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Risk of Choking to Death on One's Own Blood Is Not Cruel and Unusual Punishment

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NOTE

Risk of Choking to Death on One's Own Blood Is Not Cruel and Unusual Punishment

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

Calla M. Mears[*]

I. INTRODUCTION

Missouri began executing inmates in 1810 by hanging Peter Johnson, a man accused of murder.[1] Since Johnson's execution, Missouri executed 374 inmates between 1810 and 2019.[2] Hanging was the most common method of execution in Missouri until 1936.[3] Lethal gas was first used in Missouri in 1937 and became the most common execution method until 1987, when lethal injection took over as the predominant method.[4]

Russell Bucklew is hardly the first person to challenge Missouri's lethal injection protocol – and for good reason.[5] Lethal injection has resulted in a much greater proportion of botched executions than any other execution method, at 7.12%, with 75 out of 1054 executions by lethal injection going wrong.[6] Given the high rate of botched executions, challenged lethal injection

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1. *Missouri*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/missouri [perma.cc/ZR97-B67D].

2. *Id.*

3. *Id.*

4. *Id.*

5. *See* Taylor v. Crawford, 487 F.3d 1072, 1074 (8th Cir. 2007); Clemons v. Crawford, 585 F.3d 1119 (8th Cir. 2009).

6. *Botched Executions*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/botched-executions [perma.cc/264G-CT9T] ("Botched executions occur when there is a breakdown in, or departure from, the 'protocol' for a particular method of execution . . . Botched executions are 'those involving unanticipated problems or delays that caused, at least arguably, unnecessary agony for the prisoner or that reflect gross incompetence of the executioner."). The botched execution rates are as follows for the other methods used: 3.12% of hangings,

protocols deserve less deference than the United States Supreme Court has generally given them.

Bucklew was convicted and sentenced to death in 1997 for a crime spree of murder, burglary, and kidnapping.[7] On June 25, 2019, a final warrant of execution was ordered for Bucklew.[8] The process leading to the final execution order was long, arduous, and filled with questionable judicial reasoning. Part II of this Note first walks through the factual underpinnings of Bucklew's case and the various steps of litigation that led to the instant decision. It explores Bucklew's direct appeal, the inmate class action lawsuit he joined, his habeas corpus claim, the various Eighth Circuit decisions, and the Supreme Court decision. Next, Part III outlines the background of death penalty jurisprudence, the history of execution methods in the United States, and recent challenges to lethal injection. Part IV then details the Supreme Court's holding and reasoning, the two concurring opinions, and the two dissenting opinions. Finally, Part V critiques the majority's holding and reasoning and addresses practical implications and theoretical concerns that result from the majority's decision.

II. FACTS AND HOLDING

On March 21, 1996, Russell Bucklew followed his ex-girlfriend, Stephanie Ray, to a home in Cape Girardeau County, Missouri that she shared with her boyfriend, Michael Sanders.[9] Bucklew waited outside Ray's home for several hours, armed with duct tape, handcuffs, and pistols stolen from his brother.[10] Later that evening, Bucklew entered the home and shot Sanders to death.[11] Bucklew went on to strike Ray with a pistol, handcuff her, and throw her in his vehicle before driving away.[12] Bucklew raped Ray in his vehicle and drove until he was apprehended by law enforcement following a shootout.[13]

In Boone County, Missouri, Bucklew was convicted of murder in the first degree, burglary in the first degree, and kidnapping.[14] The jury found

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1.92% of electrocutions, 5.4% of executions by lethal gas, and 0% of executions by firing squad. The botched execution rate for all methods is 3.15%. *Id.*

7. Jack Suntrup, *Execution Date Set for Missouri Death Row Inmate Convicted of 1996 Murder*, ST. LOUIS POST-DISPATCH (June 25, 2019), https://www.stltoday.com/news/local/crime-and-courts/execution-date-set-for-missouri-death-row-inmate-convicted-of/article_8f2c5427-bed3-5df0-bdef-f5f976f8dcba.html [perma.cc/RU9D-DR6Z].

8. *Id.* He was ordered to be executed three times before: in 1998, on April 9, 2014, and on March 20, 2018. *Id.*

9. State v. Bucklew, 973 S.W.2d 83, 86 (Mo. 1998) (en banc).

10. *Id.*

11. *Id.* Sanders's children were also present at the time of the incident but were not physically harmed. *Id.*

12. *Id.*

13. *Id.* at 86–87.

14. *Id.* at 86.

two aggravating circumstances: that Bucklew committed the crimes of both burglary and kidnapping during the commission of murder.[15] The jury recommended the death sentence, and the trial court sentenced Bucklew to death.[16] Bucklew challenged his conviction and death sentence on direct appeal in 1998.[17] The Missouri Supreme Court denied all of Bucklew's claims[18] and affirmed the judgment.[19]

A. Inmate Class Action Lawsuit

In 2012, Bucklew was one of twenty-one Missouri death row inmates to challenge the execution protocol issued by the Missouri Department of Corrections ("MDOC").[20] The action was originally brought as a petition for declaratory judgment and injunctive relief in the Circuit Court of Cole County, Missouri before it was removed to federal court in August 2012.[21] The new protocol "mandate[d] execution via injection of 2 g[rams] of the anesthetic propofol and 10 [cubic centimeters] of the pain-suppressant lidocaine."[22] The plaintiffs argued that the protocol violated the ban on cruel and unusual punishment under the Eighth and Fourteenth Amendments of the United States Constitution and Article I, Section 21 of the Missouri Constitution by creating a substantial and foreseeable risk of severe pain during executions.[23] After several amendments to the original complaint, the plaintiffs' claims were ultimately dismissed on May 2, 2014 for failing to state any claims upon which relief could be granted.[24] The litigation concluded on May 16, when the plaintiffs refused to correctly re-plead their Eighth Amendment claim, citing a disagreement with the court's holding that the plaintiffs would be required to propose an alternative execution method to survive the pleading stage.[25] After this unsuccessful class action litigation, Bucklew resorted to challenging his own execution under habeas corpus law.[26]

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15. *Id.* at 94.

16. *Id.* at 86–87.

17. *See id.*

18. None of the claims made by Bucklew on direct appeal are relevant to the instant decision.

19. *Bucklew*, 973 S.W.2d at 98.

20. *See* Zink v. Lombardi, No. 2:12-CV-4209-NKL, 2012 WL 12828155 (W.D. Mo. Nov. 16, 2012).

21. *Id.* at *1.

22. *Id.*

23. *Id.*

24. Bucklew v. Lombardi, No. 14-8000-CV-W-BP, 2014 WL 2736014, at *3 (W.D. Mo. May 19, 2014), *rev'd*, 565 F. App'x 562 (8th Cir. 2014), *rev'd and remanded*, 783 F.3d 1120 (8th Cir. 2015).

25. *Id.*

26. *See* Bucklew v. Luebbers, 436 F.3d 1010 (8th Cir. 2006).

B. Habeas Corpus Challenge

On April 9, 2014, the Missouri Supreme Court ordered Bucklew's execution for May 21.[27] Bucklew argued in a motion that a stay of execution was necessary to determine the risks involved as applied[28] to executing him by lethal injection with the drug pentobarbital.[29] To prevail on this motion, Bucklew was required to prove that there was a substantial likelihood the use of pentobarbital would cause severe harm.[30] Further, he needed to present a feasible and readily implemented alternative method of execution.[31] Bucklew suffered a rare condition called cavernous hemangioma since infancy.[32] Cavernous hemangioma is a condition where "vascular lesions consisting of abnormally dilated blood vessels" are formed.[33] The blood vessels form "cavern-like" pockets were blood pools and then leaks due to defects in the walls of the vessels.[34] The lesions – varied in size – can cause headaches, hemorrhages, stroke symptoms, and seizures, depending on the size and location of the lesion.[35] Such symptoms subside and reappear over time because the pockets change in size as they leak and reabsorb blood.[36]

Cavernous hemangioma of the uvula is exceedingly rare: as of 2015, only four cases have been reported in English literature.[37] Bucklew's cavernous hemangioma primarily involved his face, including his pharynx.[38] During an examination by a physician on May 12, 2014, Bucklew had a "very large vascular mass" that obstructed his airway. According to the examining physician, his "airway [was] severely compromised or obstructed due to the

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27. Order of Execution, State v. Bucklew, No. SC80052 (Mo. Apr. 9, 2014).

28. As-applied challenges are those that argue a law or policy is constitutional on its face, but unconstitutional as applied in a particular situation. *Challenge*, BLACK'S LAW DICTIONARY (11th ed. 2019).

29. Motion for Stay of Execution at 1, Bucklew v. Lombardi, No. 14-8000-CV-W-BP, 2014 WL 12816298 (W.D. Mo. May 19, 2014). Missouri adopted the use of pentobarbital for executions in 2013. MO. DEP'T OF CORRECTIONS, *Preparation and Administration of Chemicals for Lethal Injection* (2013), https://files.deathpenaltyinfo.org/legacy/files/pdf/ExecutionProtocols/MissouriProtocol10.18.2013.pdf [perma.cc/3Z85-VNGE].

30. Bucklew v. Lombardi, 565 F. App'x 562, 564 (8th Cir. 2014).

31. *Id.*

32. Motion for Stay of Execution at 2, Bucklew v. Lombardi, No. 14-8000-CV-W-BP, 2014 WL 12816298 (Mo. May 19, 2014).

33. Rule 26(a)(2) Supplemental Expert Report of Joel B. Zivot, M.D. at 5, Bucklew v. Lombardi, No. 14-8000-CV-W-BP, 2014 WL 2736014 (W.D. Mo. May 19, 2014).

34. *Id.* at 5–6.

35. *Id.*

36. *Id.*

37. Minhua Wang et al., *Cavernous Hemangioma of the Uvula: Report a Rare Case with Literature Review*, 8 N. AM. J. OF MED. AND SCI. 56 (2015).

38. Declaration of Joel B. Zivot, M.D. at 3, Bucklew v. Lombardi, No. 14-8000-CV-W-BP, 2014 WL 2736014 (W.D. Mo. May 19, 2014).

hemangiomas."[39] In the motion, Bucklew argued his disorder presented unique risks in an execution by lethal injection.[40] Specifically, Bucklew contended that Missouri's lethal injection method would cause him to suffer severe pain from hemorrhaging or abnormal circulation, leading to a prolonged execution or that his condition would prevent the drug from circulating properly.[41] Bucklew further claimed that MDOC knew about the risks and failed to assess them with a proper medical examination.[42]

In response, the State argued Bucklew failed to show Missouri's use of pentobarbital in executions was "sure or very likely to cause serious illness and needless suffering" or that it would "give rise to sufficiently imminent dangers."[43] Further, the State claimed Bucklew did not sufficiently "present a specific, feasible, more humane method of execution."[44] The district court denied Bucklew's Motion for Stay of Execution, concluding that his claims failed as a matter of law.[45] In particular, the court held that Bucklew was not specific enough in his claims and therefore failed to show how the potential adverse consequences would rise to the level of unconstitutional pain.[46] The court also found that Bucklew did not suggest any feasible alternative methods of execution.[47]

C. Eighth Circuit Decisions

On appeal, the United States Court of Appeals for the Eighth Circuit reversed the district court's decision and granted Bucklew's motion.[48] The Eighth Circuit determined that Bucklew's medical evidence, which the State did not rebut, showed a likelihood of severe pain.[49] Further, the court held Bucklew was not required under current precedent to procure an alternative method of execution, because his case involved a "specific, medically-based, as-applied, individual challenge" to his execution method.[50] Judge Loken

39. Supplemental Affidavit of Joel B. Zivot, M.D. at 1, Bucklew v. Lombardi, No. 14-8000-CV-W-BP, 2014 WL 2736014 (W.D. Mo. May 19, 2014).

40. Motion for Stay of Execution at 1, Bucklew v. Lombardi, No. 14-8000-CV-W-BP, 2014 WL 12816298 (W.D. Mo.. May 19, 2014).

41. *Id.* at 4.

42. *Id.* at 2–5.

43. Suggestions in Opposition to Plaintiff Russell Bucklew's Motion for Temporary Restraining Order and Preliminary Injunction, and Bucklew's Motion for Stay of Execution at 6, Bucklew v. Lombardi, No. 14-8000-CV-W-BP, 2014 WL 2736014 (W.D. Mo. May 19, 2014).

44. *Id.* at 7.

45. Bucklew v. Lombardi, No. 14-8000-CV-W-BP, 2014 WL 2736014, at *10 (W.D. Mo. May 19, 2014).

46. *Id.*

47. *Id.* at *5.

48. Bucklew v. Lombardi, 565 F. App'x 562, 564 (8th Cir. 2014).

49. *Id.*

50. *Id.*

dissented and agreed with the court below that Bucklew did not present specific enough evidence of a risk of unconstitutional pain.[51]

The next day, May 21, 2014, the United States Supreme Court granted Bucklew a stay of execution pending disposition of his appeal.[52] On rehearing en banc, the Eighth Circuit held that the district court was premature in dismissing Bucklew's complaint *sua sponte*, because it was not obvious he could not prevail.[53] The court directed the State to timely respond to Bucklew's complaint or any amended complaint.[54] Additionally, the court ordered Bucklew to timely present a "feasible, readily implemented alternative procedure that will *significantly* reduce a substantial risk of severe pain and that the State refuses to adopt."[55] On remand, the district court granted summary judgment in favor of the State, again holding that Bucklew did not present sufficient evidence to establish his claim.[56] Bucklew again appealed, and the Eighth Circuit affirmed the district court's decision.[57] Bucklew's execution was scheduled for March 20, 2018.[58]

D. United States Supreme Court Decision

The United States Supreme Court granted Bucklew's Petition for a Writ of Certiorari and affirmed the courts below.[59] Bucklew argued the Eighth Circuit's decision should be reversed because (1) it erroneously assumed the execution would go as intended; (2) it incorrectly applied the "known-and-available-alternatives requirement," which was developed for facial challenges, to Bucklew's as-applied challenge; and (3) lethal gas would substantially reduce Bucklew's risk of suffering.[60] The State argued in response that (1) Bucklew failed to raise a "known and available alternative method" of execution and failed to show that he was "sure or very likely" to undergo extreme pain from lethal injection; (2) the alternative method of execution element applies to as-applied challenges; and (3) Bucklew's claim was barred by the statute of limitations because he knew of the factual basis for his claim in 2008 but did not bring this action until twelve days before his scheduled execution.[61]

The Supreme Court disagreed with Bucklew and held that an available alternative method must be presented in all challenges, whether facial or as

51. *Id.* at 572–73.

52. Bucklew v. Lombardi, 572 U.S. 1131 (2014).

53. Bucklew v. Lombardi, 783 F.3d 1120, 1127 (8th Cir. 2015).

54. *Id.* at 1128.

55. *Id.*

56. Bucklew v. Precythe, 883 F.3d 1087, 1089 (8th Cir. 2018).

57. *Id.* at 1090.

58. Petition for a Writ of Certiorari at 1, Bucklew v. Precythe, 139 S. Ct. 1112 (2019).

59. Bucklew v. Precythe, 139 S. Ct. 1112, 1134 (2019).

60. Brief for Petitioner at 23–24, Bucklew v. Precythe, 139 S. Ct. 1112 (2019).

61. Brief of Respondents at 20–24, Bucklew v. Precythe, 139 S. Ct. 1112 (2019).

applied.[62] The proposed alternative method must be not only feasible but also "readily implemented."[63] The Court determined Bucklew's suggested method of execution – nitrogen hypoxia – did not adequately show an available alternative because it had never been used by the State.[64] The State of Missouri was entitled to summary judgment on Bucklew's Eighth Amendment claim because his proposed alternative method of execution was neither feasible nor readily implemented, and even if Bucklew met both of those requirements, he did not present enough evidence to show his method would substantially reduce his risk of pain.[65]

III. LEGAL BACKGROUND

Capital punishment has existed since at least the Eighteenth Century B.C.E.[66] Death penalty jurisprudence has a lengthy history that goes back further than the founding of the United States.[67] This Section first examines the history of capital punishment in the United States and the application of the Eighth Amendment to capital punishment. Next, it details the history of modern lethal injection challenges following the reinstation of capital punishment in 1976. This Section then turns to modern challenges that fundamentally altered the legal landscape for lethal injection challenges, first outlining those brought under 42 U.S.C. Section 1983 ("Section 1983"). Finally, it looks at the effects of two landmark cases, *Baze v. Rees* and *Glossip v. Gross*, on death penalty jurisprudence.

A. A History of Capital Punishment and the Eighth Amendment

Capital punishment in the United States has steadily evolved from barbaric roots that allowed a variety of execution methods to the modern conception of a clinical procedure primarily involving lethal injection.[68] In the early days of the country's existence, judges had discretion to choose execution methods.[69] The possible methods were beheading, drowning,

62. *Bucklew*, 139 S. Ct. at 1126.

63. *Id.* at 1129. A proposed method is "readily implemented" when it is sufficiently detailed to allow a finding that it could be carried out reasonably quickly and relatively easily by the State. *Id.*

64. *Id.* at 1129–30.

65. *Id.* at 1133.

66. The first historical mention of capital punishment was in the Code of King Hammurabi of Babylon. *History of the Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/early-history-of-the-death-penalty [perma.cc/G6PT-U4ZT].

67. *Id.*

68. Chris Fisher, *Evolution of Execution*, CBA Rec. 40, 41 (Sept. 2007).

69. Robert J. Sech, Note, *Hang 'Em High: A Proposal for Thoroughly Evaluating the Constitutionality of Execution Methods*, 30 VAL. U. L. REV. 381, 390 (1995).

hanging, burning, breaking at the wheel, and drawing and quartering.[70] Most executions were carried out by hanging, which remained the most common method of execution throughout the eighteenth century and the first half of the nineteenth century.[71] Electrocution was introduced in New York as a supposedly more humane execution method following anti-hanging sentiment that developed before and during the Civil War.[72] By the end of the 1920s, more than half of all states that imposed capital punishment used electrocution.[73] Lethal gas was introduced in Nevada in 1931 and quickly expanded to other states as another common execution method.[74]

Cruel and unusual punishment, which was originally interpreted by courts to mean inhumane and barbarous punishment, is prohibited by the Eighth Amendment of the United States Constitution.[75] Early courts did not provide a comprehensive definition of cruel and unusual punishment, but additional standards were developed by the Supreme Court.[76] A state's method of execution must not involve torture or lingering death, as any punishment involving torture violates the Eighth Amendment.[77] The punishment must comply with modern civilized standards to be consistent with human dignity.[78] States are prohibited from intentionally inflicting unnecessary pain.[79]

Courts have long been inconsistent in analyses used to determine whether a certain punishment violates the Eighth Amendment. Rather than following uniform standards or rules, courts are largely left to determine whether the punishment "comports with contemporary standards of decency."[80] The Supreme Court has repeatedly recognized that the State has a duty under the Eighth Amendment to assume responsibility for the well-being and safety of the individuals incarcerated in its prisons.[81] The Eighth Amendment now bars more than just physically barbarous punishments.[82] The State has an obligation to provide medical care for its prisoners when denial of such care could result in pain and suffering that serves no

70. *Id.* at 390–91 n.51.

71. *Id.* at 391.

72. *Id.* at 392. A constitutional challenge to New York's electrocution method was made in 1890, but it was swiftly denied by the United States Supreme Court. *See In re* Kemmler, 136 U.S. 436 (1890).

73. Sech, *supra* note 69, at 393.

74. *Id.* at 393–94.

75. U.S. CONST. amend. VIII; *see e.g.*, McDonald v. Commonwealth, 53 N.E. 874, 875 (Mass. 1899).

76. *See e.g.*, *Kemmler*, 136 U.S. 436.

77. *Id.* at 447; Wilkerson v. Utah, 99 U.S. 130, 136 (1878).

78. Trop v. Dulles, 356 U.S. 86, 100 (1958).

79. Louisiana *ex rel.* Frances v. Resweber, 329 U.S. 459, 463 (1947).

80. *See e.g.*, Campbell v. Wood, 18 F.3d 662, 682 (9th Cir. 1994).

81. DeShaney v. Winnebago Cty. Dept. of Social Servs., 489 U.S. 189, 199–200 (1989).

82. Estelle v. Gamble, 429 U.S. 97, 102 (1976).

penological purpose because the infliction of such suffering does not comport with modern standards of decency.[83] The Supreme Court held in *Estelle v. Gamble* that deliberate indifference to the serious medical needs of prisoners establishes the unnecessary and wanton infliction of pain in violation of the Eighth Amendment and sufficiently states a cause of action under Section 1983,[84] which grants a cause of action to any citizen subjected to the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws" under the laws or customs of any state.[85] *Helling v. McKinney* established that prisoners can bring Eighth Amendment claims under Section 1983 for possible risk of future harm to health caused by deliberate indifference, even if there is no current risk of harm.[86]

B. Modern Challenges to Lethal Injection

In *Furman v. Georgia*, the Supreme Court effectively deemed all death penalty statutes unconstitutional because of arbitrary application and lack of guidance for juries.[87] After being prohibited briefly, capital punishment was reestablished by the Supreme Court in 1976.[88] Following the reinstatement, Oklahoma was the first state to adopt lethal injection on May 11, 1977; Texas adopted it the next day, and New Mexico and Idaho adopted it soon after.[89] Thirty-seven states adopted lethal injection between 1977 and 2002, and Texas was the first to use it for an execution in 1982.[90] Today, all twenty-nine death penalty states use lethal injection as their primary method of execution, even if it offers other methods.[91] Most modern lethal injection challenges have focused on either the drugs used or the injection procedure.[92]

The writ of habeas corpus was first established in the Magna Carta in 1215 as a way for prisoners to challenge the legality of their detention.[93] In

83. *Id.* at 102–03.

84. *Id.* at 104–05.

85. 42 U.S.C. § 1983 (2018).

86. Helling v. McKinney, 509 U.S. 25, 35 (1993).

87. Furman v. Georgia, 408 U.S. 238, 256–57 (1972) (Douglas, J., concurring).

88. Gregg v. Georgia, 428 U.S. 153, 207 (1976) (holding that Georgia's revised capital punishment statute was sufficiently structured to prevent its arbitrary application, effectively providing a way for the other states to reinstate capital punishment).

89. Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 78 (2007).

90. *Id.* at 78–79.

91. *Methods of Execution*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/methods-of-execution [perma.cc/YHL4-2LA2]. Other methods include electrocution, lethal gas, hanging, and firing squad.

92. Jerry Merrill, Comment, *The Past, Present, & Future of Lethal Injection:* Baze v. Rees' *Effect on the Death Penalty*, 77 UMKC L. REV. 161, 171 (2008).

93. Benjamin R. Orye III, *The Failure of Words: Habeas Corpus Reform, the Antiterrorism and Effective Death Penalty Act, and When A Judgment of Conviction*

the United States, the Judiciary Act of 1789 granted federal courts the power to grant the writ to federal prisoners.[94] While it could initially only be used to challenge the jurisdiction of the sentencing body, the Supreme Court expanded it in 1942 to include challenges based on other constitutional grounds.[95] Since 1942, habeas corpus relief has been available to an inmate when, *inter alia*, his or her conviction or sentence was obtained in violation of a federal constitutional right.[96] In the past, those on death row often used habeas corpus to challenge their sentences.

Congress passed the Anti-Terrorism and Effective Death Penalty Act ("AEPDA") in 1996 to further regulate federal habeas corpus actions.[97] AEPDA imposed a variety of restrictions on habeas corpus petitions and effectively limited such petitions so that they could only be brought shortly after the exhaustion of all direct appeals.[98] AEDPA prohibited all "second or successive habeas corpus application[s]" presented in a prior petition and banned those not previously presented with a few narrow exceptions.[99] A petitioner can bring a claim in a successive application only if he or she can show that it "relies on a new rule of constitutional law . . . that was previously unavailable" or if new evidence that could not have previously been found is discovered and no reasonable factfinder would have found the petitioner guilty given the new evidence.[100] All other habeas corpus claims must be filed within one year of final judgment for claims on direct appeal.[101]

1. Section 1983 Challenges

AEDPA made lethal injection challenges nearly impossible because execution dates are not always set before the one-year limit for a habeas corpus action expires.[102] In 2004, however, the Supreme Court allowed prisoners to challenge execution protocols under Section 1983.[103] While a habeas corpus petition would entirely invalidate a conviction or sentence, a Section 1983 claim would enjoin the State from any action that would

Becomes Final for the Purposes of 28 U.S.C. § 2255(1), 44 WM. & MARY L. REV. 441, 444 (2002).

94. *Id.* at 446. The writ's application was expanded to state prisoners in 1867. *Id.*

95. *Id.*

96. *Id.*

97. 28 U.S.C. § 2244 (2018). Habeas corpus actions are petitions filed by inmates challenging the legality of the petitioner's detention or imprisonment. *Habeas Corpus*, BLACK'S LAW DICTIONARY (11th ed. 2019).

98. Merrill, *supra* note 92, at 169.

99. § 2244(b)(1)–(2).

100. § 2244(b)(2)(A)–(B)(ii).

101. § 2244(d)(1)(A).

102. Merrill, *supra* note 92, at 169.

103. Nelson v. Campbell, 541 U.S. 637, 644–46 (2004).

constitute a civil rights violation.[104] In *Nelson v. Campbell*, the Supreme Court reasoned that an execution method could be challenged without invalidating the execution itself.[105] In *Nelson*, for example, the challenged method was a "cut-down" procedure that would be used to access the petitioner's veins.[106] The Court ultimately remanded the case to the district court to determine whether the "cut-down" procedure was necessary to administer the lethal injection.[107] If the procedure was found unnecessary, the State would be required to provide an alternative method of vein access but the execution would still be carried out via lethal injection.[108]

In 2006, the Supreme Court extended *Nelson* to allow Section 1983 claims to challenge the entire lethal injection procedure rather than just components of the procedure.[109] In *Hill v. McDonough*, petitioner Hill brought a Section 1983 claim challenging the common three-drug sequence Florida planned on using to execute him.[110] The courts below construed Hill's claim as a habeas corpus petition and denied it for failing to comply with the stringent requirements imposed by AEDPA.[111] The Supreme Court held that *Nelson* was controlling because Hill's claim did not challenge the lethal injection sentence generally but rather sought to prevent the State from executing him with a particular lethal injection method.[112] The Court also found it important that Florida law did not require the use of the planned execution method, so the State could conceivably use an alternative lethal injection procedure.[113] When taken together, *Nelson* and *Hill* opened the floodgates for lethal injection challenges under Section 1983.[114]

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104. Merrill, *supra* note 92, at 169.

105. *Nelson*, 541 U.S. at 644.

106. *Id.* at 642. The "cut-down" procedure at issue in *Nelson* consisted of "prison personnel . . . mak[ing] a 2-inch incision in petitioner's arm or leg; the procedure would take place one hour before the schedule execution; and only local anesthesia would be used" because he had compromised veins. *Id.* at 641.

107. *Id.* at 646.

108. *Id.* at 644.

109. Hill v. McDonough, 547 U.S. 573, 580 (2006).

110. *Id.* at 576.

111. *Id.*

112. *Id.* at 580.

113. *Id.* at 573–74.

114. *See e.g.*, Jackson v. Taylor, No. Civ. 06-300-SLR, 2006 WL 1237044 at *1 (D. Del. May 9, 2006) ("[I]t was agreed that the Supreme Court's decision in *Hill* will have a dispositive effect on plaintiff's claims and that staying this litigation is the most prudent course of action."); Morales v. Tilton, 465 F. Supp. 2d 972, 979–80, 983–84 (N.D. Cal. 2006) (ordering the State to address deficiencies in its execution procedure, such as unreliable and inconsistent screening of the execution team; a lack of supervision, oversight, and training; poor record-keeping; improper mixing and preparation of one of the drugs to be administered; and poor working conditions for the execution team); Harbison v. Little, 511 F. Supp. 2d 872, 903 (M.D. Tenn. 2007), *vacated*, 571 F.3d 531 (6th Cir. 2009) (holding that Tennessee's three-drug protocol did have unnecessary and inherent risks of severe pain, and the State was deliberately

2. The *Baze-Glossip* Test

In 2008, a group of inmates in Kentucky unsuccessfully challenged the lethal injection execution method in *Baze v. Rees*.[115] The inmates claimed that the risk the lethal injection procedure will not be properly administered violated the Eighth Amendment.[116] The Court held the possibility that an execution method may result in pain does not establish an "objectively intolerable risk of harm" that amounts to cruel and unusual harm.[117] The Court further concluded that proposing a "slightly or marginally safer alternative" is not sufficient under the Eighth Amendment to challenge a state's method of execution.[118] Rather, there must be a substantial risk of serious pain and "the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain."[119]

In 2015, the Supreme Court added to the *Baze* decision in *Glossip v. Gross.* There, a group of Oklahoma inmates on death row challenged the use of midazolam in Oklahoma's execution protocol as a violation of the Eighth Amendment for its risk of failing to desensitize the inmates from pain.[120] The Supreme Court found *Baze* to be controlling and set out two requirements to successfully enjoin a state's execution method.[121] First, a petitioner must establish that he or she can show a likelihood that the state's lethal injection protocol creates a proven risk of severe pain.[122] Second, a petitioner must show that the alleged risk is substantial compared to available known alternatives.[123] The Court ultimately determined that the inmates in *Glossip* failed to sufficiently show that midazolam created a substantial risk of harm as compared to any known and available alternative.[124] The effects of *Baze* and *Glossip* on death penalty jurisprudence were great. When considered

indifferent by rejecting a proposed one-drug protocol); Taylor v. Crawford, 487 F.3d 1072, 1080, 1083 (8th Cir. 2007) (holding that an "unnecessary risk of causing wanton infliction of pain" is a sufficient basis to challenge an execution protocol, but determining that the State's practice of not requiring anesthesiologist involvement was not a violation of the Eighth Amendment). Missouri's execution protocol was challenged again in 2009 by eight inmates who argued that the State's previously employing unqualified and incompetent execution team members violated the Eighth Amendment. The Eighth Circuit found that to be an insufficient basis for an Eighth Amendment execution protocol challenge. *See* Clemons v. Crawford, 585 F.3d 1119 (8th Cir. 2009).

115. Baze v. Rees, 553 U.S. 35, 41 (2008).

116. *Id.* at 49.

117. *Id.* at 50.

118. *Id.* at 51.

119. *Id.* at 52.

120. Glossip v. Gross, 135 S. Ct. 2726, 2731 (2015).

121. *Id.* at 2737.

122. *Id.*

123. *Id.*

124. *Id.* at 2737–38.

together, the two cases formed a test for challenges to execution methods: the petitioner must show that there is a substantial likelihood the challenged method creates a risk of severe pain and that there is a feasible and readily available alternative method. The Supreme Court used the *Baze-Glossip* test to analyze Bucklew's claim.[125]

IV. INSTANT DECISION

The United States Supreme Court rejected Bucklew's as-applied challenge for a variety of reasons. This Section reviews the majority's holding and reasoning. Next, it briefly looks at the concurring opinions, before finally examining the dissenting opinions.

A. Majority Opinion

The Supreme Court upheld Bucklew's execution method in a five-to-four decision with two concurring opinions and two dissenting opinions.[126] The majority opinion, authored by Justice Gorsuch, began by addressing Bucklew's argument that the *Baze-Glossip* test should only apply to facial challenges and not to as-applied challenges such as his.[127] The Court first noted that the Constitution permits – but does not require – states to authorize capital punishment, and the Supreme Court may only prohibit execution methods that are cruel and unusual.[128] The majority went on to detail the history of the Eighth Amendment and how it has been applied to capital punishment.[129] The Court paid particular attention to the historical meaning of "cruel and unusual" punishment and noted how its original intention was to prevent execution methods akin to torture.[130] The majority also mentioned how the predominant execution method at the time of the Eighth Amendment's adoption was hanging, which was considered more humane than other punishments yet "was no guarantee of a quick and painless death."[131] The Court reiterated that the Eighth Amendment only bans punishment that superimposes additional elements of terror or pain and emphasized that no challenged execution method has ever been found by the Court to be cruel and unusual.[132]

Bucklew argued that the *Baze-Glossip* test only applied to facial challenges because "there is no risk that an as-applied claim will function as a back-door attack on the constitutionality of the death penalty."[133] The Court

125. Bucklew v. Precythe, 139 S. Ct. 1112, 1128 (2019).
126. *See id.*
127. *Id.* at 1122.
128. *Id.* at 1122–23.
129. *Id.* at 1123–24.
130. *Id.*
131. *Id.* at 1124.
132. *Id.*; Glossip v. Gross, 135 S. Ct. 2726, 2731 (2015).
133. Brief for Petitioner at 3, Bucklew v. Precythe, 139 S. Ct. 1112 (2019).

denied Bucklew's argument because *Glossip* expressly stated that identifying an available alternative is required for all Eighth Amendment execution method challenges.[134] The majority went on to simplify the difference between facial and as-applied challenges as being a mere difference in breadth of people affected and remedies available.[135] The majority reasoned that to determine whether a method of execution is unconstitutionally painful necessarily requires a comparison to an alternative method.[136] The Court denied Bucklew's argument on a second ground. Specifically, the majority found that his reasoning was inconsistent with the original meaning of the Eighth Amendment, which the Court stated was to prevent the infliction of more pain than is necessary to carry out an execution.[137] The majority also took issue with the line-drawing problem present in Bucklew's suggestion that challenges like his would not lead to a categorical ban on certain punishments and questioned whether an inmate with a common – but not universal – disorder challenging an execution method would be considered facial or as-applied.[138] Finally, the Court downplayed the burden Bucklew must carry to present an alternative execution method because he was not limited only to methods currently authorized by Missouri.[139] The majority maintained, however, that the State could present a legitimate reason why it would not decline the proposed alternative.[140]

After finding that *Baze* and *Glossip* apply to all lethal injection challenges, the Court next turned to whether Bucklew's claim would satisfy the *Baze-Glossip* test.[141] The alternative method Bucklew proposed – nitrogen hypoxia – was rejected by the Court for two reasons.[142] First, Bucklew was not specific enough in describing the alternative method for it to be readily implemented.[143] Second, the State had a legitimate reason for declining to switch from its current method because the proposed alternative had never been carried out and Missouri would be the first.[144] The Court also determined that Bucklew did not show his alternative method would significantly reduce a substantial risk of severe pain because the risks he alleged were too speculative and not supported by evidence.[145] The Court

134. *Bucklew*, 139 S. Ct. at 1126.

135. *Id.* at 1127–28.

136. *Id.* at 1126.

137. *Id.*

138. *Id.* at 1128.

139. *Id.*

140. *Id.* The bar for presenting a reason not to adopt the proposed alternative method is low. *See* Baze v. Rees, 553 U.S. 35, 57 (2008) (a state has a legitimate interest in using a method that "preserv[es] the dignity of the procedure").

141. *Bucklew*, 139 S. Ct. at 1129. Because summary judgment was granted below, the decision hinged on whether Bucklew presented a genuine issue of material fact.

142. *Id.* at 1129–30.

143. *Id.* at 1129.

144. *Id.* at 1129–30.

145. *Id.* at 1130–33.

finally concluded that Bucklew managed to extend his case longer than necessary to the detriment of the people of Missouri and Bucklew's victims.[146]

In his concurrence, Justice Thomas argued that the Eighth Amendment was only designed to prevent the intentional infliction of pain, and therefore, Bucklew's claim failed because the pain alleged would not be inflicted intentionally.[147] In a separate concurrence, Justice Kavanaugh agreed with the majority but emphasized that the proposed alternative method of execution does not have to be authorized under current state law.[148]

B. Dissenting Opinions

Justice Breyer, writing for the dissent and joined by Justices Ginsburg, Sotomayor, and Kagan, concluded Bucklew's proposed execution was a violation of the Eighth Amendment.[149] The dissent determined that summary judgment should not have been granted to the State because Bucklew provided expert testimony, which established a genuine issue of material fact that should have gone to trial.[150] Justice Breyer disagreed with the application of *Glossip* to this case, determining that its alternative method requirement should not apply to as-applied challenges such as Bucklew's.[151] The dissent also disagreed with the majority's view that nitrogen hypoxia would be difficult to implement, citing reports in evidence saying it would be "simple to administer."[152] The dissent further argued that *Glossip* did not require evidence on "essential questions," such as when and how the nitrogen should be administered.[153] Finally, the dissent agreed with the majority that the time between conviction and execution was "excessive" but disagreed with the majority's solution of "curtailing constitutional guarantees afforded to prisoners like Bucklew who have been sentenced to death."[154]

Justice Sotomayor wrote a separate dissenting opinion to emphasize this point, stating "[t]here are higher values than ensuring that executions run on time. If a death sentence or the manner in which it is carried out violates the Constitution, that stain can never come out. Our jurisprudence must remain one of vigilance and care, not one of dismissiveness."[155]

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146. *Id.* at 1134.

147. *Id.* at 1135 (Thomas, J., concurring).

148. *Id.* at 1135–36 (Kavanaugh, J., concurring).

149. *Id.* at 1136 (Breyer, J., dissenting) (first, Justice Breyer argued that Bucklew established a genuine issue of material fact as to whether he would face extreme suffering; second, he considered whether a prisoner with a rare medical condition must identify an alternative method; finally, he addressed the issue of minimizing delays in executing death row offenders).

150. *Id.* at 1137–39.

151. *Id.* at 1140.

152. *Id.* at 1142–43.

153. *Id.* at 1143.

154. *Id.* at 1144.

155. *Id.* at 1148 (Sotomayor, J., dissenting).

V. COMMENT

There are several problems with the outcome of this case that raise a variety of concerns. This Section focuses on both the problems with the Court's holding and reasoning as well as its broader implications. First, this Section addresses and critiques the majority and concurring opinions. Next, it outlines the practical implications that result. Finally, it highlights theoretical and moral concerns that arise from this decision.

A. The Court's Incorrect Application of Legal Standards and Policies

The majority opinion answered two questions and addressed an additional policy issue. The first question was whether inmates making as-applied challenges to execution methods should be held to the same standard as those making facial challenges.[156] The second question was whether Bucklew raised a genuine issue of material fact regarding whether Missouri's lethal injection protocol would cause a substantial risk of severe harm, and if so, whether there was an available known alternative method of execution.[157] The majority implied the importance of timeliness in carrying out executions and used that as an underlying policy argument throughout the opinion.[158]

The majority maintained that *Glossip* is directly controlling in this case because *Glossip* stated in clear terms that an available alternative method is "require[d] of *all* Eighth Amendment method-of-execution claims" challenging unconstitutional pain.[159] This reasoning is flawed, however, because the circumstances in *Glossip* were different than those present here. The inmates in *Glossip* were challenging the entire execution method employed by the state of Oklahoma, whereas Bucklew argued that it would be unconstitutional when applied to him alone.[160] The distinction is important when considering the policy behind *Glossip* and how that policy does not apply in this case.[161] The Court in *Glossip* was concerned with inmates using Section 1983 execution method challenges as a backdoor means of abolishing capital punishment altogether.[162] While a valid concern under the circumstances of *Glossip*, that concern was not relevant to Bucklew's case. Bucklew individually getting a different execution method would not invalidate Missouri's execution method nor would it prevent other death row inmates from being executed under Missouri's current protocol.[163]

156. *Id.* at 1122.
157. *Id.* at 1129.
158. *See id.*
159. *Id.* at 1124 (quoting Glossip v. Gross, 135 S. Ct. 2726, 2731 (2015)).
160. *Glossip*, 135 S. Ct. at 2731; *Bucklew*, 139 S. Ct. at 1118.
161. *Bucklew*, 139 S. Ct. at 1140 (Breyer, J., dissenting).
162. *Glossip*, 135 S. Ct. at 2732–33.
163. *Bucklew*, 139 S. Ct. at 1140 (Breyer, J., dissenting).

Like *Baze*, the Court in *Glossip* was also concerned with giving deference to state legislatures and their chosen execution methods.[164] Again, while a valid consideration in those cases, that concern is not applicable here because the Missouri legislature could not predict which methods might be unconstitutionally painful for individuals with rare medical conditions.[165] Even when accepting *Glossip* as controlling, there are attributes of the *Glossip* opinion that raise concern with the Court's precedent.[166] In the 136 years of execution method challenges between *Wilkerson v. Utah* and *Glossip*, no decision imposed a requirement that an inmate plead an alternative method of execution until *Glossip*.[167] On the contrary, *Hill v. McDonough* expressly rejected the notion.[168] The majority in *Glossip* asserted that *Hill* was not controlling and dismissed it as a procedural case rather than a substantive one – but the issue at hand in Bucklew's case was both procedural and substantive.[169] The majority also erred when it contrasted lethal injection with the barbarous and torturous execution methods employed in the past, which it alleged the Eighth Amendment is meant to prohibit.[170] Although lethal injection may generally not be considered torturous, Bucklew argued that, when applied to him, there was a substantial risk that it would be excruciating and have the effects of torture.[171] The majority essentially responded that the State could execute him with lethal injection anyway.[172]

Even accepting the majority's holding that *Baze* and *Glossip* apply, Bucklew clearly raised a triable issue of fact as to whether there was an available alternative method. Because the posture below was a grant of summary judgment to the State, the applicable standard for the State to prevail on appeal is whether "there is no genuine dispute as to any material fact."[173] The record, including "depositions, documents, [and] affidavits or declarations" must be viewed as a whole and in the light most favorable to the non-moving party.[174] Bucklew presented a plethora of evidence via expert

164. *See Glossip*, 135 S. Ct. at 2737; Baze v. Rees, 553 U.S. 35, 51 (2008).

165. *Bucklew*, 139 S. Ct. at 1141 (Breyer, J., dissenting).

166. *Id.*

167. *Id. Wilkerson v. Utah* is the oldest method-of-execution case that went to the Supreme Court. *See* Wilkerson v. Utah, 99 U.S. 130 (1879).

168. Hill v. McDonough, 547 U.S. 573, 582 (2006) ("[t]he United States as *amicus curiae* contends that a capital litigant's § 1983 action can proceed if, as in *Nelson*, . . . the prisoner identifies an alternative, authorized method of execution. . . . [E]ven if the United States' proposed limitation were likely to be effective we could not accept it.").

169. *Glossip*, 135 S. Ct. at 2738–39.

170. *Bucklew*, 139 S. Ct. at 1122–24. The Eighth Amendment is interpreted under an "evolving standards of decency" test, changing the definition of "cruel and unusual" over time to reflect societal norms and expectations. Merrill, *supra* note 92, at 177.

171. Brief for Petitioner at 10–13, Bucklew v. Precythe, 139 S. Ct. 1112 (2019).

172. *Bucklew*, 139 S. Ct. at 1133.

173. Fed. R. Civ. P. 56(a).

174. *Id.*; Tolan v. Cotton, 572 U.S. 650, 651 (2014).

testimony showing a high likelihood he would experience suffocation and excruciating pain for up to several minutes.[175] The district court refused to grant summary judgment to the State on the issue, holding that the dispute between Bucklew's expert and the State's expert created a factual issue not resolvable on summary judgment.[176] Bucklew's expert also "strongly disagree[d] with [the State expert's] repeated claim that the pentobarbital injection would result in 'rapid unconsciousness.'"[177]

The majority essentially ignored all of Bucklew's expert testimony and concluded that there was no evidence he would experience pain for more than twenty to thirty seconds after the injection.[178] Whether the expert would ultimately be correct was a question of fact and therefore not appropriate to consider at the summary judgment stage. Bucklew also showed a genuine issue of fact as to whether there was an available alternative method. He identified nitrogen hypoxia – a method permitted by Missouri law[179] – as an alternative.[180] Bucklew introduced studies from states that specifically authorize nitrogen hypoxia as an alternative method showing that it is quick, less likely to be painful, and easy to implement.[181] The majority again ignored evidence introduced by Bucklew and concluded that "nothing on the record" showed lethal injection would take longer than nitrogen hypoxia to effectuate and Bucklew's evidence did not show that it would be easy to implement.[182] Had the Court correctly adhered to the summary judgment standard, Bucklew would have had an opportunity to move forward with his case.

The majority also mistakenly focused on the timeliness of Bucklew's execution as a policy argument. Bucklew was sentenced to death more than twenty years ago.[183] However, Bucklew's case is not an anomaly; the average time between sentencing and execution has risen from just over six years in 1984 to more than twenty years in 2017.[184] There are important reasons to be concerned with the increasing length of time between sentencing and execution. It "frustrates the interests of the State and of surviving victims, who have 'an important interest' in seeing justice done quickly."[185] Lengthy

175. *Bucklew*, 139 S. Ct. at 1138 (Breyer, J., dissenting).

176. *Id.*

177. *Id.*

178. *Id.* at 1133. "[A]ny conscious sensation of suffocation, asphyxiation, burning, or other extreme pain that remained present for as little as a few seconds" constitutes unnecessary pain. Brenton Schick, *Lethal Injection, Cruel and Unusual? Establishing A Demonstrated Risk of Severe Pain:* Morales v. Cate*, 623 F.3d 828 (9th Cir. 2010)*, 38 W. ST. U. L. REV. 173, 182 (2011).

179. MO. REV. STAT. § 546.720 (2018).

180. Brief for Petitioner at 15–16, Bucklew v. Precythe, 139 S. Ct. 1112 (2019).

181. *Id.*

182. *Bucklew*, 139 S. Ct. at 1132, 1129.

183. State v. Bucklew, 973 S.W.2d 83, 86 (Mo. 1998) (en banc).

184. *Time on Death Row*, DEATH PENALTY INFORMATION CENTER, https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row [perma.cc/P87M-7XL6].

185. Hill v. McDonough, 547 U.S. 573, 584 (2006).

stays are costly to the State and may also intensify the suffering accompanying the execution itself by increasing time in solitary confinement.[186] Delays also undermine the deterrent and retributive effects of capital punishment.[187] These concerns, however, must not outweigh the constitutional protections that are guaranteed to death row inmates.[188] In 2018, a Gallup poll showed that less than half of Americans think the death penalty is applied fairly.[189] With that little trust in the fairness of capital punishment procedures, the law must "ensur[e] that we accurately identify, through procedurally fair methods, those who may lawfully be put to death."[190] We simply cannot have it both ways; either we care about constitutional safeguards or we care about speedy outcomes. When dealing with something as irreversible as taking lives, we must prioritize constitutional protections over timeliness.

B. Practical Implications

The majority faulted Bucklew for not outlining his proposed alternative method with painstaking detail and particularity.[191] For example, the Court criticized him for failing to specify the required concentration of nitrogen hypoxia, the vessel needed to administer the drug, and how to protect the execution team from possible gas leaks.[192] There are two problems with this reasoning. First, *Glossip* did not impose any requirement that an inmate pleading an alternative method must give guidance down to the last detail.[193] The majority devised these requirements *sua sponte* and did not give Bucklew any notice that he would be required to plead such details. Second, these requirements effectively make it impossible for any inmate's as-applied execution method challenge to prevail.[194] This creates a serious line-drawing issue because the Court could find fault with claims from future petitioners for not including any new required detail the Court decides is relevant and necessary.

This also presents an issue of burden shifting. Requiring a death row inmate to propose an alternative method of his own execution when the State has better resources to make such determinations is facially unfair. However, accepting that an inmate must plead an alternative method because a state cannot predict the particularized needs of individuals, the feasible and readily implemented standard should be relaxed. When weighing the effects on both parties, the State is better equipped to prove the dignity of an execution

186. Glossip v. Gross, 135 S. Ct. 2764–67 (2015).

187. *Id.* at 2772 (Breyer, J., dissenting).

188. *Bucklew*, 139 S. Ct. at 1145 (Breyer, J., dissenting).

189. *Death Penalty*, GALLUP, https://news.gallup.com/poll/1606/death-penalty.aspx.

190. *Bucklew*, 139 S. Ct. at 1145 (Breyer, J., dissenting).

191. *Id.* at 1129.

192. *Id.*

193. *Id.* at 1143 (Breyer, J., dissenting).

194. *Id.*

method than an inmate is to prove a potentially a gruesome death at the hands of the government.

Not only is it absurd to expect so much from an inmate, it is also unfair because most inmates challenging their execution method lack the resources to adequately prove the alternative. Inmates in this position have no way of knowing this information and obtaining it is surely difficult. Even if they could research and provide some detail, the inmate likely is not a medical doctor or a safety expert. Further, defendants probably do not have the money to hire experts to prepare all of this information. Most importantly, is it not cruel and unusual in itself to force an inmate to research, choose, and present their preferred method of death?

C. Theoretical Concerns

Justice Breyer perfectly encapsulated the biggest problem with the majority opinion when he wrote:

> [T]his case adds to the mounting evidence that we can either have a death penalty that avoids excessive delays and "arguably serves legitimate penological purposes," or we can have a death penalty that "seeks reliability and fairness in the death penalty's application" and avoids the infliction of cruel and unusual punishments. . . . It may well be that we "cannot have both."[195]

The reasoning given by the majority can be rationalized within the confines of modern death penalty jurisprudence. However, the fact that there is even a debate about something as repugnant as whether an individual must prove a less gruesome way for himself to die should give pause to any reasonable person.

Capital punishment has evolved to become something clinical and unseen. For most of this country's history, the death penalty was a gruesome public spectacle and typically involved public hangings that drew large crowds.[196] Now, state-sanctioned executions are done in small, clinical rooms with the assistance of medical personnel, and are not seen by many people.[197] In fact, the very reason we have lethal injection is because of the growing discomfort that resulted from both needless suffering from less

195. *Id.* at 1145 (quoting Glossip v. Gross, 135 S. Ct. 2726, 2772 (2015) (Breyer, J., dissenting)).

196. Sech, *supra* note 69, at 391.

197. 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, 1104 (2003). When executions moved away from the public view to take place in prisons, many states enacted statutes dictating who could attend, but a jurisdictional split has emerged regarding whether there is a First Amendment right to witness executions. Shira Poliak, *The Logic of Experience: The Role of History in Recognizing Public Rights of Access Under the First Amendment*, 167 U. PENN. L. REV. 1561, 1580 (2019).

technologically advanced execution methods, such as hanging and electrocution, and from the prospect of executing an innocent person.[198] The difference between executions in the past and executions now is that we are able to argue about them in the abstract; most people are not affected by capital punishment, do not watch it take place, and often do not even know it is happening. Execution methods are easy to discuss when we are not forced to experience them. Overlooking whether a method is actually cruel is easy when we do not have to observe the execution.

Capital punishment is withering away in part due to squeamishness felt toward it by Americans.[199] This raises the question, why allow capital punishment at all if we are not comfortable with the reality of executions? Most democratic countries have abolished the death penalty and moved forward, leaving us in the company of authoritarian regimes.[200] Many of the countries that have yet to abolish capital punishment still allow public hangings, which at least speaks to one of the penological purposes of the death penalty – deterrence.[201] In the United States, with executions done in secrecy, it is hard to see which – if any – penological purposes are still served.

Another problem with the death penalty is that cruel and unusual punishment is a subjective standard.[202] A major attribute of the Eighth Amendment is that it is not interpreted as a static concept but rather as a standard that evolves and changes over time to match what society accepts as decent.[203] This concept has allowed the Supreme Court to maintain a vague standard and alter it as needed to fit within the zeitgeist as it changes.[204] Under this method of interpretation, the Court has been able to build upon standards of decency to become more restrictive over time.[205] Because of its inherent subjectivism, relying on the Eighth Amendment as a constitutional protection for inmates challenging their methods of execution is lackluster.

More concerning, however, is the Court's seeming departure from the evolving standards of decency analysis and its revival of applying constitutional originalism[206] to Eighth Amendment execution method challenges. The Court has applied the evolving standards of decency test

198. Mortenson, *supra* note 197, at 1102–03.

199. Richard Cohen, *Why Haven't We Abolished the Death Penalty and Moved On?*, THE WASHINGTON POST, (Nov. 8, 2017), https://www.washingtonpost.com/blogs/post-partisan/wp/2017/11/08/why-havent-we-abolished-the-death-penalty-and-moved-on/ [perma.cc/2PD8-AGFY].

200. *Death Penalty in 2018: Facts and Figures*, AMNESTY INT'L, (April 10, 2019), https://www.amnesty.org/en/latest/news/2019/04/death-penalty-facts-and-figures-2018/ [perma.cc/NQ4S-DLDV].

201. *Id.*

202. Fisher, *supra* note 68, at 42.

203. Merrill, *supra* note 92, at 77.

204. *Id.*

205. *Id.*

206. Originalism is a method of interpretation that requires the reader to analyze historical legal documents through the lens of what the writer(s) meant it to mean at the time. *Originalism*, BLACK'S LAW DICTIONARY (11th ed. 2019).

since 1958, when it determined that "the words of the Amendment are not price, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[207] The majority in *Bucklew* seemed to make an originalist argument for capital punishment when it noted that "death was 'the standard penalty for all serious crimes' at the time of the founding"[208] and that "methods of execution like these [dragging the prisoner to the place of execution, disemboweling, quartering, public dissection, and burning alive] readily qualified as 'cruel and unusual,' as a reader at the time of the Eighth Amendment's adoption would have understood those words."[209] While the evolving standards of decency test is subjective in nature, it is a better alternative than determining whether a punishment was cruel and unusual more than 200 years ago. Technology has improved since the inception of the Eighth Amendment, allowing for more humane options. Further, popular beliefs about capital punishment have evolved and people are no longer comfortable with gruesome methods of execution.

Execution by a firing squad or by guillotine would likely pass the *Baze-Glossip* test as alternatives that would substantially reduce the risk of severe pain. Courts and legislatures, however, likely would not consider allowing something like the guillotine as an execution method because its use is reminiscent of a darker time in human history.[210] Despite its efficiency, the idea of using a guillotine to conduct executions would probably horrify most people.[211] "The massive, razor-sharp blade coming down, the sound of the impact, and the bloody end create a nightmarish mental picture. Contrast this with the sterile, cool room, the needle, and the seemingly serene outcome that is the expected outcome of lethal injection."[212] The comparison between the methods of execution suggests that what is cruel and unusual is in the eye of the beholder.[213] If the death penalty is constitutional, then we should at least recognize it for what it is and embrace quicker, less painful methods of execution that are much less likely to be botched and also happen to be more gruesome. If we refuse to allow such shocking execution methods because we cannot face the grisly reality that is capital punishment, then maybe we have no business imposing it at all.

VI. CONCLUSION

Since capital punishment was reinstituted in 1976, courts have made it more and more difficult for inmates to successfully challenge their execution

207. Trop v. Dulles, 356 U.S. 86, 100–01 (1958).

208. Bucklew v. Precythe, 139 S. Ct. 1112, 1122 (2019) (quoting S. Banner, *The Death Penalty: An American History* 23 (2002)).

209. *Id.* at 1123.

210. Fisher, *supra* note 68, at 42.

211. *Id.*

212. *Id.*

213. *Id.*

method, which is almost always lethal injection. The outcome in this case did nothing to relieve this burden, and in fact, made it more difficult by holding that the *Baze-Glossip* test – requiring a showing that a challenged execution method is substantially likely to result in severe pain and that a known and readily implemented alternative is available – applies to all execution method claims, including as-applied challenges. Applying this test, the Court held that Bucklew did not sufficiently show that he would face a substantial risk of severe pain under Missouri's execution method or that his proposed alternative – nitrogen hypoxia – would be readily implemented or reduce his risk of pain.

Bucklew v. Precythe presents a variety of practical implications and theoretical concerns. The standard has now been raised so high that it will be nearly insurmountable for future petitioners to successfully challenge their execution methods, whether facially or as applied. In faulting Bucklew for not pleading his alternative method with painstaking attention to detail, the Court created a line-drawing problem that will allow courts to move the goalpost if they are at all in disagreement with a petitioner's proposed alternative method. This case finally raises concerns about the purpose of capital punishment itself. When stepping back to see the big picture of the issue, the mere fact that there is a debate over whether a person must show an easier way for him to die at the hands of the government is alarming and raises the question of why we still have capital punishment. The decision also leads one to ask whether capital punishment serves any legitimate penological purposes anymore. Russell Bucklew should have had the opportunity to litigate his case at trial where a finder of fact could have determined whether he successfully showed that Missouri's execution method, as applied to him, created a substantial risk of severe pain and whether his proposed alternative would be readily implemented. Instead, he was executed by the state of Missouri on October 1, 2019.[214]

214. Jim Salter, *Missouri Executes Killer Despite Concern About Painful Death*, AP NEWS (Oct. 1, 2019), https://www.apnews.com/612f55aada904cd4832f799996dde6d3 [perma.cc/U3YW-X57S].