

The Abolitionist's Dilemma: Establishing the Standards for the Evolving Standards of Decency

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I. INTRODUCTION

For those who believe that the death penalty should be declared unconstitutional and that the U.S. Supreme Court is the institution that should make that declaration, these are interesting times. On one hand, the Rehnquist Court, which had previously not been a reliable friend of criminal defendants, in 2002, ruled that it was unconstitutional to execute mentally retarded defendants,¹ and in 2005 it came to the same conclusion as to defendants who committed a capital crime before his or her eighteenth birthday.² On the other hand, close scrutiny of these opinions evidences that the Court all but casts aside methodology to reach the apparently desired outcome. The Court's rulings that neither juveniles nor mentally retarded defendants could be executed were welcome pronouncements to death penalty abolitionists—that is, those who advocate for and work toward the legal prohibition of capital punishment. However, that is not the end of the story.

With the end of the Rehnquist Court and the start of the Roberts Court, death penalty abolitionists should be ever more cautious in dealing with cases and issues brought before the Supreme Court. The Roberts Court is currently perceived as being more conservative than its predecessor and may be as willing to overturn precedent.³ While capital litigation on behalf of the criminally accused has always been perilous, it may be even more so

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1. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

2. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

3. See Adam Cohen, Editorial, *What Chief Justice Roberts Forgot in His First Term: Judicial Modesty*, N.Y. TIMES, July 9, 2006, § 4 (characterizing Chief Justice Roberts as “a conservative activist”); Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, § A (noting that the Court decided sixty-eight cases by full, signed opinions in the October 2006 term, that three precedents were overruled, other decisions “avoided direct overrulings while providing a roadmap for future challenges,” and that “Justice Scalia prodded Chief Justice Roberts to move further and faster to overturn precedents that both men clearly dislike”).

now. This is because most federal court judges are relatively conservative and some of the more recent appointees may actively interpret the law against the interests of capital defendants.⁴ Death penalty abolitionists therefore face a dilemma: should they advance legal arguments before courts in hopes of eventually securing judicial invalidation of the death penalty, or should they look to the legislative and executive branches for abolition of the death penalty? As the history of the death penalty in this country shows, since 1976, efforts to judicially invalidate the death penalty may backfire and ossify capital punishment practices. Though U.S. Supreme Court decisions have not always brought about wholesale change, they have, on occasion, prompted state legislatures and state executive branches to give attention to the operation of the death penalty.⁵ Most importantly, a series of adverse legal rulings could permanently derail the effort to have the death penalty judicially abolished. *Baze v. Rees*,⁶ the pending methods of execution case, may portend that the Roberts Court is less welcoming and more unlikely to assist death penalty abolitionists in their goal of eliminating the death penalty as a criminal sanction. At its most extreme, the Court may use *Baze* to reformulate the “evolving standards of decency” test and make it more difficult for capital defendants to prevail on Eighth Amendment challenges.

Nonetheless, if the anti-death penalty movement is insistent on judicial abolition of the death penalty (particularly in the federal courts), it needs a nationally coordinated legal campaign. Such a campaign should resemble the effort headed by the NAACP Legal Defense Fund (LDF) and the ACLU in the 1960s and 1970s.⁷ Failure to create such a campaign or to litigate more strategically issues in death penalty cases could result in the evisceration of the somewhat modest gains achieved through the courts.

4. See, e.g., Robert A. Carp, Kenneth L. Manning & Ronald Stidham, *The Decision-Making Behavior of George W. Bush's Judicial Appointees: Far-Right, Conservative or Moderate?*, 88 JUDICATURE 20 (2004) (voting patterns indicate the most recent appointees are among the most conservative judges on record); see also Robert A. Carp et al., *The Voting Behavior of George W. Bush's Judicial Appointees: How Sharp a Turn to the Right?*, in PRINCIPLES AND PRACTICES OF AMERICAN POLITICS: CLASSIC AND CONTEMPORARY READINGS 429, 443, 445–46 (Samuel Kernell & Steven S. Smith eds., 3d ed. 2006) (President George W. Bush's judicial trial court appointees, based on voting patterns, are the most conservative going back to Woodrow Wilson; pattern is most evident in cases involving civil rights and civil liberties, but not criminal justice).

5. For instance, *Furman v. Georgia*, 408 U.S. 238, 238–39 (1972) (ruling that carrying out the death penalty is cruel and unusual punishment) brought about needed reform and the guided discretion formulation approved of in *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (holding that statutes that suitably guided the sentencer's discretion in capital cases was not cruel and unusual punishment).

6. No. 07-5439 (U.S. appeal docketed July 19, 2007).

7. See HERBERT H. HAINES, AGAINST CAPITAL PUNISHMENT: THE ANTI-DEATH PENALTY MOVEMENT IN AMERICA, 1972–1992, at 23–54 (1996); MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 60–316 (1973).

Part II discusses the “evolving standards of decency” test, its application, and its critique in *Atkins v. Virginia*⁸ and *Roper v. Simmons*.⁹ Part III ruminates on approaches that the Court might take in deciding *Baze*. Part IV proffers thoughts on capital litigation before the Court. Part V concludes.

II. THE EVOLVING STANDARDS OF DECENCY AS THEY EVOLVED

This Part outlines the development of the Eighth Amendment’s “evolving standards of decency” test, which is at the heart of the constitutional regulation of the death penalty.

Today, most challenges to the application or operation of the death penalty—and less frequently to other criminal sentences—are based on the Eighth Amendment of the U.S. Constitution. That provision reads: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”¹⁰ The Court has been somewhat sluggish in its interpretation of the Eighth Amendment and the phrase “cruel and unusual punishments.” In 1958, the Court, in *Trop v. Dulles*,¹¹ declared that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”¹² The Court, however, did not provide further meaning to that phrase. It took until the 1970s for the Court to begin to subject the death penalty to constitutional regulation. Since then, the Court has repeatedly invoked the phrase “evolving standards of decency” when assessing the death penalty and has slowly given further content to the phrase.

The process began in earnest in *Gregg v. Georgia*,¹³ which held that the death penalty for murder did not invariably violate the Eighth Amendment.¹⁴ In *Gregg*, to assess the meaning of the Eighth Amendment, the Court considered the historical origin of the cruel and unusual punishments clause and the Court’s precedents construing that provision.¹⁵ Justice Stewart extracted two principles from the Court’s cases. First, the Court must examine contemporary values concerning the infliction of the punishment—an inquiry designed to ensure that the challenged sanction reflected the “evolving standards of decency that mark the progress of a ma-

8. 536 U.S. 304 (2002).

9. 543 U.S. 551 (2005).

10. U.S. CONST. amend. VIII.

11. 356 U.S. 86 (1958).

12. *Id.* at 101 (plurality opinion).

13. 428 U.S. 153 (1976).

14. *Id.* at 187.

15. *Id.* at 168–73 (plurality opinion).

turing society.”¹⁶ Second, the sanction also had to respect “the dignity of man,” and thus, could not be “excessive.” Detecting excessiveness required two further inquiries: first, the punishment could “not involve the unnecessary and wanton infliction of pain”; and second, the punishment could “not be grossly out of proportion to the severity of the crime.”¹⁷ *Gregg* thus seems to state three ways of measuring the meaning of the Eighth Amendment’s prohibition of cruel and unusual punishment. The punishment had to (1) be consistent with the “evolving standards of decency,” (2) respect “the dignity of man” and not be “excessive,” or (3) “not involve the unnecessary and wanton infliction of pain” and “not be grossly out of proportion to the severity of the crime.”

In a series of cases from 1976 through 1989, which dealt with the substantive limits of capital punishment—that is, whether the death penalty was a disproportionate punishment for the crime—the Court most frequently stated that to not violate the Eighth Amendment, a capital punishment practice had to comport with the “evolving standards of decency.”¹⁸ While it is true that some of the Court’s opinions issued during this period did contain versions of the other two formulations mentioned in *Gregg*, the Court largely focused on assessing whether imposing the death penalty on that class of defendants was within the “evolving standards of decency.”¹⁹ More particularly, in 1977 the Court ruled that executing a rapist who did not kill his victim was unconstitutional.²⁰ In 1982, it held that it was cruel and unusual punishment to execute felony murderers,²¹ but five years later it refined that rule to permit the possible execution of some felony murderers.²² In 1988, the Court held that executing those who committed capital crimes when they were younger than sixteen was unconstitutional,²³ the following year, the Court did not outlaw the death penalty for sixteen and seventeen year olds.²⁴ In 1986, the Court ruled that it was unconstitutional to execute the insane²⁵ and three years later, that it was permissible to execute the mentally retarded.²⁶

These cases reveal that the Court has looked to six seemingly objective factors to assess whether a death penalty practice is within the “evolving

16. *Id.* at 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

17. *Id.*

18. *Thompson v. Oklahoma*, 487 U.S. 815, 821–23 (1988) (plurality opinion).

19. *Tison v. Arizona*, 481 U.S. 137, 148 (1987).

20. *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (plurality opinion).

21. *See Enmund v. Florida*, 458 U.S. 782, 797 (1982).

22. *See Tison*, 481 U.S. at 137.

23. *Thompson*, 487 U.S. at 838.

24. *Stanford v. Kentucky*, 492 U.S. 361 (1989).

25. *Ford v. Wainwright*, 477 U.S. 399, 410 (1986).

26. *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989).

standards of decency” and therefore comported with the Eighth Amendment. The six factors are a measure of substantive proportionality.²⁷ The factors are: (1) history—whether this class of defendants had been historically subjected to the death penalty; (2) judicial precedent—what has the Court previously said or presumed about the treatment of this class of defendants; (3) statutes—have the states subjected these defendants to the death penalty; (4) jury verdicts—have juries voted to impose a death sentence on these defendants in capital prosecutions; (5) penological goal—would deterrence or retribution be achieved by the execution; and (6) international and comparative law—how do other countries and international organizations deal with or suggest how this class of defendants should be treated?²⁸ The international law inquiry has not been as strong or consistently referenced as the other factors. The third and fourth factors—relevant state statutes, which act as a proxy for legal developments within the states, and jury verdicts, which indicate how jurors voted in capital prosecutions—were viewed as the primary (and for some Justices the sole) indicators of contemporary standards.²⁹ State statutes and jury verdicts appear to be attractive indicators of the “evolving standards of decency” because they are generally the most recent formal pronouncements on the use of the death penalty in a particular context. State statutes supposedly represent the will of the populace enacted into law by their local representatives, and jury verdicts are said to reflect the sentencing judgment of the local community. In any event, to apply these two factors, the Court assesses relevant state legislation and jury verdicts in pertinent cases in all fifty states, and the majority approach is deemed the national sentiment on the issue.³⁰ According to the Court, these six factors are more objective than the personal whims of the Justices and are used to assist the Justices to assess the “evolving standards of decency.”³¹

A. *Atkins v. Virginia*

Matters seemed stable until 2002 when the Supreme Court reconsidered the question of the execution of the mentally retarded in *Atkins v. Vir-*

27. Dwight Aarons, *Can Inordinate Delay Between a Death Sentence and Execution Constitute Cruel and Unusual Punishment?*, 29 SETON HALL L. REV. 147, 159 (1998).

28. *See id.* at 147, 157–59 nn.33–40 (1998) (discussing these cases and the Court’s analysis in more extensive detail).

29. *See Thompson v. Oklahoma*, 487 U.S. 815, 865–69 (1987) (Scalia, J., dissenting).

30. *Thompson*, 487 U.S. at 826–30.

31. *But see* Susan M. Raeker-Jones, *Parsing Personal Predilections: A Fresh Look at the Supreme Court’s Cruel and Unusual Death Penalty Jurisprudence*, 58 ME. L. REV. 99, 109–26 (2006) (questioning whether the factors eliminate the subjective nature of judging).

ginia.³² The Court had decided the issue in 1989 in *Penry v. Lynaugh*,³³ when it ruled then that such practices did not violate the Eighth Amendment.³⁴ Court observers probably anticipated the Court's answer by looking at the six factors relied on in previous cases. At least four of the six factors—history, judicial precedent, state statutes, and jury verdicts—could be interpreted as indicating that executing the mentally retarded did not violate the Eighth Amendment. That approach proved to be wrong.

In *Atkins*, the Court ruled that it was cruel and unusual punishment to execute the mentally retarded.³⁵ As to the six factor test, the Court fudged. It did consider how various states addressed the issue by first looking to state statutes.³⁶ At the time of its earlier decision in *Penry*, two states had outlawed the practice.³⁷ The Court noted that sixteen states had outlawed the practice since 1989, bringing to eighteen the total number of states that banned the execution of mentally retarded defendants.³⁸ Recognizing that this total was still less than a majority of the states, the Court declared, “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change.”³⁹ It then noted that, since anticrime legislation is more popular than legislation favoring criminals and that the statutes prohibiting the execution of the mentally retarded were passed by overwhelming margins, the Court surmised that the legislation reflected the trend that “our society views mentally retarded offenders as categorically less culpable than the average criminal.”⁴⁰

State jury verdicts were not directly considered. Rather, the Court assessed executions and legislative developments since *Penry*.⁴¹ It noted that since its 1989 decision, five individuals with a known IQ of less than seventy had been executed, but that since 1990, sixteen states had enacted laws prohibiting the execution of the mentally retarded and in two of the states that didn't prohibit the practice, a mentally retarded defendant had not been executed in decades. The practice was declared rare.⁴² From this, the Court concluded that there was a national consensus against executing the mentally retarded.⁴³ Finally, the Court examined whether deterrence or retribution could be served by executing the mentally retarded and con-

32. 536 U.S. 304 (2002).

33. 492 U.S. 302 (1989).

34. *Id.* at 335.

35. *Atkins*, 536 U.S. at 321.

36. *Id.* at 313–14.

37. *Id.*

38. *Id.* at 314–15.

39. *Id.* at 315.

40. *Id.* at 315–16.

41. *Id.* at 314–15.

42. *Id.* at 316.

43. *Id.*

cluded that neither would.⁴⁴ Accordingly, it concluded: “Our independent evaluation of the issue reveals no reason to disagree with the judgment of the legislatures that have recently addressed the matter.”⁴⁵

Atkins is significant because early in its analysis the Court emphasized that it was the arbiter of the scope of the death penalty. “[T]he objective evidence, though of great importance, did not wholly determine the controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”⁴⁶ Though the Court determined that three of the traditional factors were in *Atkins*’ favor, the case does not directly answer how many of the six factors the defendant must establish before the Court will conclude that the challenged state activity violates a national consensus. Another *Atkins* innovation was the focus on how recently the ban was enacted and the margin by which it passed. In brief, *Atkins*’ approach may indicate that the Court is willing to all but eviscerate the six-factor “evolving standards of decency” test, replacing it with the Justices’ individual predilections on when a practice violates the substantive proportionality component of the Eighth Amendment.

B. *Roper v. Simmons*

Three years later the Court decided *Roper v. Simmons*.⁴⁷ The 5–4 decision held that executing an offender who was younger than eighteen when he or she committed a capital crime is cruel and unusual punishment.⁴⁸ The Court relied heavily on *Atkins* and its methodology.⁴⁹ It noted that twenty states authorized the execution of juveniles, but that only three had carried out executions of a juvenile in the last decade.⁵⁰ The Court further observed that, since it had addressed the issue in 1989, the juvenile death penalty had been abolished in five states, bringing that total to eighteen.⁵¹ Thus, instead of comparing the twenty states that authorized the execution of juveniles with the eighteen states that did not, the Court looked at the three states that had executed juveniles in the past decade and compared them to the states that had not. This allowed the Court to state:

44. *Id.* at 318–21.

45. *Id.* at 321 (internal quotation marks omitted).

46. *Id.* at 312 (internal quotation marks omitted).

47. 543 U.S. 551 (2005).

48. *Id.* at 578–79.

49. *Id.* at 564–75.

50. *Id.* at 564–65.

51. *Id.* at 565.

As in *Atkins*, the objective indicia of consensus in this case—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide significant evidence that today our society views juveniles, in the words *Atkins* used respecting the mentally retarded, as categorically less culpable than the average criminal.⁵²

The Court then relied on social science research to buttress its conclusion and to support its assessment that neither deterrence nor retribution would be served by executing juveniles.⁵³ Finally, the Court looked to the practices of other nations and to international treaties.⁵⁴

In other words, out of the six factors that the Court had considered from 1977 through 1989, in *Atkins* the Court relied on three and determined that the rate of change was sufficiently rapid that it could conclude that there was a national consensus against the execution of mentally retarded defendants. In *Roper*, the Court relied on four of the six factors and again noted the consistency of the rate of change to conclude that there was a national consensus against the execution of persons who were under eighteen at the time of the crime. Though both cases contain the “evolving standards of decency” analysis, as with previous substantive proportionality cases, the Court did not discuss the remaining factors in the six-factor test, which did not support its conclusion.

The dissents that were filed in both cases maintained that the Court should focus primarily on the state statutes on the issue and jury verdicts in capital cases with mentally retarded or juvenile defendants.⁵⁵ In *Atkins*, one Justice made sport of the majority’s innovation:

The Court’s thrashing about for evidence of “consensus” includes reliance upon the *margins* by which state legislatures have enacted bans on execution of the retarded. Presumably, in applying our Eighth Amendment “evolving-standards-of-decency” jurisprudence, we will henceforth weigh not only how many States have agreed, but how many States have agreed *by how much*. Of course if the percentage of legislators voting for the bill is significant, surely the number of people *represented* by the legislators voting for the bill is also significant: the fact that 49% of the legislators in a State with a population of 60 million voted *against* the bill

52. *Id.* at 567.

53. *Id.* at 571–75.

54. *Id.* at 575–78.

55. *Roper v. Simmons*, 543 U.S. 551, 589–90 (2005) (O’Connor, J., dissenting); *Atkins v. Virginia*, 536 U.S. 304, 322–26 (2002) (Rehnquist, C.J., dissenting); *id.* at 341–45 (Scalia, J., dissenting).

should be more impressive than the fact that 90% of the legislators in a state with a population of 2 million voted *for* it. (By the way, the population of the death penalty States that exclude the mentally retarded is only 44% of the population of all death penalty States.) This is quite absurd. What we have looked for in the past to “evolve” the Eighth Amendment is a consensus of the same sort as the consensus that *adopted* the Eighth Amendment: a consensus of the sovereign States that form the Union, not a nose count of Americans for and against.⁵⁶

The “evolving standards of decency” test is one of the areas of federal constitutional law where the practices of the state can determine whether the underlying state practice is constitutional.⁵⁷ Though neither the majority opinion in *Atkins* nor in *Roper* took issue with the dissents’ reliance on statutes and jury verdicts as indicators of contemporary public sentiment on a capital punishment practice, recounting how statutes and jury verdicts are formed suggests that statutes and jury verdicts may not always be reliable measures of current values. Legislators often face stark policy choices and frequently compromise to resolve their differences. Jurors, too, are left

56. *Atkins*, 536 U.S. at 346 (Scalia, J., dissenting) (citations omitted).

57. See, e.g., Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1105–23 (2006); Matthew E. Albers, Note, *Legislative Deference in Eighth Amendment Capital Sentencing Challenges: The Constitutional Inadequacy of the Current Judicial Approach*, 50 CASE W. RES. L. REV. 467, 490–97 (1999).

Another area is the procedural due process to which a person is entitled in light of state law or a state-created property or liberty interest. See, e.g., *Saudin v. Conner*, 515 U.S. 472, 487 (1995) (neither prison regulation nor the Fourteenth Amendment’s due process clause afforded the prisoner a protected liberty interest entitled to procedural protections); *Hewitt v. Helms*, 459 U.S. 460, 441–77 (1983) (inmate acquired protected liberty interest in remaining in general population in light of state statutes and regulations), *overruled in part* by *Saudin v. Conner*, 515 U.S. 472 (1995); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428–37 (1982) (a state law cause of action is a species of property law protected by the due process clause of the Fourteenth Amendment); *Vitek v. Jones*, 445 U.S. 480, 487–94 (1980) (involuntary transfer of prisoner to mental hospital implicates a liberty interest protected by the due process clause of the Fourteenth Amendment); *Bishop v. Wood*, 426 U.S. 341, 347–50 (1976) (because employee did not have state created property or liberty interest in continued employment his termination did not violate due process clause of the Fourteenth Amendment); *Paul v. Davis*, 424 U.S. 693, 712 (1976) (interest in reputation is neither a liberty nor a property interest protected by the due process clause of the Fourteenth Amendment); *Wolff v. McDonnell*, 418 U.S. 539, 556–65 (1974) (due process requires that prisoners in proceedings for loss of good-time credits or imposition of solitary confinement be afforded advance written notice of claimed violation, written statement of fact findings, and the right to call witnesses and present documentary evidence where such would not be unduly hazardous to institutional safety or correctional goals); *Arnett v. Kennedy*, 416 U.S. 134, 151–55 (1974) (plurality opinion) (federal statute in conferring upon employee the right not to be discharged except for cause and prescribing procedural means by which that right is protected did not create expectancy of job retention requiring procedural protection under the due process clause beyond that given by statute and related agency regulations); *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 573–74 (1972) (state did not deprive teacher of a liberty interest when it failed to rehire him for that job and he was free to seek another).

with a stark choice upon the conclusion of their deliberations. However, jurors are not supposed to compromise in reaching their verdict. Consequently, if it is absurd to rely on the percentage of the population supposedly represented by the legislatures to determine what weight to give a legislative measure, it should be equally absurd to pretend that the population's will is always reflected by the statutes a legislature enacts or that a jury's verdict always represents the values of a community. If a line must be drawn somewhere on how to measure contemporary standards of decency, then it should be drawn with full awareness of what legislative votes and jury verdicts might be said to fairly measure: the decision they come to, in the time allowed, presumably on the facts before them.

There is some discontent regarding *Atkins* and *Roper*. Some state court judges have expressed hostility to what the Court has done. For example, a justice on the Alabama Supreme Court has called on his fellow justices to resist the imposition of the U.S. Supreme Court's liberal ideology in the juvenile death penalty.⁵⁸ After *Roper*, a justice on the Mississippi Supreme Court indicated that he was reluctantly bound to change a juvenile's death sentence to life imprisonment.⁵⁹ These sentiments are basically judicial calls for reconsideration of the holdings of *Atkins* and *Roper* by judges who are otherwise bound by the Court's holdings and limited by its analysis.

In addition, some state legislatures have started to challenge long-established death penalty doctrines. In 1977, the Court essentially ruled that if a person was not killed during the commission of a crime, the death

58. See Tom Parker, *Alabama Justice Surrenders to Judicial Activism*, BIRMINGHAM NEWS, Jan. 1, 2006, at 4B. Justice Parker later explained that he had recused himself from *Ex parte Adams*, 955 So. 2d 1106 (Ala. 2005) (affirming conviction and reversing death sentence imposed on murderer who was seventeen years old at the time of the crime for further proceedings) because he helped prosecute Renaldo Adams, the defendant, as an assistant attorney general. Subsequently, in light of his column in the *Birmingham News*, in another case, Justice Parker has explained why he would not recuse himself for his alleged "unwillingness to be bound by the rulings of the United States Supreme Court" and therefore [his alleged] . . . unwillingness to be a "neutral and detached judge." *Ex parte Walker*, No. 1041931, 2007 WL 945068, at *24 (Ala. Mar. 30, 2007) (Parker, J., statement of nonrecusal).

59. *Dycus v. State*, 910 So. 2d 1100, 1102-03 (Miss. 2005) (Randolph, J., specially concurring). He wrote:

[M]y oath and loyalty to this office and the law require me to comply with the mandate of the United States Supreme Court in *Roper*

. . . .
 . . . I would respectfully urge the Supreme Court to exercise judicial restraint, as the function of all courts is to adjudicate not legislate. Courts are charged with the responsibility to interpret, not create law.

. . . .
 . . . It is not the Constitution which is changing, but only some individual justices rearranging a shapeless concept to fix their personal whims and declaring that to be the law *du jour*, without sufficient deference to the intent of the framers of the Constitution; the rule of law; legislative acts; and finally, the decision of a jury.

Id.

penalty was a disproportionate sanction.⁶⁰ Since 1995, Louisiana has had the death penalty as a sentencing option for child rapists.⁶¹ Other states are making efforts to join it.⁶² If these measures are upheld by the Court, the entire constitutional edifice of capital punishment could change.⁶³

In any event, only the most ardent death penalty abolitionist can embrace *Atkins* and *Roper*. Even then, it should not be embraced too cozily. For abolitionists to contend that the opinions herald a new day of anti-death penalty jurisprudence, they would have to ignore that the Court's conclusion can be questioned because its methodology differs substantially from precedent, and does so without explanation. *Atkins* and *Roper* go beyond the traditional common law method of fitting new cases within established precedent and the concomitant modifying of doctrine to incorporate the new cases. This is because as few as three of the traditional six factors may serve as evidence of the "evolving standards of decency," more recent developments are given primacy over long-established ones, and the Court may disregard the factors altogether and rely on its own judgment on when a practice violates the Eighth Amendment.

Methodology and explanation of changes in methodology are important measures of principled decision-making, as Herbert Wechsler wrote years ago:

The courts have both the title and the duty when a case is properly before them to review the actions of the other branches in the light of constitutional provisions, even though the action involves value choices, as invariably action does. In doing so, however, they are bound to function otherwise than as a naked power organ; they participate as courts of law. This calls for facing how determinations of this kind can be asserted to have any legal quality. The answer, I suggest, inheres primarily in that they are—or are obliged to be—entirely principled. A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neu-

60. See *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (plurality opinion).

61. LA. REV. STAT. ANN. § 14:42 (1978); LA. CODE CRIM. PROC. art. 905.4(A)(1) & (10) (1976).

62. See Lianne Hart, *More Calls for Death Penalty in Child Rapes; Measures in Several States Are Meant to Deter, but Critics See Execution Making Victims Less Likely to Tell—and More Likely to Be Killed*, L.A. TIMES, Oct. 10, 2006, at A15 (mentioning that Oklahoma, South Carolina, and Montana have adopted the death penalty for child rape and that Georgia, Alabama, Mississippi, and Minnesota are considering such laws).

63. Change may already be on the horizon. On January 4, 2008, days before oral argument of *Baze v. Rees*, the Court granted the petition for certiorari in *Kennedy v. Louisiana*, No. 07-343, which raises the question: "Whether the Eighth Amendment's Cruel and Unusual Punishment Clause permits a State to punish the crime of rape of a child with the death penalty?" See *Kennedy v. Louisiana*, 128 S. Ct. 829 (2008).

trality transcend any immediate result that is involved. When no sufficient reasons of this kind can be assigned for overturning value choices of the other branches of the Government or of a state, those choices must, of course, survive

The virtue or demerit of a judgment turns, therefore, entirely on the reasons that support it, and their adequacy to maintain any choice of values it decrees, or, it is vital that we add, to maintain the rejection of a claim that any given choice should be decreed.⁶⁴

Notwithstanding these criticisms, those who want the death penalty abolished might say: “[W]e will take either a decision declaring the whole thing unconstitutional or several decisions striking down the death penalty piece-by-piece.” The Court’s approach in *Atkins* and *Roper* may have signified the direction the Rehnquist Court was heading. However, with the recent changes to the Court, the precedential value of both cases could be short-lived.⁶⁵ Interestingly, the majority opinion in neither *Atkins* nor *Roper*—both of which overruled cases that were less than twenty years old—included a discussion or nod to *stare decisis*. It would be the height of hypocrisy for those who like the Court’s conclusions in *Atkins* and *Roper* to demand now that *stare decisis* be followed or that the Court explain why it will not adhere to the more recent decisions. Indeed, *Atkins* and *Roper* as precedents, themselves, may already be in trouble.

Part of the answer may lie in how strongly the Roberts Court will adhere to precedent. Will the Roberts Court reach out and decide cases and issues with the goal of changing the law,⁶⁶ or will the Roberts Court endeavor to issue broad decisions on the narrowest grounds possible, often without materially changing the law?⁶⁷ As to the two newest members of

64. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19–20 (1959).

65. I put no significance in the Court’s refusal to grant rehearing in *Atkins* or *Roper*.

66. Commentators dispute whether the Roberts Court predecessor, the Rehnquist Court, was an activist court. See generally Lori A. Ringhand, *The Rehnquist Court: A “By the Numbers” Retrospective*, 9 U. PA. J. CONST. L. 1033 (2007) (suggesting that in comparison to predecessor courts, the Rehnquist Court’s legacy is mixed as it invalidated more federal statutes, invalidated fewer state statutes, and overruled fewer of its precedents) and sources cited therein. It is worth noting that the Rehnquist Court was not a monolith. See Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. L. U. L.J. 569 (2003) (suggesting “two” Rehnquist Courts; the first from October 1986 to July 1994, with frequent membership changes and a full docket of argued cases, and the second from October 1994 with no change in membership, a declining docket of argued cases and dominated by a single five-Justice voting bloc). In any event, the Rehnquist Court existed from September 1986 to September 2005. During that nineteen year period, according to one author, the Court overturned forty-four of its precedents. Ringhand, *supra*, at 1049, 1079–81.

67. See John G. Roberts, Jr., Commencement Address, Georgetown University Law Center, June 2006 (suggesting that unanimous or near unanimous Court decisions based on the narrowest grounds possible provide clarity to the law, guidance to lawyers and courts, enhances the Court’s reputation, and does not foreclose the Court in future decisions).

the Court, their views on the value of precedent may lie in their testimony given during their confirmation hearings.⁶⁸

The law of constitutional stare decisis is sufficiently malleable for the Court to nearly do as it pleases. There is a list of prudential and pragmatic factors that the Court says it considers when faced with the possibility of overruling precedent: whether the rule has proven to be unworkable,⁶⁹ whether there are sufficient reliance interests and inequities that would be implicated by an overruling,⁷⁰ whether related principles of law have left the old rule as an outlier,⁷¹ or whether the old rule is no longer justified because of significant change in the underlying adjudicatory facts.⁷²

For example, in *Lawrence v. Texas*,⁷³ the Court determined that *Bowers v. Hardwick*⁷⁴ had too narrowly defined the liberty interest at stake and subsequent Court cases had cast its holding into doubt.⁷⁵ Another example of an overruling is *Payne v. Tennessee*⁷⁶ in which the Court said that two of its recent capital sentencing decisions—*Booth v. Maryland*⁷⁷ and *South Carolina v. Gathers*⁷⁸—proved to be unworkable or badly reasoned.⁷⁹ In support of the unworkability notion, the Court cited to a single case in which state court judges disagreed on how to apply *Booth*.⁸⁰ It is worth noting that in *Payne* there were two new members of the Court—Justice Kennedy and Justice Souter—and they both voted differently from the

68. During the confirmation hearings of both Chief Justice Roberts and Justice Alito, the Senate Judiciary Committee correctly focused on their understanding of precedent. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 141–48, 159–60, 195, 206–08, 223–24, 237, 270–71, 350–51, 375–76, 393 (2005); *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 318–22, 398–402, 407–08, 434–40, 446–54, 462–65, 518–20, 530–32, 553–55, 571–72, 601 (2006). Most of the senators did it in the context of abortion and *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

69. See *Planned Parenthood*, 505 U.S. at 854.

70. *Id.*

71. *Id.*

72. *Id.*

73. 539 U.S. 558 (2003) (holding state statute making it a crime for two adults of the same sex to engage in certain intimate sexual conduct violates the due process clause of the Fourteenth Amendment).

74. 478 U.S. 186 (1986) (holding the Constitution does not confer a fundamental right on homosexuals to engage in sodomy).

75. *Lawrence*, 539 U.S. at 566–74.

76. 501 U.S. 808 (1993) (holding that Eighth Amendment did not erect a per se barrier to admission of victim-impact evidence in capital sentencing proceedings).

77. 482 U.S. 496 (1987) (holding that introduction of victim-impact statement in sentencing phase of capital case violates Eighth Amendment).

78. 490 U.S. 805 (1989) (holding prosecutor engaged in improper argument in sentencing phase of capital case by reading extensively from document carried by victim and in commenting on victim's personal qualities).

79. *Payne*, 501 U.S. at 827–30.

80. *Id.* at 830 (citing *State v. Huertas*, 553 N.E.2d 1055, 1070 (Ohio 1990)).

members of the Court they succeeded, Justice Powell and Justice Brennan.⁸¹ In fact, *Payne* also demonstrates that correcting what is perceived to be an error is itself a justification for overruling precedent.⁸² Other rationales given for overruling precedent are that the case lacked constitutional roots and was wholly inconsistent with earlier Supreme Court cases,⁸³ or that the prior case was an abrupt and largely unexplained departure from precedent.⁸⁴ Finally, there is the originalist position for overruling. The argument put forth by those who believe in following the original intent of the framers is that overruling a constitutional precedent is permissible if the case relied on “flawed premises, misguided history, and an untenable vision of the needs of the federal system it purports to protect.”⁸⁵ Nearly all of these criticisms can be leveled against both *Atkins* and *Roper*.

So for those who want the death penalty to be abolished and believe that the U.S. Supreme Court is the institution by which that can or should happen, I hope that my presentation has not been too dispiriting. The Court has some work to do to ensure that its “evolving standards of decency” doctrine has meaningful content and enduring use. But let me end this Part by quoting one of my colleagues who articulates, in the context of the Court’s Fourth Amendment jurisprudence, what I call the law professor’s lament. It bemoans that judges do not acknowledge how their latest decision departs from pre-existing law or how the decision does not always fit comfortably into a tidy, seamless web of legal logic:

[T]he majority Justices sometimes have been less than candid regarding their disregard of existing doctrine, neither acknowledging nor explaining their doctrinal revisions. Instead, they simply have

81. See *Payne*, 501 U.S. at 845–50 (Marshall, J., dissenting) (noting Justice Powell and Justice Brennan were members of the Court when *Booth* and *Gathers* were decided and that Justice Powell in *Booth* and Justice Brennan in *Gathers* “set out rationale for excluding victim-impact evidence from the sentencing proceedings in a capital case”). Justice Kennedy and Justice Souter joined the majority opinion in *Payne*. Justice Souter wrote a separate concurring opinion, which Justice Kennedy joined, asserting that *Booth* and *Gathers* were wrongly decided. *Payne*, 501 U.S. at 835 (Souter, J., concurring).

82. See *Payne*, 501 U.S. at 839 (Souter, J., concurring) (stating that *Booth* and *Gathers* committed constitutional error in prohibiting admission of victim-impact evidence in capital cases).

83. See *id.* at 842.

84. *Adarand Constructors v. Peña*, 515 U.S. 200, 232–33 (1995).

85. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 248 (1985) (Brennan, J., dissenting); see also *Kelo v. City of New London*, 545 U.S. 469, 506 (2005) (Thomas, J., dissenting) (advocating reconsidering the Court’s precedents on the Fifth Amendment’s public use clause because the Court’s “cases have strayed from the Clause’s original meaning”); *United States v. Hubbell*, 530 U.S. 27, 54–55 (2000) (Thomas, J., concurring) (based on historical materials indicating willingness to reconsider the scope of the self-incrimination clause and cases interpreting it narrowly); *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (indicating willingness to reconsider commerce clause jurisprudence because “case law has drifted far from the original understanding of the Commerce Clause”).

asserted radical doctrinal claims while feigning continuity with earlier traditions.

The willingness of the majority Justices to disregard legal doctrine is important because the enforceability of a right depends on the coherence and the content of the doctrine that defines that right, as well as on the degree to which that doctrine produces clear boundaries in the form of rules.⁸⁶

The next few years may result in a significant reworking of constitutional doctrines, such as the meaning of and way to measure the Eighth Amendment's "evolving standards of decency." The question will be how the Court does it. Whichever way the Court goes—moving toward either abolition or retention of the death penalty—will the Court produce opinions that are well-written and induce respect because they honestly address and apply previous cases and doctrines? *Baze v. Rees* could provide the answers or at least some insight as to the answers.

III. METHODS OF EXECUTION AND THE EIGHTH AMENDMENT

There are several ways that the Court might handle *Baze v. Rees*. The case presents the Court with an opportunity to announce the proper legal standard to assess an Eighth Amendment challenge to a method of execution. The petitioner asks the Court to determine the proper test for assessing the constitutionality of methods of execution: whether there must not be "an unnecessary risk of pain and suffering" or whether there must not be "a substantial risk of the wanton infliction of pain?"⁸⁷ The petitioner also asks whether "the means of carrying out an execution cause an unnecessary risk of pain and suffering in violation of the Eighth Amendment upon a showing that readily available alternatives that pose less risk of pain and suffering could be used?"⁸⁸

A. *Originalist Approach*

First, there is support on the Court for limiting the scope of the Eighth Amendment, assertedly under an originalist interpretation of the amendment. Justice Scalia has concluded that the Eighth Amendment does not

86. Thomas Y. Davies, *Denying a Right by Disregarding Doctrine: How Illinois v. Rodriguez Demears Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerates the Excusability of Police Error*, 59 TENN. L. REV. 1, 6 (1991).

87. Brief for the Petitioner, at i, *Baze v. Rees*, No. 07-5439 (Nov. 5, 2007).

88. *Id.*

have a proportionality guarantee.⁸⁹ According to him, the amendment prohibits the imposition of “cruel methods of punishment that are not regularly or customarily employed.”⁹⁰ He has written that he is unwilling to extend the proportionality review provided in capital cases any further.⁹¹ He thus might conclude that the Eighth Amendment’s guarantee does not apply to the methods of execution. Justice Thomas, too, contends that as an originalist proposition the Eighth Amendment has a more limited scope than its current interpretation. He does not believe that it provides protection for how a prisoner is treated while confined.⁹² According to him, “punishment,” as used in the amendment, means legislatively authorized punishment.⁹³ The actions of prison officials, to the extent they are not part of an imposed sentence, are beyond the purview of the Eighth Amendment.⁹⁴ Both Justices seem content to rely on the political process to ensure that prisoners are not abused by their caretakers. Thus, so long as there is a legislatively approved method of execution and there is no evidence that executions are not carried out in that manner, Justice Scalia and Justice Thomas may conclude that the Eighth Amendment is not implicated. Further, they might assert that their confidence in the legislature is well-placed because over the years states have continued to adopt supposedly more humane methods of execution. Three more members of the Court might join this position and declare that the method of execution claim is not subject to Eighth Amendment strictures.

The originalist position ignores the reliance interests that attend to the Court’s precedent. That precedent has presumed that the Eighth Amendment applies to methods of execution. Indeed, every method of execution is legislatively authorized and state prison officials have established extensive procedures for performing the execution. Unlike with a term of years, when state officials execute inmates, they are carrying out the punishment lawfully imposed by a judge or jury. To exempt the method of execution process from judicial review could invite much mischief. A consequence of concluding that the Eighth Amendment does not address the methods of execution would remove an incentive of the state to take steps to ensure that executions are carried out in a humane manner. Further, the originalist position ignores that the Court has issued full decisions in two cases in which a method of execution was challenged on Eighth Amendment grounds; and in a third case, the Court sanctioned a method of execution.

89. *Harmelin v. Michigan*, 501 U.S. 957 (1991) (plurality opinion).

90. *Id.* at 976.

91. *Id.* at 996.

92. *Helling v. McKinney*, 509 U.S. 25, 38–40 (1993) (Thomas, J., dissenting).

93. *Id.* at 40.

94. *Id.* at 42.

On all occasions, as discussed immediately below, never did the Court intimate that the Eighth Amendment was inapplicable.

B. Prior Supreme Court Opinions on the Method of Execution

Three times the Court has issued full opinions in cases challenging a method of execution. In 1879, at issue in *Wilkerson v. Utah*⁹⁵ was whether a judge in the Territory of Utah had the power to authorize shooting as the method of execution, when the law of the territory did not provide for any method of execution. After noting that execution by public shooting was previously available in Utah, used by military courts, and employed in other countries,⁹⁶ the Court wrote: “Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are quite sufficient to show 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 that category, within the meaning of the eighth amendment.”⁹⁷ In 1890, in *In re Kemmler*,⁹⁸ the petitioner argued that death by electrocution was cruel and unusual punishment in violation of the Eighth Amendment. The Court seemed to reject the claim in dicta⁹⁹ and held that the Eighth Amendment guaranteed a defendant procedural due process.¹⁰⁰ The record before the Court did not demonstrate that Kemmler had suffered such a deprivation, so he was denied relief.¹⁰¹ Lastly, in 1947, in *Louisiana ex rel. Francis v. Resweber*¹⁰² the issue before the Court was whether permitting a second execution of a defendant who did not die during the first one, violated the Constitution. A plurality opinion for the Court assumed that both the Fifth Amendment’s double jeopardy clause and the Eighth Amendment’s cruel and unusual punishments clause applied to the states and held that neither was violated.¹⁰³ Echoing sentiments expressed in *Kemmler*, the plurality observed:

95. 99 U.S. 130 (1879).

96. *Id.* at 132, 134.

97. *Id.* at 134–35.

98. 136 U.S. 436, 439 (1890).

99. *Id.* at 447. After noting that torture was prohibited, the Court wrote: “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 [C]onstitution. It implies there is something inhuman and barbarous,—something more than the mere extinguishment of life.” *Id.*

100. *Id.* at 448–49.

101. *Id.* at 449.

102. 329 U.S. 459, 461–62 (1947) (plurality opinion).

103. Justice Frankfurter concurred separately, explaining that the practice complained of was not one that offended a fundamental principle of justice within as to fall within the due process clause of the Fourteenth Amendment. *Id.* at 468–72 (Frankfurter, J., concurring).

The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution. The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block. We cannot agree that the hardship imposed upon the petitioner rises to that level of hardship denounced as denial of due process because of cruelty.¹⁰⁴

In sum, *Wilkerson* employed a historical test and concluded that execution by public shooting was not unconstitutional,¹⁰⁵ while both *Kemmler* and *Resweber* narrowly construed the scope of the Eighth Amendment. However, the Eighth Amendment has been applied to the states since those decisions, resulting in an entire jurisprudence of constitutional law on the death penalty and some regulation of prison officials' conduct toward inmates.¹⁰⁶ Thus, it is questionable whether *Wilkerson*, *Kemmler*, or *Resweber* provide adequate guidance on the constitutional issues at stake in *Baze*. What the cases do provide, however, are examples of narrow legal analysis—potholes, if you will, on the road to abolition—which abolitionists should be sure to avoid and should endeavor to get the Court to disavow.

C. Evolving Standards of Decency Approach

The Justices who have written on methods of execution challenges have used a mix of legal standards to assess the claim. The most recent analysis has tended toward relying on the factors developed in the cases establishing the substantive limits of the Eighth Amendment. For example, Justice Marshall dissented from the denial of a stay in *Gray v. Lucas*.¹⁰⁷ The petitioner was challenging his scheduled execution by exposure to

104. *Id.* at 464 (majority opinion).

105. *Wilkerson*, 130 U.S. at 133–36.

106. See Aarons, *supra* note 27, at 151–60 (reviewing Eighth Amendment death penalty case law); Lisa Krim, Essay, *A Reasonable Woman's Version of Cruel and Unusual Punishment: Cross-Gender, Clothed-Body Searches of Women Prisoners*, 6 UCLA WOMEN'S L.J. 85, 98–105 (1995) (reviewing Eighth Amendment conditions of confinement case law).

107. 463 U.S. 1237 (1983) (Marshall, J., dissenting).

cyanide gas in a gas chamber.¹⁰⁸ Justice Marshall stated that the Eighth Amendment prohibited punishments that “‘involve torture or a lingering death’”¹⁰⁹ or which “‘involve the unnecessary and wanton infliction of pain.’”¹¹⁰ According to him, the gas chamber was “unnecessarily cruel” because the condemned suffered a lingering death for up to twelve minutes and the states were abandoning the gas chamber as a method of execution.¹¹¹ In Justice Marshall’s mind, a stay should have been granted because the case presented a substantial challenge to the constitutionality of the method of execution.¹¹²

Further, Justice Brennan dissented from the denial of certiorari in *Glass v. Louisiana*,¹¹³ which challenged the constitutionality of the electric chair. According to Justice Brennan, the constitutionality of a method of execution should be assessed by looking to objective factors.¹¹⁴ To him, “the Eighth Amendment prohibits ‘the unnecessary and wanton infliction of pain’”;¹¹⁵ any “‘inhuman and barbarous’ methods of execution that go at all beyond ‘the mere extinguishment of life’ and cause ‘torture or a lingering death’”;¹¹⁶ and “all forms of ‘unnecessary cruelty’ that cause gratuitous ‘terror, pain, or disgrace.’”¹¹⁷

Justice Blackmun also analyzed a method of execution—hanging—in a dissent from the denial of certiorari.¹¹⁸ He first noted that hanging was an infrequent and increasingly abandoned method of execution.¹¹⁹ Justice Blackmun then assessed whether the pain inflicted and the manner of killing comported with “‘the dignity of man.’”¹²⁰ He noted that hanging “is a crude and imprecise practice, which always includes a risk that the inmate will slowly strangulate or asphyxiate, if the rope is too elastic or too short, or will be decapitated, if the rope is too taut or too long.”¹²¹ He continued, “A person who slowly asphyxiates or strangulates while twisting at the end of a rope unquestionably experiences the most torturous and ‘wanton infliction of pain,’ while partial or complete decapitation of the person, as

108. *Id.* at 1240 (Marshall, J., dissenting from denial of stay).

109. *Id.* at 1244 (quoting *In re Kemmler*, 136 U.S. 436, 447 (1890)).

110. *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

111. *Id.* at 1245–47.

112. *Id.* at 1247.

113. 471 U.S. 1080 (1985).

114. *Id.* at 1083–84 (Brennan, J., dissenting from denial of certiorari).

115. *Id.* at 1084 (citing *Gregg*, 428 U.S. at 173).

116. *Id.* (quoting *In re Kemmler*, 136 U.S. 436, 447 (1890)).

117. *Id.* (quoting *Wilkerson v. Utah*, 99 U.S. 130, 135–136 (1879)).

118. *Campbell v. Wood*, 511 U.S. 1119, 1119 (1994) (Blackmun, J., dissenting from denial of certiorari).

119. *Id.* at 1120–21.

120. *Id.* at 1121 (quoting *Gregg*, 428 U.S. at 173 (1976)).

121. *Id.* at 1122.

blood sprays uncontrollably, obviously violates human dignity.”¹²² Concluding that hanging was offensive to civilized society, he declared that hanging was cruel and unusual punishment.¹²³ Similarly, most recently, Justice Stevens, in a dissent from an order vacating a stay of execution, stated that the gas chamber is unconstitutional, noting that the states were abandoning the gas chamber as a method of execution.¹²⁴ According to him, a method of execution should be assessed in light of other available methods.¹²⁵

Courts¹²⁶ and commentators¹²⁷ have nearly uniformly presumed that the methods of execution should be assessed under the Eighth Amendment’s “evolving standards of decency” substantive proportionality standard.¹²⁸ However, the fit is not quite complete. While it is appropriate to look to contemporary norms to circumscribe deviate practices, asserting that a method of execution is cruel and unusual punishment is not the same as a challenge to the proportionality of punishment. The issue presented in the substantive proportionality cases essentially is whether, philosophically, the defendant’s crime is worthy of the death sentence. The touchstone of the inquiry is moral blameworthiness. Whereas at issue in method of execution challenges is how the defendant is treated during the execution process, including during his last moments. This inquiry is more practical and focused on physical pain. In short, in method of execution cases the focus is on the manner by which the life is taken and not whether the life can be taken.

122. *Id.* (quoting *Gregg*, 428 U.S. at 173 (1976)).

123. *Id.* at 1123.

124. *Gomez v. U.S. Dist. Court*, 503 U.S. 654, 657–58 (1992) (Stevens, J., dissenting).

125. *Id.* at 658.

126. According to the petitioner in *Baze v. Rees*, the following courts have enunciated standards: federal appellate courts—Sixth, Eighth, Ninth, and Tenth Circuits; federal district courts—Southern District of Indiana, Eastern District of Virginia; and state supreme courts—Connecticut, Indiana, Kentucky, and Tennessee. Petition for Writ of Certiorari at *15–17, *Baze v. Rees*, 2007 WL 2781088 (2007) (No. 07-5439).

127. See Deborah W. Denno, *Adieu to Executions*, 26 OHIO N. U. L. REV. 665, 671–72 (2000); Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution?: The Engineering of Death over the Century*, 35 WM. & MARY L. REV. 551, 613–14 (1994); Peter S. Adolph, Note, *Killing Me Softly: Is the Gas Chamber or Any Other Method of Execution, “Cruel and Unusual Punishment?”*, 22 HASTINGS CONST. L.Q. 815 (1995); Kristina E. Beard, Comment, *Five Under the Eighth: Methodology Review and the Cruel and Unusual Punishment Clause*, 51 U. MIAMI L. REV. 445, 448 (1997); see also Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 348–49, 400 (1997) (developing a five-factor test and concluding that the current methods of execution are constitutionally deficient).

128. A welcome exception is *Taylor v. Crawford*, 487 F.3d 1072, 1079–80 (8th Cir. 2007), which noted the difference between conditions of confinement claims under the Eighth Amendment and the method of execution claim under the Eighth Amendment. Other courts have analyzed the issue using parts of tests from both strands of cases. See *Workman v. Bredesen*, 486 F.3d 896, 906–07, 908–09 (6th Cir. 2007); *Abdur’Rahman v. Bredesen*, 181 S.W.3d 292, 306 (Tenn. 2005).

Challenges to methods of execution should be known as “methodology review” challenges. Methodology review challenges bring to mind Justice O’Connor’s comment, written in another context: “Death will be different for each of us. For many, the last days will be spent in physical pain and perhaps the despair that accompanies physical deterioration and a loss of control of basic bodily and mental functions. Some will seek medication to alleviate that pain and other symptoms.”¹²⁹ Capital prisoners face the likely prospect that not only is the day, hour, and manner of death known, but that their last moments may be witnessed by some who relish their demise. Their method of execution claim may be a sincere effort to maintain some of the dignity of their death by circumscribing how the execution is performed. Based on my review of these legal challenges, the contention in methodology review challenges is that the Eighth Amendment’s conditions of confinement cases and “evolving standards of decency” test require that the execution should be performed in a manner that brings as little physical pain as possible to the condemned.

Despite invoking the “evolving standards of decency” test in methodology review challenges, neither courts nor commentators actually apply the six-factor test that has been used to ascertain the substantive limits of capital punishment under the Eighth Amendment.¹³⁰ Rather, they have formulated different tests, focusing on the likelihood of pain during the process. In some regard, the tests the courts and commentators have used in method of execution cases are a mix of the conditions of confinement standards developed under another strand of the Eighth Amendment and the substantive proportionality “evolving standards of decency” test of the Eighth Amendment. Though both standards are found under the Eighth Amendment, they measure different things. The conditions of confinement cases outline the minimal obligations that prison officials have to those within their care—failure to adhere to that standard is cruel and unusual treatment of a prisoner; the substantive proportionality test establishes the comparative limits on legislatively authorized punishment—this standard is breached when disproportionate punishment is meted out for a criminal offense.

Nonetheless, lethal injection is likely the only method of execution that will consistently pass the tests that have been advanced. *Baze* will supposedly articulate the proper standard. Depending on how the opinion is crafted, however, *Baze* can reformulate the “evolving standards of decency” test, making it substantially more difficult for future capital defendants to secure relief on most Eighth Amendment-based constitutional

129. *Washington v. Glucksberg*, 521 U.S. 702, 736 (1997) (O’Connor, J., concurring).

130. See *infra* notes 135–136 and accompanying text.

challenges. In contrast to the conditions of confinement cases, under the “evolving standards of decency” approach—and in light of *Atkins* and *Roper*—the Court considers the practices of all the states, to determine if there is a current trend and, if so, in what direction it is pointing.

D. *Non-Capital, Eighth Amendment Rights in Prison Approach*

The Court may treat the methods of execution issue as more analogous to the duties of prison officials cases and conditions of confinement cases¹³¹ than the substantive limits of the death penalty cases. That is, the Court may conclude that what is actually being challenged is the way the prison officials treat the death-row inmate, not the proportionality of the punishment. As such, the Court could model the approach implicitly taken by the courts that have stated a standard—using the conditions of confinement cases as a template, and that of a commentator who argues for the recognition of a post-execution right of recovery for the condemned’s estate. That commentator’s rule is:

[W]hen the government institutes the death penalty and approves one of the major execution methods, knowing from the start that some condemned inmates will suffer agonizing pain as they die, the responsible state actors can properly be charged with committing a reckless or knowing—and perhaps even an intentional—tort when a botched execution actually occurs.¹³²

He proposes “responsible government actors [be] subject to direct constitutional liability for their knowing creation of a death-penalty infrastructure that inflicts agonizing deaths on many condemned inmates. Deliberate indifference by the government to the[se] kinds of harms . . . is simply intolerable.”¹³³ Imposing civil liability on governmental officials, he believes, should lead to reforming the methods of execution.¹³⁴

E. *One Eighth Amendment*

The final approach that I will discuss has been implicit in some of the approaches previously outlined—the Court may use *Baze* to begin a recon-

131. See, e.g., *Farmer v. Brennan*, 511 U.S. 825 (1994); *Helling v. McKinney*, 509 U.S. 27 (1993); *Hudson v. McMillian*, 503 U.S. 1 (1992); *Wilson v. Seiter*, 501 U.S. 294 (1991); *Whitley v. Albers*, 475 U.S. 312 (1986); *Rhodes v. Chapman*, 452 U.S. 344 (1981); *Estelle v. Gamble*, 429 U.S. 97 (1976).

132. Julian Davis Mortenson, *Earning the Right to Be Retributive: Execution Methods, Culpability Theory, and the Cruel and Unusual Punishment Clause*, 88 IOWA L. REV. 1099, 1106 (2006).

133. *Id.* at 1161.

134. *Id.* at 1162–63.

ciliation of Eighth Amendment law. There may be sufficient support on the Court to streamline doctrine. The Court may find it “appealing to look for a single test, a grand unified theory that would resolve all of the cases that may arise under a particular clause. There is, after all, only one establishment clause, one free speech clause, one Fourth Amendment, one equal protection clause.”¹³⁵ That is, the Court could view this as a propitious occasion to clarify the law under the cruel and unusual punishments clause and declare that there is “but one cruel and unusual punishment clause and one Eighth Amendment.” This reconciliation of Eighth Amendment law could be done through a broad rule that reformulates the “evolving standards of decency” test, including, perhaps, reducing it to one objective factor—e.g., state statutes—that a court is to consider in applying the standard. Such an approach would lead to an inevitable retrenchment of the judiciary from regulation of the death penalty and constitutionally-based prison reform litigation. The approach would also ignore that “the same constitutional principle may operate very differently in different contexts. . . . And setting forth a unitary test for a broad set of cases may sometimes do more harm than good. Any test that must deal with widely disparate situations risks being so vague as to be useless.”¹³⁶ Such an approach would also disregard the reality that the same legal standard can be legitimately applied to reach opposite conclusions in similar situations.

IV. CAPITAL LITIGATION AND THE COURT

Capital litigation is always precarious—today’s apparent victory can sow the seed for tomorrow’s defeat. Until now, the Court has been cautious; it has avoided addressing the methods of execution issue. In 2004 and in 2006 it issued narrow unanimous decisions, clarifying the means by which inmates can challenge their method of execution.¹³⁷ Both decisions avoided answering whether a method of execution was a challenge to a condition of confinement or a challenge to the death sentence itself.

In raising the methods of execution issue now, capital litigants may have gotten too far ahead of themselves and the law. Lethal injection is one of the most serene ways to end the life of someone who wants to live.¹³⁸ Though they ordinarily should not be expected to offer ways that

135. *Board of Educ. v. Kirays*, 512 U.S. 687, 718 (1994) (O’Connor, J., concurring in part).

136. *Id.*

137. *See Hill v. McDonough*, 126 S. Ct. 2096, 2102–04 (2006); *Nelson v. Campbell*, 541 U.S. 637 (2004).

138. This is a relative statement. *Baze* challenges lethal injection as a method of execution because it allegedly creates a significant and unnecessary risk of inflicting pain and that the process of dying it induces violates the Eighth Amendment. Brief for the Petitioner, *supra* note 87, at 30. If these asser-

the state might constitutionally execute an inmate,¹³⁹ not proffering an alternative—which is not equally speculative as the method being challenged¹⁴⁰—presents another dilemma for abolitionists. The absence of reasonable alternatives may taint the Court's analysis because such absence raises the specter that the methods of execution challenge is a covert way to get the Court to essentially abolish the death penalty. Though capital defense lawyers who have challenged the method of execution claim that the challenge is not an effort to derail the death penalty, it is difficult to see how it is not. If the most commonly adopted method of execution cannot proceed because of a legal ruling, the death penalty becomes an illusion. In any event, even under the test the petitioner poses in *Baze*, the Court has previously rejected an Eighth Amendment claim, which was premised on the "risk" that a capital punishment scheme was defective.¹⁴¹

Baze presents the Court with an opportunity to establish a standard for assessing challenges to methods of execution. However, the Court's approach may allow it to provide answers intended to reach beyond the case. It may underscore the need for death penalty abolitionists to reinstitute a coordinated national litigation campaign, if a goal of the death penalty abolitionist movement is to have the federal judiciary declare the death penalty, or critical features of it, unconstitutional. A coordinated national legal strategy would likely do a better job bringing the types of cases and issues before the Court that would assist in the abolitionists' cause. In contrast to the present litigation approach in which capital litigants present issues in an ad hoc manner before the Court, capital defense attorneys and death penalty abolitionists may come to appreciate that a national litigation campaign can better build on past legal successes and minimize doctrinal retrenchments.

While some capital defense attorneys are abolitionists, not every one is. This difference can complicate matters when there are serious dis-

tions are true, executions may not end as states may switch to firing squads for executions. Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 *FORDHAM L. REV.* 49, 63 (2007) ("the firing squad . . . may even be the most humane of all methods [of execution]").

139. However, imposing such a requirement on the petitioner is not entirely novel. When the state infringes certain constitutional rights, a challenger may prevail by showing that less restrictive means were available by which the state could have achieved its end. JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 16.10, at 1159 (7th ed. 2004).

140. *Baze* proposes a one-drug protocol as an alternative to the current three-drug protocol. Brief for the Petitioner, *supra* note 87, at 51. At least since *Kemmler*, there have been disputes over the prisoner's physical and psychological well-being in the last moments of life. Challenges to various methods of execution have been based on news reports, first-hand accounts of executions, and somewhat speculative medical assessments. Speculation will continue until persons being executed are able to describe and their last moments are recorded; but even those thoughts will be subject to interpretation.

141. See *McCleskey v. Kemp*, 481 U.S. 279, 308–19 (1987) (rejecting statistically supported claim that there was a risk that racial prejudice influenced the jury's decision in a capital case).

agreements between capital defense attorneys and death penalty abolitionists over strategic and litigative options. Capital defense attorneys, like all lawyers, have a professional duty to their client and they may take measures to avoid the imposition of a death sentence or an execution, such as entering into a plea agreement or filing an appeal from an unfavorable disposition. Death penalty abolitionists, however, are often interested in long-term strategies to end the death penalty and may not want certain issues raised in particular cases; consequently, they may strenuously object when an issue with little chance of success is litigated by a capital defense attorney.

Further, capital defense attorneys, like other groups of lawyers, have differing interpretations of their professional obligations. Some capital defense attorneys, for example, may believe that their professional responsibilities mandate that they pursue every available avenue for relief, including those that are doomed to fail.¹⁴² In actuality, neither the professional codes nor the U.S. Constitution require that capital defense attorneys pursue every legal option.¹⁴³ The law generally leaves it to the attorney's judgment as to which claims to raise to maximize success on appeal or at trial.¹⁴⁴ In most instances, the interests of the client and the capital defense attorney are the same: seeking to avoid or to secure relief from a capital conviction or death sentence. However, those interests may diverge, such as when the client no longer wants to pursue further review of the case and the lawyer does. The overwhelming thrust in the legal literature is that it is ethically permissible for capital defense attorneys to continue to litigate the case when the client does not want to proceed, while attempting to persuade the client to continue the litigation.¹⁴⁵

But what of the situation where the client wants to pursue further discretionary review of the case and the lawyer does not? Research has not uncovered literature on when the attorney can for reasons other than the merits of the case stop representing the client. The reason may be simple: the ethical provisions declare that the lawyer should not allow outside influences to affect the representation. I am unwilling, however, to presume

142. See, e.g., Monroe H. Freedman, *The Professional Obligation to Raise Frivolous Issues in Capital Cases*, 31 HOFSTRA L. REV. 1167, 1179–80 (2003) (maintaining that capital defense attorneys have an ethical duty to raise every issue at every level of the proceedings, even what might otherwise be deemed a frivolous claim).

143. See *Jones v. Barnes*, 463 U.S. 745, 754 (1983) (holding that defense counsel assigned to litigate appeal from criminal conviction does not have a constitutional obligation to raise every non-frivolous issue request by the defendant); JOHN M. BURKOFF, CRIMINAL DEFENSE ETHICS: LAW AND LIABILITY § 5.5, at 132 n.15 (2007–08) (noting that ABA Defense Function Standard adopts *Jones*'s reasoning).

144. *Smith v. Robbins*, 528 U.S. 259, 288 (2000).

145. Richard W. Garrett, *Sectarian Reflections on Lawyers' Ethics and Death Row Volunteers*, 77 NOTRE DAME L. REV. 795, 798–99 n.15 (2002) (collecting sources).

that every capital defense lawyer is always more willing to establish adverse legal precedent instead of ending the representation.

The professional ethical standards are generally wary of lawyer withdrawals, but they do permit it. The Model Rules are more lenient than the ABA Code.¹⁴⁶ Under Model Rule 1.16(b)(1), withdrawal is permitted if it “can be accomplished without material adverse effect on the interests of the client”¹⁴⁷ and Model Rule 1.16(b)(4) permits withdrawal if “the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.”¹⁴⁸ Some capital defense attorneys might be willing to rely on either provision and seek withdrawal instead of pursuing discretionary appeals or post-conviction relief to avoid the likelihood of establishing adverse precedent for other capital defendants. Since it is nearly incontrovertible that lawyers who seek to use the courts to effectuate legal change can themselves earnestly believe that continuing to litigate a particular case will set back the cause,¹⁴⁹ it stands to reason that some capital defense attorneys currently may cloak their decision to forgo further discretionary review in terms of the futility of such efforts, when they may be as concerned about establishing adverse precedent. Nonetheless, the question of ending representation at the discretionary appeal or post-conviction stage instead of establishing bad precedent will be an issue for each capital defense attorney to face should the attorney join a national legal campaign to abolish the death penalty.

Death penalty abolitionists desperately miss the presence and perspective of Justice Thurgood Marshall and Justice William Brennan on the Court. Marshall, a staunch death penalty opponent, not only never voted to affirm a capital sentence,¹⁵⁰ he reportedly described his judicial philosophy as: “You do what you think is right and let the law catch up.”¹⁵¹ No current Justice has consistently evidenced a similar approach in capital cases. Similarly, Justice Brennan, who also never voted to affirm a capital sentence, was widely regarded for his behind-the-scenes efforts and willingness to form coalitions with other Justices to issue opinions generally in

146. BURKOFF, *supra* note 143, § 4.4, at 103–04.

147. MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(1) (1983).

148. *Id.* R. 1.16(b)(4).

149. *Cf.* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 476–505 (1976) (noting the conflict between civil rights lawyers who sought racial integration of schools and parents of school children who would settle for improvement of the educational quality of the schools their children attended, even if the schools remained racially segregated).

150. *See* MICHAEL MELLO, *AGAINST THE DEATH PENALTY: THE RELENTLESS DISSENTS OF JUSTICE BRENNAN AND MARSHALL* 158–61 (1996).

151. Deborah Rhode, *Letting the Law Catch Up*, 44 STAN. L. REV. 1259, 1259 (1992).

line with his own jurisprudential philosophy.¹⁵² Indeed, in a few cases Marshall and Brennan were able to transform their initial dissents in capital cases into opinions for the Court by altering their reasoning so other Justices would join their decision.¹⁵³ While *Atkins* and *Roper* may reflect some effort to “do what . . . is right,” more needs to be done, by the Court and advocates before it, for those cases to have a significant role in Eighth Amendment jurisprudence.

V. CONCLUSION

In its last years, the Rehnquist Court limited the availability of the death penalty. Its successor, the Roberts Court, has thus far indicated that it is willing to overturn precedents, and the capital cases are prime candidates for overruling. Consequently, death penalty abolitionist lawyers should exercise caution in the issues on which they seek Supreme Court review. It is worth noting that each of the three most recent methods of execution cases before the Court were all cases brought by different offices of capital defense attorneys, seeking to vindicate their client's rights. It is less clear that these attorneys gave extensive contemplation of the long-term consequences of the litigation.

Developing and participating in a coordinated litigation campaign may be a way for death penalty abolitionists and capital defense lawyers to not only forestall restrictive federal court rulings, but it may ultimately assist in having the federal courts continue to narrow and perhaps even eliminate the death penalty. That could be one way of dealing with the death penalty abolitionist's dilemma of establishing standards for the “evolving standards of decency.”

152. See, e.g., Harry A. Blackmun, *Justice Brennan's Influence on His Colleagues*, in REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 326, 327 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997) (“my experience with [Justice Brennan] was that he stated his case—at conference and in any opinion he circulated—in quiet but firm tones, persuasively to be sure, but never in a two-fisted, belligerent, or quarrelsome manner”); David H. Souter, *Justice Brennan's Place in Legal History*, in REASON AND PASSION, *supra*, at 299, 299–309 (describing Justice Brennan's behind-the-scene influence in *Shapiro v. Thompson*, 394 U.S. 618 (1969), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

153. See MELLO, *supra* note 150, at 176–84 (discussing drafts of *Ford v. Wainwright*, 477 U.S. 399 (1986) (plurality) (Marshall, J.) (holding that the Constitution prohibits the execution of insane defendants) and *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (plurality) (Marshall, J.) (holding Eighth Amendment's need for reliability in sentencing is violated when the sentencer is led to believe responsibility for determining the appropriateness of the death sentence lies elsewhere)).