

***BUCKLEW V. PRECYTHE* AND THE RESURGENCE OF THE METHOD OF EXECUTION CHALLENGE**

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INTRODUCTION	2
I. METHOD OF EXECUTION CHALLENGES	4
II. <i>BUCKLEW V. PRECYTHE</i>	11
A. <i>Under Bucklew, a Method of Execution Cannot Inherently Be Cruel and Unusual</i>	11
B. <i>The Bucklew Court Held that Nitrogen Hypoxia Is Not a Feasible, Readily Implemented Alternative Method of Execution</i>	13
C. <i>The Bucklew Court Said that Nitrogen Hypoxia Would Not Reduce a Substantial Risk of Severe Pain When Compared to Lethal Injection</i>	14
D. <i>The Court Focuses on Penological Justifications for Missouri’s Chosen Method of Lethal Injection Instead of Fairness to the Accused</i>	16
III. THE STAIN OF TORTURE AND THE FUTURE OF EXECUTION	17
CONCLUSION.....	22

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INTRODUCTION

On October 1, 2019, Missouri began the execution of death row inmate Russell Bucklew.¹ Those present for the execution reported seeing Mr. Bucklew strapped to a gurney, the IV inserted, and a white sheet up to his chest.² The elevated gurney was the only sign that Missouri had attempted to accommodate his cavernous hemangioma, a rare condition resulting in the growth of blood-filled tumors in his head, neck, and throat.³ His face, notable for the sizeable blackish-purple tumor protruding from his upper lip, was turned away from view.⁴

Despite being sedated, Mr. Bucklew twitched his feet as the moment of his death rapidly approached.⁵ Was he appreciating the last tangible freedom of flexing and curling his toes while he had time left? Or was he feeling his anxiety, no longer kept at bay by the Klonopin he had been taking for years, and tapping his toes in anticipation of the excruciating suffocation that would come if his tumors burst and filled his airways with blood? The single dose of pentobarbital entered his bloodstream.⁶ His feet stilled.⁷ A curtain closed between the execution chamber and those witnessing the execution. The curtain opened to show his lifeless body. The entire process took twenty-three minutes.⁸

It had been over twenty years since Missouri sentenced Russell Bucklew to death for the kidnapping and rape of his ex-girlfriend, Stephanie Ray, and the first-degree murder of Michael Sanders.⁹ After decades of appeals and constitutional challenges, Mr. Bucklew filed a final as-applied Eighth Amendment challenge to Missouri's single-injection protocol in May 2014.

1. *ACLU Statement Regarding the Unlawful Execution of Russell Bucklew*, ACLU (Oct. 1, 2019), <https://www.aclu.org/press-releases/aclu-statement-regarding-unlawful-execution-russell-bucklew> [<https://perma.cc/B7DV-U395>] [hereinafter *ACLU Statement*].

2. Holly Yan & Steve Almasy, *Missouri Inmate Executed Despite Activists' Concerns He Could Suffer Because of His Rare Disease*, CNN (last updated Oct. 1, 2019, 10:03 PM), <https://www.cnn.com/2019/10/01/us/missouri-execution-russell-bucklew-rare-disease-trnd/index.html> [<https://perma.cc/9LKK-8DS8>].

3. Lauren Gill, *Missouri Executes Russell Bucklew Despite Threat of Botched Execution*, THE APPEAL (Oct. 02, 2019), <https://theappeal.org/missouri-executes-russell-bucklew-threat-botched-execution/> [<https://perma.cc/JA2N-E6UJ>].

4. Yan & Almasy, *supra* note 2.

5. *Id.*

6. Gill, *supra* note 3.

7. Yan & Almasy, *supra* note 2.

8. *ACLU Statement*, *supra* note 1.

9. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1116 (2019).

The challenge alleged that, due to his cavernous hemangioma, Mr. Bucklew would experience excruciating pain if executed by lethal injection.¹⁰ The Eighth Circuit affirmed Missouri's decision to execute Mr. Bucklew by lethal injection. On April 1, 2019, in a five to four decision, the Supreme Court agreed. Russell Bucklew would die by lethal injection.¹¹

By most accounts, Mr. Bucklew's was an anti-climactic death. For those who hoped for his execution, the death was peaceful—far better than he deserved after being convicted of kidnapping, rape, and murder.¹² And to anti-death penalty advocates, the IV's insertion before viewing, the sheet hiding Mr. Bucklew's extremities, and the curtains separating the gallery from the execution chamber all eliminated any sign of what Mr. Bucklew might have experienced.¹³ In that respect, it was not unlike many of the executions that had come before it. What made the execution of Mr. Bucklew unique was the apparent indifference shown by the Supreme Court Justices to the heightened risk of a gruesome execution,¹⁴ particularly given public awareness of the spate of botched lethal injections nationwide.¹⁵

The Court's holding in *Bucklew*'s case represents a refusal to assess whether a method of execution amounts to torture, preferring to defer to state policy regardless of secrecy concerns and irrespective of the stain a torturous death leaves on our criminal

10. *Id.* at 1120.

11. *Id.* at 1116.

12. Yan & Almasy, *supra* note 2.

13. Gill, *supra* note 3.

14. *ACLU Statement*, *supra* note 1.

15. See Tracy Connor, *Lawyer Describes Aborted Execution Attempt for Doyle Lee Hamm as 'Torture'*, NBC NEWS (last updated Feb. 25, 2018, 8:29 PM MST), <https://www.nbcnews.com/storyline/lethal-injection/lawyer-calls-aborted-execution-attempt-doyle-lee-hamm-torture-n851006> [<https://perma.cc/3UBJ-6778>] (describing Alabama's failed attempt to execute Doyle Lee Hamm, despite warnings that it would be impossible to find a vein because of his advanced lymphatic cancer and carcinoma); Kent Faulk, *Alabama Death Row Inmate Ronald Bert Smith Heaved, Coughed for 13 Minutes During Execution*, AL.COM (last updated Mar. 07, 2019), https://www.al.com/news/birmingham/2016/12/alabama_death_row_inmate_is_se.html [<https://perma.cc/4TLE-ZDXG>] (describing execution wherein the inmate struggled to breath for 13 minutes, clenched his fists and raised his head before dying); Bob Ortega, Michael Kiefer & Mariana Dale, *Execution of Arizona Murderer Takes Nearly 2 Hours*, AZ CENTRAL (last updated July 24, 2014, 12:24 AM MT), <https://www.azcentral.com/story/news/local/arizona/2014/07/23/arizona-execution-botched/13070677/> [<https://perma.cc/8P7M-Y4N4>] (describing lethal injection wherein the inmate gasped repeatedly for one hour and forty minutes before dying).

justice system.¹⁶ In this note, I explore the ramifications of Supreme Court precedent protecting the feasibility of the death penalty at the expense of analysis into whether a method of execution is cruel and unusual. In doing so, I will argue that death penalty practices excessively sacrifice fairness and accuracy in the name of states' rights.

Part I will explore the background of method of execution claims in the United States and the ongoing tension between penological justifications for the death penalty and the heightened need for fairness and accuracy in capital cases. Part II will analyze the holding in *Bucklew* and explore areas of disagreement among the Supreme Court Justices to argue that the Court has foolhardily constructed method of execution analysis. Lastly, Part III will identify possible repercussions of *Bucklew* in the context of method-of-execution challenges.

I. METHOD OF EXECUTION CHALLENGES

The Supreme Court has never held that a state's method of execution constituted cruel and unusual punishment.¹⁷ In fact, the Court did not even consider whether a state's chosen method of execution was unconstitutionally cruel and unusual until 1878, in *Wilkerson v. Utah*.¹⁸ Writing for the majority, Justice

16. For the sake of transparency, I would like to note that I do not support the death penalty. I acknowledge that for many, opinion on the death penalty is decided by moral rather than legal reasoning. However, this Note will avoid philosophical and moral arguments regarding the redemptive nature of man and the psychology of forgiveness. If you are interested in this type of discussion, see generally JENNIFER BERRY HAWES, *GRACE WILL LEAD US HOME: THE CHARLESTON CHURCH MASSACRE AND THE HARD, INSPIRING JOURNEY TO FORGIVENESS* (2019); RACHEL KING, *DON'T KILL IN OUR NAMES: FAMILIES OF MURDER VICTIMS SPEAK OUT AGAINST THE DEATH PENALTY* (2003); SISTER HELEN PREJEAN, *DEAD MAN WALKING: THE EYEWITNESS ACCOUNT OF THE DEATH PENALTY THAT SPARKED A NATIONAL DEBATE* (1993). Additionally, this note will not discuss the racial inequities associated with the death penalty, as that discussion is better suited to analysis of capital sentencing. See generally DPIC, *Study Finds Staggering Race-of-Victim Disparities in Georgia Executions and that the Death-Penalty Appeals Process Makes Them Worse*, DEATH PENALTY INFO. CTR. (Sept. 18, 2019), <https://deathpenaltyinfo.org/news/study-finds-staggering-race-of-victim-disparities-in-georgia-executions-and-that-the-death-penalty-appeals-process-makes-them-worse> [https://perma.cc/LV6W-UZ6X]; DPIC, *Supporters Rally for New Trial for Rodney Reed, Sentenced to Death by All-White Jury in 'Jim Crow Trial' in Texas*, DEATH PENALTY INFO. CTR. (Sept. 17, 2019), <https://deathpenaltyinfo.org/news/supporters-rally-for-new-trial-for-rodney-reed-sentenced-to-death-by-all-white-jury-in-jim-crow-trial-in-texas> [https://perma.cc/SSC3-SNTQ].

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

18. 99 U.S. 130 (1878).

Clifford noted that “[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted.” He concluded that it was “safe” only to affirm that the Eighth Amendment forbids torture and “all others in the same line of unnecessary cruelty.”¹⁹ For 130 years following *Wilkinson*, the Court refused to hear method of execution challenges.²⁰

In the meantime, the Court heard several cases that shaped all capital-punishment jurisprudence. In *Furman v. Georgia*, the Court articulated that death is different.²¹ It held that arbitrary and inconsistent application of death-penalty statutes was unconstitutional, signaling that the death penalty might be abolished due to a lack of procedural safeguards.²² A mere four years later, in *Gregg v. Georgia*, the Court held that the death penalty did not inherently violate the Eighth Amendment.²³ Justice Stewart announced a presumption of validity for democratically produced punishment, indicating that legislators, not judges, are in the position to ensure that capital punishment reflected public “standards of decency.”²⁴ That same day, in *Woodson v. North Carolina*, the Court held that a mandatory capital sentencing statute was unconstitutional due to the increased need for reliability when death is on the line.²⁵ That holding recognized that the state-sponsored killing of an inmate is incomparable to any other punishment a state could inflict.²⁶ The precedent set by *Furman*, *Gregg*, and *Woodson* embodies the struggle to strike a balance between fairness and accuracy, and states’ legitimate interest in executing death row inmates. On the one

19. *Id.* at 135–36.

20. *See generally* *Gray v. Lucas*, 463 U.S. 1237 (1983) (denying cert. to hear challenge regarding constitutionality of death by cyanide gas); *Glass v. Louisiana*, 471 U.S. 1080 (1985) (denying cert. to hear challenge regarding constitutionality of electrocution); *Lawson v. Dixon*, 512 U.S. 1215 (1994) (denying cert. to hear challenge regarding constitutionality of the gas chamber); *Campbell v. Wood*, 511 U.S. 1119 (1994) (denying cert. to hear challenge regarding constitutionality of hanging).

21. 408 U.S. 238, 287–89 (1972) (Brennan, J., concurring).

22. *Id.* at 248–49 (Douglas, J., concurring).

23. 428 U.S. 153, 176 (1976).

24. *Id.* at 174–76 (“[W]e have an obligation to ensure that constitutional bounds are not overreached,” but “we may not act as judges as we might as legislators.”).

25. 428 U.S. 280, 305 (1976) (“Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”).

26. *Id.*

hand, for execution to provide retributive or deterrent values effectively, it must be timely and visible.²⁷ On the other hand, fairness and accuracy require that inmates have enough time to file appeals and challenges in hopes of protecting their liberty and bodily autonomy.²⁸

With fairness and the legitimacy of state power firmly established, the Court returned to the question of which methods of execution are constitutional in *Baze v. Rees*.²⁹ In *Baze*, Kentucky death row inmates asserted that Kentucky's lethal-injection procedures bore a significant risk of severe pain if improperly administered.³⁰ The Court upheld Kentucky's method of execution as constitutional while simultaneously leaving the door open to future challenges.³¹ Justice Kennedy reasoned that a "substantial risk of serious harm" could potentially rise to the level of cruel and unusual punishment, but a showing of a "slightly or marginally safer alternative" method could not satisfy a method of execution challenge because it would involve courts in scientific analysis beyond their expertise and, in doing so, intrude on the role of state legislatures.³² Kennedy's opinion established that method-of-execution challenges require a

27. See Maurice Chammah, *The Unfolding Campaign to Save the Death Penalty*, THE MARSHALL PROJECT (Nov. 19, 2015), <https://www.themarshallproject.org/2015/11/19/the-unfolding-campaign-to-save-the-death-penalty> [https://perma.cc/6FV2-ES8W].

28. CAROL S. STEIKER & JORDAN M. STEIKER, *COMPARATIVE CAPITAL PUNISHMENT* 97 (2019) (quoting Douglas Vick) ("Every task ordinarily performed in the representation of a criminal defendant is more difficult and time-consuming when the defendant is facing execution.")

29. 553 U.S. 35 (2008).

30. In 1977 the Oklahoma state medical examiner, Dr. Jay Chapman created the first lethal-injection protocol per the request of an Oklahoma legislator. Despite Dr. Chapman's admitted lack of expertise, the Oklahoma legislature adopted his method. Dr. Chapman issued public warnings, noting that if the drugs were not administered properly, the inmate may be subject to prolonged, severe pain. By 2008, thirty-nine states had adopted lethal injection relying on Oklahoma's protocol, without significant additional medical or scientific studies. The typical protocol required three injections—sodium thiopental (an anesthetic), pancurium bromide (a paralytic agent), and a drug to stop the heart (potassium chloride). The primary concern at the time of *Baze*, was that incorrect administration of the anesthetic would set off a chain reaction wherein the inmate would feel prolonged "intense and unbearable burning" due to the potassium chloride but be paralyzed and unable to cry out due to the pancurium bromide. Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L.J. 1331, 1333–34, 1340–41 (2014); see also *Baze*, 553 U.S. at 49.

31. Denno, *supra* note 30, at 1334–35.

32. *Baze*, 553 U.S. at 51.

comparative analysis of a state's chosen method of execution and an alternative method, as suggested by the challenger.

The Court held that to qualify as cruel and unusual punishment, a method of execution must present a "substantial" or "objectively intolerable" risk of serious harm.³³ Yet, a state's refusal to adopt alternative procedures only violates the Eighth Amendment where the alternative procedure is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain."³⁴ Justices Stevens, Thomas, and Alito wrote separately, noting that the rule raised more questions than it answered.³⁵ Their opinions were eerily predictive of the following pragmatic threats to lethal injection: increased medical research of lethal-injection protocols, the controversy over physician involvement, publicized botched executions, and diminishing drug supplies.³⁶

The Court addressed the constitutionality of lethal injection for the second time in *Glossip v. Gross*.³⁷ The challenge arose in response to Oklahoma's decision to change the pharmaceutical compounds used in its lethal-injection protocols. In the years following *Baze*, American drug manufacturers ceased sodium thiopental production due to difficulties procuring a necessary ingredient.³⁸ Several European countries created an export restriction on sodium thiopental to avoid contributing to the United States' execution of inmates.³⁹ As a result, states had to choose between halting executions or quickly enacting alternative procedures.⁴⁰ In the case of Oklahoma, midazolam was deemed an appropriate sedative.⁴¹

33. *Id.* at 50.

34. *Id.* at 52.

35. *Id.* at 71 (Stevens, J., concurring) ("I am now convinced that this case will generate debate not only about the constitutionality of the three-drug protocol ... but also about the justification for the death penalty itself."); *Id.* at 105 (Thomas, J., concurring) ("[T]oday's decision is sure to engender more litigation ... Needless to say, we have left the States with nothing resembling a bright-line rule."); *Id.* at 70 (Alito, J., concurring) ("Misinterpretation of the standard set out in the plurality opinion or adoption of the standard favored by the dissent . . . would create a grave danger of extended delay.").

36. Denno, *supra* note 30, at 1335–36.

37. 576 U.S. 863 (2015).

38. See Kevin Sack, *Shortage of Widely Used Anesthetics Is Delaying Executions in Some States*, N.Y. TIMES, Sept. 30, 2010, at A23.

39. See Dominic Casciani, *US Lethal Injection Drug Faces UK Export Restrictions*, BBC NEWS (Nov. 29, 2010, 13:47), <http://www.bbc.co.uk/news/uk-11865881> [<https://perma.cc/3ZVA-9BPR>].

40. Denno, *supra* note 30, at 1360–61.

41. *Glossip*, 576 U.S. at 863.

Oklahoma's first execution using midazolam shocked and horrified those following the case. Despite concerns that midazolam was untested and procured from an unregulated compound pharmacy, Oklahoma barreled forward with Clayton Lockett's execution.⁴² A paramedic present for the execution spoke about the prison's attitude toward the execution, saying, "There was an air of urgency there. The 'quick quick, got to get it done, got to get it done and got to make sure that everything is done right.'"⁴³ But the execution was not done right. Instead, a series of mistakes led to Lockett regaining consciousness during the procedure and writhing on the gurney until dying of a heart attack forty-three minutes later.

After the botched execution of Lockett, death row inmates filed a challenge to Oklahoma's execution protocol, arguing that midazolam would inadequately render them insensate and create a risk of severe pain.⁴⁴ The inmates suggested execution by sodium thiopental or pentobarbital instead.⁴⁵ The Court held that the inmates failed to establish a known and available alternative method of execution because Oklahoma could not procure sodium thiopental or pentobarbital. Additionally, the court held that the inmates failed to prove beyond dispute that midazolam would be ineffective.⁴⁶

The failures of the Court's decisions *Baze* and *Glossip* are multifaceted. One failure is that analyzing method of execution claims by way of comparison forgets that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."⁴⁷ The cases in which the Court found capital punishment to violate society's present standards of decency indicate that there six objective factors to assess: (1) whether the class of defendants had been historically subjected to the death penalty; (2) judicial precedent; (3) the prevalence of state statutes subjecting a class of defendants to the death penalty; (4) the prevalence of jury verdicts imposing a death sentence; (5) whether deterrence or retribution

42. *New Docs Detail Chaos of Oklahoma's Botched Execution of Clayton Lockett*, NBC NEWS (last updated March 17, 2015, 1:26 PM) <https://www.nbcnews.com/news/us-news/new-docs-detail-chaos-oklahomas-botched-execution-clayton-lockett-n325021> [<https://perma.cc/VV86-88GT>] [hereinafter *Oklahoma's Botched Execution of Clayton Lockett*].

43. *Id.*

44. *Glossip*, 576 U.S. at 867.

45. *Id.* at 878.

46. *Id.* at 884.

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

would be achieved by the execution; and (6) international law and comparison to peer democratic nations.⁴⁸ Although identifying new standards of decency has been criticized for inconsistent application and use as post hoc justification,⁴⁹ it is purported to reflect a moral consensus measured by “objective factors to the maximum possible extent.”⁵⁰ Under the *Baze-Glossip* test, the availability of an alternative method of execution is the only objective factor considered—decency has nothing to do with it.⁵¹

Pause for a moment to consider the implication that standards of decency are in some way conditional on available alternatives. According to Justice Sotomayor, it would mean that even if a lethal-injection procedure were the “chemical equivalent” of the unconstitutional practice of burning alive, the Court would not find it unconstitutional unless there was a known and available alternative.⁵² *Baze* and *Glossip* work together to ensure states may utilize any execution method, regardless of indicia of torture, so long as alternatives are not feasible. Yet, a method of execution that, by its very nature, offends standards of decency is not less offensive because it happens to be the only method available to a state.⁵³ The fact that only one method of execution is available should not affect a standards-of-decency analysis.

48. Dwight Aarons, *The Abolitionist's Dilemma: Establishing the Standards for the Evolving Standards of Decency*, 6 PIERCE L. REV. 441, 445 (2008) (discussing *Thompson v. Oklahoma*, 487 U.S. 815, 821–23 (1988) (plurality opinion); *Tison v. Arizona*, 481 U.S. 137, 148 (1987); *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (plurality opinion); *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Ford v. Wainwright*, 477 U.S. 399, 410 (1986); *Penry v. Lynaugh*, 492 U.S. 302, 240 (1989)). Some of these factors will be discussed further in Part III.

49. See *Penry v. Lynaugh*, 492 U.S. 302 (1989) (ruling that execution of the mentally retarded did not violate the Eighth Amendment); *but see Atkins v. Virginia*, 536 U.S. 304 (2002) (ruling that execution of the mentally retarded was cruel and unusual punishment when only three of the traditional factors favored the defendant). In *Atkins*, the Court emphasized its authority over the scope of the death penalty, stating, “[T]he objective evidence, though of great importance, did not wholly determine the controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.” Aarons, *supra* note 49, at 447 (citing *Atkins*, 536 U.S. at 312 (internal quotation marks omitted)).

50. *Coker*, 433 U.S. at 592 (1977).

51. In *Hall v. Florida*, Justice Kennedy indicated that decency is reflective of the Eighth Amendment’s constitutional purpose, stating, “The Eighth Amendment’s protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be. This is to affirm that the Nation’s constant, unyielding purpose must be to transmit the Constitution.” 572 U.S. 701, 708 (2014).

52. *Glossip*, 576 U.S. at 970 (Sotomayor, J., dissenting).

53. *Id.* at 974.

Additionally, placing the burden on inmates to prove that an alternative method would significantly reduce a substantial risk of severe pain assumes that inmates have access to research on the efficacy and safety of execution protocols. Most inmates do not have the necessary support to succeed in a challenge to a state's chosen method of execution because there is scant research on alternative methods of execution. Legal scholar Deborah Denno explained that many states had no alternative but to turn to compounding pharmacies to obtain lethal-injection drugs, despite an increased risk of subpar and contaminated drugs.⁵⁴ According to Denno, the lack of pharmaceutical alternatives motivated states to construct a legal veil of secrecy around execution procedures to avoid foreseeable challenges.

While Denno's suggestion that states would purposely hide the potentially torturous underbelly of their lethal-injection procedures may sound like a conspiracy theory, there is evidence to back it up. For example, in response to pharmaceutical shortages post-*Baze*, some states have evaded disclosing their death-penalty protocol.⁵⁵ In some cases, that entails cloaking both the identity of the source pharmacy and, more disturbingly, the protocol of the method itself, in complete confidentiality.⁵⁶ Therefore, the alternative-method requirement overly burdens inmates, who often cannot bypass state secrecy policies or afford to research methods of execution themselves.

This review of Eighth Amendment capital-sentencing jurisprudence establishes the struggle of balancing the finality of death, fairness, arbitrariness, and whether the punishment serves legitimate penological interests. The discussion of botched executions explains the reality of how executions are conducted in the United States and the veil of secrecy that prevents meaningful analysis. And finally, the review of *Baze* and *Glossip* demonstrates how the Court has constructed the feasible, readily implemented alternative requirement to act as a procedural barrier to inmates' method of execution challenges while affording states significant deference to utilize any available

54. Denno, *supra* note 30, at 1366.

55. *See generally* Brief Amicus Curiae of the American Civil Liberties Union et al. in Support of Petitioners at 14–18, *Baze v. Rees*, 553 U.S. 35 (2008) (No. 07-5439) (describing instances where lethal injection decision making authority was delegated to correctional officials, preventing input or oversight from democratically accountable representatives).

56. Denno, *supra* note 31, at 1377–78.

method of execution, regardless of how gruesome and inhumane the executions will be.

II. *BUCKLEW V. PRECYTHE*

Although it should hopefully be evident that the precedent established in *Baze* and *Glossip* does not adequately address the risk of torture in method-of-execution claims, it has the momentum of *stare decisis*. This section will explain how the Court applied *Baze/Glossip* precedent to Russell Bucklew's as-applied challenge to Missouri's method of execution. For the sake of clarity in a case rife with disagreement, I have broken the Court's response down by four of its important decisions in this case. The Court's holding in *Bucklew* indicates that: (A) a method of execution cannot inherently be cruel and unusual; (B) nitrogen hypoxia is not a feasible, readily implemented alternative method of execution; (C) nitrogen hypoxia would not reduce a substantial risk of severe pain when compared to lethal injection; and (D) penological justifications for Missouri's chosen method of lethal injection are more important than fairness to the accused.

A. *Under Bucklew, a Method of Execution Cannot Inherently Be Cruel and Unusual*

Justice Neil Gorsuch, wrote for the majority in *Bucklew* that the "Eighth Amendment does not guarantee a prisoner a painless death."⁵⁷ This effectively ended the debate as to whether the likelihood of pain alone could establish a method of execution as cruel and unusual. While the statement is undoubtedly chilling, it is not without historical support. Justice Gorsuch detailed the pain associated with hanging, the predominant method of execution at the time of the Eighth Amendment's adoption. He concluded that as long as a method of execution wasn't "*intended to be painful*," the risk of pain was considered an unfortunate inevitability.⁵⁸ Although, when intentional infliction of pain is "superadded" to the execution, it likely qualifies as torture. Justice Gorsuch explained that the development of increasingly more humane methods of execution resulted in the eventual replacement of hanging, supporting the conclusion that even an inhumane method of execution cannot be cruel and

57. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1123–24 (2019).

58. *Id.* at 1124 (emphasis in original, internal quotation marks omitted).

unusual unless considered comparatively against a more humane method.⁵⁹ He did not address how this comparative requirement disincentivizes the development of more humane methods because, without alternative methods to serve as comparisons, the states' chosen method will always win.

Justice Thomas expressed that only intended pain can make a method of execution cruel and unusual.⁶⁰ According to this reasoning, Missouri's execution protocol is not cruel and unusual unless intentionally designed to inflict pain, regardless of comparison to more humane methods. Although the rationale employed by Justice Thomas avoided the comparative analysis prescribed by *Baze* and *Glossip*, it is also remarkably short-sighted as to the troubling implications such a holding would have.⁶¹ Justice Breyer once again asked whether the entire practice of the death penalty is unconstitutional.⁶² In response to Justice Thomas's, Justice Breyer explained that "[t]o the prisoner who faces the prospect of a torturous execution, the intent of the person inflicting the punishment makes no difference."⁶³ In response to Justice Gorsuch, Justice Breyer invoked the Court's repeated holding that the Eighth Amendment is not a static prohibition. He argued that the Court should continually ask whether a particular execution method would cause excessive suffering in the present. Although Justice Gorsuch's argument has a stronger footing in both precedent and federalism values, Justice Breyer's argument reveals the legitimacy concerns that accompany state killing. His argument implies that, while a state may constitutionally execute inmates if the execution

59. *Id.* at 1124–25.

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

61. The current landscape of legal secrecy laws prevents much oversight into the efficacy of any given method, including whether a method is likely to result in a painful execution. If Justice Thomas's vision of cruel and unusual methods were reality, courts would likely have to blindly accept a states' proffered intent because there is little to no available evidence to support or contradict such a statement. Otherwise, courts would need to create a test to determine whether a state's stated intent is pretextual, which would be a venture into the realm of judicially created doctrine.

62. See generally *Are Justices Breyer and Ginsburg Ready to Call it Quits on the Death Penalty?*, AMNESTY INT'L, <https://www.amnestyusa.org/are-justices-breyer-and-ginsburg-ready-to-call-it-quits-on-the-death-penalty/> (last visited Dec. 31, 2019) [<https://perma.cc/MK5L-DM6U>].

63. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1144 (Breyer, J., dissenting). Breyer's assertion here appears to rely on an understanding that human dignity is a core value protected by the Eighth Amendment, and it must not always yield to state interests. See *Hall v. Florida*, 572 U.S. 701, 708 (2014).

reflects the people's will, it risks alienating the public if the killing welcomes pain beyond what is necessary.

B. The Bucklew Court Held that Nitrogen Hypoxia Is Not a Feasible, Readily Implemented Alternative Method of Execution

The majority held that Mr. Bucklew failed to show that the state of Missouri could readily implement nitrogen hypoxia. According to Justice Gorsuch, Mr. Bucklew should have submitted a proposal that was detailed enough that a state could carry it out “relatively easily and reasonably quickly.”⁶⁴ He explained that a sufficiently comprehensive plan would include instructions for a delivery device, the required nitrogen concentration, the expected time it would take for Mr. Bucklew to die, and safety protocols for the execution team. In contrast, Mr. Bucklew only supplied reports from Oklahoma and Louisiana, recommending further research. Additionally, Justice Gorsuch deferred to Missouri's facially legitimate reason for declining to adopt execution by nitrogen hypoxia, agreeing that it was an entirely new method of execution and, therefore, untried and untested.

In his dissent, Justice Breyer explained that while nitrogen hypoxia is untried and untested, the reports from Oklahoma and Louisiana support a finding that it would be feasible and easy to implement.⁶⁵ Per the reports, nitrogen hypoxia would not require medical oversight, involves a relatively simple procedure, makes use of readily available materials, and bears little risk of mistake. In response to Justice Gorsuch's detailed-proposal requirement, Justice Breyer stated, “*Glossip* did not refer to any of these requirements; today's majority invents them.”⁶⁶ While Justice Breyer correctly noted that no precedent requires an inmate to supply each detail of their proposed method of execution, *Baze* supports Justice Gorsuch's assertion that Missouri has a legitimate interest in declining to implement untested methods of execution.⁶⁷

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

65. *See id.* at 1142–43 (Breyer, J., concurring).

66. *Id.* at 1143.

67. *Baze v. Rees*, 553 U.S. 35, 52 (2008).

What no opinion addressed at length was that Missouri expressly permits execution by lethal gas.⁶⁸ Justice Breyer came close by briefly mentioning that nitrogen hypoxia is a form of execution by lethal gas, but he did not describe the procedural difficulty involved in understanding Missouri's lethal-gas protocol.⁶⁹ The Missouri statute relevant to the gas protocol specifies that the state's manner of execution is either lethal injection or lethal gas and that an "execution protocol that directly relates to the administration of lethal gas or lethal chemicals is an open record."⁷⁰

Attempting to understand the lethal gas alternative that was statutorily available to Mr. Bucklew, I filed a request to obtain any public records describing Missouri's protocol regarding the administration of lethal gas. The Custodian of Records responded, saying, "The Department has no such protocol, while lethal gas is authorized by Missouri statute, the Department's current execution protocol only relates to lethal injections."⁷¹ Given Missouri's absence of records regarding current lethal-gas protocol, I attempted to obtain historical records describing the lethal-gas protocol as it existed at the time of Missouri's last lethal-gas execution in 1965. However, there was no record of the historical lethal-gas protocol either.⁷² It is difficult to understand how Justice Gorsuch expected Mr. Bucklew to provide an informed proposal regarding execution procedures while waiting for a timely response to open record requests, navigating state secrecy, and presumably hiring an expert to design an alternative method of execution.

C. *The Bucklew Court Said that Nitrogen Hypoxia Would*

68. See MO. REV. STAT. § 546.720 (2019). Notably, this statute was effective as of 2007 and remained so at the time of Mr. Bucklew's case. However, the last execution by lethal gas in Missouri was the execution of Lloyd Anderson on January 26, 1965. Since then, Missouri has only used lethal injection as the method of execution. *DOC History*, MISSOURI DEATH ROW, <https://missourideathrow.com/doc-history/> (last visited Mar. 26, 2021) [<https://perma.cc/7PES-CACJ>].

69. See *Bucklew*, 139 S. Ct. at 1142 (Breyer, J., concurring).

70. MO. REV. STAT. § 546.720.

71. Email from Author to Anne Precythe, Custodian of Records, Mo. Dep't of Corr. (Feb. 18, 2020) (on file with author); Email from Custodian of Records, Mo. Dep't of Corr. (Feb. 20, 2020) (on file with author).

72. Email from Author to Reference Staff, Mo. State Archives (Feb. 24, 2020) (on file with author) (asking for historical files from 1965 describing Missouri's lethal-gas protocol); Email from Reference Staff, Mo. State Archives, to author (Feb. 26, 2020) (on file with author) (stating that Missouri had not retained any of the relevant files).

*Not Reduce a Substantial Risk of Severe Pain When
Compared to Lethal Injection*

The majority held that Mr. Bucklew failed to establish that Missouri's lethal-injection protocol would pose a substantial risk of severe pain.⁷³ Justice Gorsuch agreed with the court of appeals that Mr. Bucklew "made no effort" to determine how Missouri should adapt its existing protocol.⁷⁴ In his opinion, Mr. Bucklew was deliberately unaware of Missouri's willingness to elevate the gurney, thereby reducing the chance that blood would pool in Mr. Bucklew's mouth and airways. Justice Gorsuch's opinion implies that Mr. Bucklew had purposely maintained ignorance of the adapted protocol because it could reduce the likelihood of potential painful outcomes, which his claim relied on. Therefore Mr. Bucklew failed to show how significantly nitrogen hypoxia would reduce the risk of severe pain compared to lethal injection. Again, given the state's ability to hide execution protocols, this does not seem like a fair assessment.

Justice Gorsuch noted that Mr. Bucklew's claim that he would experience severe pain if executed by lethal injection was insufficient to satisfy the comparative standard because he failed to present any evidence that nitrogen hypoxia would significantly reduce that risk of pain.⁷⁵ Justice Gorsuch determined that since both methods of execution would result in approximately twenty to thirty seconds of consciousness after the execution began, any reduction of the risk of pain was likely insignificant.⁷⁶ Per Justice Gorsuch's logic, a significant reduction of risk of pain is a matter of length rather than degree.

In his dissent, Justice Breyer described the testimony of Mr. Bucklew's expert, Dr. Joel Zivot, an anesthesiologist.⁷⁷ Dr. Zivot explained that Mr. Bucklew's medical condition would likely cause him to experience prolonged, excruciating pain if he were executed by lethal injection.⁷⁸ Justice Breyer concluded that, in

73. *Bucklew*, 139 S. Ct. at 1132.

74. *Id.* at 1131 (quoting *Bucklew v. Precythe*, 883 F.3d 1087, 1095–96 (8th Cir. 2018)).

75. *Id.*

76. *Id.* at 1132.

77. *Id.* at 1137–39 (Breyer, J., dissenting).

78. Public Joint App., Vol. I at 223, *Bucklew*, 139 S. Ct. 1112 (No. 17-8151), 2018 WL 3473994 ("[I]t is highly likely that Mr. Bucklew, given his specific congenital medical condition, cannot undergo lethal injection without experiencing the excruciating pain and suffering of prolonged suffocation, convulsions, and visible hemorrhaging."); see also *Bucklew*, 139 S. Ct. at 1138 (Breyer, J., dissenting).

the light most favorable to Mr. Bucklew, the evidence presented by Dr. Zivot created a genuine factual issue as to whether Missouri's protocol posed a substantial risk of severe pain as compared to nitrogen hypoxia. According to Justice Breyer, any question about the legitimacy of one scientific opinion versus another is not for the Court to decide; it is for the factfinder to resolve at trial.⁷⁹

What is troubling about the argument here between Justices Gorsuch and Breyer is that they are both engaged in the type of scientific inquiry that Justice Kennedy specifically sought to foreclose in *Baze*.⁸⁰ On the one hand, Justice Breyer's suggestion that a trier of fact should hear the evidence shows deference to Mr. Bucklew in light of the finality of death. On the other hand, the disagreement over minutes and seconds implicates the possibility, as foreseen by Justice Kennedy, that an alternative method which only marginally reduces the risk of substantial pain is not legally sufficient to justify requiring a state to adopt an alternative method of execution.

D. The Court Focuses on Penological Justifications for Missouri's Chosen Method of Lethal Injection Instead of Fairness to the Accused

The Court discussed the states' interest in timely enforcement. Justice Gorsuch concluded that different objective requirements for facial versus as-applied challenges would all but guarantee an influx of inmates filing as-applied challenges to avoid the comparative exercise.⁸¹ Such an influx, he predicted, would increase the already extensive delay between sentencing and execution and increase court costs, thus disrespecting states' interest in conducting efficient and timely executions. Additionally, Justice Gorsuch implied that Mr. Bucklew joined "lawsuit after lawsuit" with the sole intention of delaying his execution and criticized the lack of evidence on many essential legal elements. However, Gorsuch's primary complaint was that delays between sentencing and execution effectively rob surviving victims of justice. His argument framed procedural due process as a tool wielded by inmates seeking to manipulate the legal

79. *Id.* at 1139.

80. 553 U.S. 35 at 51.

81. *Id.* at 1128.

system and avoid taking accountability for their crimes, thereby thwarting legitimate retribution and deterrence

Justice Sotomayor pointed out that timely enforcement is often in direct tension with fairness and suggested that the Court has improperly balanced the two.⁸² She reframed the “death is different” argument in the context of method-of-execution challenges. She explained that due to the degree of liberty deprivation in capital-punishment cases, the equities should favor prisoners if there is a “reasonable probability of success,” even if prisoners file the request at the last minute.⁸³ In support of her argument, Justice Sotomayor pointed to secrecy laws as “moving targets,” making it nearly impossible for inmates to grasp whether a protocol may be objectionable until it has been communicated to them by the prison.⁸⁴ Where Justice Gorsuch valued efficiency and retribution when assessing the timeliness of Eighth Amendment challenges, Justice Sotomayor valued respect for the dignity of man as well as fairness and accuracy.

Justice Breyer agreed with Justice Sotomayor and concluded that the alternative-method rule is an obstacle to prisoners, intended to preserve the legality of states’ chosen method of execution by keeping inmates from challenging the constitutionality of their execution at all. Justice Breyer’s opinion represents a pragmatic look at the alternative-method requirement: even if an inmate can prove that the state’s chosen method will cause torturous pain, the alternative-method requirement instructs courts to suspend disbelief, and blindly defer to states’ assertions that there is a facially legitimate reason for not adopting the alternative method, or that no alternative method is feasible.⁸⁵

III. THE STAIN OF TORTURE AND THE FUTURE OF EXECUTION

At this point in history, precedent supports that capital punishment is constitutional. However, the penological considerations and constitutional principles that perpetuate the death

82. *Id.* at 1146 (Sotomayor, J., dissenting).

83. *Id.*

84. *Id.* at 1147.

85. The fact is that states are constructing a sanitized façade around their procedure by placing legal veils around chemical compounds, hiding the instruments of death beneath carefully placed sheets, and vigilantly restricting visibility by drawing the curtains any time something goes wrong. They may as well be shouting, “Pay no attention to the man behind the curtain!” Unlike Dorothy, the Court is oblige. *THE WIZARD OF OZ* (Metro-Goldwyn-Mayer 1939).

penalty—federalism, fairness, retribution, deterrence, and separation of powers—often stand in stark opposition to each other. Nearly twenty years after affirming the constitutionality of the death penalty in *Gregg*, Justice Blackmun asserted that penological considerations are not just in opposition but are irreconcilable. In a sole dissent to the denial of a stay of execution for a Texas death row inmate, he stated:

Having virtually conceded that both fairness and rationality cannot be achieved in the administration of the death penalty, the Court has chosen to deregulate the entire enterprise, replacing, it would seem, substantive constitutional requirements with mere esthetics, and abdicating its statutorily and constitutionally imposed duty to provide meaningful judicial oversight to the administration of death by the states. . . . Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.⁸⁶

Although Justice Blackmun was referring to capital sentencing's constitutionality, his words ring true in method-of-execution cases. In the case of *Mr. Bucklew*, the Court used procedural consistency and deference to state legislatures to justify a performative inquiry into degrees of pain rather than a meaningful examination of the impact of a painful death. Additionally, the alternative-method requirement allows courts to present a façade of constitutional analysis while simultaneously providing states enough deference that they will always win. Perhaps that is the reason why the “Court has never held a method of execution unconstitutional.”⁸⁷

Some may argue that judicial meddling is unnecessary because a truly troubling method of execution would incite sufficient public outrage to force a state's legislature to reconsider the state's method of execution protocol.⁸⁸ Ideally, that is why

86. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from the denial of certiorari) (internal citations and footnotes omitted).

87. *Bucklew*, 139 S. Ct. at 1135 (2019) (Thomas, J., concurring).

88. See, e.g., *Our View: Let Voters Decide on the Death Penalty*, EAST OREGONIAN (Oct. 9, 2019), https://www.eastoregonian.com/opinion/editorials/our-view-let-voters-decide-on-death-penalty/article_f4d07e6a-e94f-11e9-a405-27f8ccca31f5.html [https://perma.cc/26ZT-7Y2L].

state deference could be a workable solution—state legislatures should pass legislation that reflects the will of the public to maintain electability. That argument is not completely without merit. According to the Death Penalty Information Center (DPIC), in 2020, 43% of Americans did not support the death penalty.⁸⁹ Also in 2020, Colorado became the twenty-second state to abolish the death penalty, and Louisiana and Utah reached ten years with no executions.⁹⁰ Surprisingly, Virginia, which was second in the number of executions it has carried out, outlawed the death penalty in March 2021.⁹¹ That means thirty-five states have now either abolished capital punishment or carried no executions in at least ten years.⁹² The increasing opposition to the death penalty likely played a part in states' decisions to legislatively or functionally end executions.

Yet, the federal government resumed executions in July 2020 after a seventeen-year hiatus, despite high opposition to the death penalty.⁹³ The fact that federal executions resumed amid the COVID-19 pandemic⁹⁴ raised questions about whether

89. DPIC, *The Death Penalty in 2020: Year End Report*, DEATH PENALTY INFO. CTR. 29 (Dec. 26, 2020), <https://files.deathpenaltyinfo.org/reports/year-end/Year-EndReport2020.pdf> [<https://perma.cc/D552-T37K>] [hereinafter *The Death Penalty in 2020*].

90. *Id.* at 2.

91. Denise Lavoie, *Virginia, with 2nd-Most Executions, Outlaws Death Penalty*, AP (Mar. 24, 2021), <https://apnews.com/article/virginia-to-end-death-penalty-ralph-northam-0a5b51f2e4458a0600bce6b75e6389bd>.

92. Twenty-three states have abolished capital punishment and twelve states have not carried out an execution in at least ten years. DPIC, *State by State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state> (last visited Apr. 28, 2021) [<https://perma.cc/2J3U-T8KY>]; *The Death Penalty in 2020*, *supra* note 89 at 2.

93. DPIC, *DPIC Analysis: Federal Execution Spree Out of Step with U.S. Death Penalty Trends and Attitudes*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/news/dpic-analysis-federal-execution-spree-out-of-step-with-u-s-death-penalty-trends-and-attitudes> (last visited Nov. 23, 2020) [<https://perma.cc/62KK-NX9F>].

94. Keri Blakinger & Maurice Chammah, *Witnesses to the Execution*, MARSHALL PROJECT, <https://www.themarshallproject.org/2020/07/24/witnesses-to-the-execution> (last visited Nov. 27, 2020) [<https://perma.cc/ZK9Z-L7JA>]. The first person executed by the federal government in 2020, Daniel Lewis Lee, was convicted of helping to kill William and Nancy Mueller, and Nancy's daughter, Sarah Powell, in 1996. Monica Veillette, the niece and cousin of Nancy and Sarah, sued to have the execution postponed so she could attend without risking coronavirus exposure. She stated, "[T]he government called our family's fears 'frivolous.' It made me cry more than anything thus far, to be called frivolous by the people who said they were doing this for us. It felt so cruel." Earlene Peterson, another family member of the victims who wished to be present for the execution stated, "They say

executions are retributive justice or simply a cruel celebration of governmental power.⁹⁵ This has also highlighted the tension between retribution and fairness to the accused.⁹⁶ Additionally, the scramble by death penalty states to procure lethal injection drugs by any means,⁹⁷ as well as the push to hide the origin of lethal injection drugs, indicates that some states would rather adopt an out-of-sight, out-of-mind approach to execution than allow their citizens to develop an informed perspective on the matter.

States typically argue that secrecy laws are integral to protecting the identities of those involved in meting out capital punishment.⁹⁸ Still, it is significant that increased reliance on secrecy laws has coincided with increased reliance on compounding pharmacies, which should arguably be held accountable for unreliable business practices.⁹⁹ Legal deference to states' decisions to categorically restrict any opportunity to

they're doing it for us but they're liars, lying through their teeth. They treated us as if we didn't exist. . . . I really feel in my heart the government let me down."

95. *Cf. id.* An anonymous prisoner at the same prison as Daniel Lewis Lee stated that on the day of the execution, an administrator called a meeting about what he called "the festivities." The prisoner also said that administrators required inmates to "dress in our greens, like it was fancy."

96. *Cf. Hailey Fuchs, Government Executes Second Federal Death Row Prisoner in a Week*, N.Y. TIMES (July 16, 2020), <https://www.nytimes.com/2020/07/16/us/politics/wesley-ira-purkey-executed.html> [<https://perma.cc/EFE8-7QZ5>]. Wesley Ira Purkey, the second inmate executed by the federal government, had been sentenced in 1998. His lawyers argued that he suffered from schizophrenia, Alzheimer's disease, and brain damage. As a result, he did not understand why he was being executed.

97. John Ericson, *Botched Execution Shows Perils of Lethal Injection Drug Shortage*, NEWSWEEK (April 30, 2014) <https://www.newsweek.com/2014/05/16/states-go-great-lengths-find-lethal-injection-drugs-249154.html> [<https://perma.cc/ZZ4F-F75Z>] (describing prison officials buying drugs from under-regulated pharmacies and swapping briefcases in the desert).

98. *See, e.g., Jolie McCullough, State Supreme Court Rules Texas Can Hide the Identity of Execution Drug Supplier*, TEXAS TRIBUNE (Apr. 12, 2019), <https://www.texastribune.org/2019/04/12/texas-execution-drug-suppliers-identity-can-stay-secret-high-court-say/> [<https://perma.cc/Q62P-JKUY>]; *see generally* Mary D. Fan, *The Supply-Side Attack on Lethal Injection and the Rise of Execution Secrecy*, 95 BOSTON U. L. REV. 478 (2015).

99. An analysis of the constitutionality of unorthodox and unregulated drug procurement in the death penalty context is beyond the scope of this article. Suffice it to say, prisons have carried out executions with incorrect drugs, unmixed and ineffective chemical compounds, and contaminated drugs, all with effectively no oversight. For a conversation on the constitutionality of drug procurement for capital punishment, see Barri Dean, *What are Those Ingredients You Are Mixing up Behind Your Veil?*, 62 HOWARD L.J. 309 (2018).

understand what occurs in the execution chamber, challenging the argument that the death penalty is rooted in public opinion.

Issues of whether a government may legitimately execute citizens appear in the international context as well. DPIC reports that 70% of the world's countries have abolished capital punishment, which remains legal primarily in authoritarian nations.¹⁰⁰ Additionally, the United Nations General Assembly adopted a resolution calling for a worldwide moratorium on the death penalty with the support of 120 nations, not including the United States.¹⁰¹ It seems unlikely that the United States will join the consensus among peer nations that the death penalty violates human rights because all fifty states are afforded such wide latitude through the legislative process to implement capital punishment—without meaningful judicial oversight at the federal level.

Undoubtedly, many states would avoid discussion of capital punishment as a human-rights violation by claiming a retributive duty to the victims of capital crimes.¹⁰² In the case of Mr. Bucklew, it is undeniable that the events resulting in his capital conviction were among some of the worst imaginable.¹⁰³ Setting aside the fact that there are serious questions of innocence for

100. DPIC, *Policy Issues: International*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/policy-issues/international> (last visited Dec. 31, 2019) [<https://perma.cc/3VAZ-T9LG>].

101. DPIC, *A Record 120 Nations Adopt UN Death-Penalty Moratorium Resolution*, DEATH PENALTY INFO. CTR. (Dec. 18, 2018), <https://deathpenaltyinfo.org/news/a-record-120-nations-adopt-un-death-penalty-moratorium-resolution> [<https://perma.cc/UV7E-YUQX>]; see also Lincoln Caplan, *The Growing Gap Between the U.S. and the International Anti-Death-Penalty Consensus*, NEW YORKER (Dec. 31, 2016), <https://www.newyorker.com/news/news-desk/the-growing-gap-between-the-u-s-and-the-international-anti-death-penalty-consensus> [<https://perma.cc/9FQE-GQAU>]; Richard C. Dieter, *International Influence on the Death Penalty in the U.S.*, FOREIGN SERV. J. 33 (Oct. 2003).

102. Justice Scalia sometimes pointed to violence committed against victims as justifying state-violence against death row inmates. See *Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (Scalia, J., concurring in the denial of certiorari); *Glossip v. Gross*, 135 S. Ct. 2726, 2746 (2015) (Scalia, J., concurring).

103. Russell Bucklew admitted as much in his 1996 confession; he described shooting Michael Sanders in the chest with a shotgun, shooting at Sander's children, kidnapping his ex-girlfriend, Stephanie Pruitt, and raping her before getting into a police shootout. See Kathy Sweeney, *Exclusive: Police Interview Russell Bucklew Days After 1996 Crimes*, KFVS12 NEWS (last updated Oct. 1, 2019) <https://www.kfvs12.com/2019/10/01/exclusive-police-interview-russell-bucklew-days-after-crimes/> [<https://perma.cc/WM6H-QMXX>].

other death row inmates, both living and dead,¹⁰⁴ the argument that illegal killing can only be solved by legal killing is hypocritical and short-sighted. As death penalty expert Austin Sarat explains, executions raise questions about whether capital punishment serves public justice or personal vengeance. In his words, “The killing state threatens to expose the façade of law’s dispassionate reason, of its necessity and restraint, as just that—a façade—and to destabilize law by forcing choices between its aspirations and the need to maintain social order through force.”¹⁰⁵ To put his argument into familiar context, when courts justify a potentially torturous death by saying that a painless death is not “guaranteed to many people, including most victims of capital crimes,”¹⁰⁶ instead of asking honestly whether and why the death will be painful at all, the façade of dispassionate reason gives way to a vengeance-based embrace of the very act that is being punished.¹⁰⁷ However, this façade is reconstructed and reinforced when judges deferentially elevate state justifications, making the façade the only legally recognized truth.

CONCLUSION

No one will ever know what Russell Bucklew felt in the twenty-three minutes it took for him to die. Perhaps it was painless; perhaps the pentobarbital did as it was intended and quickly rendered him insensate. But perhaps his death was not painless—perhaps the pentobarbital only rendered Mr. Bucklew motionless as he felt the blood pool in his airways until he choked on it.

What we do know is that the law favors states’ rights over fairness to inmates. We know that the Court has turned away from the interpretation that the Eighth Amendment protects human dignity, as measured by society’s evolving standards, in favor of a comparative exercise that limits the inquiry to what is feasible and available. We know that, from *Baze* to *Bucklew*, precedent signals to states that they can evade responsibility for harmful drugs and botched executions by hiding behind a veil of secrecy. And we know that procedural due process will be

104. DPIC, *Policy Issues: Innocence*, DEATH PENALTY INFO. CTR., <https://death-penaltyinfo.org/policy-issues/innocence> (last visited Nov. 21, 2020) [<https://perma.cc/TLX7-3VAW>].

105. AUSTIN SARAT, WHEN THE STATE KILLS 124 (2001).

106. *Bucklew v. Precythe*, 139 S. Ct. 1112, 1124 (2019).

107. SARAT, *supra* note 105, at 124.

sacrificed if it means that states can kill inmates faster, even though there is no proof that the death penalty satisfies the deterrent and retributive penological purposes that motivate it. Whether constitutional or not, that prospect should, at the least, make each American deeply uncomfortable.