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"Only to Have a Say in the Way He Dies": Bodily Autonomy and Methods of Execution

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Capital punishment is one of the most significant intrusions into a person's bodily autonomy; the state takes a person's life. Even though the state has stripped a person on death row of much of their autonomy and intends to kill them, removing all autonomy, a person sentenced to death may, in some circumstances, choose how they will die. While most states rely on a single method of execution, some states permit a condemned person to choose among two or more methods of execution. Constitutional challenges to methods of execution requires the challenger to demonstrate a substantial risk of severe pain that can be alleviated by an alternative method of execution.

This Article explores the contradictions of bodily autonomy in executions. Choosing among method of executions is an illusory exercise of bodily autonomy. No matter the method, it is still a choice among deaths, conflicting with the crucial bodily autonomy interest of living. Statutes or precedent that permit a choice among methods of execution produce an illusion of autonomy, but ultimately serve state interests and strengthen the institution of capital punishment. Yet sometimes a choice among methods of execution or a choice about how a person dies reflect genuine exercises of bodily autonomy interests, such as avoiding pain, dignity, preserving bodily integrity, or sending expressive messages. These actions deserve recognition as exercises of bodily autonomy that may temporarily break through the grant of illusory autonomy. This Article identifies exercises of bodily autonomy in executions and analyzes some of the ways legislatures, courts, and corrections agencies render these choices illusory.

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I. INTRODUCTION

On January 27, 2022, the state of Alabama killed[1] Matthew Reeves by lethal injection.[2] In 2018, Alabama had added nitrogen hypoxia as a method of execution.[3] Reeves, like other people on death row in Alabama who had been sentenced to death before the Act's effective date, had one opportunity to elect nitrogen hypoxia instead of lethal injection.[4] Reeves received an election form, but did not return it.[5] Almost two years before Reeves's execution date was set, Reeves sued, alleging that, because he suffered from cognitive limitations, he had not been able to read and understand the election form by himself.[6] Although the district court issued a preliminary injunction barring the state from execution Reeves by lethal injection, which the Eleventh Circuit affirmed,[7] five Justices on the Supreme Court vacated

1. I use the word "kill" deliberately in this Article and in my other scholarship. Execution, though technically accurate, is a more sanitized term than "kill." Regardless of the secrecy, attempts to sanitize, or minimize the violence of capital punishment, it is still killing and discussions of capital punishment should acknowledge that. *See* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1622 (1986).

2. Jay Reeves, *Man executed for 1996 killing after Supreme Court clears way*, AP (Jan. 28, 2022), https://apnews.com/article/us-supreme-court-health-alabama-executions-b9b6c18d2d0f1833329d09091998b14a.

3. *See* Reeves v. Comm'r, Ala. Dep't of Corr., 23 F.4th 1308, 1314 (11th Cir. 2022), *injunction vacated*, Hamm v. Reeves, 142 S. Ct. 743 (S. Ct. Jan. 27, 2022).

4. *See id.* ("Inmates like Mr. Reeves, who were sentenced to death prior to the Act's effective date, had until June 30, 2018, to elect nitrogen hypoxia in writing."); *see infra* notes 35–39 and accompanying text.

5. *Id.*

6. *Id.*

7. Hamm v. Reeves, 142 S. Ct. 743, 743 (2022) (Kagan, J., dissenting from decision to vacate injunction) (observing that "[f]our judges on two courts have decided—after

the injunction without explanation.[8] The Court's decision cleared the way for Alabama to "consign[] Reeves to a method of execution he would not have chosen if properly informed of the alternatives."[9]

A state's decision to end someone's life requires someone to make a decision about how the state will take a life. Some state statutes may dictate one particular method, such as lethal injection.[10] Others contain multiple methods of execution that a condemned person may choose from.[11] Litigation under 42 U.S.C. § 1983 challenging a state's method of execution also requires a choice about how someone will die.[12] Choices about a method of execution illustrate one of the many contradictions of capital punishment. The state has already stripped a person on death row of much of their autonomy by incarcerating them.[13] Execution fully terminates a person's bodily autonomy, yet a person sentenced to death may still wield some autonomy in choosing the method of their death or other details of their death.

Making a choice about a method of execution is, arguably, an illusory exercise of bodily autonomy. A condemned person[14] may choose among

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extensive record development, briefing, and argument—that Matthew Reeves's execution should not proceed as scheduled tonight").

8. *Id.*

9. *Id.*

10. *See infra* Part II.A.

11. *See infra* Part II.B.

12. *See* Baze v. Rees, 553 U.S. 35, 52 (2008) (plurality opinion) (identifying the Court's test for what must be demonstrated to succeed on an Eighth Amendment method-of-execution claim; the alternative presented by a prisoner must effectively address a "substantial risk of serious of harm," must be feasible, readily implemented and significantly reduce a substantial risk of severe pain); Glossip v. Gross, 576 U.S. 863, 877 (2015) (confirming the *Baze* test as the controlling standard in challenging methods-of-execution); Bucklew v. Precythe, 139 S. Ct. 1112, 1129 (2019) (confirming that the *Baze-Glossip* test is the test that must be applied to all method-of-execution challenges).

13. *See* Kathleen L. Johnson, *The Death Row Right to Die: Suicide or Intimate Decision*, 54 S. CAL. L. REV. 575, 602 (1981) (stating that procedures like automatic appeal statutes and judicial policies regarding next friend standing in capital cases favor the state's goal to the exclusion of a prisoner's right to individual autonomy); *see also* Martin R. Gardner, *Executions and Indignities-An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment*, 39 OHIO ST. L. REV. 96, 110 (1978) (noting that punishment is considered cruel under the Eighth Amendment when it unduly restricts the offender's autonomy, unnecessarily invades his privacy, produces excessive mutilation of his body, or produces unnecessary loss of self-respect).

14. I typically use the pronoun "he" throughout this Article because the overwhelming majority of people on death rows across the United States are male. The Death Penalty Information Center reports that, as of April 2021, there were 2,508 people on death row across the United States. *See Death Row Overview*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/death-row/overview (last visited Nov. 22, 2021). That number has changed—some states have commuted, resentenced, or executed people since April 2021. *See id.* at Execution Database, https://deathpenaltyinfo.org/executions/execution-database?fiters%5Byear%5D=2021 (filtering for executions in 2021); *Pervis Payne's death sentence removed, DA says*, FOX13 MEMPHIS (Nov. 18, 2021, 4:01pm CST), https://www.fox13memphis.com/news/local/pervis-paynes-death-penalty-sentence-removed-da-says

alternatives the state uses to put them to death or seek another way to be put to death that is presumably less painful than the state's chosen method. No matter the choice, the state will still kill him. The illusion of autonomy extends beyond the finality of that choice. Statutes that provide a choice among methods of execution offer an illusion of autonomy, but ultimately that choice serves state interests and reinforces the institution of capital punishment.[15]

Yet there are circumstances in which a choice among methods of execution, or choices about one's execution reflect genuine exercises of bodily autonomy. Some people have exercised their choices to serve bodily autonomy interests, including dignity, avoiding pain, signaling an opposition to capital punishment,[16] and sending expressive messages or preserving their dignity, such as a request to have a spiritual advisor in the execution chamber who may pray or offer physical contact.[17] These actions deserve attention as exercises of personal autonomy that may temporarily break through the state's illusions.

This Article explores the contradictions of bodily autonomy in executions, illusory choices about autonomy in methods of execution, and when those choices may be meaningful. Scholarship about autonomy in capital

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/KFI634ASOFHUJCWAJES5OZ2XTI/. Only 51 of the over 2,000 people on death row are women. *See Women*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/death-row/women (last visited Nov. 22, 2021). For further discussion of the gender gap in capital punishment, *see* Steven F. Shatz & Naomi R. Shatz, *Chivalry is Not Dead: Murder, Gender, and the Death Penalty*, 27 BERKELEY J. GENDER, L. & JUST. 64 (2012).

15. *See infra* Part IV.A.

16. *See Firing Squad Executes Killer*, N.Y. TIMES (Jan. 27, 1996), https://www.nytimes.com/1996/01/27/us/firing-squad-executes-killer.html (last visited Jan 30, 2022) (explaining that John Albert Taylor, who was executed by firing squad in Utah, chose to be executed in such a manner to make a statement that the state of Utah was sanctioning murder); *see also* Kurt Streeter, *Convicted Killer Gets Wish, Is Executed at San Quentin*, L.A. TIMES (March 27, 2001, 12:00 AM), https://www.latimes.com/archives/la-xpm-2001-mar-27-mn-43258-story.html (last visited Jan 30, 2022) (noting Robert Lee Massie's desire to be executed to expose what he considered to be the unfair process of automatic appeals in California capital cases).

17. *See* ALA. CODE ANN. § 15–18–83(a) (2019) (providing both the chaplain and the inmate's spiritual advisor of choice to be present at the execution). *See also* PA. CONS. STAT. § 4305 (a)(3) (2018) (noting that an inmate may have one spiritual advisor, when requested and selected by the inmate, witness their execution); ARK. CODE. ANN. § 16–90–502 (e)(1)(F) (2018) (allowing for a spiritual advisor to be present during an execution if an inmate so chooses); WYO. STAT. ANN. § 7–13–908 (a)(iii) (listing spiritual advisors as acceptable witnesses to an execution); TEX. CODE. CRIM. PROC. ANN. art. 43.20 (confirming that the chaplains of the Department of Correction as well as the spiritual advisor of the inmate may be present during the execution). *Cf.* Murphy v. Collier, 139 S. Ct. 1475, 1476 (2019) (finding that the state of Texas may not exclude Buddhist spiritual advisors from the execution room if allowing Christian or Muslim advisors to be present). *See also* Ramirez v. Collier, 10 F.4th 561, 563 (5th. Cir. 2021) (upholding the denial of the stay of execution for John Henry Ramirez as the court did not believe Mr. Ramirez's rights under the First Amendment would be violated by the state of Texas denying him the ability to have his spiritual advisor lay hands on him during his execution), *rev'd* 142 S. Ct. 1264 (2022).

punishment has assessed the autonomy interests of people who end their appeals and "volunteer"[18] to be executed.[19] The role that a condemned person's choice among methods of execution plays in the system of capital punishment also implicates significant questions of autonomy and dignity. This Article argues that the illusions of bodily autonomy in methods of execution provide substantial benefit to the state, helping to sustain capital punishment. Courts have reinforced this illusion, by making it more difficult to challenge methods of execution.

Part II describes the choice regime surrounding methods of execution and discusses the development of method-of-execution statutes that offer a choice between multiple methods of execution. In addition to a statutorily-assigned choice, condemned people challenging a state's method of execution for violating the Eighth Amendment must also present a readily available alternative. Part III focuses on bodily autonomy, assessing the overlap between volunteering for execution, medical aid in dying, and methods of execution. It also assesses five core bodily autonomy values reflected in choices about methods of execution and describes ways that condemned people have expressed their values through decisions about their executions. Part IV addresses how legislatures, courts, and corrections agencies render bodily autonomy interests in choosing among methods of execution illusory. This Article concludes by addressing the larger problem of meaningful choice within the criminal legal system in capital punishment and life without parole.

II. CHOICES AMONG METHODS OF EXECUTION

Capital punishment is the most significant intrusion into bodily autonomy within the carceral system.[20] Despite the permanence of a life sentence, death is, unquestionably "different."[21] Incarceration limits an individual's bodily autonomy by subjecting it to the control of the state, yet an incarcerated person still retains control over some aspects of their bodily autonomy. Death, by contrast, limits *any* future exercises of bodily autonomy. As Professor Todd May explains, "Death is final. It is a stoppage without goal or

18. A "volunteer" refers to a person who is being tried for capital murder who seeks to plead guilty and receive a capital sentence or a person who has received a capital sentence and seeks to drop appeals and be executed. *See* Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 853–55 (1987).

19. *See infra* notes 23, 100–101 and accompanying text.

20. *See* Kathryn E. Miller, *The Myth of Autonomy Rights*, 43 CARDOZO L. REV. 375, 379–80 (2021) (discussing the ways in which the criminal legal system strips individuals of their autonomy).

21. *See* Furman v. Georgia, 408 U.S. 238, 286 (1972) (Brennan, J. concurring) (recognizing that death penalty cases are treated differently by all parties involved from juries to legislatures, even by criminal defendants themselves); *see also* Gregg v. Georgia, 428 U.S. 153, 188 (1976) ("While *Furman* did not hold that the infliction of the death penalty per se violates the Constitution's ban on cruel and unusual punishments, it did recognize that the penalty of death is different in kind from any other punishment imposed . . . .").

wholeness. It is inescapable and yet incalculable."[22] Death permanently disengages the autonomous self from the body.

Capital punishment scholarship has wrestled with questions relating to personal autonomy, dignity, and ethics in considering whether a person facing a death sentence can "volunteer" for execution.[23] Modern capital punishment, however, presents other questions associated with bodily autonomy, specifically decisions about particular methods of execution. Methods of execution have evolved in the United States, and include hanging, lethal gas, the electric chair, the firing squad, and lethal injection, which is currently the primary method used in most U.S. capital punishment jurisdictions.[24] The twenty-seven states that retain the death penalty[25] have designated various methods of execution that state departments of corrections implement (to varying degrees of success) through execution protocols.

Some states have authorized multiple methods of execution. Some permit a choice among authorized methods; others have methods designated as backups in the event that one method is unavailable or determined to be unconstitutional. In other words, some people on death row may have the opportunity to decide *how* they will die even if they cannot escape death. Even if a state does not have alternative methods of execution for a condemned person to choose from, an Eighth Amendment challenge to a state's method of execution requires the condemned to identify a readily available alternative.[26]

This section describes the landscape of choice in methods of execution. Section A discusses states' method-of-execution statutes and the choices

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22. TODD MAY, DEATH 35 (2009).

23. *See* Kandis Scott, *Approaches to Autonomy in Capital Punishment and Assisted Suicide, in* AUTONOMY AND THE LAW 55, 57–58 (Mortimer Sellers, ed., 2007); John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICH. L. REV. 939, 941–942 (2005); Richard C. Dieter, *Ethical Choices for Attorneys Whose Clients Elect Execution*, 3 GEO. J. LEGAL ETHICS 799, 800–803 (1990); Johnson, *supra* note 13, at 628–29; J.C. Oleson, *Swilling Hemlock: The Legal Ethics of Defending a Client Who Wishes to Volunteer for Execution*, 63 WASH. & LEE L. REV. 147 (2006); Melvin I. Urofsky, *A Right to Die: Termination of Appeal for Condemned Prisoners*, 75 J. CRIM. L. & CRIMINOLOGY 553 (1984); White, *supra* note 18, at 864–65.

24. *See* Richard C. Dieter, *Methods of Execution and Their Effect on the Use of the Death Penalty in the United States*, 35 FORDHAM URB. L. J. 789, 798 (2008) ("Since the start of 2000, ninety-eight percent of the country's executions have been carried out by lethal injection").

25. Alabama, Arizona, Arkansas, California, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wyoming, as well as the federal government and U.S. Military currently use capital punishment. *See State by State*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state (last visited Dec. 9, 2021). California, Oregon, Pennsylvania, and the federal government have a moratorium on executions. *Id.*

26. *See* Baze v. Rees, 553 U.S. 35, 61 (2008) (plurality opinion); Glossip v. Gross, 576 U.S. 867, 877 (2015); Bucklew v. Precythe, 139 S. Ct. 1112, 1125 (2019).

available within those statutes. Section B explores Eighth Amendment precedent developed from method-of-execution challenges. These pieces of the system of capital punishment do not meaningfully support autonomy—in practice, successful Eighth Amendment challenges to methods of execution are rare,[27] and choice statutes may, as I discuss in Part IV, make it more difficult to challenge certain methods of execution.

A. Choosing a Method of Execution

Offering a condemned person a choice in methods of execution is not a new practice. In 1911, for example, Nevada's legislature "rejected a bill that would have given condemned criminals the choice of drinking poison or being hanged."[28] Thus far, states have not utilized capital punishment statutes that put the responsibility for carrying out the execution directly onto the person being killed.[29] Most capital punishment states, the federal government, and the U.S. military rely on lethal injection as their primary, and in most jurisdictions only, method of execution.[30] A number of states have,

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27. *See* Dieter, *supra* note 24, at 795 (describing the atmosphere in the late 90's and early 2000's in which challenges to the constitutionality of lethal injection were unsuccessful as many courts regarded these challenges as frivolous and means by which to simply delay executions); *see also* David R. Row & Jeffrey R. Newberry, *Conceptual and Scientific Defects in the Supreme Court's "Method of Execution" Jurisprudence*, 92 YALE J. BIOLOGY & MED. 793, 793 (2019) ("[N]o method of executing prisoners has ever been deemed by the Supreme Court to constitute cruel and unusual punishment").

28. STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 202 (2002).

29. Such a proposal has been discussed in academic literature. *See* Gardner, *supra* note 13, at 110–12 (discussing the potential dignity in execution suicides). I discuss this proposal in greater detail later in this Article. *See infra* notes 180–181 and accompanying text.

30. *See* ARK. CODE ANN. §5-4-617 (2015); GA. CODE ANN. § 17-10-38 (2010); IDAHO CODE § 19-2716 (2016); IND. CODE § 35-38-6-1 (2018); KAN. STAT. ANN. § 22-4001 (2020); MONT. CODE ANN. § 46-19-103 (2021); NEB. REV. STAT. § 83-964 (2017); NEV. REV. STAT. ANN. § 176.355 (2015); N.C. GEN. STAT. § 15-188 (2014); OHIO REV. CODE ANN. § 2949.22 (2014); TEX. CODE CRIM. PROC. ANN. art. 43.14; 18 U.S.C. § 3596; WYO. STAT. § 7-13-904; U.S. Army Corrections System: Procedures for Military Executions, Army Reg. No. 190-55, at 3-2 (Jan. 17, 2006). Pennsylvania and Oregon both have execution moratoria, but their sole method of execution is lethal injection. *See* 61 PA. CONS. STAT. § 4304 (2019); OR. REV. STAT. § 137.473 (2019). New Hampshire abolished the death penalty in 2019, but the abolition was not retroactive and one person, Michael Addison, remains on death row. *See* Ethan DeWitt, *Capital Beat: After death penalty repeal, what's next for Michael Addison*, CONCORD MONITOR (June 1, 2019, 10:44pm), https://www.concordmonitor.com/Capital-Beat-After-death-penalty-repeal-what-s-next-for-Michael-Addison-25934408. New Hampshire's sole method of execution is lethal injection. *See* N.H. REV. STAT. ANN. § 630:5 (2016).
Several other states have multiple authorized methods of execution, but the condemned person does not get to choose between methods. *See* MISS. CODE ANN. § 99-19-51 (2016) (switching between lethal injection, nitrogen hypoxia, electrocution, and the firing squad only in the event that a method is held unconstitutional or is unavailable); 22 OKLA. STAT. § 1014 (2014) (same); Mo. Rev. Stat. § 546.720 (2012) (authorizing executions by lethal injection and lethal gas without indicating who selects the particular method). Louisiana executes anyone sentenced to death before September 15, 1991 by electrocution, sentences on or after that date are carried out by lethal injection. *See* LA. REV. STAT. § 15:569. Utah used to permit a

however, enacted statutes granting a condemned person a choice between two or more methods of execution.

In some states, a choice among methods of execution is only available if the condemned committed an offense or was sentenced to death on or before a certain date, usually when the legislative body adopted a new method of execution ("timed choice" statutes).[31] Four states, including California, which has a moratorium on executions, allow a condemned person to choose among the authorized methods ("full choice" statutes).[32]

States have different procedures for permitting a condemned person to exercise his choice among methods of execution. California, which gives a full choice between lethal injection and lethal gas, provides that the choice must be made "in writing" and a condemned person has to make their decision "within 10 days after the warden's service upon the inmate of an execution warrant" or the state will use lethal injection.[33] Even if a person is not executed at the designated time, their choice is not binding; they have another opportunity to pick among methods of execution.[34] By contrast, Alabama offers one opportunity to opt for electrocution or nitrogen hypoxia instead of lethal injection.[35] If a person on death row wants to die by either of those methods, he has 30 days to submit a written designation after the Alabama Supreme Court issues a certificate of judgment affirming his death

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choice between lethal injection and the firing squad, *see* Alexandra L. Klein, *When Police Volunteer to Kill*, 74 FLA. L. REV. manuscript, at 10–15 (forthcoming 2022), but has since amended method-of-execution statute to designate lethal injection as the primary method, with the firing squad serving as a backup method. *See* UTAH CODE ANN. § 77-18-113.

31. *See* ARIZ. REV. STAT. § 13-757(B) ("A defendant who is sentenced to death for an offense committed before November 23, 1992 shall choose either lethal injection or lethal gas at least twenty days before the execution date."); KY. REV. STAT. § 431.220(1)(b); TENN. CODE ANN. § 40-23-114(b) ("Any person who commits an offense prior to January 1, 1999, for which the person is sentenced to the punishment of death may elect to be executed by electrocution by signing a written waiver waiving the right to be executed by lethal injection."); S.D. CODIFIED LAWS § 23A-27A-32.1 (2015) ("Any person convicted of a capital offense or sentenced to death prior to July 1, 2007 may choose to be executed in the manner provided in § 23A-27A-32 or in the manner provided by South Dakota law at the time of the person's conviction or sentence."); States generally identify a "default" method, generally lethal injection, in the event that a condemned person refuses to choose a method. *See, e.g.*, ARIZ. REV. STAT. § 13-757; TENN. CODE ANN. § 40-23-114.

32. *See* CAL. PENAL CODE § 3604(a) (choice between lethal injection and lethal gas); FLA. STAT. § 922.105(1) (choice between lethal injection or electrocution); ALA. CODE § 15-18-82.1(a)-(b) (2020) (choice between lethal injection, electrocution, or nitrogen hypoxia); S.C. CODE ANN. § 24-3-530 (2015) (choice between lethal injection (if the drugs are available), electrocution, or the firing squad).

33. CAL. PENAL CODE § 3604(b).

34. *Id.* (c).

35. ALA. CODE § 15-18-82.1(b) (2020) ("A person convicted and sentenced to death for a capital crime at any time shall have one opportunity to elect that his or her death sentence be executed by electrocution or nitrogen hypoxia.").

sentence.[36] While Alabama permitted condemned people to make a retroactive choice, they had to choose within thirty days of the effective date of the act or waive their choice.[37] When Alabama added nitrogen hypoxia as a method of execution in 2018, any person who had received a certificate of judgment had until June 30, 2018, to elect nitrogen hypoxia instead of lethal injection.[38] The changes—as well as poor implementation by corrections staff—led to lawsuits alleging that the prison failed to assist people on death row with cognitive disabilities exercise their statutorily granted choice.[39]

A legislative decision to offer a choice among methods of execution arises from many motivations, but autonomy and dignity rationales are less significant than a desire to continue executions.[40] Some "full and timed choice" statutes were likely enacted to avoid constitutional questions about whether a change in a state's method of execution violated the prohibition of ex post facto laws[41] in the U.S. Constitution. Courts have, however, generally concluded that changes in a method of execution do not violate this prohibition if the new method is more humane because a change to a method of execution does not change the penalty: death.[42] Other choice statutes were

36. *Id.* (b)(1)–(2). A person who received a certificate of judgment before July 1, 2002 who wanted to be executed by electrocution had to make their choice and deliver it in writing to the warden within 30 days of July 1, 2002. *Id.* (b)(1).

37. *Id.* (b)(1).

38. *Id.* (b)(2); Reeves v. Comm'r, Ala. Dep't of Corr., 23 F.4th 1308, 1313 (11th Cir. 2022), *injunction vacated*, Hamm v. Reeves, No. 21A372, 2022 WL 248020 (S. Ct. Jan. 27, 2022).

39. *See Reeves*, 23 F.4th at 1314 (Reeves alleged that the Alabama Department of Corrections failed to provide him with a reasonable ADA accommodation to help him read and understand his form—something that was difficult for Reeves because he suffered from cognitive disabilities); Smith v. Comm'r, Ala. Dep't of Corr., No. 21-13581, 2021 WL 4916001, at *1 (11th Cir. Oct. 21, 2021) (allegation that Alabama Department of Corrections violated Smith's rights under the ADA by failing to provide reasonable accommodations to help him read and understand his form). *See also infra* Part IV.B.

40. *See* Deborah W. Denno, *The Firing Squad as "A Known and Available Alternative Method of Execution" Post*-Glossip, 49 U. MICH. J.L. REFORM 749, 759 (2016) ("Legislative changes in execution methods during the nineteenth and twentieth centuries, however, demonstrate that states typically change their method of execution when they perceive that their current method is vulnerable to a constitutional challenge.").

41. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder, ex post facto Law . . . .").

42. *See* Malloy v. South Carolina, 237 U.S. 180, 185 (1915) ("The statute under consideration did not change the penalty-death-for murder, but only the mode of producing this, together with certain nonessential details in respect of surroundings. The punishment was not increased, and some of the odious features incident to the old method were abated."); Miller v. Parker, 910 F.3d 259, 261 (6th Cir. 2018) ("A change in a State's method of execution will not constitute an ex post facto violation if the evidence shows the new method to be more humane."). *See also* Weaver v. Graham, 450 U.S. 24, 32 n.17 (1981) (explaining that in *Malloy*, the Court "concluded that a change in the method of execution was not *ex post facto* because evidence showed the new method to be more humane, not because the change in the execution method was not retrospective").

intended to evade constitutional review of certain methods of execution—Florida, for example, added lethal injection as a method of execution after the Supreme Court granted certiorari to decide whether execution by electric chair violated the Eighth Amendment.[43] California added lethal injection as a method of execution after a federal district court concluded, and the Ninth Circuit upheld, a determination that execution by lethal gas violated the Eighth Amendment.[44]

Conversely, limiting choices among methods of execution may derive from a desire to limit autonomy or even serve the punitive justifications associated with capital punishment. For example, in 2004, Utah, which had previously offered a choice between the firing squad and lethal injection, amended its method-of-execution statute to use lethal injection as the sole method of execution.[45] This decision was, in part, motivated by the negative media attention associated with the firing squad as a method of execution and concerns that Utah's executions had turned into a spectacle.[46] During debates over the method, one senator inquired what the state's "compelling interest" was in eliminating the defendant's choice in methods of execution.[47] The bill's sponsor asserted that removing the defendant's ability to choose between methods of execution *also* served punitive rationales: "[I]t would be fair to say that if the victim didn't have a choice; why are we giving a perpetrator that choice? Let's remove that choice."[48]

Limiting the use of the firing squad (which Utah reintroduced in 2015) would prevent a person sentenced to death from turning their death into a media spectacle.[49] Preventing a person sentenced to death from controlling the narrative of their death reaffirms the state's control. The *lex talonis* rationale embedded in the sponsor's answer also signals to the way that death

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43. *See* Bryan v. Moore, 528 U.S. 960 (1999), *cert. dismissed as improvidently granted*, 528 U.S. 1133 (2000); Bryan v. Moore, 528 U.S. 1133 (2000); Denno, *The Firing Squad*, *supra* note 40, at 759–60.

44. *See* Fierro v. Gomez, 865 F. Supp. 1387, 1415 (N.D. Cal. 1994), *aff'd* 77 F.3d 301 (9th Cir. 1994), *vacated on other grounds by* 519 U.S. 918 (1996); Denno, *The Firing Squad*, *supra* note 40, at 760–61.

45. Steve Almasy, *Utah moves closer to using firing squads for execution*, CNN (Mar. 10, 2015, 10:57pm EDT), https://www.cnn.com/2015/03/10/us/utah-death-penalty-firing-squad/index.html. Any person on death row in Utah who elected the firing squad as a method of execution before the change in law is to be executed by the firing squad. Katie McKellar, *These are the 7 men sitting on Utah's Death Row*, DESERET NEWS (Oct. 4, 2021, 9:00 pm MDT), https://www.deseret.com/utah/2021/10/4/22684978/men-utah-death-row-capital-punishment-deaht-penalty-murder-inmates-killers.

46. *See* Klein, *When Police Volunteer to Kill*, *supra* note 30, manuscript at 18.

47. *See* H.B. 180, 2004 Gen. Session, 55th Leg. (Utah, Feb. 18, 2004) (statement of Sen. Evans),at 1:09:05–1:09:40, https://le.utah.gov/av/floorArchive.jsp?markerID=33616 [hereinafter Utah Sen. Session Feb. 18, 2004].

48. *Id.* at 1:09:30 (statement of Sen. Allen).

49. Some Utah legislators suggested that the spectacle actually served deterrent functions. *See id.* at 1:04:00–1:04:44 (Statement of Sen. David Thomas).

robbed a victim of their bodily autonomy; a perpetrator's execution should also reflect that loss of autonomy even beyond death.[50]

B. Constitutional Challenges and Alternative Methods

Even in states that do not offer a choice, or rely on "timed choice" statutes, the rise of litigation over a state's method of execution under § 1983 has led to other potential avenues of individual autonomy in making decisions about execution. As I discuss later in this Article, those regions of autonomy are mostly illusory. Understanding the process associated with § 1983 method of execution claims, however, helps illustrate why those claims do not offer a substantive way to vindicate individual bodily autonomy interests.

In the early 2000s, the Supreme Court assessed whether method-of-execution challenges should be brought as part of a habeas claim or under § 1983.[51] In *Nelson v. Campbell*, David Nelson challenged the state's execution protocol, specifically the potential use of a "cut down" procedure that would make a "2-inch incision in [Nelson's] arm or leg" under "local anesthesia," likely without a doctor present to permit venous access to kill Nelson during execution due to his compromised veins.[52] The Court concluded that Nelson had appropriately filed under § 1983; he did not challenge his execution, but argued that the cut down procedure was unnecessary to access his

50. *See* Brief for Respondents at 39–40, Ramirez v. Collier, 142 S. Ct. 1264 (2022) (No. 21-5592), 2021 WL 4895734 (arguing that permitting a spiritual advisor to touch a person during their execution "would undermine the State's interests in implementing the death penalty and remind the victim's family that their loved one received no such solace for his transition to the afterlife").

51. *See* Nelson v. Campbell, 541 U.S. 637, 643–44 (2004) ("We have not yet had occasion to consider whether civil rights suits seeking to enjoin the use of a particular method of execution—*e.g.*, lethal injection or electrocution—fall within the core of federal habeas corpus or, rather, whether they are properly viewed as challenges to the conditions of a condemned inmate's death sentence."). If Nelson's claims had been construed as a habeas petition, Nelson would have been unable to file the claim. *See id.* at 642.

52. *Id.* at 641. Nelson's § 1983 complaint included an affidavit from an anesthesiologist clarifying that "the cut-down is a dangerous and antiquated medical procedure to be performed only by a trained physician in a clinical environment with the patient under deep sedation." *Id.* at 642. That a state would decide to use this sort of procedure without trained experts to carry out executions is not surprising. *See, e.g.*, Nicholas Bogel-Burroughs, *Oklahoma to Continue Lethal Injections After Man Vomits During Execution*, N.Y TIMES (Oct. 29, 2021), https://www.nytimes.com/2021/10/29/us/oklahoma-execution-lethal-injection.html ("The director of Oklahoma's prison system said on Friday that he did not plan to make any changes to the agency's lethal injection protocols, a day after a man vomited while shaking for several minutes during the state's first execution since 2015."). Oklahoma had not conducted any executions since 2015 because it had botched multiple executions. *See id.* Similarly, when Alabama spent nearly three hours trying (and failing) to access Doyle Hamm's veins to execute him, Alabama's Corrections Commissioner said, "I wouldn't necessarily characterize what we had tonight as a problem." Sam Roberts, *Doyle Hamm, Who Survived a Bungled Execution Dies in Prison at 64*, N.Y. TIMES (Nov. 29, 2021), https://www.nytimes.com/2021/11/29/us/doyle-hamm-dead.html.

veins, risky, and more dangerous.[53] Nelson had proposed alternatives to the cut down procedure in his complaint,[54] illustrating that cut downs were not necessary—something that would gain unfortunate significance in other cases. Nelson's expressed interest was in limiting the pain and risk in his death, but his claim can also be understood as vindicating a limited interest in his bodily autonomy.[55] While Alabama could kill Nelson, allowing an untrained person to cut into his body to find a vein could not be justifiable unless doing so was absolutely necessary to end Nelson's life.

Two years later, the Supreme Court concluded in *Hill v. McDonough* that the proper vehicle for a method of execution challenge was a § 1983 claim.[56] Hill's claim centered on the drugs that Florida intended to use to kill him.[57] Florida intended to use a combination of three drugs (an anesthetic, a paralytic, and potassium chloride).[58] Hill argued, as many challenging lethal injection protocols do, that the state's intended anesthetic "would not be a sufficient anesthetic to render painless administration of the second and third drugs . . . ."[59] Like Nelson, Hill did not challenge the fact of his execution (even though his challenge might have the effect of delaying his execution).[60]

The United States, as an amicus, argued that, to bring a § 1983 method of execution challenge, a death row prisoner should, like Nelson, identify "an alternative, authorized method of execution" to limit death row prisoners

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53. *Nelson*, 541 U.S. at 645–46. The Court's remand indicated that the district court should hold an evidentiary hearing to assess whether the cut down procedure was really necessary to kill Nelson. *See id.* at 646.

54. *Id.*

55. *See* Gardner, *supra* note 13, at 108 (noting recognition by courts that unnecessary mutilation of the bodies of capital offenders is contrary to principles of human dignity that underlie the cruel and unusual punishment clause of the Eighth Amendment. *See also* Dieter, *supra* note 24, at 792 (discussing the genesis of lethal injection and how it attempted to balance the power of the state with "compassion and dignity" for the prisoner in comparison to electric chairs or gas chambers); Dawson v. State, 554 S.E.2d 137, 143 (Ga. 2001) ("We cannot ignore the cruelty inherent in punishments that unnecessarily mutilate or disfigure the condemned prisoner's body of the unusualness that mutilation creates in light of viable alternatives which minimize or eliminate the pain and/or mutilation."); Campbell v. Wood, 511 U.S. 1119, 1121–23 (1994) (Blackmun, J., dissenting from denial of stay of execution and certiorari) (arguing that mutilation associated with hanging violates the Eighth Amendment); Glass v. Louisiana, 471 U.S. 1080, 1085 (1985) (Brennan, J., dissenting from denial of certiorari) ("[B]asic notions of human dignity command that the State minimize 'mutilation' and 'distortion' of the condemned prisoner's body."). *Cf.* Winston v. Lee, 470 U.S. 753, 761–62 (1985) (recognizing Fourth Amendment protections should assess the extent of an intrusion into "the individual's dignitary interests in personal privacy and bodily integrity").

56. Hill v. McDonough, 547 U.S. 573, 580–81 (2006).

57. *Id.* at 578.

58. *Id.* (Florida's protocol at the time relied on sodium pentothal, pancuronium bromide, and potassium chloride).

59. *Id.*

60. *Id.* at 583 ("Any incidental delay caused by allowing Hill to file suit does not cast on his sentence the kind of negative legal implication that would require him to proceed in a habeas action.").

from gaming the system because complaints that did not identify an alternative were "more like a claim challenging the imposition of any method of execution" (and thus better characterized as habeas claims).[61] The Court declined to impose this requirement, explaining that, although the alternatives Nelson had proposed to a cut down had illustrated why the suit did not have to be brought as a habeas petition, it was "not decisive," and "did not change traditional pleading requirements for § 1983 actions."[62]

Hill, like *Nelson*, does not engage directly with the question of bodily autonomy, yet the Court's conclusion about § 1983 actions in the method of execution context hints at nebulous autonomy interests interacting with the state's chosen method of execution. Those interests—like avoiding pain or mutilation—may be subservient to the state's interest in carrying out executions, but might be grounds for invalidating a state's protocol or requiring the state to choose another way to carry out executions that did not intrude on bodily autonomy interests.

Following *Hill*, however the Court took a new direction on § 1983 claims. In *Baze v. Rees*, a group of people on Kentucky's death row sued, alleging that Kentucky's execution protocol was unconstitutional because there was a risk that state officials might improperly administer the protocol, which could cause severe pain and suffering during an execution.[63] In a plurality opinion Chief Justice Roberts concluded that, in light of Eighth Amendment standards,[64] "a condemned prisoner cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative."[65] To establish an Eighth Amendment violation, a person seeking to challenge the state's procedure had to show that the alternative "must be feasible, readily implemented, and in fact significantly reduce[s] a

61. *Id.* at 582.

62. *Hill*, 547 U.S. at 582. The distinction between habeas and § 1983 actions in the method of execution context in *Hill* centered on the nature of the relief sought and the Court was not inclined to rewrite federal pleading standards.

> If the relief sought would foreclose execution, recharacterizing a complaint as an action for habeas corpus might be proper. . . . Imposition of heightened pleading requirements, however, is quite a different matter. Specific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts.

Id. (citations omitted). Of course, following *Hill*, the Court took steps to tighten pleading standards in federal cases. *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009). *See also* A. Benjamin Spencer, Iqbal *and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185 (2010).

63. Baze v. Rees, 553 U.S. 35, 46 (2008) (plurality).

64. *See id.* at 49–50 (explaining that to show that a risk of pain violates the Eighth Amendment, "the risk must be '*sure or very likely* to cause serious illness and needless suffering' and give rise to 'sufficiently *imminent* dangers.'" (quoting Helling v. McKinney, 509 U.S. 25, 33, 34–35 (1993)) (emphasis in original)).

65. *Id.* at 51.

substantial risk of severe pain."[66] *Baze*'s discussion of pain illustrated the limits of bodily autonomy in method of execution arguments: "[T]he Constitution does not demand the avoidance of all risk of pain in carrying out executions."[67] If an alternative method or change in procedure would reduce a severe risk of pain, however, and the state "refuse[d] to adopt such an alternative . . . without a legitimate penological justification for adhering to its current method of execution," then reliance on the more painful method would violate the Eighth Amendment.[68]

Baze rejected the suggested changes to Kentucky's protocol.[69] Among other proposed changes, the petitioners contended that using a paralytic like pancuronium bromide in executions risked causing pain because it "serve[d] no therapeutic purposes while suppressing muscle movements that could reveal an inadequate administration of the first drug [an anesthetic]."[70] If the first drug, an anesthetic, failed to properly sedate a condemned prisoner, the second drug, a paralytic, would prevent them from moving or crying out as the third drug, a potassium drug, caused intense pain.[71] The Court accepted the trial court's conclusions about the use of a paralytic in an execution—it stopped respiration, but the paralytic also supported the state's interest in "preserving the dignity of the procedure" by preventing "involuntary physical movements" that might happen after executioners injected a prisoner with potassium chloride.[72] The state's interest in dignity carried more weight than a prisoner's desire to avoid physical suffering. Killing a person more quickly, with sanitized, "dignified" optics mattered more.[73]

Glossip v. Gross crystalized *Baze*'s determination that a person seeking to challenge a state's chosen method of execution must show that the method presents a substantial risk of severe pain and the condemned person must

66. *Id.* at 52.

67. *Id.* at 47.

68. *Id.* at 52.

69. *Baze*, 553 U.S. at 56.

70. *Id.* at 57.

71. *See* Eric Berger, *Evolving Standards of Lethal Injection*, *in* THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT 234, 237 (Meghan J. Ryan & William W. Berry III, eds. 2020) (discussing the risks of the three-drug protocol, particularly the use of a paralytic and potassium chloride if the initial anesthetic drug is inadequate).

72. *Baze*, 553 U.S. at 57–58 (2008) (plurality).

73. *See* Robert Blecker, *Killing Them Softly: Meditations on a Painful Punishment of Death*, 35 FORDHAM URB. L.J. 969, 988 (2008) (noting that lethal injection was conceived as a medically humane way to execute individuals and "so nearly resembles a medicalprocedure"). *See also* David Silver, *Lethal Injection, Autonomy & The Proper Ends of Medicine*, 17 BIOETHICS 205, 207 (2003) (arguing that prisoners who seek to avoid pain would choose the "medically supervised lethal injection" over other methods of execution); Mona Lynch, *On–line Executions: The Symbolic Use of the Electric Chair in Cyberspace*, 23 POL. LEGAL ANTHROPOLOGY R. 1, 14 (2000) (arguing that a state's narrative of the existence of a humane execution in contrast to "other readings" of executions may actually demonstrate the "ultimately dehumanizing nature of the sanitized disposal process that is the contemporary state execution").

also identify a readily available alternative that significantly reduces the risk.[74] *Glossip* insisted that this was a *substantive* component of an Eighth Amendment claim, rather than the shift in pleading standards that *Hill* rejected.[75] As Justice Sotomayor observed in her dissent,

> [U]nder the Court's new rule, it would not matter whether the State intended to use midazolam, or instead to have petitioners drawn and quartered, slowly tortured to death, or actually burned at the stake: because petitioners failed to prove the availability of sodium thiopental or pentobarbital, the State could execute them using whatever means it designated.[76]

Glossip, in effect, created a requirement that any prisoner who sought to challenge the state's method of execution had better come up with another way he would prefer to die—and it had to be one a state could carry out.

In some ways, *Glossip* seems to vindicate an autonomy interest; a person sentenced to death might be able to allege and prove that a state could execute him by some other method—although challenging a method of execution through a § 1983 claim requires an implied concession that the state can execute a condemned person because a § 1983 challenge cannot attack the underlying lawfulness of the sentence.[77] Yet alternatives to lethal injection may be more overtly brutal, such as the firing squad, potentially unconstitutional, like the electric chair, or altogether untested, like nitrogen hypoxia.

The Court's most recent opinion addressing the constitutionality of methods of execution, *Bucklew v. Precythe*, adds additional complications to bodily autonomy interests in selecting a method of execution. After *Glossip*, some lower courts had rejected condemned persons' designated alternatives because the alternative method of execution (frequently the firing squad) was not authorized under that jurisdiction's law.[78] *Bucklew* clarified that, "An inmate seeking to identify an alternative method of execution is not limited to choosing among those presently authorized by a particular State's law."[79] This change meant that people had greater leeway in picking a readily available alternative.[80]

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74. Glossip v. Gross, 576 U.S. 863, 877–78 (2015).

75. *Id.* at 880; *but see id.* at 972 (Sotomayor, J., dissenting) (arguing that *Baze* did not create a substantive Eighth Amendment claim requirement, but instead addressed the *Baze* petitioners' claim that "the State's protocol was intolerably risky given the alternative procedures the State could have employed").

76. *Id.* at 974–75 (Sotomayor, J., dissenting); *but see id.* at 893 (Majority) (arguing that Justice Sotomayor's critique is "simply not true").

77. *See* Eric Berger, *Courts, Culture, and the Lethal Injection Stalemate*, 62 WM. & MARY L. REV. 1, 52 (2020).

78. *See* Boyd v. Warden, Holman Corr. Facility, 856 F.3d 853, 869–70 (11th Cir. 2017).

79. Bucklew v. Precythe, 139 S. Ct. 1112, 1128 (2019).

80. The Supreme Court has granted certiorari in *Nance v. Ward*, 142 S. Ct. 858 (2022), to assess whether an "as-applied method-of-execution challenge must be raised in a habeas

In all other ways, however, *Bucklew* is best described as a disaster.[81] The Court reiterated that the Constitution does not require executions to be painless; the Eighth Amendment only "come[s] into play" when the potential pain associated with a state's chosen method is "'substantial when compared to a known and available alternative.'"[82] *Bucklew* also asserts that, even if more humane methods of execution appear, "traditionally accepted methods of execution" like "hanging, the firing squad, electrocution, and lethal injection" do not necessarily violate the Eighth Amendment.[83] While the Court insisted that a condemned person could satisfy the standards it set in *Bucklew*, its decision to insulate more traditional methods of execution limits the potential for a condemned person's ability to vindicate autonomy interests through constitutional challenges to a method of execution.[84]

Russell Bucklew suffered from cavernous hemangioma, a condition that caused vascular tumors to grow in his head, neck, and throat.[85] He argued that his medical condition presented unique risks in his execution.[86] Bucklew claimed that "this condition could prevent the pentobarbital from circulating properly in his body; that the use of a chemical dye to flush the intravenous line could cause his blood pressure to spike and his tumors to rupture; and that pentobarbital could interact adversely with his other medications."[87] Despite these allegations, the Court rejected Bucklew's arguments because he had not alleged a readily available alternative with sufficient detail.[88] Bucklew's proposal for execution by nitrogen hypoxia was, the Court complained, inadequate for a state to feasibly implement the method of execution.[89] A condemned person might be able to plead an alternative, but *Bucklew* indicates that a person sentenced to die has to identify

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petition instead of through a § 1983 action if the inmate pleads an alternative method of execution not currently authorized by state law." Petition for a Writ of Certiorari at i, Nance v. Ward, No. 21-439 (Sep. 17, 2021). *See also* Lee Kovarsky, *Justice Will Clarify How Death-Row Prisoners Can Contest a State's Method of Execution,* SCOTUSBLOG (Apr. 22, 2022, 1:09PM), https://www.scotusblog.com/2022/04/justices-will-clarify-how-death-row-prisoners-can-contest-a-states-method-of-execution/.

81. *See* Garrett Epps, *Unusual Cruelty at the Supreme Court*, THE ATLANTIC (Apr. 4, 2019), https://www.theatlantic.com/ideas/archive/2019/04/bucklew-v-precythe-supreme-court-turns-cruelty/586471/.

82. *Bucklew*, 139 S. Ct. at 1125 (quoting Glossip v. Gross, 576 U.S. 863, 878 (2015)).

83. *Id.*

84. *See id.* at 1128–29.

85. *Id.* at 1120.

86. Bucklew argued that the readily available alternative requirement should not apply in as-applied challenges like his, rather than a facial challenge to a state's method of execution. *See id.* at 1126–27. The Court held that the requirement applied to any Eighth Amendment challenge. *Id.* at 1128–29.

87. *Id.* at 1120.

88. *Bucklew*, 139 S. Ct. at 1129.

89. *Id.*

his chosen protocol with significant detail.[90] Any autonomy interest that might be available in pleading an alternative to avoid potentially unconstitutional pain may be defeated because the condemned person has not described in significant detail *how* he would like to die—even if the state's proposed choice risks unknowable suffering.

Both statutes and judicial precedent create a limited space for a person sentenced to death to engage in some exercise of bodily autonomy interests. These spaces are distinct from cases in which a person exercised his autonomy and elected to be executed, although there are some areas of overlap. Further, as the next Part describes, even these limited autonomy regions may permit a person facing execution to exercise some bodily autonomy interests.

III. AUTONOMY INTERESTS IN EXECUTIONS

On July 2, 1976, the Supreme Court published five opinions assessing the constitutionality of various states' capital punishment schemes.[91] Capital punishment, which had been suspended since 1972 after *Furman v. Georgia*,[92] could start again.[93] Just over two weeks later, Gary Gilmore shot and killed two men, Max Jensen and Ben Bushnell, in robberies at a gas station and a motel.[94] Upon being sentenced to death, Gilmore elected, as Utah law then permitted, to die by the firing squad.[95] Gilmore dropped his appeals and actively sought execution.[96] He was not the first person to be sentenced to death post-*Furman*, but he was the first person to be executed post-*Gregg*.[97] He would not be the last volunteer in the modern era of capital punishment.

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90. *Id.* ("He has presented no evidence on essential questions like how nitrogen gas should be administered (using a gas chamber, a tent, a hood, a mask, or some other delivery device); in what concentration (pure nitrogen or some mixture of gases); how quickly and for how long it should be introduced; or how the State might ensure the safety of the execution team, including protecting them against the risk of gas leaks.").

91. *See* Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976); *see also* BANNER, *supra* note 28, at 274–75.

92. 408 U.S. 238 (1972) (per curiam).

93. *See* BANNER, *supra* note 28, at 275 ("The opinions were published on July 2, 1976, almost exactly four years after the Court had declared the death penalty unconstitutional in *Furman*.").

94. *See* NORMAN MAILER, THE EXECUTIONER'S SONG 231–32; 259–61 (1979); Vern Anderson, *10 Years Later, Victims Can't Forget Gary Gilmore: Utah Killer Spurned Appeals, Demanded His Quick Execution*, L.A. TIMES (Jan. 11, 1987), https://www.latimes.com/archives/la-xpm-1987-01-11-mn-3943-story.html.

95. *See* MAILER, *supra* note 94, at 467 ("When the Judge asked him, 'Do you have an election as to the mode of death?' Gary said, 'I prefer to be shot.'").

96. *See* Gilmore v. Utah, 429 U.S. 1012, 1012–13 (1976). Gilmore, in fact, attempted suicide *twice* before Utah executed him by firing squad on January 17, 1977. *See* FREDERICK DRIMMER, EXECUTIONS IN AMERICA 115–17 (2014); MAILER, *supra* note 94, at 600–13; 773.

97. BANNER, *supra* note 28, at 275; DRIMMER, *supra* note 96, at 112–16.

A persistent issue in capital punishment that presents troubling questions of legal ethics and morality is the question of whether a person facing a death sentence should be allowed to let the state kill them. These sorts of dilemmas may appear at the trial stage, for example when a person facing a capital sentence wants to plead guilty and seek execution,[98] or during various stages in the lengthy process of appeals and habeas petitions.[99] A decision to submit to state killing differs from an individual's decision to use medical aid in dying, although there are some overlaps in the autonomy interests present in capital punishment and a decision to end one's life.[100] Choosing among methods of execution, however, has greater similarity to the autonomy considerations in medical aid in dying.

This Part evaluates the relationships between execution volunteers, medical aid in dying, and a choice among methods of execution and how choices among methods of execution reflect individuals' interests in bodily autonomy. Section A explores the parallels between the interests in "volunteering" for executions, medical aid in dying, and choice among methods of execution. Section B discusses five core bodily autonomy interests associated with capital punishment and choice among methods of execution: pain, dignity, bodily integrity, expressive messages, and living. Understanding autonomy interests is integral to understand why the limited exercise of these interests in bodily autonomy in capital punishment is ultimately illusory.

A. Volunteering to Die, Medical Aid in Dying, and Choosing Death

There is significant academic literature addressing death row "volunteers." This phenomenon raises ethical concerns for attorneys,[101] and concerns about a condemned person's mental health based on the conditions of

98. *See* Godinez v. Moran, 509 U.S. 389, 392–93 (1993); *see also* Shafer v. Bowersox, 329 F.3d 637, 640 (8th Cir. 2003) (defendant waived his right to counsel and his right to trial by jury for both the guilt and punishment phases of his trials, pled guilty to two counts of first degree murder and requested the imposition of the death penalty).

99. *See, e.g.*, Hammett v. Texas, 448 U.S. 725 (1980); Gilmore v. Utah, 429 U.S. 1012 (1976); Whitmore v. Arkansas, 495 U.S. 149 (1990); New York v. Lavalle, 697 N.Y.S.2d 241 (1999); Brewer v. Lewis, 989 F.2d 1021 (9th Cir. 1993); Red Dog v. Delaware, 625 A.2d 245 (Del. 1993); Roberts v. Dretke, 381 F.3d 491 (5th Cir. 2004); Judy v. State, 416 N.E.2d 95 (Ind. 1981); Steven K. Paulson, *Judge Allows McVeigh to Drop Appeals*, WASH. POST (Dec. 29, 2000), https://www.washingtonpost.com/archive/politics/2000/12/29/judge-allows-mcveigh-to-drop-appeals/59c67d05-45a5-484d-ba17-b9bbfa1781fc/.

100. *See* Meredith Martin Rountree, *Volunteers for Execution: Directions for Further Research Into Grief, Culpability, and Legal Structures*, 82 UMKC L. REV. 295, 302 (2014) (describing the results of a study that demonstrated important similarities existed between "free-world suicides" and "death row execution-hasteners"). *See also* Urofsky, *supra* note 23, at 575 (1984) (noting that contemporary thoughts on suicide are extremely diverse and range from opposing views on religion and humanitarian grounds to the belief that individual autonomy includes the right to end one's life).

101. *See* Blume, *supra* note 23, at 939. *See also* Dieter, *supra* note 23, at 809; Oleson, *supra* note 23, at 163; White, *supra* note 18, at 855–58.

death row or mental illness.[102] Others have pointed out that there may be long-term consequences for capital punishment litigation, such as encouraging other condemned people to volunteer, or making it easier for the state to carry out executions.[103] Decisions about whether someone can drop appeals and die also implicate questions associated with bodily autonomy.[104] Autonomy—and bodily autonomy—encompass the freedom to make one's own choices, good or bad.[105]

A decision to drop appeals or plead guilty and seek execution is an exercise of personal autonomy, as well as bodily autonomy. Scholars and others have observed that, like a person who seeks medical aid in dying due to intense suffering (or anticipated suffering and indignity) from a terminal illness,[106] a person on death row may want to end his life because of the conditions on death row.[107] A person who has been sentenced to die may share similar autonomy interests with a person diagnosed with a terminal illness—unlike most of the population of the earth, their death is scheduled (even if imprecisely). A person diagnosed with a debilitating terminal illness may experience the gradual deterioration of her body and functions, until her symptoms become unbearable. A person on death row, however, may experience having multiple execution dates arrive and pass.[108] Deciding *when* to die is an exercise of autonomy over the physical body—a decision about when dignity, bodily integrity, pain, expressive choice, and an interest in living are best met in the decision to end one's life.[109]

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102. *See* Oleson, *supra* note 23, at 170; Urofsky, *supra* note 23, at 568–69; White, *supra* note 18, at 858–59; Dieter, *supra* note 23, at 801; Blume, *supra* note 23, at 948–51.

103. Urofsky, *supra* note 23, at 566; HUGO BEDAU, THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT 122 (1977).

104. *See* SCOTT, *supra* note 23, at 63 (noting that courts focus less on individual autonomy and more on competence); *id.* at 67 ("The decision to forego one's rights is implicit in personal autonomy."); Oleson, *supra* note 23, at 186, 203–04; Urofsky, *supra* note 23, at 574–76; Dieter, *supra* note 23, at 819; Blume, *supra* note 23, at 943, 955.

105. *See* M.N.S. Sellers, *An Introduction to the Value of Autonomy in Law*, *in* AUTONOMY AND THE LAW 1, 6 (Mortimer Sellers, ed., 2007).

106. *See* Compassion in Dying v. Washington, 79 F.3d 790 (9th Cir. 1996), *rev'd sub nom* Washington v. Glucksberg, 521 U.S. 702 (1997) ("A competent terminally ill adult, having lived nearly the full measure of his life, has a strong liberty interest in choosing a dignified and humane death rather than being reduced at the end of his existence to a childlike state of helplessness, diapered, sedated, incontinent."); Oleson, *supra* note 23, at 187–88.

107. *See* Urofksy, *supra* note 23, at 572–73; Oleson, *supra* note 23, at 172–74, 227–28.

108. Oleson, *supra* note 23, at 204 (discussing the similarities between terminally ill patients and people on death row).

109. Brittany Maynard, *My Right to Death With Dignity at 29*, CNN (Nov. 2, 2014), https://www.cnn.com/2014/10/07/opinion/maynard-assisted-suicide-cancer-dignity/index.html ("I would not tell anyone else that he or she should choose death with dignity. My question is: Who has the right to tell me that I don't deserve this choice? That I deserve to suffer for weeks or months in tremendous amounts of physical and emotional pain? Why should anyone have the right to make that choice for me?").

Yet a decision to end appeals is not necessarily the best fit with the issue of medical aid in dying. Both may reflect a desire to express and protect individual autonomy.[110] But unlike the process of "volunteering," picking an execution method is a choice aimed at the specific mechanics of death and bears greater similarity to medical aid in dying.[111] While there are differences in the timing of death, the decision is about selecting the *method* of death. Similarly, both condemned people choosing a method of execution and people seeking medical aid in dying may not *actually* want to die.[112] Someone seeking medical aid in dying has a choice that is arguably freer of coercion than a person who is facing execution in that any coercive pressure comes from the fact of their medical condition instead of a state-imposed deadline for death. Professor David Silver has argued that such a choice by a condemned person retains moral significance, despite the restraint on a condemned person's liberty, assuming that the "restrictions *are legitimately made*."[113] This is a fairly significant assumption given the well-documented flaws in capital punishment trials and the restrictive nature of habeas relief.[114] But I agree with his point, and further argue that the choice has moral significance, even if it is not freely made—as the next section observes, many choices about executions are the product of personal choice and

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110. *See* Oleson, *supra* note 23, at 194–195 (summarizing research about terminally ill patients' rationales for ending their lives).

111. *See* Silver, *supra* note 73, at 207.

In making this choice, he is choosing the manner of his death, and how one dies is a matter of utmost importance. Indeed, we can fruitfully compare the autonomous choice of the condemned prisoner for lethal injection to the autonomous choice of the terminally ill patient for physician-assisted suicide. As far as autonomy is concerned, there is no reason to think that the patient's choice of the manner of her death is more significant than the choice of the condemned prisoner of the manner of his death.

112. *See* Jane E. Brody, *When Patients Choose to End Their Lives*, N.Y. TIMES (Apr. 5, 2021) ("Most people who seek medical aid in dying would prefer to live but have an illness that has in effect stripped their lives of meaning."). *See infra* note 305 and accompanying text.

113. *See* Silver, *supra* note 73, at 208. Professor Silver operates under the assumption (for the sake of argument) that capital punishment is "morally legitimate," thus provided that the condemned person was "justly convicted," then the condemned person is "legitimately restricted." *Id.* But this conclusion also assumes that a person who has been sentenced to death, provided that the restriction is legitimate, lacks an interest in continuing to live. This, as I argue later in this Part, is a valid bodily autonomy interest. *See infra* Part III.B.

114. *See generally* BRANDON L. GARRETT, END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE (2017); CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH (2016); Scott Phillips & Justin F. Marceau, *Whom the State Kills*, 55 HARV. C.R.–C.L. L. REV. 601, 642 (2020) (concluding that "the race of one's victim is an important factor in determining who will be executed"); Natasha Minsker, *Prosecutorial Misconduct in Death Penalty Cases*, 45 CAL. W. L. REV. 373, 374–89 (2009) (describing cases of prosecutorial misconduct in actual execution cases in California); Lincoln Caplan, *The Destruction of Defendants' Rights*, NEW YORKER (June 21, 2015), https://www.newyorker.com/news/news-desk/the-destruction-of-defendants-rights ("As a result of A.E.D.P.A., and the Court's interpretation of it, . . . , the reversal rate in state courts in death penalty cases has been reduced by about forty percent.").

deserve recognition as exercises of autonomy in the face of a system intended to erase a person's autonomy.

There are some significant differences between choosing a method of execution and volunteering to be executed. If a client wants to volunteer for execution, his attorney may face professional and personal ethical dilemmas[115] and must certainly assess her client's competence.[116] These ethical issues may arise to a lesser extent when selecting a method of execution. If a person sentenced to death seeks to litigate a state's problematic protocol, a § 1983 claim does not challenge the state's authority to kill him, only to change the method.[117] Challenging a method of execution nonetheless requires an attorney to detail precisely how her client will be killed.[118] Despite the consequences of decisions about methods of execution, an attorney who pursues a § 1983 method of execution challenge is likely acting in her client's best interests—they share a common objective of preserving her client's limited control over his bodily autonomy to the extent possible in death.[119] Competence may also be an issue with method of execution challenges, although those have most recently arisen based on a client's ability to choose a method of execution and whether accommodations are required to assist her client in selecting a method.[120]

The primary area of overlap between volunteering for executions and selecting a method is the long-term consequences and impact on others. Unlike medical aid in dying, volunteering for execution may have a direct impact on other condemned people's autonomy interests.[121] Commentators have argued that a decision to volunteer for execution makes it *more likely* that other people on death row (who might not want to be executed at all) will be put to death.[122] Method of execution challenges present a significant problem in this area because litigation over methods of execution has, particularly recently, created increasingly dangerous precedent. Attorneys

115. *See* Urofsky, *supra* note 23, at 580 ("No doubt counsel of condemned prisoners often develop close emotional ties to their clients, yet the courts have time and again refused to allow uninvited third parties, . . . , to displace the autonomy of prisoners.").

116. *See* id. at 563 ("If an accused insists upon waiving a right, the court must determine if he or she is competent, and if not, the court will refuse to allow a petitioner to withdraw an appeal.").

117. *See supra* notes 51–60 and accompanying text.

118. *See supra* notes 85–90 and accompanying text (discussing *Bucklew v. Precythe*).

119. *See* Part III.B (discussing bodily autonomy interests in decisions about methods of execution).

120. *See supra* notes 2–9 and accompanying text; *see also infra* Part IV.B.

121. It does not appear that authorizing medical aid in dying for terminally ill patients increases the rate of suicide in the general population. *See* Mark Joseph Stern, *Do Death With Dignity Laws Increase the General Suicide Rate?*, SLATE (Nov. 25, 2015), https://slate.com/technology/2015/11/death-with-dignity-laws-do-not-increase-suicide-rates.html.

122. *See* Oleson, *supra* note 23, at 155 (quoting Michael Mello, *Representing Death Row: An Argument for Attorney-Assisted Suicide*, 34 CRIM. L. BULL. 48, 50 (1998)); *see also* Urofsky, *supra* note 23, at 566.

litigating these issues are zealously representing their clients' best interests. The blame for this state of affairs lies with the Supreme Court, which seems determined to minimize litigation over execution based on states' interests rather than assess valid constitutional problems associated with methods of execution.[123] *Baze*, *Glossip*, and *Bucklew* created a substantial hurdle for people seeking to challenge a method of execution, and *Bucklew*'s presumption of constitutionality attached to certain methods has played out in unfortunate ways.

South Carolina ran out of execution drugs,[124] and amended its method of execution statute from a choice between lethal injection and electrocution, with lethal injection as the default, to offering a choice between lethal injection (if the drugs are available), the electric chair, or the firing squad, with the electric chair as a default.[125] Two of the people on death row who have exhausted all appeals, Brad Sigmon and Freddie Owens, filed suit in federal district court in South Carolina, arguing that electrocution violated the Eighth Amendment and identifying lethal injection as a readily available alternative.[126] The court emphasized the weight of precedent: "As noted by Justice Gorsuch in *Bucklew*, in 1890 in *In re Kemmler*, the United States Supreme Court upheld a sentence of death by electrocution noting that electrocution was not 'cruel' in the constitutional sense."[127] The presumptive constitutionality of lethal injection outweighed any facts that Sigmon and Owens could have introduced about what happens to a person *during* an electrocution.[128]

The district court's assessment of their proposed alternative—a single dose of pentobarbital—further demonstrates the devastating impact of this sort of bad precedent. Sigmon and Owens argued that a single dose of pentobarbital would "significantly reduce a substantial risk of severe pain posed by the electric chair."[129] The district court pointed out that, "when compared to electrocution, lethal injection, whether by single dose pentobarbital or by

123. *See* Eric Berger, Gross *Error*, 91 WASH. L. REV. 929, 995–96 (2016).

124. *See* Michelle Liu, *SC Delays Execution, Citing Lack of Lethal Injection Drugs*, AP (Nov. 30, 2020), https://apnews.com/article/south-carolina-courts-executions-931bae9dd612fe341f3c09b0bcd8ff91.

125. *See* S.C. CODE ANN. § 24-3-530; Ian Millheiser, *Why Firing Squads are Making a Comeback in 21st-Century America*, VOX (May 20, 2021), https://www.vox.com/22442043/firing-squad-death-penalty-execution-constitutional.

126. *See* Sigmon v. Stirling, No. 3:21-cv-01651-RBH, 2021 WL 2402279, at *1–2 (June 11, 2021).

127. *Id.* at *3, *5. *See also* Bucklew v. Precythe, 139 S. Ct. 1112, 1125 (2019) ("Nor do *Baze* and *Glossip* suggest that traditionally accepted methods of execution—such as hanging, the firing squad, electrocution, and lethal injection—are necessarily rendered unconstitutional as soon as an arguably more humane method like lethal injection becomes available.").

128. *Sigmon*, 2021 WL 2402279, at *4 ("Plaintiffs' claims cannot survive against over 100 years of federal court precedent holding that electrocution does not amount to cruel and unusual punishment under the Eighth Amendment.").

129. *Id.*

a three-drug protocol may present its own host of horrific results."[130] To reach this rather surprising conclusion, the district court relied on *other condemned people's challenges to pentobarbital lethal injection protocols*[131] and dissents by Justice Sonia Sotomayor critiquing three-drug protocols—which Sigmon and Owens had *not* suggested as alternatives.[132] The district court concluded that Sigmon's and Owens's affidavits "do not address the arguments against lethal injection made by many prisoners challenging lethal injection as also being cruel and unusual. Rather, Plaintiffs cite to cases which upheld the constitutionality of lethal injection."[133] Relying on allegations brought by other condemned people and dissents critiquing lethal injection, the court emphasized that Sigmon and Owens had shown, at most, that pentobarbital was "slightly safer," but the "stories detailing the horrors of executions, regardless of the method, underscore one important Eighth Amendment principle - the Eighth Amendment does not guarantee a painless death."[134]

Lower courts applying *Bucklew* have created other barriers to the exercise of autonomy interests. Before the Supreme Court issued *Bucklew*, the Eighth Circuit had ruled in 2018 that Ernest Johnson had plausibly pleaded that Missouri's pentobarbital execution protocol presented a substantial risk of severe pain.[135] Johnson had brought an as-applied challenge because he had part of a brain tumor removed and as a result, Johnson had scar tissue in his brain and suffered seizures.[136] Johnson alleged that this condition created a risk of severe pain in his execution because pentobarbital is known to cause seizures and "the introduction of barbiturates into the body of a person *with* a pre-existing seizure disorder is more likely to produce seizures."[137] The Eighth Circuit concluded that Johnson had plausibly satisfied the *Baze-*

130. *Id.*

131. *See id.* (citing Barr v. Lee, 140 S. Ct. 2950, 2591 (2020) (per curiam) (challenge to federal execution protocol that used pentobarbital); Zink v. Lombardi, 783 F.3d 1089, 1099–1100 (8th Cir. 2015) (challenge to Missouri's pentobarbital lethal injection protocol)).

132. *See id.* at *5.

133. *Id.* This, of course, is precisely what the district court did in concluding that electrocution did not present a severe risk of unconstitutional pain. *See supra* note 127 and accompanying text.

134. Sigmon v. Stirling, No. 3:21-cv-01651-RBH, 2021 WL 2402279, at *5 (June 11, 2021).

135. Johnson v. Precythe, 901 F.3d 973, 975–76 (8th Cir. 2018), *cert. granted and vacated by* 139 S. Ct. 1546 (2019) (granted, vacated, remanded in light of *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019)) [hereinafter *Johnson I*]. Missouri killed Johnson in October 2021. *See* Erik Ortiz & Phil Helsel, *Convicted Killer Ernest Johnson Executed Despite Questions Over his Intellectual Capacity*, NBC NEWS (Oct. 5, 2021), https://www.nbcnews.com/news/us-news/ernest-johnson-set-be-executed-few-hours-despite-questions-over-n1280799.

136. *Johnson I*, 901 F.3d at 978.

137. *Id.*

Glossip standard by showing a risk of severe pain[138] and identifying nitrogen hypoxia as an alternative method.[139]

After *Bucklew*, the Supreme Court granted, vacated, and remanded Johnson's case to the Eighth Circuit.[140] Applying *Bucklew*, that court concluded that, as nitrogen hypoxia was an untested method of execution and the Eighth Amendment did not require a state to test a new method.[141] *Bucklew* insisted that states have legitimate interests in not "be[ing] the first to experiment with a new method of execution is a legitimate reason" to reject an alternative method of execution.[142] In other words, even if a person sentenced to death *could* identify an alternative that better satisfied their autonomy interests, a state could reject novel, untried methods.

Johnson tried to amend his second amended complaint—if nitrogen hypoxia was not available, then he could rely on other methods of execution that the Supreme Court had indicated were presumptively constitutional in *Bucklew*.[143] And *Bucklew* had said that those methods did not have to be authorized by state law.[144] The Eighth Circuit decided that *Bucklew* was not "an intervening change in law that warrants granting Johnson a third opportunity to amend."[145] Some circuits had concluded that alternative methods had to be authorized by state law, the Eighth Circuit insisted that neither it, nor the Supreme Court had ever said so, even though *Bucklew* answered that open question.[146]

Unlike volunteer cases, attempts by other condemned people to challenge a method of execution to preserve bodily autonomy interests such as pain and dignity turned into precedent to strip *other* condemned people of an opportunity to preserve their interest in bodily autonomy. These interests have appeared in other method of execution cases, but are consistently undervalued as bodily autonomy interests. Section B addresses the primary interests of bodily autonomy that appear in method of execution litigation.

B. Autonomy Interests

Decisions about methods of execution implicate bodily autonomy interests. Death, as I have observed earlier, ends bodily autonomy and control

138. *Id.* ("We think these allegations are sufficient to meet the first element of an Eighth Amendment claim at the pleading stage. Dr. Zivot, as a medical expert, predicts 'a violent seizure that is induced by Pentobarbital injection,' opines that a seizure 'would occur' during Johnson's execution, and states that such seizures are 'severely painful.'").

139. *Id.* at 978–79.

140. Precythe v. Johnson, 139 S. Ct. 1546 (2019).

141. Johnson v. Precythe, 954 F.3d 1098, 1102 (8th Cir. 2020) [hereinafter *Johnson II*].

142. Bucklew v. Precythe, 139 S. Ct. 1112, 1130 (2019).

143. *See Johnson II*, 954 F.3d at 1103; *Bucklew*, 139 S. Ct. at 1125.

144. *Johnson II*, 954 F.3d at 1103; *Bucklew*, 139 S. Ct. at 1128–29.

145. *Johnson II*, 954 F.3d at 1103.

146. *Id.*; *see infra* Part IV.A.

over one's body.[147] A decision about *how* a person dies can reflect that person's values and choices about the physical experience of death. This choice, of course, is not one that everyone will experience, but when a person faces a planned death, he may seek to vindicate bodily autonomy interests through exercising whatever choices are available as he dies.[148] A condemned person may exercise his choice in a way that reflects his bodily autonomy interests and values, even if that choice is a limited exercise of autonomy interests in a coercive environment.

This section briefly explores five bodily autonomy issues associated with executions: pain, dignity, bodily integrity, expressive messages, and living. The way executions are carried out implicates the first four issues; that executions happen at all implicates the fifth. This is not intended to be an exhaustive assessment of these interests (or even an exhaustive list of the bodily autonomy interests in executions); instead it illustrates some of the ways in which choices about execution might vindicate bodily autonomy interests, even as these interests mask the illusory nature of choice in execution.

Pain. Pain is a significant issue in decisions about methods of execution. Challenges to methods of execution typically center on the likelihood that a protocol will cause severe, unconstitutional pain.[149] Recent executions in Tennessee illustrate this issue. Tennessee's default method of execution is lethal injection,[150] but it has a "timed choice" provision that allows a person sentenced to death before January 1, 1999 to choose to die by

147. That said, individuals arguably retain autonomy interests over their bodies after death; they may decide to donate organs, be buried or cremated, or donate their bodies for scientific research and exploration. *See* Hilary Young, *The Right to Posthumous Bodily Integrity and Implications of Whose Right It Is*, 14 MARQ. ELDER'S ADVISOR 197, 199 (2013) ("[T]here are many laws that reflect the importance of posthumous bodily integrity by granting individuals the right to make decisions about the treatment of their future corpses.").

148. *See* Sivakumar Sathasivam, *Autonomy in Assisted Suicide*, 42 GERIATRIC MED. J. 46, 46–47 (May 2012); Kristen Loveland, Note, *Death and Its Dignities*, 91 N.Y.U. L. REV. 1279, 1302–03 (2016) ("The opportunity for the prisoner to choose her last meal and last words can be understood as an effort to respect the prisoner's dignity by allowing her a final opportunity to act on free will." (citation omitted)); Daniel LaChance, *Last Words, Last Meals, and Last Stands: Agency and Individuality in the Modern Execution Process*, 32 LAW & SOC. INQUIRY 701, 712–13 (2007) ("The diversity of final statements of inmates is striking. Final statements in Texas can be bawdy or contrite, submissive or defiant . . . Each of these diverse statements leaves us with a powerful, final image of the offender as an agent making a choice.").

149. *See* Glossip v. Gross, 576 U.S. 863, 867 (2015) (Eighth Amendment claim about Oklahoma execution protocol); Baze v. Rees, 553 U.S. 35, 49–50 (2008) (plurality opinion) (claim about protocol and likelihood of pain); In re Ohio Execution Protocol, 860 F.3d 881, 884 (6th Cir. 2017) (en banc) (claims that Ohio's lethal injection protocol would cause unconstitutional pain); Cooey v. Strickland, 589 F.3d 210, 224 (6th Cir. 2009) (protocol error may cause severe pain); Campbell v. Wood, 18 F.3d 662, 683 (9th Cir. 1994) (en banc) (assessing pain in hanging); Glossip v. Chandler, No. CIV-14-0665-F, 2021 WL 3561229, at *5–6 (W.D. Okla. Aug. 11, 2021) (claims about effect of midazolam as anesthetic in execution);

150. TENN. CODE ANN. § 40-23-114(a).

electrocution.[151] Tennessee's lethal injection protocol used three drugs: midazolam, vecuronim bromide (a paralytic), and potassium chloride.[152] This sort of protocol may cause unconstitutional pain.[153]

Two states have held the electric chair is an unconstitutional method of execution that violates state constitutional prohibitions on cruel and unusual punishment.[154] Electric chair executions cause burning and charring,[155] and it is unclear when the voltage renders the person being killed unconscious or causes death.[156] And yet, when confronted with the opportunity to choose between the electric chair and lethal injection, *five* people that Tennessee executed between 2018 and 2019 decided to risk being set on fire over experiencing lethal injection.[157] The first person to be executed in Tennessee in

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151. *Id.* (b).

152. West v. Parker, No. 3:19-cv-00006, 2019 WL 2341406, at *4 (M.D. Tenn. June 3, 2019). Tennessee's protocols have varied from a single-drug protocol using pentobarbital to a "two protocol" approach that had the option of either the single-drug or three-drug protocol. *Id.* Tennessee altered its protocols mid-litigation. *Id.*

153. *See supra* note 71 and accompanying text (discussing pain in lethal injection executions).

154. *See* Dawson v. State, 554 S.E.2d 137, 144 (Ga. 2001) (holding that electrocution violates the state's constitution); State v. Mata, 745 N.W.2d 229, 279 (Neb. 2008) (same).

155. *See* Glass v. Louisiana, 471 U.S. 1080, 1087–88 (1985) (Brennan, J., dissenting from denial of certiorari) (describing the physiological effects of electrocution).

156. *Id.* at 1089.

> Whether because of shoddy technology and poorly trained personnel, or because of the inherent differences in the "physiological resistance" of condemned prisoners to electrical current, . . . it is an inescapable fact that the 95-year history of electrocution in this country has been characterized by repeated failures swiftly to execute and the resulting need to send recurrent charges into condemned prisoners to ensure their deaths.

157. Edmund Zagorski died in the electric chair on November 1, 2018. Mariah Timms, Nicole Young, Yihyun Jeon, Natalie Allison & Adam Tamburin, *Tennessee Executes Edmund Zagorski by Electric Chair*, THE TENNESSEAN (Nov. 1, 2018, 7:28pm CT), https://www.tennessean.com/story/news/2018/11/01/execution-edmund-zagorski-tennessee-electric-chair/1570451002/. David Earl Miller died in the electric chair on December 6, 2018. Mariah Timms, Matt Lakin, Yihyun Jeon & Natalie Allison, *Tennessee Executes David Earl Miller by Electric Chair*, THE TENNESSEAN (Dec. 6, 2018, 7:28pm CT), https://www.tennessean.com/story/news/2018/12/06/david-earl-miller-execution-electric-chair-tennessee/2158239002/. Stephen West died in the electric chair on August 15, 2019. Adam Tamburin, Mariah Timms & Matt Lakin, *Tennessee Executes Stephen Michael West by Electric Chair*, THE TENNESSEAN (Aug. 15, 2019, 7:30pm CT), https://www.tennessean.com/story/news/2019/08/15/tennessee-execution-stephen-michael-west-dies-electric-chair/2009390001/. Lee Hall died on December 5, 2019. Mariah Timms & Adam Tamburin, *Tennessee Executes Blind Death Row Inmate Lee Hall by Electric Chair for 1991 Murder of Girlfriend*, THE TENNESSEAN (Dec. 5, 2019, 10:28pm ET), https://www.usatoday.com/story/news/nation/2019/12/05/lee-hall-execution-death-electric-chair-tennessee/2626129001/?utm_source=feedblitz&utm_medium=FeedBlitzRss&utm_campaign=usatoday-newstopstories. Nicholas Sutton died in the electric chair on Feb. 20, 2020. Travis Dorman, *Nicholas Sutton's Last Words Before Execution: 'I'm just grateful to be a servant of God.'*, KNOX NEWS (Feb. 20, 2020, 9:03pm ET), https://www.knoxnews.com/story/news/crime/2020/02/20/nicholas-sutton-last-words-before-tennessee-execution-electric-chair/4799483002/.

nearly a decade, Billy Ray Irick, who died in 2018, may have experienced excruciating pain during his execution by lethal injection.[158] The five people who picked the electric chair did so because they "fear[ed] being frozen in place and feeling intense discomfort while drugs work to kill them."[159] By exercising the choice the statute had provided, the five people who died in Tennessee were able to retain some control over their bodily autonomy, even if that control was only illusory.

Constitutional challenges to methods of execution necessarily focus on pain—the Eighth Amendment does not require a painless death, but it does prohibit wanton and unnecessary pain.[160] Challenges to a method of execution have focused on the risky nature of various lethal injection protocols and the potential for pain,[161] and the interaction between lethal injection drugs and a person's particular medical conditions that may create a significant risk of pain and suffering.[162] Ernest Johnson, for example, sought to be executed by nitrogen gas because Missouri's protocol, which uses pentobarbital, risked triggering "excruciating seizures" due to Johnson's epilepsy, which was caused by a brain tumor and damage from brain surgery.[163] Even though the Supreme Court's Eighth Amendment jurisprudence tends to undervalue, if not ignore, the issue of pain, it remains a critical facet of bodily autonomy

158. *See* Dave Boucher & Adam Tamburin, *Tennessee Execution: Billy Ray Irick Tortured to Death, Expert Says in New Filing*, THE TENNESSEAN (Sept. 7, 2018, 8:17am CT), https://www.tennessean.com/story/news/crime/2018/09/07/tennessee-execution-billy-ray-irick-tortured-filing/1210957002/ (quoting an expert statement that "Irick 'experienced the feeling of choking, drowning in his own fluids, suffocating, being buried alive, and the burning sensation caused by the injection of the potassium chloride'").

159. Rick Rojas, *Why This Inmate Chose the Electric Chair over Lethal Injection*, N.Y. TIMES (Feb. 19, 2020), https://www.nytimes.com/2020/02/19/us/electric-chair-tennessee.html. The term "intense discomfort," however, seems inconsistent with the description that one of the lawyers who represented the condemned person provided: "about 14 minutes of pain and horror." *Id.*

160. *See* Bucklew v. Precythe, 139 S. Ct. 1112, 1124 (2019) (explaining that the Eighth Amendment only prohibits "long disused" forms of punishment that intensify the death sentence by using unnecessarily painful or disgraceful measures).

161. *See, e.g.*, Glossip v. Gross, 576 U.S. 863, 867 (2015) (disputing the use of midazolam as a tertiary substitute for unavailable drugs in Oklahoma's three-drug execution method); Clemons v. Crawford, 585 F.3d 1119, 1122 (8th Cir. 2009) (challenging Missouri's lethal injection protocol due to its provision by untrained and incompetent personnel); *see also A New Test for Evaluating Eighth Amendment Challenges to Lethal Injections*, 120 HARV. L. REV. 1301, 1302 n.13 (2007) ("Inmates have also challenged lethal injections under other theories. For instance, on several occasions, prison officials have had difficulty finding a vein, leading to lengthy and gruesome procedures." (citing Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says about Us*, 63 OHIO ST. L.J. 63 (2002))).

162. *See Bucklew*, 139 S. Ct. at 1120 ("Mr. Bucklew now contend[s] that the State's protocol would cause *him* severe pain because of his particular medical condition." (emphasis in original)).

163. Johnson v. Precythe, 141 S. Ct. 1622, 1623 (2021) (Sotomayor, J., dissenting from denial of certiorari).

in the decisions about methods of execution as well as decisions to challenge methods of execution.

Dignity. Dignity interests overlap with other facets of autonomy: pain, bodily integrity, and expressive messages.[164] The term is often difficult to define, appearing in multiple contexts and carrying differing meanings.[165] The Eighth Amendment approach to dignity[166] has been described as on restricting the state's authority to punish to "the limits of civilized standards."[167] This broader concept of dignity has also been applied to executions. Justice Brennan argued persuasively that dignity requires "minimization of physical violence during executions irrespective of the pain that such violence might inflict on the condemned[,]" and limiting "mutilation" and "distortion" of the condemned person's body.[168] More recently, the Supreme Court has prioritized the state's dignity interests (which overlap with the expressive message function discussed *infra*) in executions.[169] *Baze*, for example, but emphasized that paralytic drugs that enhanced the risk of suffering "preserv[e] the dignity of the procedure, especially where convulsions and seizures could be misperceived as signs of consciousness or distress."[170]

Medical and legal definitions of dignity and its relationship to autonomy overlap—dignity "implies being respected as a human being with a life to be lived and choices to be made."[171] Dignity respects and values choice as

164. *See, e.g.*, Campbell v. Wood, 18 F.3d 662, 701–02 (9th Cir. 1994) (Reinhardt. J., dissenting); Campbell v. Wood, 511 U.S. 1119, 1122 (1994) (Blackmun, J., dissenting from denial of certiorari); Glass v. Louisiana, 471 U.S. 1080, 1085 (1985) (Brennan, J., dissenting from denial of certiorari); Fierro v. Gomez, 865 F. Supp. 1387, 1415 (N.D. Cal. 1994), *vacated by* Fierro v. Terhune, 147 F.3d 1158 (9th Cir. 1998); *see also* Jyl Gentzler, *What Is a Death With Dignity*, 28 J. MED. & PHIL. 461, 466 (discussing the relationship between pain and dignity).

165. *See* Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 175 (2011); Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 657–58 (2008); *see also generally* MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING (2012); JEREMY WALDRON, DIGNITY, RANK AND RIGHTS (2012).

166. *See* Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.").

167. *Id.*

168. Glass v. Louisiana, 471 U.S. 1080, 1085 (1985) (Brennan, J., dissenting from denial of certiorari).

169. *See* Baze v. Rees, 553 U.S. 35, 57 (2008) (plurality opinion); *see also* Loveland, *supra* note 148, at 1306–08 (discussing "collective dignity" interests).

170. *Baze*, 553 U.S. at 57; *see also* Transcript of Oral Argument at 43, Baze v. Rees, 553 U.S. 35 (2008) (No. 07-5439) (Counsel for Kentucky arguing that a paralytic "does bring about a more dignified death, dignified for the inmate, dignified for the witnesses" even though the paralytic was the primary risk for masking anesthetic failure).

171. Charlotte Delmar, *The Interplay Between Autonomy and Dignity: Summarizing Patients' Voices*, 16 MED. HEALTH CARE & PHILOSOPHY 975, 976 (2013); *see also* Gardner, *supra* note 13, at 107 (describing the relationship between recognizing a human's "intrinsic worth," dignity, and autonomy").

a way to reflect a person's autonomy.[172] In the deeply undignified world of capital punishment, there is limited autonomy and there are many injuries to dignity.[173] Prioritizing state decisions about methods of execution or execution protocols may exacerbate these dignitary harms. As Justice Stevens observed in *Baze*, the "minimal interest" in "ensuring that a condemned inmate dies a dignified death and that witnesses to the execution are not made uncomfortable by an incorrect belief . . . that the inmate is in pain, is vastly outweighed by the risk that the inmate is actually experiencing excruciating pain that no one can detect."[174] Experiencing pain may harm dignity, but masking pain in this way is also a dignitary harm because it expresses the state's indifference to the risk of human suffering in favor of cosmetic, enforced dignity.[175]

A person facing a state-imposed death may pick a method to preserve his dignity. For example, John Albert Taylor, who Utah executed by firing squad in 1996, selected that method over lethal injection in part because he perceived it to be a more dignified death.[176] Taylor asserted that "he did not want to lie there and 'flop around like a fish.'"[177] Choosing among methods of execution that are (somehow) consistent with Eighth Amendment values might, as one commentator has argued, "respect[] the inmate's interest in a death reflecting her self-determination and dignity."[178] Similarly, Professor Martin Gardner posited in an article shortly after *Gregg v. Georgia*,[179] that states could permit condemned people to commit suicide within a deadline or face execution by the state.[180] He argued that this method, which allowed

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172. Delmar, *supra* note 171, at 976; Gardner, *supra* note 13, at 107 ("[T]he essence of being a person lies in the notions of individual autonomy and freedom of choice.").

173. *See supra* note 107 and accompanying text.

174. Baze v. Rees, 553 U.S. 35, 73 (2008) (Stevens, J., concurring in the judgment).

175. *Cf.* Blecker, *supra* note 73, at 987–88.

> The paralytic agent should not be employed to mask pain; neither should the initial anesthetic alone be allowed to produce its false appearance. If a killer deserves a quick but painful death, we deserve the satisfaction of knowing he experiences it. If most condemned killers deserve to die, but without pain, we commit a great injustice by creating false appearances that obscure their wrongly inflicted, unjustly suffered pain.

176. *See* L. KAY GILLESPIE, THE UNFORGIVEN: UTAH'S EXECUTED MEN 171 (2d ed. 1997) (explaining that condemned people the author interviewed "felt that lethal injection robbed them of their masculinity and 'dignity' and that the firing squad, at least, allowed them to maintain both").

177. *Id.* at 168; *see also* Matthew Brown, *Child Killer Faces Utah Firing Squad*, AP (Jan. 26, 1999), https://apnews.com/article/2080c83dd6a1978642d22784047835d1 ("Taylor said he chose the firing squad because it would be a costly inconvenience to the state and because he feared 'flipping around like a fish out of water' if given an injection.").

178. Loveland, *supra* note 148, at 1313. Loveland argues that methods of execution must also respect "collective dignity" through avoiding methods that may be brutal or likely unconstitutional. *See id.*

179. 428 U.S. 153 (1976).

180. *See* Gardner, *supra* note 13, at 111.

a condemned person to choose the "circumstances of his death" demonstrated greater respect for individual dignity as well as the condemned person's privacy interests.[181] The difficulty with offering choice as a way to vindicate individual dignity is that, as I will discuss in Part IV, choice among methods of execution is not intended to vindicate individual dignity, but reinforces the absolute hopelessness of avoiding execution.

Dignity may extend beyond selecting a method of execution—a person being put to death may seek to reinforce their death with dignity to the extent allowable, such as by seeking to have their spiritual advisor present. The presence of a spiritual advisor may increase an individual's dignity in death by maximizing their personal choice (if the state permits it),[182] or by creating a way for the condemned person's death to have more of a resemblance to natural, non-state-imposed death. I have discussed this topic *infra* as it applies to expressive messages, but it applies to dignity as well. The decision to affirm one's own value and intrinsic worth as a human in the face of a dehumanizing process that abnegates humanity is a powerful expressive message that asks the viewer to consider what dignity really means.

Bodily Integrity. An interest in bodily integrity is associated with both pain and dignity,[183] although it implicates more than these interests. Courts, however, tend to focus on overlapping areas that implicate dignity and pain, rather than a condemned person's interest in his bodily integrity. Capital punishment cannot be unconstitutionally painful, but it also should not include "other circumstances of terror, pain, or disgrace[.]"[184] *Wilkerson v. Utah* observed that this included cases "where the prisoner was drawn or dragged to the place of execution, in treason; or where he was embowelled alive, beheaded, and quartered, in high treason. Mention is also made of public dissection in murder, and burning alive in treason committed by a female."[185] These sorts of punishments certainly implicate pain and dignity interests, but they also reflect a person's interest in the integrity of their body; even if a method of execution not is painful, it may be unconstitutional.[186]

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181. *Id.* at 112.

182. *See infra* notes 213–219 and accompanying text (discussing limitations on spiritual advisors in the execution chamber).

183. *See* Gardner, *supra* note 13, at 108 ("Human dignity also entails respect for bodily integrity. . . . The courts have thus recognized that unnecessary mutilation of the bodies of capital offenders affronts the principles of human dignity that underlie the cruel and unusual punishment clause.").

184. Wilkerson v. Utah, 99 U.S. 130, 135 (1878); *see* Bucklew v. Precythe, 139 S. Ct. 1112, 1124 (2019) (explaining that the Eighth Amendment prohibits "punishment that intensifie[s] the sentence of death with a (cruel) 'superadd[ition]' of 'terror, pain, or disgrace'" (quoting Baze v. Rees, 553 U.S. 35, 448 (2008))); Glossip v. Gross, 576 U.S. 863, 893 (2015) (disputing that Oklahoma's method of execution is tantamount to being "drawn and quartered, slowly tortured to death, or actually burned at the stake" (citation omitted)).

185. *Wilkerson*, 99 U.S. at 135.

186. *See* Dawson v. State, 554 S.E.2d 137, 143 (Ga. 2001) (arguing that focusing only on "unnecessary conscious pain" "would lead to the abhorrent situation where a condemned

Judges have argued that methods that could cause a swift, painless death, but entail excessive bodily mutilation, are likely unconstitutional because they are inconsistent with "basic notions of human dignity."[187] The guillotine, which theoretically is a quick way to die, "entails frank violence (i.e., gross laceration and blood-letting) and mutilation (i.e., decapitation)[.]"[188] Courts have prioritized pain and dignity interests over bodily integrity, and asserted that some forms of punishment are so extreme that legislative bodies simply would not use them.[189]

Bodily integrity and the potential for mutilation has been a factor in assessing the constitutionality of methods of execution. In *Dawson v. State*, the Georgia Supreme Court held that electrocution was unconstitutional because "the bodies of condemned prisoners in Georgia are mutilated during the electrocution process," even if the court was unsure of whether electrocution caused pain.[190] Execution by the electric chair causes "some degree of burning of the prisoner's body," including "blisters and burn marks" or "sloughing or 'slippage' of a large portion of the scalp and the skin at the back of the head and also on the legs[.]"[191] A person sentenced to death retains some interest in his bodily integrity—executing him in a way that "inflicts purposeless physical violence and needless mutilation" fails to serve legitimate goals of punishment.[192]

Interests in bodily integrity are also relevant in other methods of execution. In *Nelson v. Campbell*, the Supreme Court did not consider Nelson's bodily integrity interests; instead it considered whether using the cut down was "gratuitous."[193] But Nelson's bodily integrity interests are inextricable from the gratuitous nature of a cut down; the state should not unnecessarily mutilate Nelson's body while killing him. Proposing an alternative method of execution allowed Nelson an opportunity to resist the state's mutilation and affirmed his autonomy over at least some part of his death. State mutilation may even bar executions. In 2018, Alabama attempted to execute Doyle

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prisoner could be burned at the stake or crucified as long as he or she were rendered incapable by medication of consciously experiencing the pain, even though such punishments have long been recognized as "manifestly cruel and unusual.'" (quoting *In re Kemmler*, 136 U.S. 436, 446 (1890))).

187. Glass v. Louisiana, 471 U.S. 1080, 1085 (1985) (Brennan, J., dissenting from denial of certiorari).

188. Provenzano v. Moore, 744 So.2d 413, 428–29 (Fla. 1999); *see also* Jones v. State, 701 So.2d 76, 84 (Fla. 1997) (Shaw, J., dissenting); Campbell v. Wood, 18 F.3d 662, 706 (9th Cir. 1994) (Reinhardt, J., dissenting).

189. *See Campbell*, 18 F.3d at 706 ("[W]hatever the state of the law in 1789, beheading is inconsistent with our current standards of decency, both because every state has rejected that form of execution *and* because there is a savagery to the extreme bodily mutilation and the outpouring of blood that is simply inconsistent with human dignity.").

190. *Dawson,* 554 S.E.2d at 143.

191. *Id.* at 141.

192. *Id.* at 142.

193. Nelson v. Campbell, 541 U.S. 637, 645 (2004).

Hamm although medical experts warned that executioners might not be able to access Hamm's peripheral or central veins because he was being treated for cancer and Hepatitis C, and he had a history of intravenous drug use.[194] Alabama proceeded anyway, only to call off Hamm's execution after nearly *three hours* of attempting to access Hamm's veins.[195] Hamm had not opted for the electric chair; instead he sought to be executed by oral administration of the lethal injection drugs—an option that Alabama rejected.[196] Instead, Alabama punctured Hamm repeatedly, mutilating his body.[197] Hamm filed suit, and the state of Alabama settled the case, agreeing to drop further attempts at execution.[198] Alabama's attempt to kill Hamm was unquestionably painful, but it also interfered with his interests in his bodily integrity and dignity.

Bodily integrity may be relevant as a matter of constitutional law for people who do not face a death sentence,[199] but courts tend to prioritize other issues when speaking of capital punishment. In this way, bodily integrity is similar to the interest in staying alive, discussed below. It matters, even if courts do not substantially engage with the interest.

Expressive Messages. Executions, like all forms of punishment,[200] carry expressive messages.[201] Assessing certain methods of execution invites

194. Sam Roberts, *Doyle Hamm, Who Survived a Bungled Execution Dies in Prison at 64*, N.Y. TIMES (Nov. 29, 2021), https://www.nytimes.com/2021/11/29/us/doyle-hamm-dead.html; Bernard E. Harcourt, *The Ghoulish Pursuit of Executing a Terminally Ill Inmate*, N.Y. TIMES (Dec. 20, 2017), https://www.nytimes.com/2017/12/20/opinion/executing-terminally-ill-inmates.html (discussing the state's ability to achieve venous access).

195. It appears that executioners ended their attempts to kill Hamm when they did because his death warrant was set to expire within half an hour of ending the attempted execution. Roberts, *supra* note 194.

196. *See* Chandrika Narayan, *Alabama's aborted execution was 'botched and bloody,' lawyer says*, CNN (Feb. 28, 2018), https://www.cnn.com/2018/02/27/us/alabama-aborted-execution/index.html.

197. *See* Bernard Harcourt, *Dr. Heath Examines Doyle Hamm on Sunday, February 25, 2018*, UPDATE: DOYLE LEE HAMM V. ALABAMA (Feb. 25, 2018), http://blogs.law.columbia.edu/update-hamm-v-alabama/2018/02/25/dr-heath-examines-doyle-hamm-on-sunday-february-25-2018/ ("The IV personnel almost certainly punctured Doyle's bladder, because he was urinating blood for the next day. They may have hit his femoral artery as well . . . . There were multiple puncture wounds on the ankles, calf, and right groin area, around a dozen. . . . He seems to have 6 puncture marks in his right groin, and large bruising and swelling in the groin.").

198. *See* Roberts, *supra* note 194.

199. *See, e.g.*, Schmerber v. California, 384 U.S. 757, 772 (1966) (holding that a blood draw to test for drunk driving conducted by a physician did not violate the Fourth and Fourteenth Amendments); Winston v. Lee, 470 U.S. 753, 755 (1985) (holding that compelling an individual to "undergo a surgical procedure under a general anesthetic for removal of a bullet lodged in his chest" would violate the Fourth and Fourteenth Amendments).

200. *See* Susan A. Bandes, *All Bathwater, No Baby: Expressive Theories of Punishment and the Death Penalty*, 116 MICH. L. REV. 905, 916 (2018).

201. *See* TIMOTHY V. KAUFMAN-OSBORN, FROM NOOSE TO NEEDLE: CAPITAL PUNISHMENT AND THE LATE LIBERAL STATE 199 (2002) ("[T]he state has an interest in

historic comparison to earlier ways that executions could be carried out or historic atrocity.[202] The way a state carries out executions sends particular messages[203] and sometimes sends messages the state may not intend.[204] Lethal injection, for example, has been critiqued as a medicalized procedure that is intended to mask the violence of killing.[205] Indeed, the Supreme Court has recognized a *state's interest* in the "dignity of the procedure" that overrides the potential risk to the person being killed.[206] In some cases, however, a person sentenced to death may be able to subvert the state's expressive messages through his choice of execution method or how the execution is carried out. Consider the message that the men who elected to die in the electric chair in Tennessee conveyed through their choice even if that message was unintentional. The electric chair is a far more violent method of execution,[207] and choosing it rejects the state's attempt to create an externally peaceful, medicalized death.

Other people have selected overtly violent methods of execution to convey a message. When Utah had a "free choice" statute allowing condemned people to choose between the firing squad and lethal injection, some

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medicalizing capital punishment as fully as possible since it thereby assumes that the character of a depoliticized humanitarian (non)event, a painless matter of putting someone 'to sleep.'").

202. *See, e.g.*, Campbell v. Wood, 18 F.3d 662, 706 (9th Cir. 1994) (Reinhardt, J., dissenting) (explaining that the guillotine, despite resulting in a quick and painless death, would fail constitutional muster under the Eighth Amendment); Jones v. State, 701 So. 2d 76, 84 (Fla. 1997) (Shaw, J., dissenting) (same).

203. *See* Mona Lynch, *On-line Executions: The Symbolic Use of the Electric Chair in Cyberspace*, 23(2) POLITICAL & LEGAL ANTHROPOLOGY REV. 1, 5 (Nov. 2000) (arguing that the "ritualized, publicly witnessed, brutally violent" nature of lynchings contrasted sharply to "the official movement to private, humane ceremonies").

204. Christina Hauser, *Outrage Greets Report of Arizona Plan to Use 'Holocaust Gas' in Executions*, N.Y. TIMES (Jun. 2, 2021), https://www.nytimes.com/2021/06/02/us/arizona-zyklon-b-gas-chamber.html ("Headlines noting that the chemicals could form the same poison found in Zyklon B, a lethal gas used by the Nazis, provoked fresh outrage, including among Auschwitz survivors in Germany and Israel, over the association with the Holocaust and hydrogen cyanide's use in the death camps.").

205. *See* KAUFMAN-OSBORN, *supra* note 201, at 210 ("[D]uring an execution by this means, there is no clear indication as to when the act of killing begins, the body evinces no signs that it is being killed and its status as dead can be known not by any discernible change in the character of embodiment, but only via an act of official declaration.").

206. Baze v. Rees, 553 U.S. 35, 57 (2008) (plurality opinion); *see also* Ramirez v. Collier, 142 S. Ct. 1264, 1280 (2022) (recognizing the government's "compelling interest" in "maintaining solemnity and decorum in the execution chamber").

207. *See* Glass v. Louisiana, 471 U.S. 1080, 1086–88 (1985) (Brennan, J., dissenting from denial of certiorari) (outlining the multiple ways in which the electric chair exceeds mere death by being "extremely violent and inflict[ing] pain and indignities"); Dawson v. State, 554 S.E.2d 137, 143 (Ga. 2001) ("The evidence adduced in the record in Moore reveals uncontrovertedly that the bodies of condemned prisoners in Georgia are mutilated during the electrocution process."); State v. Mata, 745 N.W.2d 229, 278 (Neb. 2008) ("Besides presenting a substantial risk of unnecessary pain, we conclude that electrocution is unnecessarily cruel in its purposeless infliction of physical violence and mutilation of the prisoner's body.").

decisions expressly reflected that choice. John Albert Taylor selected the firing squad in part for its expressive messages.[208] Taylor picked the firing squad because, as he said, "It is symbolic to me. I maintain my innocence. If they are putting a bullet in me they are murdering me. It is the most hassle and the most expensive."[209] Ronnie Lee Gardner, who was sentenced to death for shooting and killing an attorney while trying to escape from custody during his trial for a separate murder,[210] opted for the firing squad for his own expressive reasons. Gardner picked the firing squad because, as he put it, "I lived by the gun, I murdered with a gun, so I will die by the gun."[211] He also expressed an interest in the firing squad based on his "Mormon heritage,"[212] which prompted the Church of Jesus Christ of Latter-day Saints to emphatically and publicly reject the doctrine of "blood atonement" the day of Gardner's execution.[213] Choosing a more overtly violent method of execution allows a person to convey a message, even if he is using the end of his body to convey that message. Picking a method that looks more like the sort of violence the state is punishing the condemned person for, illustrates the reality of state-directed killing in a way that is hard to ignore.

Expressive messages may appear in other choices about executions that reflect interests in bodily autonomy. Courts typically assess requests for spiritual advisors to be present in the execution chamber under the First Amendment[214] and the Religious Land Use and Institutionalized Persons Act.[215] The

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208. *See* GILLESPIE, *supra* note 176, at 168–71.

209. *Id.* at 168; *see also* Brown, *supra* note 177 (explaining that Taylor "hoped the method would more dramatically underscore his claim that his death would be state-sanctioned murder").

210. *See* Nate Carlisle, *Ronnie Lee Gardner: A Dark and Deadly Path*, SALT LAKE TRIB. (June 7, 2010, 10:16am), https://archive.sltrib.com/article.php?id=49705008&itype=CMSID.

211. Joseph P. Williams, *The Return of the Firing Squad*, U.S. NEWS (March 3, 2017, 6:00am), https://www.usnews.com/news/the-report/articles/2017-03-03/the-firing-squad-is-making-a-comeback-in-death-penalty-cases.

212. *Inmate Threatens to Sue if State Won't Let Him Die by Firing Squad*, DESERET NEWS (Feb. 19, 1996, 12:00am), https://www.deseret.com/1996/2/9/19224129/inmate-threatens-to-sue-if-state-won-t-let-him-die-by-firing-squad ("But Gardner says he's always preferred the firing squad. 'I guess it's my Mormon heritage,' he said. 'I like the firing squad. It's so much easier . . . and there's no mistakes.'").

213. *Mormon Church Statement on Blood Atonement*, DESERET NEWS (June 18, 2010, 12:00pm MDT), https://www.deseret.com/2010/6/18/20122138/mormon-church-statement-on-blood-atonement ("[S]o-called 'blood atonement,' by which individuals would be required to shed their own blood to pay for their sins, is not a doctrine of The Church of Jesus Christ of Latter-day Saints.").

214. *See* U.S. CONST. amend. I.

215. 42 U.S.C. §§ 2000cc *et seq.* *See* Ramirez v. Collier, 10 F.4th 561, 561 (5th Cir. 2021) (per curiam), *rev'd* 142 S. Ct. 1264 (2022) (denying a stay of execution in response Ramirez's claims that denying him a spiritual advisor in the execution chamber violated his First Amendment rights and RLUIPA); Dunn v. Ray, 139 S. Ct. 661, 661–62 (2019) (Kagan, J., dissenting from grant of application to vacate stay (arguing that the state's policy of denying a non-Christian prisoner his spiritual advisor of choice in the execution chamber was likely to violate the First Amendment); Murphy v. Collier, 139 S. Ct. 1475, 1475 (2019)

Supreme Court recently discussed some of this messaging in an opinion assessing whether a condemned person was entitled to a preliminary injunction to litigate claims over his right to have a spiritual advisor present.[216] John Henry Ramirez sought to have his "chosen spiritual advisor . . . perform ministrations in the execution chamber that include laying hands on petitioner and audibly praying over and with petitioner during the final moments of petitioner's life."[217] While Ramirez's claim reflects his desire to exercise his religious beliefs, it also reflects a choice about the physical conditions of his body during his execution. Ramirez seeks the comfort associated with spiritual touch.[218] His decision conveys his personal, expressive message about his death and the end of his autonomy over his physical body. Ramirez's decision about *how* he dies also transforms his death from the sterile, pseudo-medical environment of lethal injection to a gentler death that conveys the message of his personal salvation and his dignity and worth as a human.[219] It is a message that the state sought to silence, by contending that prayer might be aimed at persuading executioners or witnesses, upset the victim's family, or "otherwise interfere with the execution."[220]

I do not suggest that the First Amendment is inadequate to encompass Ramirez's interests; rather considering his interest in bodily autonomy at the moment of his death makes his claims all the more compelling. While the oral arguments in the Supreme Court suggested that at least some justices considered Ramirez's arguments a delay tactic, intended to keep him alive through litigation,[221] that should not mean that Ramirez could not exercise a

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(Kavanaugh, J., concurring in grant of application for stay) (state's policy of not permitting spiritual advisors who are not Muslim or Christian in the execution chamber potentially violated Murphy's First Amendment rights because Murphy is Buddhist); Dunn v. Smith, 141 S. Ct. 725, 725 (2021) (Kagan. J., concurring in denial of application to vacate injunction) (arguing that Alabama's decision to ban all clergy members from the execution chamber "substantially burdened" Smith's exercise of religion under RLUIPA).

216. Ramirez v. Collier, 142 S. Ct. 1264, 1275 (2022); *see also* Ian Millheiser, *The Supreme Court Finally Figures out that Religious Liberty Cases Are Hard*, VOX (Nov. 10, 2021), https://www.vox.com/22772213/supreme-court-religion-death-penalty-ramirez-collier-constitution-liberty.

217. Brief for Petitioner at 3, Ramirez v. Collier, 142 S. Ct. 1264 (2022) (No. 21-5592), 2021 WL 4666575.

218. *See id.* at 7 ("The pastor's prayers and laying on of hands at the moment of death are significant to petitioner's and Pastor Moore's faith because, like many Christians, they believe they will either ascend to heaven or descend to hell at the moment of death."); *id.* at 21 ("To petitioner and Pastor Moore, '[t]ouch is spiritually important . . . [because] Jesus healed by touching.'").

219. Prayer, as well as other spiritual messaging, were not unusual features of early executions in America. *See Ramirez*, 142 S. Ct. at 1278–79 (discussing the history of prayer at executions); BANNER, *supra* note 28, at 34–35 (discussing the spiritual messages associated with public hangings).

220. *Ramirez*, 142 S. Ct. at 1280.

221. Transcript of Oral Argument at 7–8, Ramirez v. Collier, 142 S. Ct. 1264 (2022) (No. 21-5592) (Thomas, J.) ("I guess my question is, can one's repeated filing of complaints, particularly at the last minute, not only be seen as evidence of gaming of the system but also of

meaningful choice in how he died and resist the consistent approaches of the state to further dehumanize him in the moments of his death. Further, even if these challenges *are* about delay, Ramirez and other people facing death sentences have a justifiable bodily autonomy interest in being alive.

Living. Death interferes with a person's bodily autonomy interest in continuing to live. Litigation over the potential unconstitutionality of methods of execution is predominately directed at questions of pain and suffering inherent in the state's chosen method or methods of execution.[222] To be sure, this litigation is aimed at vindicating critical interests, such as an absence of government transparency;[223] inadequate expertise by execution teams or development of protocols;[224] arbitrariness in government decision making about methods of execution;[225] or requiring the government to comply with laws.[226] But litigation over methods of execution (including a state's failure

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the sincerity of religious beliefs?"); *id.* at 13 (Kavanaugh, J.) (explaining that Texas is concerned that "people are moving the goalposts on their claims in order to delay their executions").

222. *See* Keaton Ross, *Oklahoma Watch: Details on the Death Row Lawsuit Questioning Oklahoma's Lethal Injection Protocol*, TULSA WORLD (Feb. 20, 2022), https://tulsaworld.com/news/state-and-regional/govt-and-politics/oklahoma-watch-details-on-the-death-row-lawsuit-questioning-oklahomas-lethal-injection-protocol/article_68baad9c-90d7-11ec-bec5-133eb7a2c1c6.html (lawsuit on constitutionality of Oklahoma's lethal injection protocol and the likelihood of pain from the protocol); *see supra* Part II.B (discussing litigation over methods of execution).

223. *See* William W. Berry III & Meghan J. Ryan, *Cruel Techniques, Unusual Secrets*, 78 OHIO ST. L.J. 403 (2017); Mary D. Fan, *The Supply-Side Attack on Lethal Injection and the Rise of Execution Secrecy*, 95 B.U. L. REV. 427 (2015).

224. *See* Ty Alper, *What Do Lawyers Know About Lethal Injection?*, 1 HARV. L. & POL'Y REV. ONLINE (2008), https://www.law.berkeley.edu/files/dpc/2008.Alper.harvardlawandpolicy.pdf; Corinna Barrett Lain, *Death Penalty Exceptionalism and Administrative Law*, 8 BELMONT L. REV. 552, 561–72 (2021) (discussing the absence of expertise in agencies tasked with developing and carrying out execution protocols).

225. *See* Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What it Says About Us*, 63 OHIO ST. L.J. 63 (2002); Alexandra L. Klein, *Nondelegating Death*, 81 OHIO ST. L.J. 923, 965 (2020) (outlining the primary separation of powers problems related to agency discretion in execution methods).

226. *See* Heckler v. Chaney, 470 U.S. 821 (1985); *Smith v. Comm'r, Ala. Dep't of Corr.*, No. 21-13581, 2021 WL 4916001, at *1 (11th Cir., Oct. 21, 2021) ("Mr. Smith claims that Defendants violated his rights under the ADA when they gave death-row inmates an Election Form to opt in to this new method of execution but failed to provide Mr. Smith with a reasonable accommodation to ensure that he meaningfully understood the Election Form and the choice it provided him."); Reeves v. Comm'r, Ala. Dep't of Corr., 23 F.4th 1308, at *1 (11th Cir. 2022), *injunction vacated*, Hamm v. Reeves, 142 S. Ct. 743 (S. Ct. Jan. 27, 2022) (similar claims); State v. Sigmon, Nos. 2002-024388 & 2021-000584 (S.C. June 16, 2021), https://documents.deathpenaltyinfo.org/Sigmon-Stay-Order-SC-2021-06-16.pdf (staying an execution based on "the statutory right of inmates to elect the manner of their execution); State v. Owens, No. 2006-038802 (S.C. June 16, 2021), https://documents.deathpenaltyinfo.org/Owens-Stay-Order-SC-2021-06-16.pdf (same).

to comply with its own laws) is also aimed at preserving a condemned person's life.

The Supreme Court has critiqued this interest, suggesting that this sort of litigation is more akin to a bad faith delaying tactic.[227] For example, in *Bucklew v. Precythe*, Justice Gorsuch rejected Bucklew's argument that the *Baze-Glossip* "readily available alternative" requirement should only apply to facial challenges than as-applied challenges to methods of execution, observing that, "Unless increasing the delay and cost involved in carrying out executions is the point of the exercise, it's hard to see the benefit in placing so much weight on what can be an abstruse exercise."[228] This conclusion overlooks the very real interests in ensuring that a person's death is not unconstitutionally painful, as well as the sometimes unlawful and antidemocratic conduct that states engage in to carry out executions. To a majority of the court, a challenge to methods of execution is almost offensive, aimed at thwarting the state's interest in putting someone to death.[229] While individual constitutional rights are certainly at stake in these challenges, a person facing down a government that wants to kill them retains a valid autonomy interest in *not dying*.

The Supreme Court's preference for avoiding delay in executions has overridden its willingness in earlier cases to address potential bodily autonomy concerns associated with pain, dignity, and bodily integrity, even if it did not expressly recognize the autonomy values therein.[230] In some ways, the Court's perspective echoes the legislative emphasis on *lex talonis*; victims were unable to choose how they died so a person who has been sentenced to death should not either.[231] Indeed, the Court's emphasis on state interests in carrying out capital sentences suggests that a condemned person's interests in being alive are extinguished at some point during capital proceedings. This is evident from the Court's response to method of execution challenges in recent years—its jurisprudence sounds like a demand that people sentenced to death should go ahead and die.[232] Being sentenced to

227. Bucklew v. Precythe, 139 S. Ct. 1112, 1133–34 (2018) (complaining that Bucklew had "secure[d] delay through lawsuit after lawsuit").

228. *Id.* at 1128.

229. *See* Baze v. Rees, 553 U.S. 35, 71 (2008) (Alito, J., concurring) ("The Court should not produce a *de facto* ban on capital punishment by adopting method-of-execution rules that lead to litigation gridlock.")

230. *See supra* Part II.B.

231. *See supra* notes 45–50 and accompanying text.

232. *See* Dunn v. Ray, 139 S. Ct. 661, 662 (2019) (Kagan, J., dissenting from grant of application to vacate stay) ("The Eleventh Circuit wanted to hear that claim in full. Instead, this Court short-circuits that ordinary process—and itself rejects the claim with little briefing and no argument—just so the State can meet its preferred execution date."); Brief for Petitioner at 8–10, Ramirez v. Collier, 142 S. Ct. 1264 (2022) (No. 21-5592), 2021 WL 4666575; *see also* Lee Kovarsky, *The Trump Executions*, 100 TEX. L. REV. 621, 658–63 (2022) (discussing the Supreme Court's response to the 2020 and 2021 federal execution spree); Ngozi Ndulue, *Symposium: The Shadow Docket is Shaping the Future of Death Penalty Litigation*,

death, it seems, is enough to strip away an individual's bodily autonomy interest in living. This should not be the case, but the criminal legal system, and the system of capital punishment, have rarely, if ever, operated to protect the autonomy of individuals trapped within it.[233] To the extent that there are areas in which condemned people can exercise autonomy, they are, as I discuss in the next Section, largely illusory.

IV. ILLUSORY AUTONOMY

The question of bodily autonomy in capital punishment is, as I have noted earlier, one of the many contradictions of the death penalty. Humans have an inherent instinct to be alive, to stay alive,[234] but once a person has been sentenced to death, courts refuse to recognize the validity of that interest—a capital sentence apparently strips a person of their legally cognizable interest in not dying.[235] States allow condemned people to have spiritual advisors in the execution chamber—but not *all* condemned people—and then change policies and complain that the *condemned person* is the source of the delay.[236] Legislators offer a choice among methods of execution and then courts and corrections agencies make it more difficult to exercise the choice. Courts identify pain as a potential constitutional problem—and then insist that not *all* pain in executions is unconstitutional and the Constitution only matters when comparing methods.[237]

Despite the fact that some people facing execution act in ways to retain their bodily autonomy, these small acts ultimately are subsumed by the state's power to take human life.[238] But it is more than the state's power to

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SCOTUSBLOG (Oct. 26, 2020), https://www.scotusblog.com/2020/10/symposium-the-shadow-docket-is-shaping-the-future-of-death-penalty-litigation/.

233. *See* Miller, *supra* note 20, at 397–404 (discussing the absence of autonomy within the criminal legal system).

234. *See* MAY, *supra* note 22, at 7 (discussing the instinct to live); *see also* Tad Friend, *Jumpers*, NEW YORKER (Oct. 5, 2003), https://www.newyorker.com/magazine/2003/10/13/jumpers (discussing experiences of people who jumped off the Golden Gate Bridge in suicide attempts who describe changing their minds immediately after jumping).

235. *See supra* Part III.B.

236. *See* Dunn v. Ray, 139 S. Ct. 661, 662 (2019) (Kagan, J., dissenting from grant of application to vacate stay); Brief for Petitioner at 45, Ramirez v. Collier, 142 S. Ct. 1264 (2022) (No. 21-5592), 2021 WL 4666575 (pointing out that Texas created the delay when it promulgated "multiple inconsistent policies" about having a spiritual advisor present during an execution).

237. *See* Bucklew v. Precythe, 139 S. Ct. 1112, 1125 (2019).

238. Some people have fought on their way to the execution chamber. *See* Michael Graczyk, *Texas Executes Ponchai Wilkerson*, AP (Mar. 14, 2000), https://apnews.com/article/b6804b90680b56cd720d22a9c0b4a533 ("Wilkerson, 28, had struggled with prison guards all day. He refused to leave his holding cell near the death chamber and guards had to use additional restraining bands to bind him to the gurney."); Jeffrey E. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, THE ATLANTIC (June 2015), https://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/ (describing how Lockett resisted being taken out of his cell to be brought to the execution holding cell).

kill that renders choices among methods of execution or attempts to challenge methods of execution illusory. Instead, legislative grants of autonomy actually reinforce the death penalty. Courts have also made it more difficult to challenge methods of execution through decisions in cases that involve a condemned person's bodily autonomy interests.

This Part explores three reasons why bodily autonomy interests in choosing methods of execution is illusory. Section A describes some of the difficulties in challenging methods of execution or making meaningful choices among methods of execution based on legislative and judicial decision-making. Section B turns to the actions that corrections officials may undertake to make it more difficult, sometimes in parallel with legislative action. Section C addresses the overarching problem of meaningful choice within the criminal legal system in capital sentences and in sentences of life without parole.

A. Legislative and Judicial Obstacles

When states modify their method of execution statutes, some legislators may emphasize that a new method is less painful or quicker than another method—even a method that the legislature has *already* authorized and used as its primary or default method.[239] For example, when South Carolina adopted the firing squad as a method of execution in 2021, it retained the electric chair, and in fact made it the default method in the event that a condemned person did not choose, instead of lethal injection.[240] One of the bill's sponsors, Senator Dick Harpootlian explained that he had sponsored the bill because the electric chair was inhumane, saying, "There's instance after instance after instance where people are not dead on the first jolt, they're screaming and on fire."[241] Legislators do not change or add methods of

239. *See Hearing on H.B. 11: Death Penalty Procedure Amendments*, 61st Leg., 2015 Gen. Sess., at 38:06–39:08 (Utah Feb. 23, 2015) (statement of Rep. Paul Ray), https://le.utah.gov/av/floorArchive.jsp?markerID=90707 (describing the firing squad as a "quick bleed out" and claiming that lethal injection was "a lot slower; more painful . . . than a firing squad"); *See Hearing on S.B. 200 Before the South Carolina Senate*, 124th Leg., 2021–2022 Gen. Sess., at 1:10:00-1:11:02 (S.C. Mar. 2, 2021) 1:16:43–1:17:35 (statement of Sen. Hembree) https://www.scstatehouse.gov/video/archives.php (asserting that the firing squad is probably more humane than the electric chair). *See also* Deborah W. Denno, *Getting to Death: Are Executions Constitutional?* 82 IOWA L. REV. 319, 388 (1997) ("Legislatures and courts have consistently insisted that the primary reason states change from one execution method to the next is to ensure greater humaneness and standards of decency for those awaiting execution.").

240. *See supra* note 125 and accompanying text.

241. Jamie Lovegrove, *Why a Democrat Pushed for Firing Squad to Be Added to SC Death Penalty Bill*, POST & COURIER (May 7, 2021), https://www.postandcourier.com/politics/why-a-democrat-pushed-for-firing-squad-to-be-added-to-sc-death-penalty-bill/article_bac5e5f6-af3d-11eb-9eee-17c6341208cb.html.

execution out of a desire to grant a condemned person greater choice, reduce pain, or convey dignity, even if they pay lip service to these ideas.[242]

Instead, as Professor Deborah Denno's scholarship demonstrates, states modify method of execution statutes to keep executing people.[243] She observes that, "The death is different principle is twisted because the state's goal is not to enforce a higher level of scrutiny or justice, but rather to safeguard the enactment of the death penalty, without interruption or regard to human cost."[244] The sponsor of South Carolina's bill may reasonably believe that the firing squad is the quickest and least painful method of execution, but legislative deliberations repeatedly returned back to the three men on South Carolina's death row who had exhausted all of their appeals that the state was, at that time, unable to kill.[245] After a number of botched electric chair executions,[246] Florida gave condemned people a choice between lethal injection and electrocution, setting lethal injection as the default method.[247] The Supreme Court sped up the pace on that decision when it granted certiorari to assess the constitutionality of electrocution.[248] After Florida changed its methods, the Court dismissed the case as improvidently granted.[249] Frequent litigation over lethal injection drugs has encouraged states to turn to new and untried cocktails of lethal injection drugs[250] or totally untested

242. *See id.* (quoting Senator Harpootlian on his belief that the death penalty is "morally wrong," but "morally necessary" so it should be "humane").

243. *See* Denno, *supra* note 239, at 389 ("States have also appeared to change methods to stay one step ahead of a constitutional challenge to a particular method of execution."); *id.* at 390 (explaining that states add "backup" methods for similar reasons).

244. *Id.* at 390.

245. *See* Jeffrey Collins, *South Carolina Law Makes Death Row Inmates Pick: Firing Squad or Electric Chair?*, NPR (May 17, 2021), https://www.npr.org/2021/05/17/997488183/south-carolina-law-makes-death-row-inmates-pick-firing-squad-or-electric-chair.

246. *See* Rick Bragg, *Florida's Messy Executions Put the Electric Chair on Trial*, N.Y. TIMES (Nov. 18, 1999), https://www.nytimes.com/1999/11/18/us/florida-s-messy-executions-put-the-electric-chair-on-trial.html.

247. *See* FLA. STAT. § 922.105 (1) (2005) ; Sara Rimer, *Florida Lawmakers Reject Electric Chair*, N.Y. TIMES (Jan. 7, 2000), https://www.nytimes.com/2000/01/07/us/florida-lawmakers-reject-electric-chair.html.

248. *See* Rimer, *supra* note 247; Bryan v. Moore, 528 U.S. 960 (1999).

249. *See* Bryan v. Moore, 528 U.S. 1133 (2000) (dismissing writ of certiorari as improvidently granted based on Florida's representation that Bryan would be executed by lethal injection unless he chose electrocution); *Court Dismisses Challenge to Florida Executions*, N.Y. TIMES (Jan. 25, 2000), https://www.nytimes.com/2000/01/25/us/court-dismisses-challenge-to-florida-executions.html.

250. *Deadline to Seek Execution of Zane Floyd Before Lethal-Injection Drugs Expire Passes in Nevada*, DEATH PENALTY INFO. CTR. (Feb. 16, 2022), https://deathpenaltyinfo.org/news/deadline-to-seek-execution-of-zane-floyd-before-lethal-injection-drugs-expire-passes-in-nevada; Jonathan Allan, *Exclusive: While Battling Opioid Crisis, U.S. Government Weighed Using Fentanyl for Executions*, REUTERS (Sept. 13, 2019), https://www.reuters.com/article/us-usa-executions-exclusive/exclusive-while-battling-opioid-crisis-u-s-government-weighed-using-fentanyl-for-executions-idUSKCN1VY0YS; Dara Kam, *Florida Defends Use of New Lethal Injection Cocktail*, ORLANDO WEEKLY (Aug. 4, 2017), https:/

methods, like nitrogen hypoxia.[251] States do not act out of a desire to grant a condemned person more autonomy or dignity by choosing a method of execution that a condemned person may find more dignified or humane.

If anything, offering alternative methods may insulate potentially unconstitutional methods of execution. This means that a choice among methods, which courts have suggested is a "more humane" approach,[252] and one that commentators have suggested better serves condemned people's interests[253] actually *reinforces* state control over capital punishment and makes it *more difficult* to challenge methods. This result arises from the relationship between a legislative decision to offer a choice between methods of execution and judicial precedent.[254] In *Stewart v. LaGrand*, the Supreme Court considered a habeas petition challenging the constitutionality of lethal gas as a method of execution.[255] Walter LaGrand had previously filed a writ of habeas corpus challenging lethal gas, which was denied in part because "the claim was not ripe until and unless LaGrand chose gas as his method of execution," because Arizona offered a choice between gas and lethal injection.[256] In a simultaneous proceeding involving Karl LaGrand,[257] the Ninth

/www.orlandoweekly.com/orlando/florida-defends-use-of-new-lethal-injection-cocktail /Content?oid=5953178 ("In the new protocol, Florida is substituting etomidate for midazolam as the critical first drug, used to sedate prisoners before injecting them with a paralytic and then a drug used to stop prisoners' hearts.").

251. *See* Mike Cason, *Alabama Says Spiritual Advisor Can be in Death Chamber for New Nitrogen Method of Execution*, ALABAMA (Nov. 30, 2021), https://www.al.com/news /2021/11/alabama-says-spiritual-advisor-can-be-in-death-chamber-for-new-nitrogen-method-of-execution.html ("The Legislature approved the nitrogen hypoxia method when Alabama and other states were having difficulty obtaining the drugs for lethal injections and a time of growing litigation challenging the lethal injection method as cruel and unusual after some botched executions.").

252. Courts have also held that being forced to choose among methods of execution does not violate the Eighth Amendment. *See* Campbell v. Blodgett, 978 F.2d 1502, 1517-18 (9th Cir. 1992) ("Any fear that results from the prisoner's opportunity to choose the method of his execution is not unusual punishment. As for 'cruelty,' allowing the defendant to choose the 'less frightening' method appears to us to be a more humane approach because it gives the defendant an opportunity to avoid or lessen his particular fear."); *see also* State v. Rupe, 683 P.2d 571, 593–94 (Wash. 1984); Hooper v. Schriro, No. CV98-2164-PHX-SMM, 2008 WL 4542782, at *35 (D. Ariz. 2008).

253. *See* Loveland, *supra* note 148, at 1313–14.

254. *See* Christopher Q. Cutler, *Nothing Less Than the Dignity of Man: Evolving Standards, Botched Executions and Utah's Controversial Use of the Firing Squad*, 50 CLEV. ST. L. REV. 335, 393–94 & n. 327 (2003) (discussing the post-*LaGrand* landscape surrounding Eighth Amendment waiver).

255. Stewart v. LaGrand, 526 U.S. 115, 118 (1999). As discussed in Part II.B, *supra*, the Supreme Court has since decided that the proper vehicle for challenges to the constitutionality of a method of execution is an action under 42 U.S.C. § 1983.

256. *Id.* at 117 (citing LaGrand v. Stewart, 133 F.3d 1253, 1264 (9th Cir. 1998)).

257. Karl and Walter LaGrand were brothers. *See* Patty Machelor, *LaGrand: 18 Minutes to Die*, TUCSON CITIZEN (Mar. 4, 1999), http://tucsoncitizen.com/morgue2/1999/03/04 /147996-lagrand-18-minutes-to-die/.

Circuit rejected the argument that, by voluntarily choosing lethal gas as a method of execution, Karl LaGrand had waived constitutional challenges to the method, observing that "Eighth Amendment protections may not be waived, at least in the area of capital punishment."[258]

When Walter LaGrand's case reached the Supreme Court, the Court pivoted, concluding that, "Walter LaGrand, by his actions, has waived his claim that execution by lethal gas is unconstitutional."[259] He had selected lethal gas and, even after receiving another opportunity to choose lethal injection, "insisted that he desired to be executed by lethal gas."[260] Picking lethal gas, even when Arizona's default method was lethal injection meant that he had "waived any objection he might have to it."[261] The Court also rejected the Ninth Circuit's conclusion in Karl LaGrand's case—a condemned person *can* waive Eighth Amendment protections.[262]

Since *LaGrand*, courts have refused to review the constitutionality of a method of execution because legislatures have offered a condemned person a choice—and choosing waives the constitutionality of the chosen method.[263] Courts have also relied on *LaGrand* to bar condemned people from challenging the methods of execution they must pick—including when a person refused to choose and ended up with the default method.[264]

Returning to the Tennessee executions in 2018 and 2019, Stephen West, who was able to choose between lethal injection and electrocution, attempted

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258. LaGrand v. Stewart, 173 F.3d 1144, 1148 (9th Cir. 1999). Arizona executed Karl LaGrand by lethal injection at his request. *See* Machelor, *supra* note 257.

259. *Stewart*, 526 U.S. at 119.

260. *Id.*

261. *Id.*

262. *Id.* (citing Teague v. Lane, 489 U.S. 288 (1989).

263. *See* Stanford v. Parker, 266 F.3d 442, 462 (6th Cir. 2001) ("[I]f Stanford chooses electrocution over lethal injection, the constitutionality of which he does not challenge, he will waive any objection to electrocution. Thus, we need not consider whether electrocution is cruel and unusual punishment because, for that issue to be relevant, Stanford would first have to waive it."); Bell v. True, 413 F. Supp.2d 657, 737 (W.D. Va. 2006); Haight v. Parker, No. 3:02-CV-206-S, 2015 WL 13548182, at *104 (W.D. Ky. July 17, 2015); Duncan v. Carpenter, No. 3:88-00992, 2014 WL, at *42–43 (M.D. Tenn. Aug. 11, 2014); State v. Bays, 716 N.E.2d 1126, 1144 (Ohio 1999). Courts had considered waiver even before *LaGrand*. *See* Jeffrey Kirchmeier, *Let's Make a Deal: Waiving the Eighth Amendment by Selecting a Cruel and Unusual Punishment*, 32 CONN. L. REV. 615, 636–40 (2000).

264. *See* Cone v. Bell, 492 F.3d 743, 757 (6th Cir. 2007), *vacated on other grounds by* 556 U.S. 449 (2009) ("Since Cone selected a method of execution different from the state's default method, his objections to his chosen method of execution are waived and we do not reach the merits of his claim."); Bell v. True, 413 F. Supp.2d 657, 737 (W.D. Va. 2006); Hooper v. Schriro, No. CV98-2164-PHX-SMM, 2008 WL 4542782, at *35 (D. Ariz. 2008); Duncan v. Carpenter, No. 3:88-00992, 2014 WL, at *42–43 (M.D. Tenn. Aug. 11, 2014); State v. Morris, 24 S.W.3d 788, 797 (Tenn. 2000); Orbe v. Johnson, 601 S.E.2d 547, 550 (Va. 2004) (concluding that Orbe "waived any right he may have to complain about lethal injection in Virginia" because he "chose to allow the statutory default provisions to apply"). *See also* JOSEPH HELLER, CATCH-22, at 46 (1961) ("'That's some catch, that Catch-22,' he observed. 'It's the best there is,' Doc Daneeka agreed.").

to challenge the constitutionality of both methods.[265] The district court concluded that West's claim was not ripe because Tennessee law only uses electrocution as a method of execution in three circumstances.[266] First, West could choose electrocution, second, the Tennessee Supreme Court or the United States Supreme Court could hold lethal injection unconstitutional, or third, the Commissioner of the Tennessee Department of Corrections could certify to the Governor that he could not carry out lethal injection executions because one or more of the drugs was not available.[267] And even if West elected to die by electrocution, which he ultimately did, he had waived any challenges to the constitutionality of that method.[268]

Courts have also applied the *Baze–Glossip* standard in a way that makes pleading an alternative method of execution an illusory choice. Although members of the Supreme Court insist that it cannot be *that* difficult to satisfy the standards it set in *Baze*, *Glossip*, and *Bucklew*,[269] courts are remarkably resistant to Eighth Amendment § 1983 claims.[270] Before *Bucklew*, several courts had concluded that the alternative method of execution had to be one authorized by that particular state's law.[271] *Bucklew* settled that question: "An inmate seeking to identify an alternative method of execution is not limited to choosing among those presently authorized by a particular State's law."[272] And yet, the application of this precedent sometimes resembles the circularity of *LaGrand*. Ernest Johnson, as I have discussed above, plausibly demonstrated a substantial risk of severe pain *and* identified a plausible alternative,[273] then attempted to amend his petition to change his method of execution to better comply with *Bucklew*'s insistence that states could reject

265. *See* West v. Parker, No. 3:19-cv-00006, 2019 WL 2341406 (M.D. Tenn. June 3, 2019).

266. *See id.* at *15–17; TENN. CODE ANN. § 40-23-114(b), (d)–(e) (2014). Courts may also dismiss cases challenging lethal injection protocols as unripe based on the possibility of state changes to protocols. *See* Berger, Gross *Error*, *supra* note 123, at 992–93.

267. *See* TENN. CODE ANN. § 40-23-114(b), (d)–(e) (2014); *West*, 2019 WL 2341406, at *15.

268. *See West*, 2019 WL 2341406, at *16–17 (citing Duncan v. Carpenter, No. 3:88-00992, 2014 WL, at *42–43 (M.D. Tenn. Aug. 11, 2014)); *see also* West v. Parker, 783 F. App'x 506, 511 n.1 (6th Cir. 2019).

269. *See* Bucklew v. Precythe, 139 S. Ct. 1112, 1128–29 (2019); *id.* at 1136 (Kavanaugh, J., concurring) ("[A]n inmate who contends that a particular method of execution is very likely to cause him severe pain should ordinarily be able to plead some alternative method of execution that would significantly reduce the risk of severe pain.").

270. *See* McGehee v. Hutchinson, 854 F.3d 488, 493–94 (8th Cir. 2017).

271. Arthur v. Comm'r, Ala. Dep't of Corr., 840 F.3d 1268, 1316 (11th Cir. 2016); Boyd v. Warden, Holman Corr. Facility, 856 F.3d 853, 865–68 (11th Cir. 2017); Bible v. Davis, No. 4:18-CV-1893, 2018 WL 3068804, at *9 (S.D. Tex. June 21, 2018); Gray v. McAuliffe, No. 3:16CV982-HEH, 2017 WL 102970, at *18–19 (E.D. Va. Jan. 10, 2017).

272. *Bucklew*, 139 S. Ct. at 1128.

273. *See supra* notes 135–139 and accompanying text (discussing Ernest Johnson's case and the Eighth Circuit's decision).

nitrogen gas as a readily available alternative because of its novelty.[274] Despite the uncertainty over what constituted a readily available alternative, which the Court clarified in *Bucklew*, the Eighth Circuit refused to permit Johnson to pick another alternative because, although there was no Supreme Court precedent on that question, the Eighth Circuit had not agreed with the Eleventh Circuit that the alternative had to be available under state law in an opinion *after* Johnson had filed the amended complaint at issue.[275] As Justice Sotomayor wrote in her dissent from the Supreme Court's decision to deny Johnson's petition for certiorari, "the Eighth Circuit's decision punishes Johnson for failing to anticipate significant changes in the law brought on by *Bucklew*. . . . [and] ensur[ing] that Johnson's claim will never be heard on the merits."[276]

The choices that legislators and courts provide do not confer dignity and autonomy, even if people sentenced to death may choose to exercise them in ways that reflect their bodily autonomy. Rather, they reinforce the state's power to kill. Providing a choice among methods of execution makes it more difficult to challenge the constitutionality of those methods, but refusing to choose still leads to death.

B. Obstacles to Autonomy

Similar problems arise in being able to actually choose among alternatives or the ways in which corrections agencies implement the choices. This section focuses on two particular examples of this issue. First, even if states provide a choice among methods of execution, it may be difficult to actually make the choice because of limited statutory opportunities and the way corrections officials make the choice available. Second, jurisdictions may be in such a rush to execute that they ignore statutory obligations requiring them to offer a choice.

As I have discussed earlier, states that permit a choice among methods of executions follow different procedures to implement those choices. California, for example, is unusual; it offers opportunities to make different choices each time a new execution warrant is issued.[277] Other jurisdictions offer only one opportunity.[278] Florida, for example, states that a condemned person "shall have one opportunity" to choose electrocution over lethal

274. *See supra* notes 141–142 and accompanying text.

275. Johnson v. Precythe, 954 F.3d 1098, 1103 (8th Cir. 2020) ("Neither the Supreme Court nor this court ever said that the universe of available alternatives was limited by state law. When we first addressed the point, after Johnson filed his latest amended complaint, we said the opposite.").

276. Johnson v. Precythe, 141 S. Ct. 1622, 1624 (2021) (Sotomayor, J., dissenting from denial of certiorari).

277. *See supra* notes 33–34 and accompanying text (discussing California's choice provision).

278. *See supra* notes 35–39 and accompanying text (discussing the process for selecting nitrogen hypoxia as a method of execution in Alabama).

injection, and the condemned waives his choice "unless it is personally made by the person in writing and delivered to the warden of the correctional facility within 30 days after the issuance of mandate pursuant to a decision by the Florida Supreme Court affirming the sentence of death[.]"[279] Thus even if a condemned person's bodily autonomy interests may have changed over time due to their physical health (a factor that may impact the state's ability to access veins during lethal injection), family relationships, or personal and spiritual growth, they are unable to change their method of execution.

Similar issues arise if a state alters its method of execution statutes. When Alabama changed its method of execution statute to include nitrogen hypoxia, it provided a single opportunity to people who had been sentenced to death before the statute's effective date to choose the new method.[280] In 2018, between June 26 and the deadline of June 30, 2018, the Warden of Holman Prison "obtained an election form created by the Federal Defenders for the Middle District of Alabama" and had the form distributed to everyone on death row.[281] Instead of the *thirty days* the statute contemplated, the population of death row had *four days* to make the decision.[282] Matthew Reeves received the form, but did not return it.[283] Neither did Willie Smith.[284]

Both Smith and Reeves suffered from cognitive deficiencies and later alleged in their respective lawsuits that they were unable to review the form without assistance.[285] Crucially, both filed suit well before their execution dates had been set; Smith sued in 2019 and Reeves sued "more than 22 months before his execution date was set . . . ."[286] The district court hearing Reeves's case concluded that "the form provided benefits, including notice of the new method of execution, the ease and ability of electing the new method, the avoidance of the 'substantially painful' lethal injection, and the

279. FLA. STAT. § 922.105(2) (2005).

280. *See* Reeves v. Comm'r, Ala. Dep't of Corr., 23 F.4th 1308, 1313–14 (11th Cir. 2022).

281. *Id.* at 1314.

282. *See* Smith v. Ala. Dep't of Corr., No. 21-13581, 2021 WL 4916001, at *5 (11th Cir. Oct. 21, 2021) (Pryor, J. Jill, concurring) ("Mere days before the 30-day window closed, the Department . . . took it upon itself to distribute a three-sentence Election Form to death-row prisoners at the prison where Mr. Smith was confined.").

283. *Reeves*, 23 F.4th at 1314.

284. *See* Smith v. Comm'r, Ala. Dep't of Corr., No. 21-13298, 2021 WL 4817748, at *1 (11th Cir. Oct. 15, 2021).

285. *See id.* ("Because Smith suffers from 'significant cognitive deficiencies,' he alleges he was unable to 'enjoy the benefit of the statute and the election form' without being aided with comprehension of the form and its contents."); *Reeves*, 23 F.4th at 1314 ("Mr. Reeves alleged that 'with IQ scores in the upper 60s and low 70s, his general cognitive limitations and severely limited reading abilities rendered him unable to read and understand the election form without assistance.'").

286. *See Smith*, 2021 WL 4817748, at *1; *Reeves*, 23 F.4th at 1314. Alabama executed Smith in October 2021. *See* Andy Rose & Rebekah Reiss, *Alabama Death Row Inmate is Executed Nearly 30 Years After Conviction*, CNN (Oct. 22, 2021), https://www.cnn.com/2021/10/22/us/alabama-death-row-inmate-willie-smith-executed/index.html.

reservation of the inmate's right to challenge the constitutionality of the new execution protocol."[287] Despite their cognitive disabilities,[288] neither man received an opportunity to exercise a decision about his bodily autonomy at the moment of death. Perhaps most troubling of all, corrections officials apparently had no "statutory obligation to provide death row inmates with any election form . . . ."[289] Alabama law, in other words, gave people on death row an opportunity to choose a different method, without any clear indicator of *how* they were to exercise that choice in the restrictive environment of death row. And even when corrections officials implemented a process, they failed to accord people on death row with disabilities the opportunity to exercise a meaningful choice between lethal injection and nitrogen hypoxia,[290] an error that courts compounded.[291]

There are times, however, when courts *can* enforce the opportunity to make a choice. As I have discussed earlier in this Article, South Carolina's decision to change its methods of execution meant that people on death row had to choose between lethal injection, the firing squad, or the electric chair.[292] Shortly after the legislature passed the law, the South Carolina Department of Corrections got the state's electric chair ready and the state's Supreme Court set the date for Brad Sigmon's execution.[293] After changing its method of execution statute, South Carolina's Department of Corrections and Governor then claimed that the people on death row actually *did not* have the right to choose—they argued that "officials will carry out executions with the methods available at the time[.]"[294]

The statute specifically states that "[a] person convicted of a capital crime and having imposed upon him the sentence of death shall suffer the

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287. *Reeves*, 23 F.4th at 1315.

288. The district court found that Reeves's prison file indicated that he had difficulties with communication, was "easily confused," had trouble processing information, and suggested he might not be able to read. *Id.* at 1315–16.

289. *Id.* at 1324 (recognizing this argument, but concluding that "once they undertook to do so, they were required to comply with the ADA"); *Smith*, 2021 WL 4817748, at *3 ("The district court reasoned that the election form was not the only method by which Smith could exercise his statutory right to elect to be put to death by nitrogen hypoxia and that it was defense counsel who was responsible for informing Smith about the change in law.").

290. *See id.* at 1324–25; Smith v. Ala. Dep't of Corr., No. 21-13581, 2021 WL 4916001, at *5 (11th Cir. Oct. 21, 2021) (Pryor, J. Jill, concurring) ("The Election Form included no explanation of the law, no description of execution by nitrogen hypoxia, and no notice that there was less than a week left to choose the nitrogen hypoxia option.").

291. *See supra* notes 7–9 (discussing the Supreme Court's decision to vacate Reeves's stay of execution with no explanation); Hamm v. Reeves, 142 S. Ct. 743 (2022); Smith v. Comm'r, Ala Dep't of Corr., No. 21-13581, 2021 WL 4916001, at *4 (11th Cir. Oct. 21, 2021).

292. *See supra* note 125 and accompanying text.

293. *See South Carolina Law Forcing Choice of Electric Chair or Firing Squad Faces Challenge*, THE GUARDIAN (June 7, 2021), https://www.theguardian.com/us-news/2021/jun/07/south-carolina-death-penalty-law-court.

294. *Id.*

penalty by electrocution or, at the election of the convicted person, by firing squad or lethal injection, if it is available at the time of election . . . ."[295] As lethal injection was not available—the state ran out of drugs in 2013[296]—that left the firing squad. Surprisingly, the South Carolina Supreme Court *stayed* the executions. The court acknowledged that "lethal injection is unavailable due to circumstances outside the control of the Department of Corrections and firing squad is currently unavailable due to the Department of Corrections having yet to complete its development and implementation of necessary protocols and policies."[297] Because, the court explained, people on death row had a "statutory right . . . to elect the manner of their execution," it vacated the execution notices and refused to permit any further notices to issue until the Department of Corrections could offer a choice between the electric chair and the firing squad.[298] South Carolina's attempt to speed up executions ended up on hold because, in its haste to kill, its officials had chosen not to follow the law.

Providing a choice may permit a person facing execution to act in a way that validates his bodily autonomy interests, but implementation is substantially flawed. The rush to execute means that a person is denied his final opportunity to make a choice to reaffirm his dignity.[299] Offering a choice may well permit further entrenchment of capital punishment and permit states to evade judicial review of methods of execution that are most likely unconstitutional. And even if states do provide that choice, it is not always easy for a person sentenced to death to exercise this statutory right over their final moments.

But a choice may not validate bodily autonomy interests when it is not a voluntary, meaningful choice. Thus, the exercise of bodily autonomy through choice is ultimately illusory. Such a decision is part of a state trap that creates the illusion of autonomy while really ensuring that the person who makes the choice will be executed anyway.

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295. S.C. CODE ANN. § 24-3-530(A) (2021).

296. *See* Liu, *supra* note 124.

297. State v. Sigmon, Nos. 2002-024388 & 2021-000584, at 1 (S.C. June 16, 2021), https://documents.deathpenaltyinfo.org/Sigmon-Stay-Order-SC-2021-06-16.pdf; *see also* State v. Owens, No. 2006-038802, at 1 (S.C. June 16, 2021), https://documents.deathpenaltyinfo.org/Owens-Stay-Order-SC-2021-06-16.pdf (same).

298. *Sigmon*, Nos. 2002-024388 & 2021-000584, at 1; *Owens*, Owens, No. 2006-038802, at 1 (same). South Carolina finished developing its execution protocols and modifying its execution chamber in March 2022. Jaclyn Diaz, *Death Row Executions by Firing Squad Can Now be Carried Out in South Carolina*, NPR (Mar. 18, 2022, 9:37pm ET), https://www.npr.org/2022/03/18/1087677686/south-carolina-firing-squad-execution-death-row.

299. *See* Smith v. Ala. Dep't of Corr., No. 21-13581, 2021 WL 4916001, at *5 (11th Cir. Oct. 21, 2021) (Pryor, J. Jill, concurring) ("Mr. Smith intended to exercise that right, but because of his disability, he was unable to do so. ADOC has acknowledged that it could, if ordered to do it, give Mr. Smith another chance to make the election. Under these circumstances, I cannot silently acquiesce in the State's refusal to afford Mr. Smith this final dignity.").

C. *Choosing Among Deaths*

Offering choices does not necessarily confer dignity or greater bodily autonomy interests. A person facing death should have an opportunity to maintain their dignity, preserve their bodily autonomy, convey expressive messages, and avoid pain. I do not argue that these choices always confer autonomy, but rather that they may be used in ways to vindicate these important interests. Even when a condemned person can assert limited exercises of bodily autonomy in picking a method of execution or the details of his death, courts rarely recognize these interests. As this Article has demonstrated, courts undervalue pain, prioritize a state's cosmetic dignity interests, and dismiss litigation as a delaying tactic, even when it vindicates important rights and ensures state compliance with the law.[300] And even if a person *can* exercise these choices, control over their bodily autonomy is illusory because ultimately, the state will take their life.

An execution is the antithesis of dignity and autonomy: a person is strapped down,[301] sometimes blindfolded,[302] muted,[303] or stuck with needles. Their death, although not a mass public proceeding, is a spectacle nonetheless.[304] This process strips away any final illusions of bodily autonomy. The real bodily autonomy interest when considering capital punishment is the interest in being alive.[305] Death is a punishment unlike any other punishment.

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300. *Cf.* Brandon Hasbrouck, *Saving Justice: Why Sentencing Errors Fall Within the Savings Clause, 28 U.S.C. § 2255(e)*, 108 GEO. L.J. 287, 330 (2019) ("Finality, in other words, should never be elevated over the legal rule that people should not be in prison because of an unlawful conviction or sentence.").

301. *See* Frank Green, *Witnessing Executions*, 49 U. RICH. L. REV. 763, 769 (2015) ("After the inmate's arms, legs, and torso are strapped down, a second curtain is drawn between the gurney and the witnesses . . . .").

302. *See* Provenzano v. Moore, 744 So.2d 413, 433 (Fla. 1999) (Shaw, J., dissenting) (describing a "heavy fabric face-mask" placed on Allen Lee Davis's face during his execution); GILLESPIE, *supra* note 176, at 151 (describing a hood being placed over Gary Gilmore's head before the firing squad shot him).

303. *See Provenzano*, 744 So.2d at 433 (Shaw, J., dissenting) ("According to witnesses' accounts, when Davis was being strapped into the chair, guards placed a solid leather mouth-strap across his mouth and nose area. This mouth-strap is wide—approximately five inches from top to bottom—and it covered the entire lower portion of Davis's face from the bottom of his chin to immediately below his nose.").

304. *See* Mona Lynch, *The Disposal of Inmate #85271: Notes on a Routine Execution*, *in* STUDIES IN LAW, POLITICS, AND SOCIETY VOL. 20, at 3, 19 (Austin Sarat & Patricia Ewick, eds. 2000) (describing the spectacle and ritual of an execution); Gareth Evans, *The Americans Volunteering to Watch Executions*, BBC NEWS (Apr. 11, 2017), https://www.bbc.com/news/world-us-canada-39535957 (discussing civilians who volunteer to witness executions in Virginia and other states); *Cf.* Gardner, *supra* note 13, at 108 ("The moment of one's death is a particularly personal and private occasion.").

305. *See* David C. Anderson, *Who Wears the Blindfold at Executions?*, N.Y. TIMES (Feb. 26, 1995), https://www.nytimes.com/1995/02/26/weekinreview/the-nation-who-wears-the-blindfold-at-executions.html ("'The thing that bothers the condemned prisoner is the fact that you are going to kill him,' says Wilbert Rideau, who spent years on death row in the 1970's

It is "calculated killing," that is a "denial of the executed person's humanity."[306] Understanding that death is absolute finality, and that in capital punishment, death is imposed by an external decision-maker who does not *have* to choose it reflects the total absence of bodily autonomy and the intensely personal nature of death. "[O]ne's own death cannot be understood by coming to terms with someone else's death. The silencing of one's experience, including the experience of the silencing of another's experience remains intimately one's own in a way that cannot be understood by analogy with anyone or anything else."[307]

The people who volunteer for execution or those who challenge the unconstitutionality of lengthy stays on death row have pointed to the conditions of death row.[308] As Justice Brennan observed in *Furman v. Georgia*, "mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death."[309] Being sentenced to death means that a person will receive multiple notices of the anticipated date of their death; they may come within days of death, only to receive a temporary reprieve.[310] Capital punishment presumes that interest is extinguished through the decision of twelve members of a community deciding that a person does not deserve to live, but I do not think it should be—or ever *can* be. But of course, the difference between life and death in capital proceedings is also illusory because the choice facing a person in that situation is to either die at the hands of the state or in the hands of the state.

Professor Brandon Garrett has described life without parole as the "other death penalty,"[311] and the description is apt.[312] A person who is incarcerated retains some rights and more bodily autonomy than a person who is

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but escaped execution when the United States Supreme Court rendered Louisiana's old capital punishment law unconstitutional.").

306. Furman v. Georgia, 408 U.S. 238, 290 (1972) (Brennan, J., concurring).

307. MAY, *supra* note 22, at 9.

308. *See* Urofsky, *supra* note 23, at 568–69 ("The simple reason most condemned prisoners on death row want to terminate their appeals is that they find conditions on death row intolerable.").

309. Furman v. Georgia, 408 U.S. 238, 288 (1972) (Brennan, J., concurring); *see also* In re Medley, 134 U.S. 160, 172 (1890) ("[W]hen a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it . . . .").

310. *See Earl Washington*, THE INNOCENCE PROJECT, https://innocenceproject.org/cases/earl-washington/ (noting that Washington came within nine days of being executed).

311. *See* GARRETT, *supra* note 114, at 167 ("Tens of thousands of people who never could or never would have been sentenced to death now get the 'other death penalty.'").

312. *See* United States v. Surratt, 797 F.3d 240, 270 (Gregory, C.J., dissenting) (describing a life without parole sentence as "a death sentence of a different kind").

executed,[313] but incarceration significantly impairs aspects of personal autonomy. The only way to truly validate some bodily autonomy interests for people sentenced to death is to end capital punishment. The way to validate bodily autonomy interests for a person facing a life sentence is to reconsider the way we incarcerate and recognize the humanity in incarcerated people. I do not argue that an interest in bodily autonomy means that nobody could be imprisoned, but incarceration should not become a living death, such that real death begins to seem like a reasonable decision.[314]

V. CONCLUSION

Providing a choice among methods of execution may create spaces in which a person who has been sentenced to death can exercise limited choices to enact their values through exercises of bodily autonomy. But these exercises of autonomy are illusory because the way legislatures, courts, and corrections agencies create a range of choices or facilitate a choice ultimately reinforces the system of capital punishment. These opportunities to exercise bodily autonomy also ignore the autonomy interest in continuing to live—and live under conditions that *permit* life.

The decline of the death penalty has not diminished the carceral state's power; the rise of life without parole has only adopted a different kind of death penalty and strengthened the state. Even if the death penalty is abolished, the illusion of bodily autonomy remains, because, after all, prisons remain filled with people who will die in them.

313. *See Furman,* 408 U.S. at 290 (Brennan, J., dissenting) (discussing the difference between death as a punishment and incarceration as a punishment).

314. *See* Urofsky, *supra* note 23, at 568–69.