombardi*²⁹³ and *Schad v. Brewer*.²⁹⁴ This section will begin with a brief reiteration of the drug shortages states are facing. Next, the section will explore the litigation tactics used by inmates and the varying degrees of success the inmates have had. The final section will argue for the extension of the Right of Access to the protocols surrounding capital punishment.

In recent years, death penalty states have had difficulty procuring the drugs traditionally used in lethal injection procedures. The European manufacturers of the drugs have stopped manufacturing the drugs in an effort to curtail the supply in the United States. Consequently, states have had to turn to alternative methods either to acquire the drugs or to carry out the lethal injection procedure. Some states have resorted to using compound pharmacists to manufacture the necessary drugs. Other states have resorted to more questionable methods. The result has been the same for each state: a shortage in the supply of the lethal injection drugs.

As states have struggled to acquire the drugs, they have also become less transparent in regards to lethal injection procedures. In particular, states have sought to shield the public from information about the sources of the drugs. Missouri and Arizona have similar provisions to limit access to information about the execution procedures. Specifically, states shield the identities of the executioners, as defined by the state. In the face of drug shortages, states have sought to expand the definition of the executioner beyond a specific individual. Defendants have responded, with varying success, with new tactics to acquire shielded information.

A. *In re Lombardi*

Missouri's death penalty statute grants discretion to the Director of the Missouri Department of Corrections to devise the lethal injection

²⁹³ *In re Lombardi*, 741 F.3d 888 (8th Cir. 2014).

²⁹⁴ No. CV-13-2001-PHX-ROS, 2013 U.S. Dist. LEXIS 145387 (D. Ariz. Oct. 7, 2013)*aff'd* 732 F.3d 946 (9th Cir. 2013).

protocol.²⁹⁵ The Director also chooses the members of the “execution team” comprised of “those persons who administer lethal gas or lethal chemicals and those persons, such as medical personnel, who provide direct support for the administration of lethal gas or lethal chemicals.”²⁹⁶ The chosen execution protocol “that directly relates to the administration of...lethal chemicals” remains open to the public.²⁹⁷ However, other elements of the execution remain confidential, such as the “identities of members of the execution team” and execution protocols not directly related to the actual administration of the drugs.²⁹⁸

In response to the dwindling supply of lethal injection drugs, Missouri’s Director “issued a new execution protocol in May 2012 that called for the injection of two grams of propofol.”²⁹⁹ However, the Director abandoned the use of propofol in October 2013 because its use as an anesthetic in surgical procedures could be jeopardized by resulting European Union trade restrictions.³⁰⁰ Consequently, Missouri adopted new procedures that replaced propofol with pentobarbital.³⁰¹ Missouri also added the compound pharmacy responsible for providing the pentobarbital to the execution team.³⁰²

In 2012, death row inmates in Missouri sued the Director alleging that the new protocol violated the Eighth Amendment’s cruel and unusual punishment clause.³⁰³ After Missouri revised its lethal injection protocol, the inmates filed an amended complaint on December 3, 2013, challenging “the current protocol and the use of pentobarbital.”³⁰⁴ The district court issued a discovery order that required “the Director to disclose to counsel for the plaintiffs...the identities of the physician who provides a prescription for the compounded pentobarbital, the pharmacist who compounds the pentobarbital used in executions, and the laboratory that tests the compounded drug.”³⁰⁵ The district court asked the inmates’ attorneys to keep the information “confidential ‘other than as needed to do the investigation.’”³⁰⁶ The plaintiffs sought to use the discovery to possibly form the basis of an Eighth Amendment claim, believing that the

²⁹⁵ MO. REV. STAT. § 546.720.1 (2007).

²⁹⁶ MO. REV. STAT. § 546.720.2 (2007).

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *In re Lombardi*, 741 F.3d at 890.

³⁰⁰ *Id.* at 891.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *In re Lombardi*, 741 F.3d at 892.

³⁰⁶ *Id.*

use of pentobarbital from a compounding pharmacy “creates a substantial risk of severe pain or an objectively intolerable risk of severe pain.”³⁰⁷

The Director sought a writ of mandamus from the Eighth Circuit to stop the district court from enforcing the discovery orders.³⁰⁸ A three-judge panel granted the writ in part, prohibiting the disclosure of the prescribing physician’s identity.³⁰⁹ However, the Director still needed to disclose “the identities of the compounding pharmacy and the testing laboratory.”³¹⁰ The Eighth Circuit then granted a rehearing en banc.³¹¹

The Director put forth two reasons to deny the inmates access to the requested information. First, the Director argued that the information was protected by Missouri statute.³¹² Specifically, by declaring the compounding pharmacy and testing laboratory members of the execution team, the identities fell under the Missouri execution statute, which ensures the confidentiality of members of the execution team.³¹³ Second, the Director asserted that the plaintiffs had failed to state a claim in the underlying litigation.³¹⁴ The plaintiffs did not provide enough information in their Eighth Amendment complaint to support their claim; therefore, the district court should not have granted discovery, but should have dismissed the claim.³¹⁵ The Director also feared that disclosure of the information could lead to “collateral consequences” that would prevent future acquisition of lethal injection drugs.³¹⁶ If known to the public, compounding pharmacies might succumb to outside pressure and no longer sell drugs to the government.³¹⁷

The Eighth Circuit agreed with the Director’s argument that the inmates lacked a claim that could withstand a motion to dismiss. The plaintiffs failed to show that “the risk of harm arising from the State’s current lethal-injection protocol is substantial when compared to known and available alternatives.”³¹⁸ Relying on *Baze v. Rees*, the Court stated:

Where, as here, there is no assertion that the State acts purposefully to inflict unnecessary pain in the execution process, the Supreme Court recognized only a limited right

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *In re Lombardi*, 741 F.3d at 892.

³¹¹ *Id.* at 893.

³¹² *Id.* at 894.

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *In re Lombardi*, 741 F.3d at 894.

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.* at 895.

under the Eighth Amendment to require the State *to change* from one feasible method of execution to another.

. . . Without a plausible allegation of a feasible and more humane alternative method of execution, or a purposeful design by the State to inflict unnecessary pain, the plaintiffs have not stated an Eighth Amendment claim based on the use of compounded pentobarbital.³¹⁹

The inmates had hoped to use the information acquired through discovery to support their Eighth Amendment claims. Without the identity of the compounding pharmacy, the inmates could not research and ensure the safety of the drugs administered during the lethal injection. Caught in a Catch-22, the inmates' claim failed because the inmates did not have the information they sought to acquire in discovery. Ultimately, *In re Lombardi* shows the difficulty in not only succeeding on, but also proceeding to, discovery of an Eighth Amendment claim without access to all the information concerning the execution protocols. An Eighth Amendment claim by itself does not gain the plaintiff access to the execution protocols the state seeks to keep private.

B. *Schad v. Brewer*

Like Missouri, Arizona's death penalty statute gives the state department of corrections leeway in determining the protocol. The statute limits the method of execution to lethal injection, but does not define the drugs to be used.³²⁰ As such, the Arizona Department of Corrections makes the ultimate decision on the exact drugs used for the execution. Arizona's death penalty statute also keeps the identity of the executioner out of the public domain:

The identity of executioners and other persons who participate or perform ancillary functions in an execution and any information contained in records that would identify persons is confidential and is not subject to disclosure...³²¹

Two Arizona death row inmates filed a complaint against the governor of Arizona, the director of the Arizona Department of Corrections, and their respective wardens.³²² The inmates hoped to

³¹⁹ *Id.* at 895-96.

³²⁰ ARIZ. REV. STAT. ANN. § 13-757(A): The penalty of death shall be inflicted by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, under the supervision of the state department of corrections.

³²¹ ARIZ. REV. STAT. ANN. § 13-757(C).

³²² *Schad*, No. CV-13-2001-PHX-ROS, 2013 U.S. Dist. LEXIS 145387, at *2.

receive an injunction from the district court requiring the defendants to disclose the information about the lethal injection drugs.³²³ Specifically, the inmates requested to know:

- a. The manufacturer of lethal-injection drugs;
- b. The NDCs of lethal-injection drugs;
- c. The lot numbers of lethal-injection drugs;
- d. The expiration dates of lethal-injection drugs;
- e. Documentation indicating that those who will handle pentobarbital or other controlled substances in the execution have the appropriate DEA authorization to do so.³²⁴

Of particular interest, the inmates did not claim any Eighth Amendment violation, but sought the information under alleged violations of the First and Fourteenth Amendment.³²⁵ Unlike the plaintiffs from *In re Lombardi*, the plaintiffs did not claim a breach of the Eighth Amendment. Rather than seek the information through discovery, the plaintiffs in *Schad v. Brewer* made the lack of information the basis of their claim.

The plaintiffs had attempted to receive the information outside of litigation. Lawyers for the plaintiffs wrote two letters over the summer of 2013 requesting information about the lethal injection protocols.³²⁶ The plaintiffs hoped to learn “the name of the manufacturer of the drug, the brand name of the drug, the expiration date, whether the drug is compounded, and the Drug Enforcement Administration registrations authorizing the execution team members to handle controlled substances.”³²⁷ The State refused to provide the name of the manufacturer or the source of the drug, citing A.R.S. §13-757(C) and its prohibition on the revelation of the identity of execution team members.³²⁸ A public records request by the American Civil Liberties Union of Arizona succeeded in obtaining “a highly redacted document regarding the acquisition of the execution drugs,” revealing “only that the drug is Nembutal® that was purchased sometime in 2011.”³²⁹

The conflict surrounding the drug information stemmed from plaintiffs’ perceptions that Arizona may have either improperly acquired the drug or would use expired drugs. Plaintiffs cited *Cook v. FDA* in

³²³ *Id.* at *1.

³²⁴ *Id.* at *2-3.

³²⁵ Complaint for Equitable, Injunctive, and Declaratory Relief at 1, *Schad v. Brewer*, No. CV-13-2001-PHX-ROS, 2013 U.S. Dist. LEXIS 145387, at *2 (D. Ariz. Oct. 7, 2013).

³²⁶ *Schad*, 2013 U.S. Dist. LEXIS 145387, at *3-*4.

³²⁷ *Id.* at *4.

³²⁸ *Id.*

³²⁹ *Id.*

which the DC Circuit found that the FDA had permitted Arizona, California, and Tennessee to import lethal injection drugs in violation of the Food, Drug, and Cosmetic Act.³³⁰ At one execution, Arizona discovered that the drugs to be used had expired.³³¹ In fact, the plaintiffs alleged that the state's stockpile of pentobarbital, comprised of Nembutal®, had expired in March 2013.³³² The manufacturer of Nembutal® no longer sold the drug to departments of corrections, leaving Arizona without a source to acquire the drug legitimately.³³³

Plaintiffs' arguments focused on Arizona's attempts to conceal the requested information from the public. First, plaintiffs attempted to establish a right to the information under the First Amendment.³³⁴ According to the plaintiffs, the lack of information leaves plaintiffs "unable to vindicate any potential Eighth Amendment claim that they may have."³³⁵ For their First Amendment claim, the plaintiffs relied upon *California First Amendment Coalition v. Woodford*, which recognized a public "right to be informed about how the State and its justice system implement the most serious punishment a state can exact from a criminal defendant—the penalty of death."³³⁶ In furtherance of their argument, the plaintiffs noted that Arizona had previously provided similar information in past public-records proceedings.³³⁷ Second, the plaintiffs claimed that the denial of access to the information "violate[d] their right to due process and meaningful access to the courts by preventing them from discovering whether they have a colorable claim that their executions will be carried out in violation of the Eighth Amendment."³³⁸

Defendants countered by doubting the ability of the plaintiffs to make an eventual Eighth Amendment claim.³³⁹ Moreover, defendants relied again upon Arizona's execution statute, which prohibits the disclosure of the executioner's identity.³⁴⁰ Under the defendant's arguments, the drug manufacturers fell under the definition of a "person" for whom the death penalty statute required confidentiality.³⁴¹ Defendants also argued that by

³³⁰ 733 F.3d 1, 12 (D.C. Cir. 2013).

³³¹ Motion by Plaintiffs for Preliminary Injunction, and Memorandum in Support Thereof at 3-4, *Schad v. Brewer*, No. CV-13-2001-PHX-ROS, 2013 U.S. Dist. LEXIS 145387, at *2 (D. Ariz. Oct. 7, 2013) [hereinafter Motion and Memorandum].

³³² *Id.* at 4.

³³³ *Schad*, 2013 U.S. Dist. LEXIS 145387, at *5.

³³⁴ Motion and Memorandum, *supra* note 328, at 7.

³³⁵ *Id.*

³³⁶ 299 F.3d 868, 873 (9th Cir. 2002).

³³⁷ Motion and Memorandum, *supra* note 328, at 10.

³³⁸ *Schad*, 2013 U.S. Dist. LEXIS 145387, at *6.

³³⁹ *Id.* at *6-7.

³⁴⁰ *Id.* at *7.

³⁴¹ *Id.* at *16.

revealing the information, the sources of the drugs may become subject to public pressure and attacks.³⁴² If the information were to become well known, the state could find it even more difficult to maintain a supply of lethal injection drugs.³⁴³

The district court rejected the inmates' due process claim. The court reasoned that the plaintiffs could not show an actual injury: "Because Plaintiffs do not have a constitutional right to assess whether they have [an Eighth Amendment] claim, they have failed to state a claim for denial of access to the courts in violation of their due process rights."³⁴⁴ However, the court did accept the First Amendment claim. Relying on *California First Amendment Coalition*, the district court found a public right of access under the First Amendment to the drug information "because there is both an historical tradition with public access to information about the means of executions and a public importance of public access to that information."³⁴⁵ Having found a right to access the information, the Court then determined that Arizona's attempts to deny access to the information lacked a rational relationship to a legitimate penological interest.³⁴⁶ The court found the defendants' concerns of possible public backlash to be speculative.³⁴⁷ Moreover, some requested information, such as the drug expiration date, lot number, or National Drug Code, would not reveal the manufacturer's identity.³⁴⁸ In granting plaintiffs' motion, the court did not require Arizona to provide all the requested information, for fear of disclosing the executioner's identity. Instead, the court ordered the state to disclose:

- a. The manufacturer of lethal injection drugs;
- b. The NDCs of lethal-injection drugs;
- c. The lot numbers of lethal-injection drugs;
- d. The expiration dates of lethal-injection drugs.³⁴⁹

The decision in *Schad v. Brewer* provides an interesting new twist in death penalty litigation. As the *Schad* court implied in rejecting the due process claim, discovery is not a right for plaintiffs. In order to succeed on an Eighth Amendment claim, plaintiffs must have all of the information prior to filing their complaint for any chance at moving on to the discovery stage of litigation. When the state appears uncooperative in granting access to lethal injection protocols, the response should not be

³⁴² *Id.* at *18.

³⁴³ *Id.*

³⁴⁴ *Schad*, 2013 U.S. Dist. LEXIS 145387, at *29.

³⁴⁵ *Id.* at *14-15.

³⁴⁶ *Id.* at *16.

³⁴⁷ *Id.* at *20.

³⁴⁸ *Id.* at *21-22.

³⁴⁹ *Id.* at *29.

grounded in an Eighth Amendment claim. Plaintiffs' claim would most likely not survive a motion for dismissal. Rather, the plaintiffs should look to the First Amendment as a sword. Through a right of access claim, the plaintiffs can acquire the information needed to bring forth an Eighth Amendment claim with a better potential for success. Of course, plaintiffs would need to move quickly in the face of possible executions; however, temporary stays would provide a means of delaying executions.

After the decision in *Schad v. Brewer*, the defendants provided the plaintiffs with the requested information.³⁵⁰ Ultimately, the information could not form the basis of an Eighth Amendment claim and both plaintiffs were executed.³⁵¹

C. The Future of Right of Access

Both the public and the condemned inmate have an interest in knowing the exact procedures used in implementing the death penalty. As such, the Right of Access should extend to the state execution protocols, albeit for different reasons. In terms of the public, society has an interest in seeing that when the State implements the most severe punishment, the State does so in keeping with Eighth Amendment principles. Similarly, the condemned individual has an interest in knowing that when the State executes him, or her, the State does so humanely. The idea of the individual right admittedly is a more nuanced argument and rests less upon extension of Supreme Court precedent and more upon general ideas of morality. In both instances, the Right of Access should be extended to include all information pertaining to executions.

A public Right of Access to execution information is an extension of the *Richmond-Globe* theory of court access. Although the Court denied a Right of Access under the Sixth Amendment,³⁵² the test articulated by the Court in *Globe* clearly finds a Right of Access an integral part of the First Amendment. Applying the *Globe* test to execution protocols, the argument for public access to the information becomes more compelling. First, a long history of public access to executions has existed. True, for

³⁵⁰ *Edward Schad, Robert Glen Jones, Jr. Executions: State Provides Drug Information to Court*, ABC (Oct. 5, 2013, 2:28 PM), <http://www.abc15.com/news/region-phoenix-metro/central-phoenix/edward-schad-robert-glen-jones-jr-executions-state-provides-drug-information-to-court>.

³⁵¹ *Arizona Executes 71-year-old Edward Schad, Its Oldest Death Row Inmate*, THE GUARDIAN (Oct. 9, 2013, 5:15 PM), <http://www.theguardian.com/world/2013/oct/09/arizona-executes-schad-oldest-person-death-row>; Michael Kiefer, *Man Who Killed 7 in Arizona Put to Death*, USA TODAY (Oct. 23, 2013, 3:32 p.m.), <http://www.usatoday.com/story/news/nation/2013/10/23/killer-robert-jones-execution-arizona/3168907/>.

³⁵² *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

the last one hundred-fifty years the states have curtailed the public's ability to view executions in the open. However, the public still had access to the information as to how the executions took place. Although the hangings of Minnesota occurred behind closed doors, the public still knew that the state would use the simple rope and gallows to execute a condemned person. Similarly, as New York prepared to implement the first execution via electrocution, newspaper articles provided the public with detailed accounts of exactly how the execution would occur. In terms of lethal injections, only in the past few years have states sought to curtail public access to the information surrounding the implementation of the execution. The details surrounding execution procedures have traditionally been open to the public. Under the second prong of the *Globe* test, access to lethal injection protocols would seem important to ensure that States execute individuals in a manner consistent with Eighth Amendment principles. Similar to public access to trials, public access to execution procedures would ensure the constitutionality of the proceeding and maintain public confidence in capital punishment.

Of course, a fundamental difference exists between the trial and the implementation of punishment. The Court has consistently deferred to prison officials in cases that challenged regulations restricting public access to prisoners.³⁵³ However, a key difference exists between such regulations and the denial of information concerning execution protocols. In seeking access to the execution protocols, the public does not attempt to conduct interviews with selected prisoners nor does it attempt to film segments of the prison. The public seeks general information from the prison officials as to how a government proceeding—perhaps the most severe and grave proceeding a government can undertake—is to be conducted. In each of the prison access cases, the Court also noted the ability of the public to obtain the information through other means—citizens committees, prison mail to family members.³⁵⁴ State secrecy surrounding execution protocols provides no alternative means for the public to know the details of the execution itself. Prisoners cannot write letters to family members detailing how the state procured the drugs because the state does not provide access to the information. Unlike prison conditions, the lethal injection protocols are not readily observable and capable of dissemination to outside sources by prisoners because the states refuse to provide the information.

Courts confronted with demands for the information pertaining to the acquisition of lethal injection drugs have discussed the interest the State has in maintaining the secrecy of the executioner. Most notably, Chief

³⁵³ *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978).

³⁵⁴ *Id.* at 30.

Judge Kozinski in *Landrigan v. Brewer* argued that states should protect the drug manufacturers from potential public attacks.³⁵⁵ Chief Judge Kozinski also seems to accept the need to protect European suppliers from criminal investigations under the European Union:

Indeed, Arizona had good reasons not to [provide the name of the drug manufacturer]; just twenty-four hours after the state attorney general conceded the drug was imported from Great Britain, one journalist suggested the company might be criminally liable under an EU regulation that makes it illegal to “trade in certain goods which could be used for capital punishment, torture, or other cruel, inhuman or degrading treatment.”³⁵⁶

Such arguments not only seem to condone the violation of the laws of other jurisdictions but also, and more importantly, fail to appreciate the role of the public in the Eighth Amendment’s evolution. If the public expresses displeasure with a company providing the State with lethal injection drugs, the public does so as a showing of the evolving standards of decency. If a company chooses to respect public concerns and abstain from lethal injection proceedings, it does so of its own volition.

The First Amendment Right of Access provides the means through which society can properly evaluate the evolving standards of decency integral to the Eighth Amendment. As the Right of Access gives substance to the Freedom of the Press Clause, so too does it provide substance for the Eighth Amendment. Society cannot accurately judge the humaneness of current punishments if it lacks all the information required to do so. By keeping various death penalty protocols secret, states keep arguments about the constitutionality of lethal injections and the death penalty as a whole limited. The Right of Access enables the public to receive information concerning government proceedings. The free access to all of the information concerning execution proceedings ensures a true discussion of whether current practices remain constitutional in light of evolving standards of decency.

When considering whether an individual inmate should be able to assert the Right of Access on his or her own behalf, one must look beyond the societal benefits of the right. True, the individual can gain information that will then become subject to public scrutiny through the open courts. However, something more fundamental should compel the State to provide the inmate with all information surrounding the execution process, especially when the information directly pertains to the exact method

³⁵⁵ 625 F.3d 1132, 1143 (9th Cir. 2010) (dissenting from denial of rehearing en banc).

³⁵⁶ *Id.*

employed to end the inmate's life. The inmate cannot ensure the constitutionality of the punishment if he or she does not know the details of the method itself. Such secrecy seems contrary to fundamental understandings of morality and fairness within the punishment stage of the criminal justice system. The individual should know the details of the punishment that the state will impose upon him or her. When the individual receives a sentence of a term of imprisonment, the individual can observe the conditions once inside the prison and report upon them. Executions do not have such benefits. Once the punishment has been administered, a life ends. Therefore, it is incumbent upon the state to provide the information in advance.

Extending the Right of Access to include all information concerning executions does not come without some limits. For the public, the right would not extend to include access to watch the execution. Rather, the right would simply require states to disclose the details of the execution protocols. Likewise, the individual prisoner would have a right to know the means by which the state will execute him, but not necessarily to broadcast the execution or invite unlimited guests to view the execution. Such limits take into account the states' interests in maintaining order within prisons and keep with the Supreme Court prison access cases of the 1970s.

CONCLUSION

This article does not seek to argue against the constitutionality of the death penalty, nor does it seek to delve into the morality of such a punishment. It seeks to shed light on a potential new frontier for death penalty litigation—First Amendment Right of Access. Current state government practices have attempted to obscure from the public the means by which inmates are executed. By using a First Amendment claim, inmates can combat state obfuscation and perhaps gain access to information that could form the basis of an Eighth Amendment claim.

Justice Marshall theorized that if the public had all the information concerning the application and administration of capital punishment, a majority of the public would reject the punishment.³⁵⁷ State attempts to keep the protocols surrounding executions outside the public domain make it difficult to test Justice Marshall's theory. A Gallup poll released in October 2013 showed the lowest support for the death penalty in forty years at sixty percent in favor of the punishment.³⁵⁸ However, in that

³⁵⁷ *Furman*, 408 U.S. at 369.

³⁵⁸ Jeffrey M. Jones, *U.S. Death Penalty Support Lowest in More Than 40 Years*, GALLUP, <http://www.gallup.com/poll/165626/death-penalty-support-lowest-years.aspx?>

same poll, fifty-two percent of Americans believed the death penalty is applied fairly and forty percent thought the death penalty was applied unfairly.³⁵⁹ The numbers from the polls come when states have actively sought to shield from the public the exact details of how an inmate is put to death.

The basis of the Eighth Amendment, the evolving standards of decency that mark the progress of a maturing society, is meaningless unless the standards are permitted to evolve. To do so, society must have access to information, hence, the importance of a First Amendment Right of Access. Once the information is available, the citizenry can make a fully informed decision. In the interim, inmates should be able to use the Right of Access as a means to circumvent the limitations presented by state attempts to keep lethal injection protocols secret.

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³⁵⁹ *Id.*

