Lethal Paralytics and the Censorship of Suffering

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Approximately two dozen states utilize a three-drug lethal injection method to execute condemned persons. This protocol consists of (i) an anesthetic or sedative; (ii) a paralytic; and (iii) potassium chloride (which stops the heart). The purpose of the paralytic is purely cosmetic: it prevents witnesses from having to watch the condemned person convulse as they die.

This Note argues that when a condemned person chooses to refuse a lethal paralytic, they are engaging in First Amendment-protected expressive speech. State regulations requiring the use of a paralytic warrant strict scrutiny because they (i) restrict speech based on subject matter; (ii) are a form of prior restraint; (iii) discriminate based on viewpoint; and (iv) compel speech. The state's interest in requiring the paralytic—to censor the violence of the condemned person's death—is neither legitimate nor compelling. As such, lethal paralytic requirements fail strict scrutiny and violate the First Amendment.

Part I of this Note outlines the history of capital punishment and the advent of lethal injection in the United States. It details the various constitutional challenges that have been brought to bear against lethal injection protocols generally, and the use of paralytics specifically. Part II examines the constitutional rights of incarcerated persons and considers whether an individual's decision to refuse a paralytic can be considered expressive speech under the Spence-Johnson *test. Next, it contemplates the appropriate standard of review for regulations requiring the use of a paralytic. Finally, it examines whether lethal paralytic requirements can survive strict scrutiny or any lesser standard of review. Part III explores the policy implications of recognizing a condemned person's right to refuse lethal paralytics. Not only would acknowledging such a right advance the fundamental values of the First Amendment, it would also help to prevent needless pain and suffering.*

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INTRODUCTION

"At least from a condemned inmate's perspective, . . . visible yet relatively painless [execution methods][1] may be vastly preferable to an excruciatingly painful death hidden behind a veneer of medication. The States may well be reluctant to pull back the curtain for fear of how the rest of us might react to what we see. But we deserve to know the price of our collective comfort before we blindly allow a State to make condemned inmates pay it in our names."
Justice Sonia Sotomayor[2]

Michael Lee Wilson was executed on January 9, 2014, by the state of Oklahoma, using a controversial three-drug protocol: pentobarbital (an anesthetic), vecuronium bromide (a paralytic), and potassium chloride (an acid which stops the heart).[3] According to media witnesses, Mr. Wilson showed no outward signs of

1. Justice Sotomayor was specifically referring to execution by firing squad.
2. Glossip v. Gross, 576 U.S. 863, 977 (2015) (Sotomayor, J., dissenting).
3. *See* Rick Lyman, *Ohio Execution Using Untested Drug Cocktail Renews the Debate Over Lethal Injections*, N.Y. TIMES (Jan. 16, 2014), https://www.nytimes.com/2014/01/17/us/ohio-execution-using-untested-drug-cocktail-renews-the-debate-over-lethal-injections.html [https://perma.cc/E8GH-EQXJ]. *See also Condemned Man's Last Words: "I Feel My Whole Body Burning,"* CBS NEWS (Jan. 10, 2014), https://www.cbsnews.com/news/okla-man-says-he-can-feel-body-burning-during-execution/#lnrrd6i79cp30jzdgcq [https://perma.cc/NN6N-DY2H].

physical distress.[4] But his haunting final words testified to the contrary: "I feel my whole body burning."[5]

Mr. Wilson was likely anesthetized using a contaminated batch of pentobarbital.[6] Not only did this injection fail to render him sufficiently unconscious, it also caused him to experience excruciating pain.[7] To make matters worse, Mr. Wilson likely also felt the third drug, potassium chloride, course through his veins like liquid fire, burning him alive from the inside out.[8] Once the paralytic was administered, however, Mr. Wilson was likely unable to so much as twitch in response.[9] He therefore died in a chemical straitjacket—his torture concealed from all those in attendance.

Three months later, on April 29, 2014, Oklahoma executed Clayton Derrell Lockett using a similar three-drug protocol. Instead of pentobarbital, however, the state used midazolam (a benzodiazepine).[10] Midazolam, unlike sodium thiopental and other anesthetic agents, does not produce the requisite level of unconsciousness necessary to render a person totally insensate to pain.[11] Instead, it leaves the condemned person merely sedated.[12]

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4. *See* ASSOCIATED PRESS, *"I Feel My Whole Body Burning," Says Oklahoma Death Row Inmate During Execution*, FOX NEWS (Dec. 1, 2015), https://www.foxnews.com/us/i-feel-my-whole-body-burning-says-oklahoma-death-row-inmate-during-execution [https://perma.cc/3TAD-SFB7].

5. *See id.* While Mr. Wilson was able to utter these final words, it is possible that his bodily movements were otherwise inhibited by the vecuronium bromide.

6. *See* Charlotte Alter, *Oklahoma Convict Who Felt "Body Burning" Executed With Controversial Drug*, TIME (Jan. 10, 2014), https://nation.time.com/2014/01/10/oklahoma-convict-who-felt-body-burning-executed-with-controversial-drug/ [https://perma.cc/HXW5-F8WS]. The manufacture of pentobarbital is often poorly regulated, which leads to contaminated batches. *See id.*

7. Oklahoma used pentobarbital that it had obtained from a compounding pharmacy to sedate Mr. Wilson. *See* Lyman, *supra* note 3.

8. Potassium chloride apparently feels like liquid fire in the veins. *See* Noah Caldwell & Ailsa Chang, *Gasping For Air: Autopsies Reveal Troubling Effects of Lethal Injection*, NPR (Sept. 21, 2020), https://www.npr.org/2020/09/21/793177589/gasping-for-air-autopsies-reveal-troubling-effects-of-lethal-injection [https://perma.cc/3AUV-BTZT].

9. *See Vecuronium Bromide for Injection Warnings and Precautions*, PFIZER, https://www.pfizermedicalinformation.com/en-us/vecuronium-bromide/warnings [https://perma.cc/P5CW-5C75] ("Administration of vecuronium bromide results in paralysis, which may lead to respiratory arrest and death.").

10. Jeffrey E. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, ATLANTIC (June 2015), https://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/ [https://perma.cc/UWT9-YPTN].

11. *See* AM. SOC'Y OF HEALTH-SYSTEM PHARMACISTS, *Midazolam Hydrochloride*, DRUGS.COM (Sept. 5, 2015), https://www.drugs.com/monograph/midazolam.html [https://perma.cc/YM4Q-V8PD].

12. *See id.*

According to Dean Sanderford, one of Lockett's attorneys, the execution was a scene of "complete horror."[13] At first, everything seemed to proceed as normal: Mr. Lockett closed his eyes as the midazolam took effect. Ten minutes later, a member of the execution team pronounced Mr. Lockett unconscious.[14] But then Lockett started twitching. Soon, he could be heard groaning and mumbling: "Man . . . I'm not . . . Something's wrong. . . ."[15] Sanderford explained that things quickly took a turn for the worse:

> It looked like . . . someone waking up from anesthesia, except it looked far more terrible. There was convulsing, his body kept lifting up off the gurney like he was trying to sit up. His eyes opened at one point, he started mumbling more. It was pretty clear to me that he was coming back into consciousness.[16]

At that point, prison officials closed the curtain, obstructing the witnesses' view. Reporters in the observation room were visibly shaken.[17] Around 6:56 PM, the execution was called off. Lockett's vein had exploded, likely due to improper placement of his intravenous (IV) line.[18] Consequently, the lethal injection drugs had leaked into his surrounding tissue, where they had failed to take full effect.[19] At 7:06 PM, Mr. Lockett was declared dead after suffering a heart attack.[20]

On August 9, 2018, Tennessee executed Billy Ray Irick using a three-drug combination of midazolam, vecuronium bromide, and potassium chloride. Witnesses reported that Mr. Irick strained,

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13. *See* Lindsey Bever, *Oklahoma Inmate's Lawyer on the Botched Execution: "Complete Horror,"* WASH. POST (Apr. 30, 2014), https://www.washingtonpost.com/news/post-nation/wp/2014/04/30/oklahoma-inmates-lawyer-on-the-botched-execution-complete-horror/ [https://perma.cc/MAL2-WWAP].

14. Pronouncing a condemned person unconscious is an unusual practice. Ziva Branstetter, a media witness, explained that "[t]his [was] the first execution [she had] covered that [corrections officials] made a point of pronouncing someone unconscious before they pronounce[d] him dead." Mark Berman, *What It Was Like Watching the Botched Oklahoma Execution*, WASH. POST (May 2, 2014), https://www.washingtonpost.com/news/post-nation/wp/2014/05/02/what-it-was-like-watching-the-botched-oklahoma-execution/ [https://perma.cc/QR3X-PEED].

15. *See* CNN, *Oklahoma Inmate Execution Botched*, YOUTUBE (Apr. 30, 2014), https://www.youtube.com/watch?v=E_rLhC2wL6w [https://perma.cc/M3PX-K2A5].

16. *See* Bever, *supra* note 13.

17. *See* Berman, *supra* note 14.

18. *See id.*

19. *See id.*

20. *See id.*

choked, and thrashed during the procedure.[21] Shortly prior to the execution, the U.S. Supreme Court had declined to issue a stay—a decision from which Justice Sonia Sotomayor sharply dissented. Sotomayor criticized the majority for turning a "blind eye to a proven likelihood that the State of Tennessee [was] on the verge of inflicting . . . torturous pain" on Mr. Irick, "while shrouding his suffering behind a veneer of paralysis."[22]

What do Irick's, Lockett's, and Wilson's executions demonstrate? Perhaps two things. First, condemned persons suffer incredible pain when they are not fully anesthetized during lethal injection. Second, when a paralytic is properly administered, a condemned person's pain is largely concealed—hidden behind a chemical curtain. The use of paralytics in lethal injection protocols therefore makes it difficult for courts to determine whether condemned persons are being subjected to cruel and unusual punishment in violation of the Eighth Amendment.

Various constitutional challenges have been levied against the use of paralytics in lethal injection—all to little avail. Some advocates have argued that the use of paralytics violates the Eighth Amendment's prohibition on cruel and unusual punishment.[23] Others have contended that lethal paralytics interfere with the public's First Amendment right to access information about an execution.[24] Some have even suggested that the use of paralytics interferes with a defendant's Fourteenth Amendment right to bodily autonomy.[25]

This Note takes a new approach. It argues that when a condemned person chooses to refuse a paralytic, they are engaging in expressive speech protected by the First Amendment. Under the *Spence-Johnson* test, refusing a paralytic qualifies as protected speech because (i) the condemned person intends to convey a particularized message, and (ii) it is likely that this message would be understood by witnesses. As such, state regulations requiring the use of a paralytic warrant strict scrutiny because they (i)

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21. *See Medical Expert: Billy Ray Irick Tortured to Death in Tennessee Execution*, DEATH PENALTY INFO. CTR. (Sept. 14, 2018), https://deathpenaltyinfo.org/news/medical-expert-billy-ray-irick-tortured-to-death-in-tennessee-execution [https://perma.cc/GF4L-VXJ6].

22. *See* Irick v. Tennessee, 139 S. Ct. 1, 4 (2018) (Sotomayor, J., dissenting).

23. *See infra* Section I.C.1.

24. *See infra* Section I.C.3.

25. *See infra* Section I.C.2.

restrict speech based on subject matter; (ii) are a form of prior restraint; (iii) discriminate based on viewpoint; and (iv) compel speech. The state's interest in requiring the paralytic—to censor the violence of the condemned person's death—is neither legitimate, nor compelling. As such, lethal paralytic requirements fail strict scrutiny and violate the First Amendment.[26]

Part I of this Note outlines the history of capital punishment and the advent of lethal injection in the United States. It details the various constitutional challenges that have been brought to bear against lethal injection protocols generally, and the use of paralytics specifically. Part II examines the constitutional rights of incarcerated persons and considers whether an individual's decision to refuse a paralytic can be considered expressive speech under the *Spence-Johnson* test. Next, it contemplates the appropriate standard of review for regulations requiring the use of a paralytic. Finally, it examines whether lethal paralytic requirements can survive strict scrutiny or any lesser standard of review. Part III explores the policy implications of acknowledging a condemned person's right to refuse lethal paralytics. Not only would recognizing such a right advance the fundamental values of the First Amendment, it would also help prevent needless pain and suffering.

I. FACTUAL & LEGAL BACKGROUND

A. A BRIEF HISTORY OF LETHAL INJECTION

The U.S. Supreme Court has held that capital punishment is not per se unconstitutional under the Eighth Amendment.[27] However, it seems likely that the Founding Fathers would have considered today's execution methods to be highly unusual in light of eighteenth-century practice. For most of American history (and indeed most of Western history), executions were quintessentially public affairs. Those convicted of capital crimes in England—and by extension, the American colonies—were typically executed by

26. The First Amendment's guarantee of free speech was incorporated into the Fourteenth Amendment's Due Process Clause and applied against the states in *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

27. *See* Gregg v. Georgia, 428 U.S. 153, 187 (1976) ("We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.").

hanging, a simple method that required little training or expense.[28] Such hangings attracted large crowds. For example, the last public execution in Philadelphia in 1837 drew an audience of approximately 20,000 people.[29]

Public executions were expressive, highly ritualized affairs. As Gil Santamarina wrote in *The Case for Televised Executions*, "[t]he public display of the condemned person being led to the gallows, his last words . . . and the condemned's subsequent death by hanging, all served as a means of inculcating into the populace what the social elite of the period deemed to be positive values."[30] Public executions thereby affirmed the government's authority[31] and aimed to deter lawbreaking by providing a graphic reminder of its deadly consequences.[32]

During the nineteenth century, executions moved behind closed doors. This shift was likely the unintended consequence of a growing death penalty abolitionist movement, which decried public execution as a barbaric and inhumane practice.[33] Most states responded to the growing distaste for capital punishment not by abolishing the death penalty altogether, but instead by removing executions from the public eye. In 1833, Rhode Island became the first state to authorize closed-door executions.[34] By

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28. *See* Michael Reggio, *History of the Death Penalty*, PBS (Feb. 9, 1999), https://www.pbs.org/wgbh/frontline/article/history-of-the-death-penalty/ [https://perma.cc/W9VC-6CFV].

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

30. *See* Gil Santamarina, Note, *The Case for Televised Executions*, 11 CARDOZO ARTS & ENT. L.J. 101, 101 (1992) (citing LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776–1865 27 (1989)).

31. In other words, public executions "were designed to make the state's dealing in death majestically visible to all. Live, but live by the grace of the sovereign; live, but remember that your life belongs to the state." Austin Sarat, *Killing Me Softly: Capital Punishment and the Technologies for Taking Life*, *in* PAIN, DEATH, AND THE LAW 43, 50 (Austin Sarat ed., 2001).

32. As the French philosopher Michel Foucault observed, "[t]he public execution [ought] to be understood not only as a judicial but also as a political ritual. It belongs, even in minor cases, to the ceremonies by which power is manifested." MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 47 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

33. The death penalty abolitionists' first major victory came in 1847, when Michigan became the first state to abandon the use of capital punishment. *See Michigan Legal Milestones*, STATE BAR OF MICH. (Nov. 6, 2018), https://www.michbar.org/programs/milestone/milestones_firsttoabolish [https://perma.cc/3CZF-2JF6].

34. *See* Nicholas Levi, Note, *Veil of Secrecy: Public Executions, Limitations on Reporting Capital Punishment, and the Content-Based Nature of Private Execution Laws*, 55 FED. COMM. L.J. 131, 139 (2002).

1849, fourteen other states had followed suit.[35] A dearth of closed-door execution facilities, however, meant that public executions continued at the discretion of local officials for decades to come.[36] Public executions were only abolished in the early twentieth century after state governments seized control of capital punishment. The last public execution on record in the United States took place on May 21, 1937, in Galena, Missouri.[37]

Most death penalty abolitionists opposed removing capital punishment from the public eye,[38] believing that the "disgust produced by public executions would lead to the entire abolition of capital punishment."[39] In 1834, for example, Samuel Bowne opposed a bill in the New York State Assembly that would have authorized closed-door executions.[40] Bowne told his fellow legislators that if capital punishment were to persist, he thought it should be conducted in public so "that [its] consequences and enormity might be more vividly impressed on the public mind."[41] While the 1884 bill failed, the New York state legislature adopted a similar measure the following year. Reformer Horace Greely argued that this closed-door execution law "subtracted much of the force" from the death penalty abolitionist cause.[42]

The advent of closed-door executions blunted the debate surrounding the morality of capital punishment. While the tapering of death penalty abolitionist fervor was partly due to emerging tensions in the lead-up to the Civil War, "the historical evidence demonstrates that closed-door execution laws contributed significantly to a decline in public debate on a core political

35. *See id.* at 140.

36. *See* Bessler, *supra* note 29, at 363.

37. *See id.* at 365.

38. For example, Thomas Upham, a leading death penalty abolitionist in Maine, wrote: "[S]ome of the United States have recently enacted, that executions shall not be public. A great anomaly this in a republican government! Our courts of justice must be open to the public; the deliberations of our legislatures must be public; not even a poor freemasonry society is to be tolerated, because its ceremonies are secret; but when life is to be taken, when a human being is to be smitten down like an ox, when a soul is to be violently hurled into eternity, the most solemn occasion that can be witnessed on earth, then the public must be excluded. . . . If business of this nature is done at all, it must be done in the light of day[.]" THOMAS C. UPHAM, THE MANUAL OF PEACE 234–35 (1836), reprinted in CAPITAL PUNISHMENT IN THE UNITED STATES: A DOCUMENTARY HISTORY 50–51 (B. Vilas & C. Morris, eds. 1997).

39. *See* Bessler, *supra* note 29, at 361.

40. *See* PHILIP E. MACKEY, HANGING IN THE BALANCE: THE ANTI-CAPITAL PUNISHMENT MOVEMENT IN NEW YORK STATE, 1776–1861 115–17 (1982).

41. *See id.*

42. *See* Levi, *supra* note 34, at 141.

issue."[43] During the latter half of the nineteenth century—concurrent with the shift to closed-door executions—many states sought to "civilize" the death penalty. In 1885, after a series of disastrous public hangings,[44] New York launched a commission to investigate "whether the science of the present day" could find a more "humane" alternative to hanging.[45] The commission embarked on a two-year study to consider every known method of execution, and ultimately endorsed the electric chair.[46] This method gained widespread acceptance after the first person was executed by the electric chair in 1890;[47] by 1949, twenty-six states had authorized use of the chair.[48]

This method, however, was not without its challenges. Unlike hanging, the electric chair required that the executioner be highly skilled in the procedure.[49] If the electrocution was done improperly, or if the machinery was not adequately maintained, the condemned person could be subjected to a grisly death.[50] For example, in 1946, Louisiana attempted to execute eighteen-year-old Willie Francis using its portable electric chair, "Gruesome Gertie."[51] The machine, however, had been improperly prepared by an inebriated corrections official, and the electric current was not strong enough to kill the condemned.[52] Willie therefore convulsed violently as the 300 lb. chair rocked across the floor. Witnesses could hear Willie shouting "Take it off! Take it off! I can't breathe!"[53] States therefore continued to search for less

43. *See id.*

44. *See* Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 62 (2007).

45. *See id.*

46. *See id.*

47. *See id.*; *see also In re* Kemmler, 136 U.S. 436 (1890).

48. *See* Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 365 (1997).

49. *See* Ellyde Roko, Note, *Executioner Identities: Toward Recognizing a Right to Know Who Is Hiding Beneath the Hood*, 75 FORDHAM L. REV. 2791, 2797 (2007).

50. *See, e.g.*, Mike Clary, *Flames Erupt in Electric Chair's Death Jolt*, L.A. TIMES (Mar. 26, 1997), https://www.latimes.com/archives/la-xpm-1997-03-26-mn-42277-story.html [https://perma.cc/7BC8-KZCW].

51. *See My Constitution: "Death By Installments": "Lucky" Willie Francis and a Murder in Cajun Country*, CTR. FOR C-SPAN SCHOLARSHIP & ENGAGEMENT AT PURDUE UNIV., https://www.cla.purdue.edu/academic/communication/cspan/ccse/civics-literacy-initiative/4-death-by-installments.html [https://perma.cc/WL8R-9H7X].

52. *See* Gilbert King, *The Two Executions of Willie Francis*, WASH. POST (July 19, 2006), https://www.washingtonpost.com/wp-dyn/content/article/2006/07/18/AR2006071801376.html [https://perma.cc/T6YU-Q83G].

53. *See My Constitution*, *supra* note 51. Similarly, during the execution of Pedro Medina in 1997, a crown of flames shot out from the electric chair's headpiece, roasting

overtly macabre methods—experimenting, for example, with lethal gas[54] and firing squads.[55] Eventually, their quest led to lethal injection.

In 1976, Oklahoma Assemblyman Bill Wiseman asked Dr. Jay Chapman, the state's medical examiner, to devise a more humane execution method.[56] Notably, Dr. Chapman had "no experience with [that] sort of thing." He was "an expert in dead bodies, but not an expert in getting them that way."[57] Nevertheless, Dr. Chapman agreed to help. Sitting in Wiseman's office, Dr. Chapman dictated the following lines, which Wiseman transcribed on a notepad: "An intravenous saline drip shall be started in the prisoner's arm, into which shall be introduced a lethal injection consisting of an ultra-short-acting barbiturate in combination with a chemical paralytic."[58] Approximately one year later, the Oklahoma legislature adopted Dr. Chapman's proposal, copying Wiseman's notes nearly word for word.[59]

In an interview with Human Rights Watch, Dr. Chapman later explained that he "didn't do any research" before recommending an ultra short-acting barbiturate and paralytic agent. "I just knew . . . I wanted to have at least two drugs in doses that would each kill the prisoner, to make sure if one didn't kill him, the other would."[60] There is no evidence to suggest that Oklahoma consulted any other medical experts before adopting its statute.[61]

Medina's skull. *See Botched Executions*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/botched-executions [https://perma.cc/P6E5-P8NA].

54. By 1994, virtually no state viewed the gas chamber as an acceptable method of execution. *See* Denno, *supra* note 48, at 368. However, Alabama is currently seeking to execute Kenneth Eugene Smith using nitrogen hypoxia. *See* Ayana Archie, *Alabama Requests a Date to Execute an Inmate Via Nitrogen Hypoxia for the First Time*, NPR (Aug. 29, 2023), https://www.npr.org/2023/08/28/1196493956/alabama-death-penalty-execution-nitrogen-hypoxia [https://perma.cc/PM7Y-LELD].

55. Firing squad is an authorized method of execution in five states: Mississippi, Oklahoma, Utah, Idaho, and South Carolina. *See Methods of Execution*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/methods-of-execution [https://perma.cc/HH9M-RJT5].

56. *See* HUMAN RIGHTS WATCH, *So Long As They Die: Lethal Injections in the United States*, 18 HRW 1, 14 (Apr. 2006), https://www.hrw.org/sites/default/files/reports/us0406webwcover.pdf [https://perma.cc/HG9C-TV8G].

57. *See* Denno, *supra* note 44, at 66.

58. *See* HUMAN RIGHTS WATCH, *supra* note 56, at 14.

59. "[T]he punishment of death must be inflicted by continuous, intravenous administration of a lethal quantity of an ultra-short-acting barbiturate . . . [in] combination with a chemical paralytic agent until death is pronounced by a licensed physician according to accepted standards of medical practice." OKLA. STAT. ANN. tit. 22, § 1014(A) (1977).

60. *See* HUMAN RIGHTS WATCH, *supra* note 56, at 15.

61. *See id.* at 14–15.

Although Oklahoma's lethal injection law clearly specified two drugs, Dr. Chapman later included a third drug when formulating the state's protocol. When asked why he added potassium chloride (a heart-stopping agent), Dr. Chapman replied, "Why not?"[62] He explained that even though large doses of the ultra short-acting barbiturate and paralytic would suffice to kill the condemned person, he "wanted to make sure the prisoner was dead at the end, so why not just add a third lethal drug?" Dr. Chapman noted that he did not have a specific reason for choosing potassium chloride, aside from his general knowledge of its lethality.[63]

Dr. Chapman's combination of sodium thiopental (the ultra short-acting barbiturate), pancuronium bromide (the paralytic), and potassium chloride (the heart-stopping agent) became the standard protocol throughout the United States.[64] By 2004, 37 states had enacted lethal injection statutes; the three-drug protocol became the primary execution method in 36 of those states.[65] Notably, this procedure had never been scientifically evaluated for its effects on human beings when it was first formulated.[66]

Until 2009, most states utilized Dr. Chapman's protocol, with some administering pentobarbital (a short-acting barbiturate) in place of sodium thiopental.[67] In 2010, shortages of pentobarbital and sodium thiopental led many states to begin experimenting with a new drug: midazolam (a benzodiazepine).[68] As of 2023,

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62. *See id.* at 15.

63. *See id.*

64. In *Baze v. Rees*, the Supreme Court described the three-drug method as follows: "The first drug, sodium thiopental (also known as Pentothol), is a fast-acting barbiturate sedative that induces a deep, comalike unconsciousness when given in the amounts used for lethal injection. The second drug, pancuronium bromide (also known as Pavulon), is a paralytic agent that inhibits all muscular-skeletal movements and, by paralyzing the diaphragm, stops respiration. Potassium chloride, the third drug, interferes with the electrical signals that stimulate the contractions of the heart, inducing cardiac arrest. The proper administration of the first drug ensures that the prisoner does not experience any pain associated with the paralysis and cardiac arrest caused by the second and third drugs." 553 U.S. 35, 42–44 (2008) (internal citations omitted).

65. *See* HUMAN RIGHTS WATCH, *supra* note 56, at 21.

66. *See* Franchesca Fanucchi, *The Problematic Nature of Execution by Lethal Injection in the United States and People's Republic of China*, 8 THEMIS 143, 149–150 (2020), https://scholarworks.sjsu.edu/cgi/viewcontent.cgi?article=1087&context=themis [https://perma.cc/WT7W-V4G4].

67. *See Overview of Lethal Injection Protocols*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/lethal-injection/overview-of-lethal-injection-protocols [https://perma.cc/L97S-EBBM].

68. *See* ROBIN KONRAD, DEATH PENALTY INFO. CTR., BEHIND THE CURTAIN: SECRECY AND THE DEATH PENALTY IN THE UNITED STATES 10, 35 (2018), https://deathpenaltyinfo.org/

approximately two dozen states continue to utilize the three-drug method—which is now commonly composed of midazolam, pancuronium (or vecuronium) bromide, and potassium chloride.[69]

Lethal injection has the highest botch rate of any execution method in the United States.[70] In 2022, seven of twenty lethal injections in the United States were mishandled (or approximately thirty-five percent)—a record high.[71] Moreover, it is estimated that approximately 75 of 1,054 lethal injections were mishandled from 1982 to 2010 (or approximately seven percent overall).[72] Many of these botched executions were caused, in part, by the executioners' lack of training.[73] Lethal injections are typically administered by prison employees, because medical ethics prevent doctors and nurses from participating in capital punishment.[74] This means that there is a greater likelihood that the lethal drugs will not be injected correctly.[75] If improperly administered, anesthetic agents such as sodium thiopental and pentobarbital can wear off or fail to produce the requisite level of unconsciousness.[76] The condemned person can therefore die a torturous death.

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facts-and-research/dpic-reports/in-depth/behind-the-curtain-secrecy-and-the-death-penalty-in-the-united-states [https://perma.cc/LX6K-JZCD].

69. *See State-By-State Execution Protocols*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/methods-of-execution/state-by-state-execution-protocols [https://perma.cc/3S3V-F2UG].

70. As compared to other legal methods, such as the electric chair and firing squad.

71. *See* Juliana Kim, *More Than a Third of Executions in 2022 Were 'Botched,' A Report Finds*, NPR (Dec. 21, 2022), https://www.npr.org/2022/12/21/1144188268/executions-2022-botched-lethal-injection [https://perma.cc/C2ZX-T3YR] (citing DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2022: YEAR END REPORT 2 (2022), https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2022-year-end-report [https://perma.cc/5E77-H8D6]).

72. *See Botched Executions*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/botched-executions [https://perma.cc/P6E5-P8NA] (citing AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA'S DEATH PENALTY 119–20 (2014)). Recall that prior to 2009, most states utilized Dr. Chapman's method; as such, many, if not most, of these botched lethal injections likely involved a three-drug protocol. *See* DEATH PENALTY INFO. CTR., *supra* note 67.

73. *See* Kim, *supra* note 71.

74. *See* Tanya Albert Henry, *AMA to Supreme Court: Doctor Participation in Executions Unethical*, AM. MED. ASS'N (Aug. 22, 2018), https://www.ama-assn.org/delivering-care/ethics/ama-supreme-court-doctor-participation-executions-unethical [https://perma.cc/39GP-9PLJ].

75. *See* Kim, *supra* note 71.

76. *See* Adam Liptak, *Critics Say Execution Drug May Hide Suffering*, N.Y. TIMES (Oct. 7, 2003), https://www.nytimes.com/2003/10/07/us/critics-say-execution-drug-may-hide-suffering.html [https://perma.cc/RB9P-VXZT].

B. LETHAL PARALYTICS

Before detailing the history and purpose of lethal paralytics, it is worth saying a few words about the other two drugs in the protocol: the anesthetic (or sedative) and the heart-stopping agent. The first drug, the anesthetic, is meant to ensure that a condemned person is rendered insensate to pain prior to the injection of the paralytic and heart-stopping agent. For many years, most states used sodium thiopental (an ultra short-acting barbiturate)[77] to anesthetize the condemned.[78] As noted,[79] many states now use midazolam (a benzodiazepine),[80] which is generally considered incapable of inducing the deep coma-like unconsciousness necessary to prevent condemned persons from experiencing extreme pain.[81]

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77. State protocols generally call for approximately five grams of sodium thiopental or pentobarbital—amounts that far exceed the dosages used in surgery and physician-assisted suicide. Arizona's one-drug protocol, for example, specifies a total of five grams of pentobarbital or, in the alternative, five grams of sodium thiopental. *See* ARIZ. DEP'T OF CORR. REHAB. AND REENTRY, DEPARTMENT ORDER MANUAL, 710–EXECUTION PROCEDURES, Attachment D, 2 (2017), https://documents.deathpenaltyinfo.org/ArizonaProtocol_4.20.22.pdf [https://perma.cc/F4H4-SP3M]. This amount of anesthetic is more than sufficient to render a condemned person unconscious and, eventually, dead. *See* HUMAN RIGHTS WATCH, *supra* note 56, at 27.

78. *See* DEATH PENALTY INFO. CTR., *supra* note 69.

79. By 2011, Hospira, the only FDA-approved manufacturer of sodium thiopental in the United States, had stopped producing sodium thiopental. Many states therefore turned to pentobarbital, a similar short-acting barbiturate. *See* Eric Eckholm & Katie Zezima, *States Face Shortage of Key Lethal Injection Drug*, N.Y. TIMES (Jan. 21, 2011), https://www.nytimes.com/2011/01s/22/us/22lethal.html [https://perma.cc/E9Y4-29JU]. However, pentobarbital also came into short supply as European manufacturers began to impose export restrictions to prevent its use in capital punishment. *See* KONRAD, *supra* note 68 at 26.

80. Seven states have used midazolam as the first drug in the three-drug protocol: Florida, Ohio, Oklahoma, Alabama, Virginia, Arkansas, and Tennessee. *See* DEATH PENALTY INFO. CTR., *supra* note 67.

81. *See* Ellen M. Unterwald, *Private: Supreme Court: Base Lethal Injection Decisions on Science*, AM. CONST. SOC'Y (Apr. 22, 2015), https://www.acslaw.org/expertforum/supreme-court-base-lethal-injection-decisions-on-science/ [https://perma.cc/UNE8-ZRN2]. Benzodiazepines like midazolam have a "ceiling effect"—i.e., beyond a certain dosage, the drugs do not produce a greater level of sedation. This is because benzodiazepines require the presence of the GABA neurotransmitter—of which the human body has a limited supply—in order to function. Barbiturates like sodium thiopental and pentobarbital, by contrast, do not require the presence of a neurotransmitter to produce their biological effect. Moreover, while increased dosages of barbiturates completely shut down the activity of nerve cells in the body, benzodiazepines merely decrease nerve activity for short periods of time. Midazolam is thus much less effective than sodium thiopental and pentobarbital in rendering a condemned person insensate to pain. *See id.* Nevertheless, the Supreme Court has held that protocols utilizing midazolam do not violate the Eighth Amendment, notwithstanding numerous botched executions in which the drug was used. *See* Glossip v. Gross, 576 U.S. 863, 867 (2015).

The third drug, potassium chloride, is designed to kill the condemned person by stopping their heart. When properly administered, potassium chloride acts quickly, causing cardiac arrest within minutes.[82] If the condemned person is not properly anesthetized, however, they will experience excruciating pain. Potassium chloride "inflames the potassium ions in the sensory nerve fibers, literally burning up the veins as it travels to the heart."[83] Potassium chloride is so painful that the American Veterinary Medical Association (AVMA) prohibits its use as a sole agent of euthanasia—it may only be injected after an animal is fully anesthetized (an effect not produced by midazolam alone).[84]

The second drug in the protocol (commonly pancuronium bromide)[85] is "a neuromuscular blocking agent that paralyzes all of a body's voluntary muscles, including the lungs and diaphragm."[86] When properly administered, a sufficient dosage of pancuronium bromide will eventually cause death by asphyxiation. The drug, moreover, will inhibit most forms of movement—including speech and facial expression.[87] Thus, if a condemned person is still conscious when the potassium chloride is administered, they will experience extreme pain without the ability to express their suffering. Surgery patients who have been administered pancuronium bromide or similar neuromuscular blocking agents

82. *See* HUMAN RIGHTS WATCH, *supra* note 56, at 22.

83. *Id.*

84. *See* AM. VETERINARY MED. ASS'N, *2000 Report of the AVMA Panel on Euthanasia*, 218 JAVMA 669, 681 (2001). Less painful drugs are available. Experts recommend pentobarbital, for example, which is commonly used in animal euthanasia and physician-assisted suicide. An overdose of pentobarbital is effectively painless, because it shuts down the body's circulation gradually. *See* HUMAN RIGHTS WATCH, *supra* note 56, at 22–23. While fourteen states have used pentobarbital in executions, many continue to use potassium chloride instead. *See* DEATH PENALTY INFO. CTR., *supra* note 67; *see also* DEATH PENALTY INFO. CTR., *supra* note 69. When asked why states would continue administering a painful drug when safer options are available, Dr. Mark Dershwitz explained that "[i]t's not about the prisoner. . . . It's about the audience and prison personnel who have to carry out the execution." Pentobarbital and similar drugs cause a relatively slow (albeit painless) death. Electrical activity can persist in the heart "for a very long time, in healthy people almost certainly for more than half an hour." Dershwitz argued that "[i]t would be hard for everybody to have to sit and wait for the EKG activity to cease so they can declare the prisoner dead." HUMAN RIGHTS WATCH, *supra* note 56, at 23–24.

85. Pancuronium bromide is often referred to by its brand name, Pavulon. *See Pavulon*, RXLIST, https://www.rxlist.com/pavulon-drug.htm [https://perma.cc/CS94-XWS7].

86. HUMAN RIGHTS WATCH, *supra* note 56, at 24 (citing RANDALL C. BASELT, DISPOSITION OF TOXIC DRUGS AND CHEMICALS IN MAN (7th ed. 2004)).

87. *See id.*

(such as vecuronium bromide) without adequate anesthesia[88] have reported nightmarish experiences wherein they were awake and capable of feeling incredible pain, but incapable of communicating with their surgery team.[89] By 2006, at least 30 states had banned the use of neuromuscular blocking agents in animal euthanasia, due to the high risk of concealed suffering.[90] According to Human Rights Watch, "state correction officials have [therefore] settled on a protocol and procedure to kill condemned inmates that is considered too risky and dangerous for the euthanasia of dogs and cats."[91]

If the first drug sedates the condemned person and the third drug kills them, what is the purpose of the second drug? Why do some states require the use of a lethal paralytic? According to the state of Kentucky in *Baze v. Rees*, lethal paralytics serve four main interests: (i) they provide a chemical redundancy to ensure the condemned person's death;[92] (ii) they protect the dignity of the condemned;[93] (iii) they prevent the condemned person's IV line

88. "Anesthesia awareness, also called unintended intraoperative awareness, is defined as the unintended experience and explicit recall of intraoperative events. . . . The use of neuromuscular blocking agents is associated with a higher incidence of intraoperative awareness. . . . The administration of neuromuscular blocking agents may impede patient's movements which are a more useful and simpler method of detecting perioperative awareness." Hyun Sik Chung, *Awareness and Recall During General Anesthesia*, 66 KOREAN J. ANESTHESIOL., 339, 341 (2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4041951/pdf/kjae-66-339.pdf [https://perma.cc/XC43-3RPJ].

89. Jeanette Liska described her 1990 experience of intraoperative awareness, in which she lay paralyzed on the operating table with no way of communicating with the doctors and nurses in the room. "Drowning in an ocean of searing agony, I sensed the skein of my entire life unraveling, thread by thread. But I was the only one who heard my tortured screams—silent screams that reverberated again and again off the cold walls of my skull." HUMAN RIGHTS WATCH, *supra* note 56, at 25 n.101 (citing JEANETTE LISKA, SILENCED SCREAMS; SURVIVING ANESTHETIC AWARENESS DURING SURGERY: A TRUE LIFE-ACCOUNT 15 (2002)).

90. *See* HUMAN RIGHTS WATCH, *supra* note 56, at 25 n.104 (collecting state statutes).

91. *See id.* at 25–26.

92. *See* Brief for Respondents at 9, Baze v. Rees, 553 U.S. 35 (2008) (No. 07-5439) ("Petitioners argue that pancuronium has no purpose when used in an execution. However, Dr. William Watson, an expert for petitioners, testified that in executing someone, pancuronium would have a use in stopping breathing. Other medical testimony showed that pancuronium would decrease respiration in the condemned inmate." (internal citations omitted)). Dr. Chapman himself only included the paralytic as a lethal redundancy in his protocol. While speaking with Human Rights Watch, Chapman explained that he could have recommended "a five or six drug protocol, I don't care. I called for the use of a barbiturate and paralytic agent just because it's better to have two things that could kill a prisoner than one." *See* HUMAN RIGHTS WATCH, *supra* note 56, at 26.

93. *See* Brief for Respondents, *supra* note 92, at 9 ("Moreover, the use of pancuronium eliminates convulsions and thus provides a dignified death to the inmate. . . .").

from becoming dislodged;[94] and (iv) they safeguard witnesses from psychological harm.[95]

There is ample reason to doubt the legitimacy of the first rationale. Paralytic agents are *not* required to ensure a condemned person's death.[96] A sufficient dose of the ultra short-acting barbiturate should suffice to kill the condemned[97] (hence why some states now utilize a one-drug protocol consisting solely of pentobarbital[98]). Moreover, even if the first drug somehow fails to cause death, the third drug, potassium chloride, invariably will.[99] As such, the state's interest in lethal redundancy is satisfied irrespective of the paralytic.

Similarly, the proposition that lethal paralytics somehow protect the dignity of the condemned is highly questionable. In *Baze*, the government argued that the paralytic brought "about a

94. *See id.* ("[P]ancuronium assures that involuntary muscle reactions will not cause an intravenous ('IV') line to dislodge, therefore decreasing the possibility of the chemicals not being properly introduced into the condemned.").

95. *See id.* at 51 ("Petitioners' argument ignores the impact on family members and other witnesses who view the involuntary contractions."). Dr. Dershwitz also argued that "pancuronium does serve a useful purpose" since it disguises the condemned person's motor movements from onlookers. *See* HUMAN RIGHTS WATCH, *supra* note 56, at 27. "Q. Is there anything beneficial that pancuronium does for the inmate? A. Not the inmate directly. Q. And indirectly? A. It may decrease the misperception of these involuntary movements as consistent with suffering on the part of the witnesses, including the inmate's family. Q. But for the inmate himself? A. I said no." Dershwitz Dep., vol. 1, at 119–120, Jackson v. Danberg, No. 06-CV-300 (D. Del. Sept. 10, 2007); *see also* HUMAN RIGHTS WATCH, *supra* note 56, at 3 ("Indeed, the only apparent purpose of the pancuronium bromide is to keep the prisoner still, saving the witnesses and execution team from observing convulsions or other body movements that might occur from the potassium chloride, and saving corrections officials from having to deal with the public relations and legal consequences of a visibly inhumane execution.").

96. For example, in *Abdur'Rahmnan v. Bredesen*, the Tennessee Supreme Court found that Pavulon is "unnecessary" in the protocol, and that "the state has no reason for using such a 'psychologically horrific' drug to execute [a condemned person]." HUMAN RIGHTS WATCH, *supra* note 56, at 26 (citing Abdur'Rahmnan v. Bredesen et al., No. M2003-01767-SC-R11-CV (Ten. Sup. Ct. Oct. 17, 2005), p. 89a). The court further noted that "[i]f Pavulon were eliminated from the . . . lethal injection method, it would not decrease the efficacy or the humaneness of the procedure." *Id.* The Court also found that "[t]he method could be updated with second or third generation drugs to, for example, streamline the number of injections administered. The state's use of Pavulon, a drug outlawed in Tennessee for euthanasia of pets, is arbitrary. The State failed to demonstrate any need whatsoever for the injection of Pavulon." *Id.* at 26 n.107. Nonetheless, the court held against the petitioner—citing a lack of visible evidence that any condemned person in Tennessee had ever been conscious during their execution. *See id.* As Human Rights Watch has noted, however, this is exactly the kind of proof that the use of Pavulon would mask. *See id.*

97. *See* HUMAN RIGHTS WATCH, *supra* note 56, at 14.

98. *See, e.g.*, N.C. DEP'T. OF ADULT CORR., NORTH CAROLINA EXECUTION PROCEDURE MANUAL FOR SINGLE DRUG PROTOCOL (PENTOBARBITAL) (2013), https://files.nc.gov/ncdps/documents/files/Protocol.pdf [https://perma.cc/DU6L-HSGS].

99. *See* HUMAN RIGHTS WATCH, *supra* note 56, at 2.

more dignified death" by preventing the condemned from convulsing on the gurney.[100] A plurality of the Court agreed.[101] However, while the Court paid lip service to the dignity of the condemned, in reality, it trampled upon their dignity of choice. In her note, *Death And Its Dignities*, Kristen Loveland explained that advocates of assisted suicide often base their arguments for a "right to die" on the notion of self-determination. "They deploy dignity to empower the individual to die in a manner of her choosing."[102] Dignity, therefore, inheres in the power of choice—in the agency of determining how one will die. Allowing condemned persons to refuse lethal paralytics does not render their deaths less dignified, as the Court in *Baze* suggested. On the contrary, it affords them greater dignity—providing them with one last measure of autonomy.[103]

Finally, it is unlikely that a paralytic is required to prevent IV lines from becoming dislodged. Condemned persons are fully restrained while lying on the execution gurney. Heavy straps prevent them from moving to such a degree that they could affect their IV lines.[104] Indeed, states utilizing the one-drug protocol of pentobarbital have not reported instances in which the condemned person's IV lines became dislodged.[105]

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100. Transcript of Oral Argument at 33, Baze v. Rees, 553 U.S. 35 (2008) (No. 07-5439), https://www.supremecourt.gov/pdfs/transcripts/2007/07-5439.pdf [https://perma.cc/2MUF-28UB].

101. *See* Baze v. Rees, 553 U.S. 35, 57–58 (2008) ("The Commonwealth has an interest in preserving the dignity of the procedure, especially where convulsions or seizures could be misperceived as signs of consciousness or distress. Second, pancuronium stops respiration, hastening death. Kentucky's decision to include the drug does not offend the Eighth Amendment.").

102. *See* Kristen Loveland, Note, *Death and Its Dignities*, 91 N.Y.U. L. REV. 1279, 1281 (2016).

103. Presumably, the government would argue that the condemned person would die a more "dignified" death if they are not seen convulsing on the gurney. While some condemned persons might agree, others might not. By empowering condemned persons to choose whether to receive a paralytic, recognizing a First Amendment right to refuse lethal paralytic satisfies this dignity concern. *See infra* Section III.A.3.

104. *See* Deborah W. Denno, *When Legislatures Delegate Death*, 63 OHIO ST. L.J. 63, 108 (2002) ("In general, executioners strap the inmate to a gurney in the execution chamber, insert a catheter into a vein, and inject a nonlethal solution.").

105. As of July 15, 2023, this author could not locate a single instance in which a state utilizing a one-drug protocol of pentobarbital reported that a condemned person's IV line had become dislodged. If an IV line does become dislodged during lethal injection, it is more likely due to improper insertion. For example, during the execution of Raymond Landry on December 14, 1988, the IV line "popped free" from the needle inserted into Mr. Landry's arm. *See* Mary Schlangenstein, *The Execution Early Tuesday of Raymond Landry Was Interrupted*, UNITED PRESS INT'L (Dec. 13, 1988), https://www.upi.com/Archives/1988/12/13/The-execution-early-Tuesday-of-Raymond-Landry-was-interrupted/4883597992400/

The state's primary interest in requiring the use of lethal paralytics is to safeguard witnesses from psychological harm.[106] By preventing the condemned person from convulsing on the gurney,[107] the paralytic creates the illusion of a peaceful death.[108] This Note argues that such a purpose is not legitimate, let alone compelling.

C. CONSTITUTIONAL CHALLENGES

Various constitutional challenges have been brought against lethal injection generally, and the use of paralytics specifically. Virtually all have ended in failure. The following section provides a brief survey of these arguments.

1. *Eighth Amendment Claims*

Capital defense attorneys routinely argue that their states' lethal injection protocols violate the Eighth Amendment's prohibition on cruel and unusual punishment. In *Baze v. Rees*[109] and *Glossip v. Gross*,[110] the U.S. Supreme Court created a new standard to govern such Eighth Amendment method-of-execution claims. First, the defendant must show that there is an available

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[https://perma.cc/EGP6-DZ2U]. Like all persons executed by lethal injection in Texas prior to 2012, Mr. Landry was administered a paralytic; as such, this failure was likely caused by human error, not bodily movements. *See* DEATH PENALTY INFO. CTR., *supra* note 69.

106. *See* Brief for Respondents, *supra* note 92, at 50–51 ("Petitioners' own expert witnesses conceded that pancuronium's primary function in an execution is to prevent involuntary muscle contractions that would otherwise result from administration of the other lethal injection chemicals[.]" Said contractions "could be incorrectly interpreted as signs of pain or suffering.").

107. Even if the condemned person is fully anesthetized and incapable of experiencing pain, their body might spasm once the potassium chloride induces cardiac arrest. When the heart stops, the condemned person's brain will be starved of oxygen, which may lead to "involuntary jerking of the arm and leg muscles." HUMAN RIGHTS WATCH, *supra* note 56, at 27.

108. After a two-week trial on Tennessee's three-drug lethal injection protocol, Judge Ellen Hobbs Lyle of the Davidson County Chancery Court concluded that the paralytic (pancuronium bromide) serves "no legitimate purpose." Liptak, *supra* note 76. "The Pavulon gives a false impression of serenity to viewers, making punishment by death more palatable and acceptable to society." *Id.* Similarly, Robert Dunham, Executive Director of the Death Penalty Information Center, has stated that "[t]he paralytic performs no legitimate function in the execution itself. . . . It's so that it's less difficult for the eyewitnesses to watch." Marcella Corona, *Experts Weigh in On Use of Paralytic Drug in Executions*, RENO GAZETTE J. (Nov. 9, 2017), https://www.rgj.com/story/news/2017/11/09/nevada-lethal-injection-drugs-cruel-unconstitutional-execution-scott-dozier/826575001/ [https://perma.cc/R2XN-NPJX].

109. 553 U.S. 35, 52 (2008).

110. 576 U.S. 863, 877 (2015).

alternative method which substantially reduces the risk of severe pain.[111] Second, the defendant must show that the state has no legitimate penological reason for refusing to adopt this alternative method.[112] Finally, the defendant must show that the alternative method is tried and tested and can be "readily implemented."[113]

Baze and *Glossip* thereby established a perverse burden of proof. In effect, the Court issued a "macabre challenge" to condemned persons: they must propose a constitutional method for their own executions.[114] At the same time, the Court raised the bar for successful Eighth Amendment claims. Under the *Baze-Glossip* standard, most capital defendants are unable to make the requisite showing.[115] For example, in 2018, twenty-nine condemned persons jointly challenged the constitutionality of Tennessee's three-drug protocol. They proposed a lethal dosage of pentobarbital as their readily available alternative. The condemned persons likewise attempted to amend their complaint to include a two-drug alternative which eliminated the paralytic.[116] The Supreme Court of Tennessee rejected the one-drug proposal, writing that the plaintiffs had failed to show that pentobarbital was readily available to Tennessee's Department of Corrections.[117]

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111. *See* Baze v. Rees, 553 U.S. 35, 61 (2008); *see also* Glossip v. Gross, 576 U.S. 863, 877 (2015).

112. *See Baze*, 553 U.S. at 52.

113. *See Baze*, 553 U.S. at 52; *see also Glossip*, 576 U.S. at 877.

114. *See* Arthur v. Dunn, 580 U.S. 1141, 1141 (2017) (Sotomayor, J., dissenting) ("Nearly two years ago in *Glossip v. Gross*, . . . the Court issued a macabre challenge. In order to successfully attack a State's method of execution as cruel and unusual under the Eighth Amendment, a condemned prisoner must not only prove that the State's chosen method risks severe pain, but must also propose a 'known and available' alternative method for his own execution."); *see also Glossip*, 576 U.S. at 978 (Sotomayor, J., dissenting) ("Today, however, the Court absolves the State of Oklahoma of this duty. It does so . . . by imposing a wholly unprecedented obligation on the condemned inmate to identify an available means for his or her own execution.").

115. *See, e.g.*, *Glossip*, 576 U.S. at 869 ("While methods of execution have changed over the years, '[t]his Court has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment.'" (internal citations omitted)).

116. *See* Liliana Segura, *"Our Most Cruel Experiment Yet": Chilling Testimony in a Tennessee Trial Exposes Lethal Injection as Court-Sanctioned Torture*, INTERCEPT (Aug. 5, 2018), https://theintercept.com/2018/08/05/death-penalty-lethal-injection-trial-tennessee/ [https://perma.cc/7KXV-Q9TS].

117. *See* Abdur'Rahman v. Parker, 558 S.W.3d 606, 626 (Tenn. 2018) ("In summary, we agree with the trial court's finding that pentobarbital—the only alternative method of execution that the Plaintiffs sufficiently pleaded—is not available for use in executions in Tennessee. Therefore, the Plaintiffs failed to carry their burden of showing availability of their proposed alternative method of execution, as required under the Glossip standard. . . .").

It also dismissed the plaintiffs' two-drug proposal on the grounds that they had failed to include that alternative in their initial complaint.[118]

2. *Fourteenth Amendment Claims*

The Court has recognized a right to bodily autonomy in the context of nonconsensual medical treatments.[119] Some scholars have suggested that similar claims might be made in the context of lethal injection.[120] Under this theory, condemned persons would have a Fourteenth Amendment substantive due process right to "have a say" in the drugs that are injected into their bodies. Such a claim, however, seems unlikely to succeed. All methods of execution are in some way violative of an individual's right to bodily autonomy. Moreover, if the Court accepted this argument, it is unclear how far it would extend. For example, could a condemned person claim a right to be executed using pentobarbital (their drug of choice) as opposed to sodium thiopental, even though the state does not have access to the former? Could they assert this right to refuse lethal injection altogether? It seems unlikely that the Court would be willing to open such a pandora's box.[121]

3. *First Amendment Claims*

The First Amendment is typically invoked in the lethal injection context as protecting the public's right to access information about executions. For example, in *First Amendment Coalition of Arizona v. Ryan*,[122] plaintiffs alleged that the First

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118. *See id.* at 621 ("But the Plaintiffs completely failed to plead a two-drug protocol as an 'Available Alternative.'").

119. *See, e.g.*, Washington v. Harper, 494 U.S. 210, 229 (1990) ("The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty."); *see also* Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261, 278 (1990) (acknowledging that the defendant had a right to refuse medical treatment under the Fourteenth Amendment's Due Process Clause).

120. For example, in *"Only to Have a Say in the Way He Dies": Bodily Autonomy and Methods of Execution*, Professor Alexandra Klein analyzes capital punishment through the lens of bodily autonomy, arguing that state laws permitting condemned persons to choose between different methods of execution ultimately provide an illusion of autonomy. 99 U. DET. MERCY L. REV. 323, 326 (2022). True bodily autonomy requires that condemned persons be able to prevent their own executions. *See id.* at 372; *see also infra* Section III.A.3.

121. In the wake of *Dobbs v. Whole Women's Health*, it seems especially unlikely that the Court would recognize the bodily autonomy rights of condemned persons. 142 S. Ct. 2228 (2022) (holding that the Constitution does not confer a right to abortion).

122. 938 F.3d 1069 (9th Cir. 2019).

Amendment protects the public's right to access information about the source and quality of the state's lethal injection drugs, as well as the qualifications of its execution team members.[123] The Ninth Circuit ultimately rejected this claim, finding that there is no First Amendment right to access such information.[124] Meanwhile, the American Civil Liberties Union (ACLU) made a similar argument in *Beardslee v. Woodford*[125] and *Abdur'Rahman v. Bresden*,[126] wherein it filed amicus briefs claiming that the use of pancuronium bromide in the states' lethal injection protocols violated the public's "First Amendment right to witness an entire execution from the moment the condemned inmate enters the execution chamber until [their] life is extinguished."[127] However, the courts did not reach the merits of this claim.[128] Other plaintiffs, meanwhile, have successfully alleged that the public has a First Amendment right to "hear the sounds of executions in their entirety."[129] Finally, some scholars have argued that regulations

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123. *See, e.g.*, First Amend. Coal. of Ariz. v. Ryan, 938 F.3d 1069 (9th Cir. 2019).

124. In *First Amendment Coalition of Arizona v. Ryan*, the Ninth Circuit held that the First Amendment right of access to governmental proceedings did not entitle the plaintiffs to information regarding execution drugs and personnel as a matter of law; as such, the district court did not abuse its discretion by dismissing with prejudice those aspects of the plaintiffs' claim. *See* 938 F.3d at 1080. *See also* Phillips v. DeWine, 841 F.3d 405, 418 (6th Cir. 2016) ("'[T]he Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act,' and '[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control.'" (internal citations omitted)); Zink v. Lombardi, 783 F.3d 1089, 1112 (8th Cir. 2015) ("The Eleventh Circuit has ruled that the First Amendment does not grant a prisoner a right 'to know where, how, and by whom the lethal injection drugs will be manufactured.' . . . We agree with the Eleventh Circuit . . . and conclude that the prisoners failed to state a claim under the First Amendment." (internal citations omitted)).

125. 395 F.3d 1064 (9th Cir. 2005).

126. 181 S.W.3d 292 (Tenn. 2005).

127. *See ACLU Says California's Use of Paralytic Drug During Executions is Unconstitutional*, ACLU (Jan. 13, 2005), https://www.aclu.org/press-releases/aclu-says-californias-use-paralytic-drug-during-executions-unconstitutional [https://perma.cc/3LD2-ES4V]; *see also Tennessee's Use of Lethal Injection Chemical Blocks Public's First Amendment Right to Know, Says ACLU*, ACLU (June 8, 2005), https://www.aclu.org/press-releases/tennessees-use-lethal-injection-chemical-blocks-publics-first-amendment-right-know [https://perma.cc/L5V6-5UHM].

128. *See* Beardslee v. Woodford, 395 F.3d 1064, 1076 n.14 (9th Cir. 2005) ("Amici claim that pancuronium bromide acts as a 'chemical curtain' interfering with the public's right to know. *See* California First Amend. Coal. v. Woodford, 299 F.3d 868 (9th Cir. 2002). Although their arguments may have merit, these parties did not intervene in the district court action and their independent claims are not properly before us."); *see also Bresden*, 181 S.W.3d 292 (wherein the Court did not address the amicus' argument).

129. *See* First Amend. Coal. of Ariz. v. Ryan, 938 F.3d 1069, 1075 (9th Cir. 2019) (holding that the public has the right under the First Amendment "to hear the sounds of executions in their entirety").

that prevent executions from being filmed or televised violate the First Amendment.[130] Such claims have not succeeded in court.[131]

All of these First Amendment arguments are localized in the rights of the public, rather than the rights of the condemned.[132] Focusing on the rights of the public devalues the autonomy of incarcerated persons. A better approach would be to pair the First Amendment right of access claims with those centered on the rights of the condemned. This Note presents the case for the latter—i.e., the First Amendment right of condemned persons to refuse lethal paralytics.

The appellant in *Beardslee v. Woodford* made a similar argument. There, Donald Beardslee, a condemned person on California's death row, argued (*inter alia*) that the use of pancuronium bromide in the state's lethal injection protocol infringed upon his First Amendment right to free speech.[133] Beardslee maintained that the paralytic would make it impossible for him to notify others if he was conscious during the execution procedure and experiencing pain. Beardslee contended that "the existence of any possibility of an error that would result in his being conscious yet unable to communicate . . . is sufficient to establish a First Amendment violation."[134] The court noted that Beardslee's First Amendment claim was inextricably linked to his failed Eighth Amendment claim. Specifically, the court found that Beardslee's alleged right to speak, was, in essence, "a right to claim that one's Eighth Amendment rights are being violated."[135] Because the Court did not find a substantial risk of an Eighth Amendment violation, it rejected Beardslee's First Amendment

130. *See, e.g.*, Bessler, *supra* note 29, at 358; *see also* Santamarina, *supra* note 30, at 105.

131. *See, e.g.*, Garrett v. Estelle, 556 F.2d 1274, 1276 (5th Cir. 1977) ("We hold that the protection which the first amendment provides to the news gathering process does not extend to matters not accessible to the public generally, such as filming of executions in Texas state prison, and therefore that Garrett has no such right.").

132. As explained elsewhere in this Note, the courts have restricted the constitutional rights of incarcerated persons. *See, e.g.*, *infra* Section II.B.3.a. The decision to focus on the rights of the public is therefore likely a strategic one.

133. *See* Beardslee v. Woodford, No. C 04 5381, 2005 U.S. Dist. LEXIS 144, at *10 (N.D. Cal. Jan. 7, 2005) ("Plaintiff also asserts a First Amendment violation, arguing that the use of pancuronium bromide during the execution will make it impossible for him to cry out if he is not unconscious and therefore experiences pain and suffering as a result of the injection of pancuronium bromide and potassium chloride.").

134. *See id.*

135. *See id.* at *11.

claim.[136] The Ninth Circuit affirmed this ruling[137] and the Supreme Court denied certiorari.[138]

So far as this author has been able to determine, a First Amendment claim localized in the free speech rights of the condemned has not been raised in any case since. This Note forwards an argument similar to Beardslee's, with an important caveat: Beardslee claimed that lethal paralytics violate the First Amendment because they prevent a condemned person from expressing that they are awake and experiencing pain. His argument was therefore tied to the condemned person's ability to verbalize whether the state was actively violating the Eighth Amendment.[139] This Note asserts that condemned persons have a First Amendment right to express the violence of their death irrespective of any Eighth Amendment violation. Regulations requiring the use of lethal paralytics unlawfully censor this expressive speech.

II. FIRST AMENDMENT ANALYSIS

Three questions arise in an analysis of whether regulations requiring the use of a paralytic in lethal injection violate a condemned person's First Amendment right to free speech:

i. Does the act of refusing a paralytic qualify as speech for the purposes of the First Amendment?
ii. If so, what standard of review applies to regulations requiring the use of lethal paralytics?
iii. Under that standard, do lethal paralytic requirements violate the First Amendment?

The following section deals with each of these questions in turn, concluding that: (i) refusing a paralytic qualifies as expressive speech for the purposes of the First Amendment under the *Spence-Johnson* test; (ii) strict scrutiny is the appropriate standard of review because lethal paralytic requirements restrict speech based on subject matter, are prior restraints on speech, discriminate

136. *See id.* at *12.
137. *See* Beardslee v. Woodford, 395 F.3d 1064 (9th Cir. 2005).
138. *See* Beardslee v. Woodford, 543 U.S. 1096 (2005).
139. *See* Beardslee v. Woodford, No. C 04 5381, 2005 U.S. Dist. LEXIS 144, at *11 (N.D. Cal. Jan. 7, 2005).

based on viewpoint, and compel speech; and (iii) such laws fail strict scrutiny, as well as lesser standards of review, because they do not serve a legitimate or compelling state interest.

A. REFUSING A PARALYTIC QUALIFIES AS FIRST AMENDMENT-PROTECTED SPEECH

Does refusing a paralytic qualify as expressive speech? In *Spence v. Washington*,[140] the U.S. Supreme Court considered whether displaying an American flag upside-down and affixed with a peace symbol constituted expressive speech for the purposes of the First Amendment. In a per curiam opinion, the Court affirmed that it did, holding that the state statute criminalizing Spence's behavior violated the First Amendment.[141] In its expressive speech analysis, the Court found it relevant that "[a]n intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[142] Over a decade later, in *Texas v. Johnson*,[143] the Court elevated this language in *Spence* to a formal two-part test. A non-verbal action will be considered expressive speech warranting First Amendment protection if:

(a) an intent to convey a particularized message is present; and
(b) it is likely that the message would be understood by those who viewed it.[144]

Lower courts have since applied the *Spence-Johnson* test in numerous First Amendment cases.[145]

Choosing to refuse a lethal paralytic satisfies both prongs of the *Spence-Johnson* test and therefore qualifies as expressive speech under the First Amendment. The first prong of the *Spence-Johnson* test has three components: (i) there must be a message;

140. 418 U.S. 405 (1974) (per curiam).
141. *See id.* at 414–15.
142. *See id.* at 410–11. In its formulation of the test in *Johnson*, the Court removed the "in the surrounding circumstances" language from *Spence*. *See* Texas v. Johnson, 491 U.S. 397, 404 (1989) (per curiam).
143. 491 U.S. 397 (1989).
144. *See Johnson*, 491 U.S. at 404.
145. *See, e.g.*, Cressman v. Thompson, 798 F.3d 938, 956 (10th Cir. 2015); State v. Immelt, 173 Wash. 2d 1, 22 (2011); Hernandez v. Superintendent, Fredericksburg-Rappahannock Joint Sec. Ctr., 800 F. Supp. 1344, 1348 (E.D. Va. 1992).

(ii) the message must be intended; and (iii) the message must be particularized.[146] Turning to the first element: does refusing a lethal paralytic convey a message? As noted, lethal paralytics serve to sanitize the execution process by concealing the violence of the execution and signs of potential suffering.[147] By refusing a paralytic, the condemned person would expose the true nature of their death and allow witnesses to watch them convulse on the execution gurney.[148] The condemned person's decision to refuse the lethal paralytic would thereby communicate a message that the state is inflicting violence and potential suffering.

Would that message be intended? The government might contend that the condemned person's convulsions are involuntary,[149] and that any message communicated by their bodily movements is therefore unintentional. The fact, however, that a condemned person's convulsions could be involuntary is of little relevance. By refusing a paralytic, the condemned person would be actively choosing to showcase such movements. In other words, they would intend that the audience witness the violence of their death and signs of potential suffering.

Would the message be particularized?[150] In *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*,[151] the Supreme Court cast doubt on whether particularization must be present in order to satisfy the first prong of the *Spence-Johnson* test.[152] The condemned person's message, however, would nonetheless be particularized. By refusing the paralytic, the condemned person would be saying: "Observe the violence of my

146. In *Hurley v. Irish-American Gay, Lesbian, and Bisexual Grp. of Bos.*, the Court suggested that a "particularized message" need not be present. "[A] narrow, succinctly articulable message is not a condition of constitutional protection." 515 U.S. 557, 569 (1995). The Circuits are divided on the extent to which *Hurley* modified the *Spence-Johnson* test. *See, e.g.*, Cressman v. Thompson, 798 F.3d 938, 955 (10th Cir. 2015) ("Our sister circuits have taken divergent approaches to reconciling Hurley with the requirements of the *Spence-Johnson* test."). This Note assumes that the particularized message component is still relevant.

147. *See supra* Section I.B.

148. The Court has previously found bodily movements to communicate expressive messages. *See, e.g.*, Barnes v. Glen Theatre, 501 U.S. 560, 566 (1991) (holding that nude dancing is a form of expressive conduct within the scope of the First Amendment).

149. If properly anesthetized, a condemned person's convulsions would be the product of involuntary muscular contractions. *See* HUMAN RIGHTS WATCH, *supra* note 56, at 27.

150. In other words, would a *particular* message be conveyed, as opposed to any message?

151. 515 U.S. 557 (1995).

152. *See supra* note 145.

death. Reckon with the reality of what the state is doing to me."[153] Such a message could be characterized as a protest of government policy. As such, it would likely meet the particularity requirement. Thus, the first prong of the *Spence-Johnson* test is satisfied.

Turning to the second prong: How likely is it that this message would be understood by those who view it? In general, the likelihood that any message is comprehended by a recipient is primarily a function of the message's ambiguity—i.e., the degree to which the message lends itself to disparate interpretations.[154] The more ambiguous the message, the less likely it will be understood. Refusing a paralytic is subject to primarily two interpretations: (i) the condemned person intends for witnesses to observe the violence of their death; or (ii) the condemned person seeks to avoid the potential pain caused by the paralytic.[155] Even if witnesses considered the latter to be the condemned person's primary objective, they would likely understand that the condemned person at least collaterally intended that the violence of their death be made visible to those in attendance. After all, the most obvious consequence of refusing a paralytic is the manifestation of the condemned person's convulsions.[156] It seems likely that witnesses would comprehend that, by refusing a paralytic, the condemned person intended that viewers reckon with the violence and potential suffering afflicted by the state.[157]

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153. Even if the condemned person's primary intent in refusing the paralytic was to avoid potential pain, a collateral consequence of that action would be to force witnesses to observe the violence of the condemned person's death. A condemned person who is therefore aware that refusing a paralytic will cause witnesses to see the violence of their death might therefore be said to have intended this message.

154. *See, e.g.*, Adam Sennet, *Ambiguity*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2021), https://plato.stanford.edu/entries/ambiguity/ [https://perma.cc/FL22-M2J7] ("Ambiguity is generally taken to be a property enjoyed by signs that bear multiple (legitimate) interpretations in a language. . . .").

155. *See infra* Section III.A.2; *see also* HUMAN RIGHTS WATCH, *supra* note 56, at 24.

156. The condemned person's attorney can also clarify the intended message by making a statement to that effect before or after the execution.

157. The Supreme Court has previously found the second prong of the *Spence-Johnson* test to have been satisfied in far more ambiguous cases. *Spence* itself provides one such example. On May 10, 1970, Harold Spence hung an American flag upside down with a peace symbol affixed to it, in protest of the United States' recent invasion of Cambodia and the Kent State massacre. *See* Spence v. Washington, 418 U.S. 405, 405–08 (1974) (per curiam). Hanging from his apartment window, this symbol was subject to multiple interpretations: Perhaps Spence was protesting the Vietnam War generally, rather than the invasion of Cambodia specifically? Perhaps Spence was objecting to the murder of Charles Oatman on May 9, 1970, in Richmond County Jail? (Charles Oatman's death in police custody precipitated the Augusta Civil Rights riot on May 11, 1970. *See* Sea Stachura, *Remembering the Augusta Civil Rights Riot, 50 Years Later*, NPR (Oct. 1, 2020), https://www.npr.org/2020/

The second prong of the *Spence-Johnson* test is therefore satisfied; as such, refusing a paralytic should be considered expressive speech for the purposes of the First Amendment.

The state might nevertheless dispute the notion that, by refusing a paralytic, a condemned person engages in expressive speech. For example, the government might allege that refusing a paralytic is a form of non-communicative conduct that condemned persons do not have a right to engage in at all.[158] In other words, condemned persons can no more refuse a paralytic than any other drug in the lethal injection protocol. Unlike the anesthetic and heart-stopping agent, however, the paralytic serves no purpose aside from concealing the violence of the condemned person's death. Refusing a paralytic therefore has a strong expressive function in a way that refusing the anesthetic or heart-stopping agent typically would not.

The state might also argue that refusing a paralytic is a negative action (i.e., a refusal to do something), which cannot be considered expressive "conduct." However, the U.S. Supreme Court has implicitly acknowledged that negative actions can qualify as expressive conduct in the context of silent sit-ins. In *Brown v. Louisiana*,[159] for example, plaintiffs were arrested for refusing to leave a segregated library after being ordered to do so by a local sheriff. The Court held that the plaintiffs' silent protest qualified as expressive speech under the First Amendment. According to Justice Fortas, the First Amendment right to free

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10/01/918414307/remembering-the-augusta-civil-rights-riot-50-years-later [https://perma.cc/XHC7-ELTC]). Perhaps his flag had no meaning, and merely reflected Spence's eccentric aesthetic? Despite the ambiguity of Spence's message, the Supreme Court found that—given the proximity of the action to the invasion of Cambodia and the Kent State massacre—witnesses would likely interpret the upside-down flag to signal Spence's protest of those events. *See Spence*, 418 U.S. at 410 ("In this case, appellant's activity was roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy, also issues of great public moment. . . . A flag bearing a peace symbol and displayed upside down by a student today might be interpreted as nothing more than bizarre behavior, but it would have been difficult for the great majority of citizens to miss the drift of appellant's point at the time that he made it."). The Court therefore found the action's temporal proximity to the referenced events to be dispositive of the second prong of the *Spence-Johnson* test. In the context of lethal injection, the condemned person's choice to refuse a paralytic would immediately proceed the witnesses' observation of the condemned person's pain and suffering. Thus, the temporal proximity and causal connection between those two events is far more direct than the events at issue in *Spence* (which occurred days prior to displaying the flag).

158. *See, e.g.*, Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993) (holding that the physical assault of another person does not qualify as expressive conduct).

159. Brown v. Louisiana, 383 U.S. 131 (1966) (Fortas, J., plurality opinion).

speech was not confined to verbal expression but embraced other types of expressive conduct, including the plaintiffs' refusal to vacate the library.[160] Thus, acts of refusal (such as refusing a paralytic) can qualify as constitutionally protected speech.

Even if the state concedes that refusing a paralytic is a form of expressive speech, it might nevertheless contend that it is under no obligation to *facilitate* a condemned person's speech by changing its lethal injection protocol to make the paralytic optional. The government might argue, for example, that it would similarly be under no obligation to provide protesters with microphones so that they might communicate with large crowds. This analogy exemplifies the negative versus positive rights distinction.[161] The state would essentially be contending that condemned persons do not have a *positive* right to speak that the government must actualize. Instead, the condemned person has a *negative* right to speak free from state interference.

This argument, however, assumes that the state is doing nothing to inhibit the expressive speech of condemned persons to begin with. Yet, in the execution context, the government proactively restrains the condemned person's freedom of speech by imposing a paralytic requirement where none previously existed. A more apt analogy would be to a government banning the use of microphones to prevent protesters from communicating with large crowds. While the state is not required to facilitate a condemned person's speech, it similarly cannot inhibit that speech in the first place.[162]

B. STRICT SCRUTINY IS THE APPROPRIATE STANDARD OF REVIEW

Having concluded that refusing a paralytic qualifies as expressive speech under the *Spence-Johnson* test, it remains to be determined which standard of review ought to apply to regulations requiring the use of lethal paralytics.[163] This Note argues that

160. *Brown*, 383 U.S. at 141–42.

161. *See, e.g.*, Johan Vorland Wibye, *Reviving the Distinction Between Positive and Negative Human Rights*, 35 RATIO JURIS 363, 365 (2022) ("A positive right entitles the right-holder to have the duty-bearer *do* some act, while a negative right entitles the right-holder to have the duty-bearer *refrain* from doing an act.").

162. *See infra* Section II.B.1.b.

163. In modern constitutional law, there are three tiers of scrutiny that courts will variably apply depending on the nature of the rights at stake, and whether the plaintiffs

such regulations warrant strict scrutiny for four independently sufficient (yet conjunctively persuasive) reasons: (a) lethal paralytic requirements restrict speech based on subject matter; (b) lethal paralytic requirements are a form of prior restraint on speech; (c) lethal paralytic requirements discriminate based on viewpoint; and (d) lethal paralytic requirements compel speech.

1. *Strict Scrutiny Is Appropriate Because Lethal Paralytic Requirements Restrict Speech Based on Subject Matter, Are a Form of Prior Restraint, Discriminate Based on Viewpoint, and Compel Speech*

    a. *Lethal Paralytic Requirements Restrict Speech Based on Subject Matter*

When determining which tier of scrutiny applies to laws burdening the First Amendment, courts typically ask whether the regulation at issue is "content-neutral" or "content-based."[164] Content-based regulations are presumptively unconstitutional

belong to a suspect class. Strict scrutiny is the least deferential standard of review vis-à-vis the law at issue. Under that standard, the state must show that their interest is "compelling" and that their means of achieving it are "the least restrictive" possible. *See* R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights*, 4 U. OF PA. J. CONST. L. 225, 228 (2002). Rational basis review is the most deferential standard of review. Typically, courts apply the rational basis test so long as there is no fundamental right or suspect classification at issue. Under that standard, courts ask whether the government's action was "rationally related" to a "legitimate" state interest. *See id.* Intermediate scrutiny—as its name suggests—occupies the middle-ground between rational basis review and strict scrutiny. Under that standard, the government must advance a "substantial" or "important" (rather than "compelling" or "legitimate") interest in a narrowly tailored way. Unlike strict scrutiny, the means used to advance the government's interest need not be the least restrictive possible. *See id.*

164. David L. Hudson, Jr., *Content Based*, THE FIRST AMEND. ENCYC. (2009), https://www.mtsu.edu/first-amendment/article/935/content-based [https://perma.cc/37RJ-YSQQ].

and receive strict scrutiny.[165] Content-neutral regulations, meanwhile, typically receive intermediate scrutiny.[166]

How do courts determine whether a regulation is "content-neutral" or "content-based"? Writing for the majority in *Reed v. Town of Gilbert*,[167] Justice Thomas opined that if a law "draws distinctions based on the message a speaker conveys," it is to be treated as content-based and subject to strict scrutiny.[168] Facially content-neutral laws, moreover, can be considered "content-based" if the regulation cannot be "justified without reference to the content of the regulated speech" or if they were adopted "because of disagreement with the message [the speaker] conveys."[169] Thus, content-based restrictions typically restrict speech based on the *subject matter* of the speaker's message. However, two subspecies of content-based restrictions exist—namely, prior restraint and viewpoint discrimination (discussed *infra*).

Regulations requiring the use of lethal paralytics restrict the condemned person's expressive speech based on subject matter. As noted, the primary purpose of lethal paralytics is to conceal the violence of a condemned person's death. Lethal paralytic

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165. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); *see also* Police Department of Chicago v. Mosley, 408 U.S. 92, 95 (1972) ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); Collin v. Smith, 578 F.2d 1197, 1202 (7th Cir. 1978) ("[A]nalysis of content restrictions must begin with a healthy respect for the truth that they are the most direct threat to the vitality of First Amendment rights.").

166. *See* David L. Hudson, Jr., *Content Neutral*, THE FIRST AMEND. ENCYC., https://www.mtsu.edu/first-amendment/article/937/content-neutral [https://perma.cc/6CHM-SRPG].

167. Reed v. Town of Gilbert, 576 U.S. 155 (2015).

168. *See id.* at 163; *see also* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986) (holding that content-neutral speech regulations are "those that are justified without reference to the content of the regulated speech" (internal quotations omitted)). Justice Thomas further clarified that "[a] law that is content-based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Reed*, 576 U.S. at 165. For example, in *Boos v. Barry*, the Court found that a Washington, D.C. ordinance banning the display of signs criticizing foreign governments outside of foreign embassies to be an impermissible content-based restriction on speech. 485 U.S. 312, 329 (1988).

169. *Ward*, 491 U.S. at 791. For example, in *Sorrell v. IMS Health*, the Court noted that if a government "bent on frustrating an impending demonstration" passed a law demanding two years' notice before the issuance of parade permits, such a law, while facially content-neutral, would be content-based because its purpose was to suppress speech on a particular subject. 564 U.S. 552, 566 (2011).

requirements therefore target the subject of the condemned person's speech—namely, its message of state-inflicted violence and potential suffering. Such regulations therefore amount to content-based censorship, warranting strict scrutiny.

b. *Lethal Paralytic Requirements Are a Form of Prior Restraint*

Lethal paralytic requirements can similarly be characterized as prior restraints on expressive speech. In the context of the First Amendment, "prior restraint" typically refers to the government's ability to prevent the publication of printed materials.[170] Prior restraint is distinguished from other forms of content-based censorship insofar as it prevents speech *before* it occurs, rather than punishing it or restricting it afterwards.[171] In the lethal injection context, regulations requiring the use of paralytics preemptively inhibit expressive speech. The condemned person is never given the opportunity to express the violence and potential suffering inflicted by the state.

Like other forms of content-based restrictions, prior restraint is presumptively unconstitutional.[172] Many scholars have argued that the First Amendment was specifically designed to protect citizens from this preemptive form of censorship, which the Framers had experienced during colonial rule.[173] In light of that history, the Supreme Court has held that the government "carries a heavy burden" of justifying the imposition of such an *ex ante* restriction.[174] Lethal paralytic requirements therefore warrant strict scrutiny because they qualify as a form of prior restraint.

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170. *See* Daniel Baracskay, *Prior Restraint*, THE FIRST AMEND. ENCYC. (2009), https://www.mtsu.edu/first-amendment/article/1009/prior-restraint [https://perma.cc/5GTP-WGYL].

171. "Prior restraint" therefore describes a species of *ex ante* content-based restriction, as opposed to the more common *ex post* form.

172. *See* N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." (citing Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963))); *see also* Near v. Minnesota, 283 U.S. 697 (1931). However, the Court has not clarified whether *ex ante* content-based restrictions (i.e., prior restraints) warrant a stronger presumption of unconstitutionality than ex post restrictions. While acknowledging the possibility of a more stringent standard, this Note argues that regulations requiring the use of paralytics ought to receive normal strict scrutiny.

173. *See* Baracskay, *supra* note 170.

174. *See N.Y. Times Co.*, 403 U.S. at 714 (citing Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)).

c. *Lethal Paralytic Requirements Discriminate Based on Viewpoint*

Regulations requiring the use of lethal paralytics likewise censor speech based on viewpoint.[175] Viewpoint discrimination is distinguished from garden variety content discrimination insofar as the former discriminates based on the perspective of the speaker on a given subject while the latter discriminates based on the subject matter itself.[176] Courts treat viewpoint-based restrictions with particular distaste.[177]

Here, the condemned person seeks to communicate that their execution is a violent affair, and that witnesses should reckon with the potential suffering inflicted by the state. The government, meanwhile, seeks to communicate that the execution is peaceful and humane—which it does by concealing the violence of the condemned person's death. By requiring the use of lethal paralytics, the state thereby censors a viewpoint opposite to its own.

The Court has looked with particular disfavor upon laws that discriminate based on viewpoint. Writing for the majority in *Rosenberger v. Rectors and Visitors of the University of Virginia*,[178] Justice Kennedy explained that:

> When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or

175. *See* Kevin Francis O'Neill, *Viewpoint Discrimination*, THE FIRST AMEND. ENCYC. (2017), https://www.mtsu.edu/first-amendment/article/1028/viewpoint-discrimination [https://perma.cc/2QQ8-C69L].

176. *See id.* "For example, if an ordinance banned all speech on the Iraq War, it would be a content-based regulation. But if the ordinance banned only speech that criticized the war, it would be a viewpoint-based regulation." *Id.* The distinction between viewpoint discrimination and content-based discrimination is often blurry. In fact, viewpoint discrimination is often considered a subcategory of content discrimination. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination.").

177. *See* O'Neill, *supra* note 175 ("Viewpoint discrimination is a form of content discrimination particularly disfavored by the courts.").

178. 515 U.S. 819.

> the opinion or perspective of the speaker is the rationale for the restriction.[179]

The Court has deemed viewpoint discrimination presumptively unconstitutional.[180] Because paralytic requirements discriminate against the condemned person's viewpoint (that the execution is a violent affair) in favor of the government's viewpoint (that the execution is peaceful), they therefore warrant strict scrutiny.

d. *Lethal Paralytic Requirements Compel Speech*

Generally speaking, the government may not compel individuals to communicate a message they do not wish to express. For example, in *West Virginia State Board of Education v. Barnette*, the Court held that the state could not force children to stand, salute the flag, and recite the pledge of allegiance.[181] More recently, in *Rumsfeld v. Forum for Academic and Institutional Rights*, Chief Justice Roberts reiterated that the "freedom of speech prohibits the government from telling people what they must say."[182]

Under the *Spence-Johnson* test, lethal paralytic requirements are themselves a form of government speech.[183] By enacting these laws, states intend to communicate the particularized message that lethal injection is a peaceful affair. This message is likely understood by execution witnesses, insofar as they would have no reason to suspect that the condemned person is suffering in any way. In other words, the average observer would likely walk away from the execution believing that the condemned person had died a peaceful death.[184]

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179. *Id.* at 829 (internal citations omitted).

180. *See id.* at 829–830.

181. 319 U.S. 624, 642 (1943).

182. 547 U.S. 47, 61 (2006). *See also* Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (where the Court struck down a Florida "right-of-reply" statute that compelled newspapers to publish the response of a public figure about whom the papers had previously published criticism); Hurley v. Irish-American Gay, Lesbian, and Bisexual Grp. of Bos., 515 U.S. 557, 559 (1995) (where the Court invalidated a law compelling the hosts of a parade to include participants whom they would have otherwise excluded).

183. In *Cressman v. Thompson*, the Tenth Circuit applied the *Spence-Johnson* test to an Oklahoma license plate regulation to determine whether it compelled speech. *See* 798 F.3d 938, 957 (10th Cir. 2015).

184. Some might argue that witnesses cannot "understand" a message if they do not recognize it to be a message at all. In other words, if an observer accepts what they see to be an expected outcome, rather than an intended message, then they have not "understood"

Lethal paralytic requirements therefore compel condemned persons to communicate a message they might neither believe nor wish to convey—namely, that they were executed in a peaceable manner. By requiring the use of a paralytic, the state hijacks the condemned person's body to express that falsehood. The compulsion of this speech warrants strict scrutiny.[185]

In sum, lethal paralytic requirements compel speech, discriminate based on viewpoint, constitute a form of prior restraint, and restrict speech based on subject matter. Each of these reasons independently suffices to warrant strict scrutiny. Together, they provide a compelling justification for treating regulations requiring the use of lethal paralytics as presumptively unconstitutional. Nevertheless, this Note briefly surveys why lesser standards of review—i.e., intermediate scrutiny and rational basis review—are inappropriate in the context of paralytic requirements.

2. *Intermediate Scrutiny Is Inappropriate Because Paralytic Requirements Are Not Content-Neutral*

In order to justify the application of intermediate scrutiny, a court would have to characterize regulations requiring the use of lethal paralytics as content-neutral. Content-neutral laws restrict speech irrespective of subject matter or viewpoint. However, once a court acknowledges that refusing a paralytic is a form of expressive speech, it is hard to see how the censorship of that speech could be considered "content-neutral" given that the paralytic directly targets the subject matter and viewpoint of the condemned person's speech.[186] The better counterargument would

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that message within the meaning of the *Spence-Johnson* test. Thus, witnesses to an execution cannot "understand" the government's message that lethal injection is a peaceful affair if they are ignorant of the fact that that this is, in fact, a message (as opposed to reality). However, this argument assumes that the witnesses to an execution are unaware of the fact that the violence of the condemned person's death is being actively concealed by a paralytic (a dubious proposition with respect to the attending attorneys and corrections officers). Moreover, this logic would preclude any effective propaganda from being properly considered speech so long as the government ensures that recipients are kept ignorant of its falsity.

185. *See, e.g.*, Am. Meat Inst. v. United States Dep't of Agric., 760 F.3d 18, 35 (2014) ("[C]ontent based speech regulations—including compelled speech—are subject to strict scrutiny.").

186. Some might argue that lethal paralytic requirements are indeed content-neutral, because they apply regardless of the condemned person's intended message (or lack thereof) in refusing a paralytic. In other words, the regulation would apply equally to a condemned

be that refusing a paralytic is *not* a form of expressive speech under the *Spence-Johnson* test. For the reasons given *supra*, however, this argument is unavailing.[187] Below, this Note posits that even if these regulations were somehow characterized as content-neutral, they would still fail intermediate scrutiny.

3. *Rational Basis Review Is Inappropriate Because the Rationales Supporting Its Use Are Inapposite*

Rational basis review normally applies to laws that do not implicate fundamental rights or suspect classifications. Given that free speech is considered a fundamental right, regulations that impinge upon the First Amendment rarely receive rational basis review. The state might nevertheless argue that rational basis review ought to be applied to lethal paralytic requirements because: (a) courts are incompetent to assess, and should therefore defer to, the state's determinations regarding the necessity of penological regulations; and (b) the execution chamber is a "non-public forum" in which the government may more freely burden speech.[188] This section responds to each of these arguments in turn.

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person who wishes to communicate the violence of their death and to a condemned person who wishes to express some other message. As such, the regulation would be "neutral" as to the content of the condemned person's speech. This argument ignores the fact, however, that the most direct and obvious consequence of refusing a paralytic would be to showcase the violence of the condemned person's death (i.e., their physical convulsions). At some level then, a person who chooses to refuse a lethal paralytic intends for this violence to be made visible. It is precisely this display that is being targeted by the government regulation. The fact that the condemned person's other messages might be collaterally estopped by the paralytic does not make the regulation content-neutral.

187. *See supra* Section II.A.

188. The state might also argue that rational basis review ought to be applied to lethal paralytic requirements because condemned persons are "civilly dead" and not entitled to the full scope of constitutional guarantees. Prior to the twentieth century, many states imposed a punishment known as "civil death" (*civiliter mortis*), wherein incarcerated persons forfeited their civil rights upon conviction. In England, civil death was inflicted at common law, while in the United States, it existed only by statute. *See* Gabriel Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1796 (2012). By the end of the nineteenth century, the institution of civil death had begun to fade under a tide of progressive criticism, and by the late twentieth century, the formal institution of civil death had all but disappeared from the American legal landscape. *See id.* at 1798. While a handful of civil death statutes have survived into the twenty-first century, few are given formal effect. *See id.* at 1798 ("New York, the Virgin Islands, and Rhode Island retain forms of it for persons sentenced to life imprisonment, and Idaho retains a version of it for all prisoners. . . ." (internal citations omitted)). In 2022, for example, the Rhode Island Supreme Court declared its state's civil death statute unconstitutional. *See* Mark Pratt, *State Supreme Court: 'Civil Death' Law is*

a. Turner *Deference Is Not Warranted in the Execution Context*

The Supreme Court has suggested that states may restrict the civil rights of incarcerated persons in ways that would otherwise be unconstitutional for non-incarcerated persons.[189] Thus, whereas strict or intermediate scrutiny would apply to a government regulation burdening the rights of a non-incarcerated person, rational basis review might apply to regulations burdening the rights of an incarcerated person.

For example, in *Jones v. North Carolina Prisoners' Union*, the Court held that restrictions on an incarcerated person's union activities did not violate the First Amendment.[190] Writing for the majority, Justice Rehnquist argued that the lower court ought to have given greater deference to prison administrators. He quoted the Court's previous opinion in *Pell v. Procunier*[191] to suggest that "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to [security] considerations, courts should ordinarily defer to their expert judgment in such matters."[192] After applying rational basis review,[193] Rehnquist concluded that the union activity restrictions were constitutional because prison administrators could rationally

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Unconstitutional, AP NEWS (Mar. 2, 2022), https://apnews.com/article/prisons-rhode-island-statutes-property-rights-0df3054a5d95381e50ef4a247287af4f [https://perma.cc/NA3N-K5EJ]. Consequently, incarcerated persons are no longer considered "civilly dead" for the purposes of civil rights adjudication. The Supreme Court has acknowledged that they retain their constitutional rights upon conviction. *See* Hovey v. Elliott, 167 U.S. 409, 444 (1897) (wherein the Court rejected the constitutionality of civil death when it held that a court of equity could not disregard an answer and enter default judgment against a defendant who was in contempt on another issue) ("[I]f such power obtained, then the ancient common-law doctrine of outlawry, and that of the continental systems as to 'civil death,' would be a part of the chancery law, a theory which could not be admitted without violating the rudimentary conceptions of the fundamental rights of the citizen."). Thus, civil death cannot support the application of rational basis review to regulations requiring the use of a lethal paralytic.

189. Moreover, many states have imposed civil death-type collateral consequences for felony conviction, including, for example, disenfranchisement. The Court has held such collateral consequences to be constitutional. *See, e.g.*, Richardson v. Ramirez, 418 U.S. 24 (1974).

190. 433 U.S. 119 (1977).

191. 417 U.S. 817 (1974) (holding that California prison restrictions on face-to-face interviews with inmates did not violate the First Amendment).

192. 433 U.S. at 128.

193. The Court also argued that rational basis review was warranted because a prison is a non-public forum. *See Jones*, 433 U.S. at 134; *see infra* Section II.B.3.c.

believe that union activity would pose a threat to the order and security of the prison.[194]

Ten years later, the Court created a formal test to determine whether a state regulation burdening an incarcerated person's freedom of speech satisfies rational basis review. In *Turner v. Safley*,[195] the Court considered the First Amendment right of incarcerated persons to send and receive mail. There, a 5-4 majority held that a prison regulation that affects an incarcerated person's constitutional rights "is valid if it is reasonably related to legitimate penological interests."[196] The Court judged the reasonableness of the regulation according to four factors:

1. whether there is a "valid, rational connection" between the regulation and the legitimate governmental interest used to justify it;
2. whether there are alternative means for the prisoner to exercise the right at issue;
3. the impact that the desired accommodation will have on guards, other inmates, and prison resources (so-called "ripple effects"); and
4. the presence or absence of "ready alternatives."[197]

The Court found that the Missouri Department of Corrections' (MODOC) correspondence rule was reasonably related to a legitimate penological interest and therefore constitutional.[198]

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194. *See Jones*, 433 U.S. at 135.

195. 482 U.S. 78 (1987).

196. *Turner*, 482 U.S. at 89.

197. The presence of ready alternatives makes it more likely that a regulation would be considered reasonable, while the absence of such alternatives makes it less likely that the regulation would be considered reasonable. *See id.* at 90.

198. *See Turner*, 482 U.S. at 91. Regarding the first factor, the majority argued that the correspondence rule was rationally related to the legitimate security concerns of prison officials, who testified that mail between prisons can be used to communicate escape plans, to arrange violent acts, and to foster prison gang activity. As for the second factor, the majority reasoned that the regulation did not deprive incarcerated people of all forms of First Amendment expression, but simply barred communication with a limited class of people—other incarcerated persons—about whom prison administrators had cause to be concerned. Meanwhile, regarding factor three, the majority contended that the lower courts had underestimated the cost of permitting correspondence—which would require that staff conduct item-by-item review and would create an appreciable risk of missing dangerous communications. *See id.* at 91–92. Finally, regarding factor four, the Court argued that MODOC had "no obvious, easy alternatives to the policy [it] adopted[.]" *Id.* at 93. Other prison systems (including the Federal Bureau of Prisons) had concluded that restrictions on prison correspondence were necessary to protect institutional order and security. The Court noted that the regulation was content-neutral and held that restricting prison

This Note applies the *Turner* test to regulations requiring the use of paralytics in Section II.C.3. Here, it posits that a rational basis standard is inapposite to lethal paralytic requirements. In *Turner*, the Court justified the exercise of judicial deference based on the proposition that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform."[199] As such, the separation of powers principle dictated that courts should defer to prison administrators where a regulation "reasonably relate[s] to a legitimate penological interest."[200] The Court reasoned that deference was warranted in *Turner* because allowing correspondence among incarcerated persons implicated prison security concerns, and courts were ill equipped to weigh these competing interests.[201] In *Procunier*, by contrast, no such concerns were present; as such, the Court imposed intermediate scrutiny.[202]

A challenge to lethal paralytic requirements more closely resembles *Procunier* than *Turner*. Regulations requiring the use of lethal paralytics do not promote prison security, nor do they serve any other legitimate penological objective.[203] As such, the institutional competence of the courts (and the attendant separation of powers concern) is not implicated. Strict scrutiny should therefore apply.

As a general matter, it is worth noting that "death is different."[204] Whereas deferential review might be appropriate in the context of incarceration, it is inapposite to capital punishment. So far as this author could determine, the Supreme Court has never applied the *Turner* test to execution regulations—despite the fact that it recently had the opportunity to do so in *Ramirez v. Collier* (a case concerning a condemned person's First Amendment right to free exercise).[205] *Turner* deference is therefore inappropriate in the context of regulations requiring the use of lethal paralytics.

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correspondence did not unconstitutionally burden the incarcerated persons' First Amendment rights. *See id.* at 93.

199. *See Turner*, 482 U.S. at 84 (quoting Procunier v. Martinez, 416 U.S. 396, 405 (1974)).

200. *See id.* at 89.

201. *See id.* at 84.

202. *See* Procunier v. Martinez, 416 U.S. 396, 413–14 (1974).

203. *See infra* Section II.C.1.

204. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 994 (1991).

205. 142 S. Ct. 1264, 1275 (2022).

b. *The Execution Chamber Is a Limited Public Forum*

An alternative argument for the application of rational basis review is based not on the status of the condemned, but rather on the nature of the space in which the execution occurs. Writing for the majority in *Perry Education Association v. Perry Local Educators' Association*,[206] Justice White explained that there are three categories of government property for the purposes of First Amendment analysis: (i) traditional or quintessential public forums; (ii) limited or designated public forums; and (iii) non-public forums. Traditional or quintessential public forums are those spaces in which free speech by the public has been available since time immemorial (e.g., public parks).[207] In such forums, the government "may not prohibit all communicative activity," and content-based restrictions on speech are highly suspect.[208] Designated or limited public forums describe government property that the state has traditionally left open for certain kinds of First Amendment activity (e.g., municipal theaters).[209] In such spaces, the government may impose "[r]easonable time, place[,] and manner regulations[,]" but "content-based prohibition[s] must be narrowly drawn to effectuate a compelling state interest."[210] Finally, non-public forums are a residual category of government property that are neither traditional nor designated public forums (e.g., airport terminals).[211] There, the government may (in addition to time, place, and manner restrictions) "reserve the forum for its intended purposes . . . as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[212] This tripartite schema is known as the "public forum doctrine."[213]

Proponents of lethal paralytic requirements might argue that the execution chamber is a non-public forum and therefore subject to reasonable restrictions that do not discriminate based on the speaker's point of view (a form of rational basis review). But

206. 460 U.S. 37 (1983).
207. *See id.* at 45.
208. *See id.* at 45.
209. *See id.* at 45.
210. *See id.* at 46.
211. *See id.* at 46.
212. *See Perry Education Ass'n*, 460 U.S. at 46.
213. *See* David L. Hudson, Jr., *Public Forum Doctrine*, THE FIRST AMEND. ENCYC. (Jan. 8, 2020), https://www.mtsu.edu/first-amendment/article/824/public-forum-doctrine [https://perma.cc/B836-XDA5].

regulations requiring the use of a paralytic *necessarily* discriminate on the basis of viewpoint.[214] Consequently, even if the execution chamber were considered a non-public forum, the state would not be able to require the use of a paralytic under the First Amendment, because doing so would amount to viewpoint-based discrimination.

A second objection to the application of rational basis review would be that an execution chamber should not be classified as a non-public forum in the first place. Non-public forums refer to locations in which the government has not traditionally permitted *any* First Amendment activities.[215] Historically, however, executions have been the site of limited expressive speech. From time immemorial, condemned persons have typically been allowed to utter "last words" in the presence of witnesses (including members of the media, attorneys for the state and defense, and the victim's family members).[216] The fact that the government has traditionally allowed this form of speech indicates that the execution chamber ought to be classified as a limited or designated public forum, in which content-based restrictions must be subjected to strict scrutiny.[217]

The public forum doctrine and *Turner* deference are therefore insufficient justifications to support the application of rational basis review to regulations requiring the use of lethal paralytics.

C. LETHAL PARALYTIC REQUIREMENTS FAIL STRICT SCRUTINY AND THEREFORE VIOLATE THE FIRST AMENDMENT

This section proceeds to apply strict scrutiny to lethal paralytic requirements. Ultimately, it argues that such regulations lack a legitimate or compelling state interest and are not the least restrictive means of accomplishing the government's goal. This section also considers whether lethal paralytic requirements would survive lesser standards of review—namely, intermediate scrutiny and rational basis review—and concludes that they would not.

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214. *See supra* Section II.B.1.c.

215. *See* Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 46 (1983).

216. *See, e.g.*, Kevin Francis O'Neill, *Muzzling Death Row Inmates: Applying The First Amendment to Regulations that Restrict a Condemned Prisoner's Last Words*, 33 ARIZ. ST. L.J. 1159, 1159 (2001).

217. One might even consider the execution chamber to be a traditional public forum, given the fact that condemned persons have been permitted to utter last words in the presence of the public and/or its representatives (the media) since time immemorial.

1. *Lethal Paralytic Requirements Fail Strict Scrutiny Because the Government Does Not Have a Compelling Interest in Restricting the Condemned Person's Speech*

To survive strict scrutiny, a regulation must serve a compelling government interest and must either be narrowly tailored or the least restrictive means of achieving that interest.[218] This is an extraordinarily high bar. As Justice Souter famously wrote in his dissenting opinion in *Alameda Books v. City of Los Angeles*, "[s]trict scrutiny leaves few survivors."[219] In other words, the standard is often "strict in theory, but fatal in fact."[220]

What is the government's interest in requiring the use of lethal paralytics? As previously noted, the state's alleged interest in requiring lethal paralytics is fourfold: (i) they provide a chemical redundancy that will ensure the condemned person's death;[221] (ii) they protect the dignity of the condemned;[222] (iii) they prevent the condemned person's IV line from becoming dislodged;[223] and (iv) they safeguard witnesses from psychological harm.[224] Section I.B argued that the first three justifications are illegitimate. This section asks whether the state's interest in protecting the psychological well-being of witnesses is legitimate, and if so, whether it is compelling.

Unfortunately, the Supreme Court has never specified what constitutes a "legitimate" state interest.[225] Nevertheless, it has suggested that (at minimum) the state may not legitimately act in service of an end that flatly contravenes constitutional values.[226]

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218. *See* David Hudson, Jr., *Strict Scrutiny*, THE FIRST AMEND. ENCYC., https://www.mtsu.edu/first-amendment/article/1966/strict-scrutiny [https://perma.cc/22K7-DKDR].

219. 535 U.S. 425, 455 (2002) (Souter, J., dissenting).

220. *See* Hudson, *supra* note 219.

221. *See supra* note 92.

222. *See supra* note 93.

223. *See supra* note 94.

224. *See supra* note 95.

225. *See, e.g.*, Nollan v. Cal. Coastal Comm'n., 483 U.S. 825, 834 (1987) ("Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest. . . .'").

226. *See, e.g.*, U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."); *see also* Loving v. Virginia, 388 U.S. 1, 11 (1967) (implicitly rejecting the maintenance of white supremacy as a legitimate governmental interest).

One such value is promoting the search for truth.[227] The government's interest in requiring lethal paralytics actively impairs the search for truth by presenting a false statement of fact to witnesses—namely, that lethal injection is a peaceful process.[228] As the Supreme Court stated in *Gertz v. Robert Welch*, "there is no constitutional value in false statements of fact."[229] Under this formulation, then, the government's interest in requiring lethal paralytics is illegitimate.

Admittedly, this mode of analysis focuses more on the legitimacy of the government's means (i.e., making a false statement of fact) than its ends (protecting the psychological well-being of witnesses). The proper inquiry therefore centers on the state's interest in protecting witnesses from the psychological harm of viewing an uncensored execution. In some contexts, shielding members of the public from psychological harm could be considered a legitimate state objective. For example, the Supreme Court has recognized a categorical exception to free speech protections for obscenity.[230] In those cases, the Court has acknowledged that states have a legitimate interest in protecting captive or unwitting viewers (particularly children) from the psychological or moral harm that might be inflicted by viewing obscenity.

Of course, there are key distinctions between the Court's obscenity case law and the lethal injection context. Here, the traumatizing scene that the government seeks to censor is one that

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227. *See, e.g.*, NOAH FELDMAN & KATHLEEN SULLIVAN, CONSTITUTIONAL LAW 935 (20th ed. 2019).

228. Regardless of whether the condemned person experiences pain, their death is still violent in the sense that lethal injection causes physical convulsions. Indeed, Merriam Webster defines "violent" as "extremely powerful or forceful and capable of causing damage." It lists "violent coughing" as an example—indicating that spasmodic action fits this definition. *See Violent*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/violent [https://perma.cc/W9VA-YWKU].

229. Gertz v. Robert Welch, 418 U.S. 323, 340 (1974) ("But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues. . . . They belong to that category of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'" (internal citations omitted)).

230. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words'—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.").

the state itself created and permitted witnesses to observe. That scene, moreover, is one of violence, as opposed to a patently offensive image "appeal[ing] to the prurient interest."[231] In *Brown v. Entertainment Merchants Association*, the Court explicitly stated that the First Amendment exception for obscenity does not extend to scenes of violence.[232] Finally, unlike the unwitting observers in the Court's obscenity case law,[233] witnesses to an execution (including members of the execution team) actively choose to observe the condemned person's death; they are neither captive nor unwilling spectators.[234] So long as the state warns these witnesses in advance about the violence they will observe, it has done all that it can (short of abolishing capital punishment) to protect them from trauma. If, at the last minute, a witness wishes to shield themselves from psychological harm, they need only "avert their eyes"[235] or leave the viewing room.[236]

Thus, while the Supreme Court considers the state's interest in protecting individuals' psychological wellbeing to be legitimate in some contexts, there is reason to doubt it would consider that same

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231. *See* Miller v. California, 413 U.S. 15, 24 (1973).

232. 564 U.S. 786, 793 (2011) ("[V]iolence is not part of the obscenity that the Constitution permits to be regulated.").

233. *See, e.g.*, Cohen v. California, 403 U.S. 15, 21 (1971) (involving non-consenting members of the public confronted with Cohen's jacket, which read "Fuck the Draft").

234. Even witnesses who might be required under state law to attend the execution (e.g., the prison warden, attorneys for the state, etc.) could always refuse to comply or resign their post. While such action could result in the temporary loss of one's livelihood, non-compliance/resignation is nevertheless still an option.

235. *See, e.g.*, Cohen v. California, 403 U.S. 15, 21 (1971) ("Of course, the mere presumed presence of unwilling listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. . . . Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes.").

236. One could argue that witnesses cannot so easily avoid hearing the sounds of an execution (e.g., groaning, crying, etc.) if the condemned person is not paralyzed. Again, so long as the state warns voluntary witnesses in advance about the sounds they will hear during the execution, it has done all that it can (short of abolishing capital punishment) to protect them from trauma. Furthermore, in *First Amendment Coalition of Arizona v. Ryan*, the Ninth Circuit implicitly rejected the notion that the government has a compelling interest in shielding witnesses from the sounds of an execution, holding that "the First Amendment right of access to governmental proceedings encompasses a right to hear the sounds of executions in their entirety." 938 F.3d 1069, 1075 (9th Cir. 2019). As for involuntary witnesses (e.g., other incarcerated persons), the facts of *Ryan* are instructive: The witnesses in the viewing room adjacent to Arizona's execution chamber could not hear the sounds of the execution once Arizona officials turned off the microphone in the execution chamber (which was connected to speakers in the viewing room). *See id.* at 1073. This indicates that sound did not easily travel from the execution chamber to adjacent areas of the prison. While the same might not be true in other prisons, it is worth noting that at the time of the complaint in *Ryan*, Arizona did not use a paralytic in its lethal injection protocol. *See* DEATH PENALTY INFO. CTR., *supra* note 69.

interest to be legitimate in the context of lethal injections. Assuming, however, that the Court would find the state's interest to be legitimate vis-à-vis lethal injection, the question remains: Is the state's interest in protecting the psychological well-being of execution witnesses sufficiently compelling to survive strict scrutiny?

Two audiences that the state might be particularly concerned for are corrections officers and the victim's family members. The government might argue that the trauma incurred by observing the full violence of a condemned person's death could inhibit a corrections officer's ability to participate in future executions. The state might therefore contend that it has a compelling interest in requiring the use of lethal paralytics to ensure the future administrability of the death penalty. Not only is such an argument premised on conjecture, it is also morally unconscionable. The state would essentially be asserting that its current lethal injection protocol is so objectively horrifying that it risks traumatizing its corrections officers absent the use of a paralytic. Therefore, that violence must be concealed, so that the state can continue executing people in an objectively horrifying way. Such an argument cannot be considered legitimate. Moreover, it is worth emphasizing that members of the execution team are volunteers—they need not participate in the lethal injection and thereby risk potential trauma.

The state might also object to the notion that a victim's family members actively *choose* to attend an execution. These witnesses are present only because the condemned person took the life of their loved one (perhaps heinously so). In that sense, the victim's family members are not willing participants, but rather duty-bound spectators. This objection, however, while certainly sympathetic, denies the agency of family members in choosing to witness the condemned person's death. At the end of the day, the victim's family members need not attend the execution; or, alternatively, they need not watch as the condemned person convulses on the gurney. They could observe the condemned person immediately prior to the administration of the lethal drugs or immediately after their death.

The state might nevertheless contend that by allowing a condemned person to refuse a lethal paralytic, the state would essentially be permitting that person to retraumatize the victim's family members with the spectacle of their violent death. Yet,

while the victim's family members are permitted to attend the execution, there is no authority to suggest that they are entitled to observe a non-violent death. Lethal injection was only invented in the 1970s; as such, the illusion of a peaceful execution has been available for less than fifty years.[237] Historically, capital punishment was always a violent affair, and the victim's family members observed that violence.

The state's interest in protecting family members, corrections officers, and other witnesses[238] from psychological harm is outweighed by the condemned person's strong interest in expressing the violence that is being inflicted upon them. Such expression is quintessentially an act of protest—one that informs the public about the reality of lethal injection. Refusing a lethal paralytic, moreover, is the condemned person's final speech act on this earth. In other words, this expression is the last idea they will ever communicate before the state silences them forever. As such, it ought to be entitled to special solicitude in the strict scrutiny analysis.[239]

Thus, even if the state's interest in protecting witnesses from psychological harm were considered legitimate, it ought not be considered compelling. Given that these regulations fail the first prong of the conjunctive strict scrutiny test, this Note will not dwell on whether they can be considered the least restrictive means. Suffice it to say that the government could also achieve its alleged interest by simply preventing witnesses from attending

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237. *See supra* Section I.A.

238. The state could also argue that it has a legitimate interest in protecting the condemned person's family members from the trauma associated with watching their loved one convulse on a gurney. Unlike other witnesses, the condemned person's family members might not have a true choice vis-à-vis attending the execution. Nevertheless, these witnesses will likely be traumatized irrespective of the condemned person's convulsions. After all, they must stand idly by as the government kills their loved one right in front of them.

239. Last words have long been afforded special deference in the Anglo-American legal system. *See, e.g.*, Kevin Francis O'Neill, *Muzzling Death Row Inmates: Applying The First Amendment to Regulations that Restrict a Condemned Prisoner's Last Words*, 33 ARIZ. ST. L.J. 1159–1160 (2001) ("The privilege to utter a last dying speech in the moments just before one's execution is a freedom that is deeply ingrained in Anglo-American history and tradition. Visible as early as 1388, the privilege was consistently honored at English executions throughout the sixteenth century and took root on this side of the Atlantic in the seventeenth century. It was available to everyone: from kings, queens, and aristocrats to the poorest of the poor. Indeed, the privilege was extended to individuals conspicuously bereft of most rights: including 'witches,' slaves, and prisoners of war. Even a Tennessee lynch mob saw fit to afford its victim the right to deliver a last dying speech.").

executions, having witnesses sign a waiver, or changing their execution method.

One last question remains: What if the Court decides that a more deferential standard of review ought to apply? Would lethal paralytic requirements survive intermediate scrutiny or rational basis review?

2. *Lethal Paralytic Requirements Would Fail Intermediate Scrutiny Because the Government's Interest Is Not Substantial*

Having argued that the government's interest in requiring lethal paralytics is neither legitimate nor compelling, this Note maintains that the government's interest is likewise not substantial. Nevertheless, this section proceeds to apply the intermediate scrutiny test that the Court adopted for expressive speech in *United States v. O'Brien*.

On March 31, 1966, David Paul O'Brien and three other men burned their draft cards in front of a South Boston courthouse to express their opposition to the Vietnam War. They were charged under the Selective Service Act (SSA) of 1948, which prohibited the knowing mutilation of a draft card.[240] Writing for the majority, Chief Justice Warren opined that when a regulation prohibits conduct that combines "speech" and "nonspeech" elements, "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[241] The regulation must:

1. be within the constitutional power of the government to enact;
2. further an important or substantial government interest;
3. that interest must be unrelated to the suppression of speech (or be content-neutral); and
4. prohibit no more speech than is essential to further that interest.[242]

Applying this test to the SSA, the Court found that the statute did not violate the First Amendment because (i) it was within the scope of Congress' Article I power to "raise and support armies";

240. *See* United States v. O'Brien, 391 U.S. 367, 370 (1968).
241. *See id.* at 376.
242. *See id.* at 377.

(ii) it furthered the important government interest of administering a functioning draft system; (iii) it was unrelated to the suppression of speech; and (iv) it was the only available means to ensure that draft cards would remain accessible.[243]

As noted, once a court acknowledges that refusing a paralytic is a form of expressive speech, it would be difficult to characterize lethal paralytic requirements as content-neutral. In other words, lethal paralytics are directly related to the suppression of speech. Such regulations therefore fail the third prong of the *O'Brien* test. Lethal paralytic requirements, moreover, are not the only available means of furthering the government's interest in protecting witnesses from psychological harm.[244] As such, they fail *O'Brien*'s intermediate scrutiny test.

3. *Lethal Paralytic Requirements Would Fail Rational Basis Review Because the Government's Interest Is Not Legitimate*

Under rational basis review, courts ask whether the government's action was rationally related to a legitimate state interest. This section applies the rational basis test developed by the Court in *Turner v. Safley*, concluding that lethal paralytic requirements fail that standard.[245]

Under the *Turner* test, courts measure the reasonableness of a carceral regulation according to four factors.[246] The first *Turner* factor has become the most important in the Court's analysis, likely because it encapsulates the rational basis standard.[247] Writing for the majority in *Turner*, Justice O'Connor noted that—in the context of determining whether the government's interest in the regulation was "legitimate" (factor 1)—the Court had previously "found it important to inquire whether prison regulations restricting inmates' First Amendment rights operated

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243. *See id.* at 377–86.

244. *See supra* Section II.C.1.

245. 482 U.S. 78 (1987).

246. The four factors are: "whether there is a 'valid, rational connection' between the regulation and the legitimate governmental interest used to justify it; whether there are alternative means for the prisoner to exercise the right at issue; the impact that the desired accommodation will have on guards, other incarcerated persons, and prison resources (so-called 'ripple effects'); and the presence or absence of 'ready alternatives.'" Turner v. Safley, 482 U.S. 78, 90 (1987).

247. *See* Kevin Francis O'Neill, *Rights of Prisoners*, THE FIRST AMEND. ENCYC. (2017), https://www.mtsu.edu/first-amendment/article/923/rights-of-prisoners [https://perma.cc/L2B4-7G3H].

in a neutral fashion, without regard to the content of the expression."[248] Justice O'Connor implied that regulations that were not content-neutral would likely fail the first (and most probative) *Turner* factor. As previously noted, regulations requiring the use of a paralytic are *not* content-neutral.[249] Since this factor has become dispositive, we need not consider the remaining factors. For the sake of diligence, however, this Note does so below.

Regulations requiring the use of paralytics fail the second *Turner* factor because there is no alternate means for the condemned person to express their pain and suffering other than by refusing a paralytic. Condemned persons therefore lack an alternative vehicle for exercising their First Amendment right. Lethal paralytic requirements similarly fail the third *Turner* factor (i.e., impact on guards, other incarcerated persons, and prison resources). As noted, allowing condemned persons to refuse a paralytic could possibly cause members of the execution team to incur psychological trauma. Those officials, however, might experience such harm irrespective of whether the paralytic was administered.[250] Meanwhile, other incarcerated persons would largely remain unaffected because they are not typically permitted to witness executions. As for prison resources, allowing condemned persons to refuse the paralytic, moreover, would save taxpayer resources by reducing (and perhaps eliminating) the need for the state to purchase pancuronium bromide (or similar drugs).[251]

Finally, regulations requiring the use of lethal paralytics fail the fourth *Turner* factor because "ready alternatives" exist. This factor is reminiscent of the *Baze-Glossip* standard, which requires that a condemned person challenging the constitutionality of an execution procedure on Eighth Amendment grounds identify a "feasible, readily implemented" alternative.[252] Here, the feasible, readily implemented alternative would be to execute the

248. *See* Turner v. Safley, 482 U.S. 78, 90 (1987) (citing Pell v. Procunier, 417 U.S. 817, 828 (1974); Bell v. Wolfish, 441 U.S. 520, 551 (1979)).

249. *See supra* Section II.B.1.a.

250. Corrections officers have reported experiencing psychological trauma from the act of taking someone's life. *See, e.g.*, Chiara Eisner, *Carrying Out Executions Took a Secret Toll On Workers—Then Changed Their Politics*, NPR (Nov. 16, 2022), https://www.npr.org/2022/11/16/1136796857/death-penalty-executions-prison [https://perma.cc/A8BK-K5H3].

251. *See infra* Section III.C.

252. *See* Baze v. Rees, 553 U.S. 35, 52 (2008); *see also* Glossip v. Gross, 576 U.S. 863, 877 (2015).

condemned person without the use of a paralytic. The injections of potassium chloride and the ultra short-acting barbiturate are more than sufficient to kill the condemned. The paralytic is wholly unnecessary.[253]

Regulations requiring the use of a paralytic fail the four *Turner* factors and do not satisfy rational basis review. As such, they violate the First Amendment even under that most deferential standard.

III. POLICY IMPLICATIONS

This Note has already discussed some of the potential consequences of recognizing a right to refuse lethal paralytics (e.g., the risk of traumatizing execution witnesses). This section discusses three further policy implications. Recognizing a right to refuse lethal paralytics would (i) advance core First Amendment values; (ii) prevent needless pain and suffering; and (iii) conserve taxpayer resources.

A. RECOGNIZING A RIGHT TO REFUSE LETHAL PARALYTICS WOULD . . .

1. *Advance Core First Amendment Values*

Scholars have argued that free speech serves three fundamental values: (i) advancing truth in the marketplace of ideas; (ii) facilitating democratic self-governance; and (iii) promoting individual autonomy.[254]

a. *Truth*

Refusing lethal paralytics would expose the violence and suffering inflicted by the state through lethal injection. This truth-revealing function is important because it would allow defense attorneys to better monitor (and thereby prevent) the unconstitutional infliction of pain and suffering. Under the *Baze*-

253. *See* HUMAN RIGHTS WATCH, *supra* note 56, at 26 (citing Abdur'Rahmnan v. Bredesen et al., No. M2003-01767-SC-R11-CV (Ten. Sup. Ct. Oct. 17, 2005), p. 89a).

254. *See, e.g.*, FELDMAN & SULLIVAN, *supra* note 227 ("Free speech has been thought to serve three principal values: advancing knowledge and 'truth' in the 'marketplace of ideas,' facilitating representative democracy and self-government, and promoting individual autonomy, self-expression, and self-fulfillment." (internal citations omitted)).

Glossip standard, a defendant challenging the constitutionality of a state's execution protocol must prove that the state's chosen method cruelly "superadds" pain to the death sentence.[255] By concealing outward signs of the condemned person's suffering, the paralytic essentially creates a doctrinal shield to successful method-of-execution challenges under *Baze* and *Glossip*. In effect, it makes it very difficult to prove that a given execution method carries a substantial risk of severe pain.

Dissenting in *Glossip*, Justice Sotomayor criticized the Court's reliance on the lack of evidence of pain and suffering in eleven Florida executions that utilized midazolam:

> Florida's use of this same three-drug protocol in 11 executions . . . tells us virtually nothing. Although these executions have featured no obvious mishaps, the key word is "obvious." Because the protocol involves the administration of a powerful paralytic, it is, as Drs. Sasich and Lubarsky explained, impossible to tell whether the condemned inmate in fact remained unconscious.[256]

Allowing condemned persons to refuse lethal paralytics would empower attorneys to better assess whether the state's lethal injection protocol is superadding pain in violation of the Eighth Amendment. Visual evidence of the condemned person's suffering would enable these defenders to bring successful method-of-execution challenges to protect future condemned persons from similar torture.

b. *Democratic Self-Governance*

Time and time again, the Court has affirmed that capital punishment is constitutional, and that our democratic institutions must be the ones to abolish it.[257] This separation of powers refrain, however, is predicated on the proper functioning of those political bodies—which requires informed debate. As Justice Marshall declared in his dissent in *Gregg v. Georgia*, "[t]he constitutionality of the death penalty turns . . . on the opinion of an *informed*

255. *See* Bucklew v. Precythe, 139 S. Ct. 1112, 1125 (2019).
256. *Glossip*, 576 U.S. at 967 (Sotomayor, J., dissenting).
257. *See id.* at 869.

citizenry."[258] The use of paralytics in lethal injection contributes to an ill-informed public by removing vital information from debates about capital punishment.

A majority of Americans continue to support the death penalty.[259] Yet one wonders what percentage of that population would change their minds if they knew exactly what lethal injection entails. Many Americans no doubt continue to believe that the United States conducts "humane" executions—i.e., that lethal injection is a peaceful process akin to putting an animal to sleep. Would they continue to support the death penalty if the true violence of the system were on full display? This author conjectures that many would not.

Allowing condemned persons to refuse lethal paralytics—and to thereby expose the violence of their deaths—might cause lawmakers to reconsider their support for the death penalty (at least in its current form). As the French philosopher Michel Foucault explained in *Discipline & Punish*, the removal of capital punishment from the public square to behind closed doors allowed the state to distance itself—morally and in the public imagination—from the violence of executions.[260] No longer would the state take direct ownership for killing a person in cold blood. Now, the government can avoid the shame associated with execution by "keep[ing] its distance from the act, tending always to entrust it to others, under the seal of secrecy."[261] Lawmakers, then, take no responsibility for the torturous deaths they passively (and in some cases, affirmatively) sanction.[262] Perhaps if the violence of lethal injection was made visible, lawmakers might think twice before voting to sustain such a penalty.[263]

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258. 428 U.S. 153, 232 (1976) (Marshall, J., dissenting) (emphasis added).

259. *See* Pew Research Center, *Most Americans Favor the Death Penalty Despite Concerns About Its Administration* (June 2, 2021), https://www.pewresearch.org/politics/2021/06/02/most-americans-favor-the-death-penalty-despite-concerns-about-its-administration/ [https://perma.cc/6NMV-G5ET] (finding that "60% of U.S. adults favor the death penalty for people convicted of murder, including 27% who strongly favor it. About four-in-ten (39%) oppose the death penalty, with 15% strongly opposed.").

260. *See* FOUCAULT, *supra* note 32, at 13.

261. *See id.* at 15–16.

262. *See generally* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 8, 1601–29 (1986).

263. Similarly, if jurors were aware of the risk of suffering attendant to lethal injection, they might be less willing to impose capital punishment. While attorneys cannot present information about the nature of a sentence during the penalty phase of trial, if the true violence of lethal injection were widely known in society, members of the jury would carry

c. *Individual Autonomy*

As argued *supra* in Part I.B, a condemned person's dignity is better protected by affording them the autonomy to choose whether to have a paralytic administered. Recognizing a right to refuse a lethal paralytic would afford the condemned person the dignity of that choice. Stripping them of their agency does not protect the condemned person's dignity, but rather tramples upon it.[264]

2. *Prevent Needless Pain and Suffering*

From the moment it is injected, pancuronium bromide causes needless pain and suffering. According to Dr. David Greenblatt,[265] an expert in pharmacology and therapeutics, pancuronium bromide is "formulated in an acidic solution" which makes it painful to inject if the condemned person is not properly sedated.[266] The true horror begins once the drug starts to take effect. The condemned person will experience chemical asphyxiation, as their lungs and diaphragm stop working. According to Dr. Greenblatt, this means that they are basically suffocating.[267] By refusing a paralytic, the condemned person might avoid this feeling of chemical asphyxiation.[268]

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that knowledge with them into their deliberations. This author conjectures that death-qualified jurors would be less willing to vote for death in light of that information.

264. *See supra* Part I.B.

265. Dr. Greenblatt was the longtime head of the department of pharmacology and therapeutics at the Tufts University School of Medicine.

266. *See* Segura, *supra* note 116.

267. *See id.*

268. Nevertheless, it is possible that the condemned person will experience a drowning sensation notwithstanding the absence of a paralytic. An investigation by NPR of more than 200 lethal injection autopsies (obtained through public records requests) showed evidence of pulmonary edema (a condition in which the lungs are filled with fluid) in eighty-four percent of cases. Those findings were remarkably consistent across states, notwithstanding their disparate protocols. *See* Caldwell & Chang, *supra* note 8. As Magistrate Judge Michael Merz described in his ruling on a stay of execution: "All medical witnesses to describe pulmonary edema agreed it was painful, both physically and emotionally, inducing a sense of drowning and the attendant panic and terror, much as would occur with the torture tactic known as waterboarding." *Id.* Pulmonary edema is likely caused by the injection of large amounts of fluid into the condemned person's bloodstream—particularly the first drug (sodium thiopental, pentobarbital, or midazolam, etc.). According to pulmonologist Philippe Camus, when a large dose of drugs is rapidly injected into the body, it pushes a concentrated "front" through the bloodstream. "The quicker the injection, the denser the front, and the higher the risk of causing damage." *Id.* That concentrated front can rupture the capillaries in the lungs—flooding the neighboring air sacs (alveoli) with blood and plasma. *See id.* Pulmonologist Jeffrey Sippel likened this phenomenon to a river flooding its banks. When fluid from the capillaries enters the air

3. *Conserve Taxpayer Resources*

Finally, allowing condemned persons to refuse lethal paralytics would conserve taxpayer resources. The Tennessee Department of Corrections (TDOC) spent approximately $190,000 from 2017 to 2020 to acquire midazolam, vecuronium bromide, and potassium chloride—the three drugs used in its lethal injection protocol.[269] During that time, they executed only two condemned persons—Billy Ray Irick and Donnie Johnson—which suggests a price tag of roughly $100,000 in drugs for each execution.[270] Invoices obtained by *The Guardian* reveal that vecuronium bromide was the most expensive drug that the state purchased, with a unit price of $750 per 10 mg. By comparison, the state obtained midazolam at a unit price of $667.97 per 50 mg and potassium chloride at a unit price of $480 per KCL 15% solution 60 ml cmpd.[271] In total, TDOC spent approximately $18,000—or roughly 10% of its spending on lethal injection drugs from 2017 to 2020—on vecuronium bromide.[272] If given the choice, it is reasonable to expect that many condemned persons would refuse lethal paralytics. This means that the state could purchase far less of that drug and thereby save thousands (and potentially tens of thousands) of taxpayer dollars each year.

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sacs in the lungs, the condemned person will experience a drowning sensation. Those who have studied this phenomenon attribute pulmonary edema to the large dose of the first drug that condemned persons receive. *See id.* By eliminating the second drug, however, it is possible that the attendant decrease in overall fluid being injected into the condemned person's body would reduce the likelihood of pulmonary edema. *See id.* Even if that were not the case, removing the paralytic would at least eliminate the psychological horror that accompanies being in severe pain but incapable of expression. According to Dr. Mark Heath, an anesthesiologist who taught at Columbia Medical School, the paralytic causes condemned persons to feel as though they are trapped in a "chemical tomb." Liptak, *supra* note 76. In other words, they are in extreme pain but helpless to communicate that fact.

269. *See* Ed Pilkington, *Revealed: Republican-Led States Secretly Spending Huge Sums On Execution Drugs*, GUARDIAN (Apr. 9, 2021), https://www.theguardian.com/world/2021/apr/09/revealed-republican-led-states-secretly-spending-huge-sums-on-execution-drugs [https://perma.cc/P5BR-GR7Y].

270. *See Tennessee DOC Lethal Injection Cost Documents 2017–2020*, https://www.documentcloud.org/documents/20600596-tennessee-doc-lethal-injection-cost-documents-2017-2020 [https://perma.cc/J639-4LMR].

271. That said, Tennessee purchased far less of the paralytic than it did midazolam. *See id.*

272. *See id.*

CONCLUSION

In October 2018, thirty-three condemned persons in Tennessee filed suit challenging their state's three-drug protocol on Eighth Amendment grounds. After a two-week trial, Judge Ellen Hobbs Lyle wrote that the paralytic (pancuronium bromide) serves "no legitimate purpose" in the execution. According to Judge Lyle, paralytics only provide "the appearances of a serene expiration when actually [the condemned person is] feeling and perceiving the excruciatingly painful ordeal of death by lethal injection."[273] The paralytic "gives a false impression of serenity to viewers, making punishment by death more palatable and acceptable to society."[274] Notwithstanding these concerns, Judge Lyle upheld Tennessee's three-drug protocol under the *Baze-Glossip* standard. Her comments, however, were discerning: Paralytics indeed serve no legitimate purpose in lethal injection. They exist solely to censor the violence and suffering inflicted by the state, and to thereby assuage society's collective conscience.

When a condemned person chooses to refuse a lethal paralytic, they are engaging in First Amendment-protected expressive speech. Regulations requiring the use of lethal paralytics warrant strict scrutiny because they (i) restrict speech based on subject matter; (ii) amount to a form of prior restraint; (iii) discriminate based on viewpoint; and (iv) compel speech. Because lethal paralytics do not serve a legitimate—let alone compelling—state interest, they fail strict scrutiny and therefore violate the First Amendment.

This approach vindicates the three fundamental values of the First Amendment: advancing truth in the marketplace of ideas, facilitating democratic self-governance, and promoting individual autonomy. It likewise prevents needless pain and suffering and conserves taxpayer resources. Perhaps most importantly, however, it forestalls the state from lying to the American people. Such lies destroy the very foundation of self-government. As Nobel Peace Prize laureate Maria Rezza once said: "Without facts, you

273. Liptak, *supra* note 76.
274. *Id.*

can't have truth. Without truth, you can't have trust. Without trust, we have no shared reality, no democracy. . . ."[275]

275. Maria Ressa, *Nobel Peace Prize Lecture*, THE NOBEL PRIZE (Dec. 10, 2021) (transcript *at* https://www.nobelprize.org/prizes/peace/2021/ressa/lecture/) [https://perma.cc/B2Q6-LCRY].