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# Reflections on Justice John Paul Stevens's Concurring Opinion in *Baze v. Rees*: A Fifth Gregg Justice Renounces Capital Punishment

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## TABLE OF CONTENTS

INTRODUCTION .....	785
I. FROM THERE TO HERE: 2006 TO 2008.....	794
A. <i>The View in Early 2006</i> .....	798
B. <i>Developments at the Court</i> .....	801
1. Double Deference .....	809
2. More Numerousness .....	810
3. A Court Divided .....	817
C. <i>Developments on the Ground</i> .....	819
II. WHY THE BREAK, WHY BAZE AND WHY NOT DISSENT?.....	827
A. <i>Overview</i> .....	827
B. <i>An Answer Only to the Second Question Presented</i> .....	831
C. <i>“Societal Purposes” for Capital Punishment</i> .....	834
1. Incapacitation .....	834
2. Deterrence .....	837
3. Retribution .....	840
D. <i>“Exercising My Own Judgment”</i> .....	843

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1. The Resurrection of <i>Trop v. Dulles</i> .....	844
2. Constitutionally Unacceptable Risk: The Reemergence of “Social Realities” in the Court’s Capital Punishment Jurisprudence .....	851
III. REEXAMINING CAPITAL PUNISHMENT .....	855
A. <i>Lethal Injection Challenges and Justice Stevens’s     Expectations in Baze</i> .....	855
B. <i>The Very Long Haul</i> .....	866
CONCLUSION.....	876

## INTRODUCTION

In March of 2009, I was invited to bring my capital defense lawyer's perspective to the UC Davis Law Review's symposium on Justice John Paul Stevens; my role was to trace the Justice's death penalty jurisprudence. Three years earlier, Professors James Liebman and Lawrence Marshall, both former law clerks for Justice Stevens, had published a comprehensive article on his death penalty jurisprudence.<sup>1</sup> Fortuitously, the symposium was held a month shy of the one-year anniversary of the Supreme Court's decision in *Baze v. Rees*, which ostensibly established the test for determining whether a method of execution violates the Eighth Amendment's ban on "cruel and unusual" punishment, and further determined that Kentucky's three-drug lethal injection procedure satisfied that standard.<sup>2</sup> Justice Stevens joined in upholding Kentucky's protocol; however, in his concurring opinion, he announced his conclusion that capital punishment is an

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<sup>1</sup> See generally James S. Liebman & Lawrence C. Marshall, *Less Is Better: Justice Stevens and the Narrowed Death Penalty*, 74 *FORDHAM L. REV.* 1607 (2006) (comparing Justice Stevens's "nuanced," "less-is-better" approach to administration of death penalty, with that of members of Court who, unlike Justice Stevens, were among nine Justices whose collection of separate opinions made up decision in *Furman v. Georgia*, 408 U.S. 238 (1972), and with views of others who served with Justice Stevens since his appointment to Court in 1975). Although published in 2006, Liebman and Marshall's review of the Court's capital punishment jurisprudence concludes before the 2006 term, after the Court had granted review in several significant death penalty cases: *Kansas v. Marsh*, 548 U.S. 163 (2006); *House v. Bell*, 547 U.S. 518 (2006); *Holmes v. South Carolina*, 547 U.S. 319 (2006); *Oregon v. Guzek*, 546 U.S. 517 (2006). See Liebman & Marshall, *supra*, 1667 & nn.255 & 256.

<sup>2</sup> *Baze v. Rees*, 128 S. Ct. 1520, 1523 (2008) (plurality opinion) ("To prevail, such a claim must present a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm.'" (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846 & n.9 (1994))); *id.* ("To effectively address such a substantial risk, a proffered alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. A State's refusal to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for its current execution method, can be viewed as 'cruel and unusual.'"); see also Eric Berger, *Lethal Injection and the Problem of Constitutional Remedies*, 27 *YALE L. & POL'Y REV.* 259, 277 (2009) ("Because *Baze* relied on an incomplete record and resulted in seven different opinions, it is difficult to know what the law is."); *id.* ("Even to the extent, though, that the three-Justice plurality's opinion may be viewed as the holding, it offers incomplete clarification."); Justin F. Marceau, *Lifting the Haze of Baze: Lethal Injection, the Eighth Amendment, and Plurality Opinions*, 41 *ARIZ. ST. L.J.* 159, 206 (2009) (arguing that, in capital cases, rule in *Marks v. United States*, 430 U.S. 1888 (1977) — that plurality opinions constitute binding precedent — should be revisited so that "the Court affords non-majority opinions as to Eighth Amendment standards only result stare decisis").

“excessive and cruel and unusual punishment violative of the Eighth Amendment.”<sup>3</sup> Lauded and denounced by commentators, Justice Stevens’s conclusion had prompted a scorching rejoinder by Justice Antonin Scalia.<sup>4</sup> Nonetheless, the opinion was universally acknowledged as a watershed in Justice Stevens’s capital punishment jurisprudence.<sup>5</sup> At least to those outside the Court, Justice Stevens’s step into the abolitionist camp was wholly unexpected.

Justice Stevens’s concurrence in *Baze* comprises three sections: first, his critique of the “disturbing” use of pancuronium bromide — the paralytic, second chemical — in the three-drug lethal injection execution protocol; second, his refutation of three rationales for capital punishment, with an emphasis on retribution; and third, the Justice’s explanation of the exercise of his “own judgment” that capital punishment violates the Eighth Amendment, based upon his identification of “special,” “serious,” and “significant” “concern[s],” which had emerged as a result of his “extensive exposure to countless cases.”<sup>6</sup> Although Justice Stevens concluded that the death penalty “represents ‘the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes,’ ”

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<sup>3</sup> *Baze*, 128 S. Ct. at 1551 (Stevens, J., concurring in judgment) (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring)).

<sup>4</sup> *Id.* at 1552-56 (Scalia, J., concurring in judgment, joined by Thomas, J.); see, e.g., Editorial, *The Supreme Court Fine-Tunes Pain*, N.Y. TIMES, Apr. 17, 2008, <http://www.nytimes.com/2008/04/17/opinion/17thu3.html?scp=7&sq=%22justice%20stevens%22%20%22lethal%20injection%22&st=cse> (calling Justice Stevens’s rejection of capital punishment “a welcome surprise”); Bruce Fein, *Dueling Justices on Death Penalty*, WASH. TIMES, Apr. 29, 2008, [http://www.washingtontimes.com/news/2008/apr/29/dueling-justices-on-death-penalty/?feat=article\\_related\\_stories](http://www.washingtontimes.com/news/2008/apr/29/dueling-justices-on-death-penalty/?feat=article_related_stories) (dismissing Justice Stevens’s concurrence as a series of “cerebral stumbles”); Alice Ristroph, *What Is a Judicial Fiat, Anyway?*, CONCURRING OPINIONS, Apr. 22, 2008, [http://www.concurringopinions.com/archives/2008/04/what\\_is\\_a\\_judic.html](http://www.concurringopinions.com/archives/2008/04/what_is_a_judic.html) (criticizing Scalia’s characterization of Justice Stevens’s opinion as an act of “judicial fiat” when, in fact, Justice Stevens “let executions rather than his own will be done”).

<sup>5</sup> See, e.g., Robert Barnes, *In Reversal, Stevens Says He Opposes Death Penalty*, WASH. POST, Apr. 17, 2008, at A12 (“Joseph Thai, an Oklahoma University law professor and former Justice Stevens clerk, said that the Justice’s statement is the culmination of ‘the evolution of his position on the death penalty over the last 30 years or so . . . . Nonetheless, it’s still a pretty big step for him.’ ”); Linda Greenhouse, *Justice Stevens Renounces Capital Punishment*, N.Y. TIMES, Apr. 18, 2008, at A22 (“His opinion . . . was the culmination of a remarkable journey for a Republican antitrust lawyer.”); James Oliphant, *Stevens New Foe of Death Penalty*, CHI. TRIB., Apr. 17, 2008, at 1 (“The nation’s longest serving Supreme Court justice, John Paul Stevens, parted company with his colleagues Wednesday, declaring for the first time his formal opposition to capital punishment.”).

<sup>6</sup> See *Baze*, 128 S. Ct. at 1543, 1547-48, 1550-51 (Stevens, J., concurring in judgment) (citations omitted).

he declined to break with the Court's precedent, and decided *Baze* based upon the premise that the punishment is constitutional.<sup>7</sup> Yet when he returned to the questions presented in the case to concur in the plurality's judgment upholding Kentucky's lethal injection protocol, Justice Stevens did so without expressing his interpretation of "the framework for evaluating the constitutionality of particular methods of execution."<sup>8</sup>

Any analysis of Justice Stevens's rejection of capital punishment in *Baze* cannot lose sight of the fact that his vote was indispensable to the Court's revival of the death penalty in 1976.<sup>9</sup> On July 2, 1976, in *Gregg v. Georgia* and two companion decisions,<sup>10</sup> the Court ratified statutes by which Georgia, Texas, and Florida reenacted the death penalty under what has come to be denominated the "holding" of *Furman v. Georgia*, requiring that the ultimate punishment not be imposed in an arbitrary or discriminatory manner.<sup>11</sup> Justice Stevens, who had been on the Court fewer than six months, joined Justices Potter Stewart and

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<sup>7</sup> *Id.* at 1551-52 (quoting *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring)).

<sup>8</sup> *Id.* at 1552. In contrast to the opinions of Justices Brennan and Marshall in *Furman* and that of Justice Blackmun in *Callins*, Justice Stevens's ten-page concurring opinion in *Baze* is almost terse. *Id.* at 1542-52. See *Furman v. Georgia*, 408 U.S. 238, 257-307 (1972) (Brennan, J., concurring); *id.* at 314-72 (Marshall, J., concurring) (appendix excluded); *Callins v. Collins*, 510 U.S. 1141, 1143-59 (1994) (Blackmun, J., dissenting). Although not necessarily central to his judicial philosophy, it is Justice Stevens's stated practice to be succinct whenever possible, and to use footnotes to expand upon his main points. See Justice John Paul Stevens, C-SPAN, June 24, 2009, at 6, <http://supremecourt.c-span.org/assets/pdf/JPStevens.pdf>.

<sup>9</sup> See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 274 (Harvard Univ. Press 2002) ("Stevens, the newest Justice, cast the deciding vote."). Banner refers to the outcome in the five decisions, collectively known as the "Gregg cases," as the "resurrection" of capital punishment. *Id.* at 267. Because of *Furman*, 408 U.S. 153, "Capital punishment no longer existed anywhere in the United States." *Id.* at 266. See also Liebman & Marshall, *supra* note 1, at 1612 (noting Justice Powell's observation in dissent that five-person per curiam opinion " 'nullified' the 'capital punishment laws of no less than 39 States and the District of Columbia.' " (quoting *Furman*, 408 U.S. at 417-18 (Powell, J., dissenting))).

<sup>10</sup> *Gregg v. Georgia*, 428 U.S. 153, 206-07 (1976); see *Jurek v. Texas*, 428 U.S. 262, 277 (1976); *Proffitt v. Florida*, 428 U.S. 242, 259-60 (1976).

<sup>11</sup> *Furman*, 408 U.S. at 240-41; see Liebman & Marshall, *supra* note 1, at 1614 & n.45 (discussing Court's repeated discernment of " 'holding' (beyond the technical one that preexisting death verdicts and discretionary statutes were invalid)"). John Paul Stevens was nominated by President Gerald R. Ford and took his seat as an Associate Justice of the Supreme Court on December 19, 1975. See [Supremecourtus.gov](http://www.supremecourtus.gov), *The Justices of the Supreme Court*, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited February 6, 2010).

Lewis E. Powell to provide the third vote for the plurality opinions in all five capital punishment decisions issued that day.<sup>12</sup>

Notwithstanding the states' post-*Furman* scramble to reenact capital punishment statutes and repopulate death rows, had Justice William O. Douglas remained on the Court, one wonders whether he would have supplied the third vote for the pluralities in *Gregg*, *Jurek v. Texas*, and *Proffitt v. Florida*. Justice Douglas was so concerned about the issue that, even after suffering a stroke, he came to the Court to hear argument in a case that was then expected to be the first post-*Furman* decision.<sup>13</sup> In Justice Douglas's view, the grossly disproportionate imposition of capital punishment on the poor and on African Americans established that arbitrariness in the exercise of discretion by juries and judges was synonymous with discrimination.<sup>14</sup> As Professor Anthony Amsterdam, a principal architect of the NAACP Legal Defense Fund's capital punishment litigation strategy, recounts: "Evidence of caste discrimination and capricious inequality played a significant part" in the argument in *Furman* that capital punishment violated the Eighth Amendment.<sup>15</sup> The LDF lawyers recognized that, although the discretion of the sentencer now must be guided, "prosecutorial charging and plea-bargaining discretion — probably the most important determiners of the ultimate sentence in any potentially capital prosecution — remained completely unfettered and insulated from judicial scrutiny under *Furman*."<sup>16</sup>

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<sup>12</sup> *Roberts v. Louisiana*, 428 U.S. 325, 327 (1976) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280, 282 (1976) (plurality opinion); *Jurek*, 428 U.S. at 264; *Proffitt*, 428 U.S. at 244; *Gregg*, 428 U.S. at 154.

<sup>13</sup> See BANNER, *supra* note 9, at 271 (referring to *Fowler v. North Carolina*, 422 U.S. 1039 (1976) and discussing how rulings on constitutionality of post-*Furman* capital punishment statutes "pile[d] up at the Court" after Justice Douglas became ill and awaited his retirement and confirmation of his successor, Justice Stevens).

<sup>14</sup> See *Furman*, 408 U.S. at 252-53, 246-47 (Douglas, J., concurring); Liebman & Marshall, *supra* note 1, at 1613, 1617.

<sup>15</sup> Anthony G. Amsterdam, *Opening Remarks: Race and the Death Penalty Before and After McCleskey*, 39 COLUM. HUM. RTS. L. REV. 34, 41 (2007); see also Nadya Labi, *A Man Against the Machine*, MAG. N.Y.U. L. SCH., 10, 13 (2007) ("Amsterdam forged the legal infrastructure that helped the Legal Defense Fund (LDF) challenge just about every death penalty case across the country."). See generally *Woodson*, 428 U.S. at 303 (plurality opinion) (noting that unbounded jury discretion must be replaced "with objective standards to guide, regularize and make rationally reviewable the process for imposing a sentence of death"); BANNER, *supra* note 9, at 247-75 (describing litigation across country that culminated in *Furman* and LDF's role in challenging post-*Furman* statutes).

<sup>16</sup> Amsterdam, *supra* note 15, at 42 n.28.

Justice Douglas retired in 1975 and was replaced by Justice Stevens, who had no jurisprudential track record on the issue of capital punishment nor an investment in any of the nine individual opinions in *Furman*.<sup>17</sup> As Liebman and Marshall explain, beginning in *Gregg*, Justice Stevens aligned himself with Justice Potter Stewart and adopted Justice Stewart's "less-is-better" or "narrowing" approach as the analytic mechanism for eliminating the indiscriminate application of capital punishment.<sup>18</sup> After a relatively brief period of support for this view, the Court rejected it in favor of Justice Byron White's "numerousness" approach, which aimed to moderate arbitrariness through more frequent imposition of the death penalty.<sup>19</sup> Over the decades during which Justice White's view prevailed, Justice Stevens authored dozens of trenchant dissenting opinions in capital punishment cases on questions of procedural and substantive rights. His dissents, however, were grounded in the view that a constitutional capital punishment regime was achievable.<sup>20</sup> For example, in *McCleskey v. Kemp*, the Court held that social science data alone were not sufficient to establish a violation of the Fourteenth Amendment's Equal Protection Clause or of the Eighth Amendment's Cruel and Unusual Punishment Clause.<sup>21</sup> Justice Stevens dissented, but did not join in the part of Justice William J. Brennan's dissenting opinion that adjudged arbitrariness an "intractable reality of the death penalty."<sup>22</sup> Nor was Justice Stevens persuaded that a ruling in favor of Warren McCleskey would inevitably bring down Georgia's death penalty.<sup>23</sup> He

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<sup>17</sup> See BANNER, *supra* note 9, at 274-75 (quoting Justice Stevens, "Furman is law for me and that's my starting point," based upon reconstruction of conference notes of Justices Powell and Brennan). Justice Stevens has "said that when nominated to the Court he did not himself know how he would vote on capital punishment." Diane Marie Amann, *John Paul Stevens, Human Rights Judge*, 74 *FORDHAM L. REV.* 1569, 1599 n.178 (2006) [hereinafter Amann, *Human Rights Judge*]; Justice John Paul Stevens, Opening Assembly Address, American Bar Association Annual Meeting, Orlando, Florida (Aug. 3, 1996), in 12 *ST. JOHN'S J. LEGAL COMMENT.* 21, 25, 31 (1996) [hereinafter Stevens, Orlando ABA Address].

<sup>18</sup> See Liebman & Marshall, *supra* note 1, at 1617-19.

<sup>19</sup> See *id.* at 1618, 1632.

<sup>20</sup> See *id.* at 1610 (explaining that, among *Furman* Justices who were persuaded that constitutional fix could be found for "arbitrariness" in states' capital punishment schemes, "Justice Stewart believed the penalty was imposed too indiscriminately and that the solution was 'narrowing'"). After Justice Stevens joined the Court, he "placed himself squarely in Justice Stewart's less-is-better camp." *Id.*

<sup>21</sup> *McCleskey v. Kemp*, 481 U.S. 279, 306-07 (1987).

<sup>22</sup> *Id.* at 320 (Brennan, J., dissenting, joined by Marshall, J.; joined by Blackmun & Stevens, JJ. except as to Part I).

<sup>23</sup> *Id.* at 367 (Stevens, J., dissenting). Justice Stevens did, however, insist that "[i]f society were indeed forced to choose between a racially discriminatory death

argued that the risk of arbitrariness and discrimination in the imposition of capital punishment could be “significantly decreased, if not eradicated,” by restricting death-eligible offenses to a narrow category of “extremely serious crimes.”<sup>24</sup> In *Payne v. Tennessee*, Justice Stevens, dissenting, acknowledged that the Court’s decision represented a stunning deviation from the Court’s governing principles, and would inevitably lead to the capricious imposition of the death penalty in some cases based upon the introduction of “victim impact” evidence that “is irrelevant to the defendants’ moral culpability.”<sup>25</sup> Yet he did not join with Justice Harry A. Blackmun in Justice Thurgood Marshall’s dissent that saw in the judgment “a preview of an even broader and more far-reaching assault upon this Court’s precedents,” one that would extend beyond those sentenced to death to people of color, women, and the poor.<sup>26</sup> Justice Stevens’s

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penalty . . . and no death penalty at all, the choice mandated by the Constitution would be plain.” *Id.* (citation omitted).

<sup>24</sup> *Id.* Also, while he was willing to assume the validity of the empirical data for purposes of deciding the constitutional question, Justice Stevens would have remanded the case to the court of appeals to determine “whether the Baldus study is valid” and, if so, to apply the facts in the case to the study’s results and decide whether there was “an unacceptable risk that race played a decisive role in McCleskey’s sentencing.” *Id.*; see also Liebman & Marshall, *supra* note 1, at 1611.

<sup>25</sup> *Id.* at 856, 860-61 (writing that Court’s about-face in *Payne* abrogated Eighth Amendment’s prohibition against arbitrary and capricious imposition of death penalty by permitting introduction of evidence that (1) is irrelevant to defendant’s “personal culpability” and (2) does not “direct[] and limit[]” sentencer’s discretion); see also Liebman & Marshall, *supra* note 1, at 1638 n.139.

<sup>26</sup> *Payne v. Tennessee*, 501 U.S. 808, 856 (1991) (Marshall, J., dissenting, joined by Blackmun, J.); see, e.g., Jonathan Simon, *Fearless Speech in the Killing State: The Power of Capital Crime Victim Speech*, 82 N.C. L. REV. 1377 (2004) (using clemency hearings that culminated in then-Governor George Ryan’s 2003 commutation of 167 death row inmates to explore central role that crime victims played in politics of capital punishment). For Justice Stevens, the outcome in *Payne* was a result of improper political influence — the “victims’ rights” movement — on the judiciary. *Payne*, 501 U.S. at 867 (Stevens, J., dissenting, joined by Blackmun, J.). He did not go as far as Justice Marshall, who wrote that unwarranted abandonment of precedent could be explained only by the change “in the Court’s own personnel.” *Id.* at 850 (Marshall, J., dissenting, joined by Blackmun, J.). In the recent campaign finance decision, Justice Stevens may well have experienced the same disillusionment, indeed outrage, as Justice Marshall expressed in *Payne*. See *Citizens United v. Fed. Election Comm’n*, No. 08-205, 2010 WL 183856, at \*62 (Jan. 21, 2010) (Stevens, J., dissenting, joined by Ginsburg, Breyer & Sotomayor, JJ.) (arguing that “the only relevant thing that has changed since [the Court’s two major campaign finance precedents] is the composition of this Court”); Adam Liptak, *Stevens Era, Nearing End, Takes on an Edge*, N.Y. TIMES, Jan. 25, 2010, at A12 (describing Justice Stevens’s dissent as “shot through with disappointment, frustration and uncharacteristic sarcasm”).



dissent in both cases and his jurisprudence on issues of race also support the conclusion that he did not sign on to Justice Brennan's dissent in *McCleskey* or Justice Marshall's dissent in *Payne* because of his confidence in the "less-is-better approach to capital sentencing," rather than a reluctance to admit to the pernicious influence of race discrimination in the administration of the death penalty.<sup>27</sup>

With his concurring opinion in *Baze*, Justice Stevens became the fifth *Gregg* Justice to declare that capital punishment violates the Eighth Amendment.<sup>28</sup> When Justice Stevens planted himself on the abolitionist side of the constitutional divide, he did not, however, follow the lead of his *Gregg* colleagues, Justices Brennan, Marshall, and Blackmun.<sup>29</sup> He announced that his conclusion did not "justify a refusal to respect precedents that remain a part of our law."<sup>30</sup> For this

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<sup>27</sup> Liebman & Marshall, *supra* note 1, at 1648. Justices Douglas, Stewart, and White agreed that the production of arbitrary outcomes was the overarching constitutional infirmity of the death penalty statutes, but "Justices Stewart's and White's diagnoses and solutions were contradictory." *Id.* at 1609-10. For example, dissenting in *Payne*, Justice Stevens characterized the introduction of victim impact evidence as antithetical to the Court's precedents, which were grounded in the premise that the defendant — not the victim — is on trial, and to the Eighth Amendment's mandate against the arbitrary imposition of the death penalty. *See Payne*, 510 U.S. at 859-61, 866 (Stevens, J., dissenting, joined by Blackmun, J.) (warning that introduction of victim impact evidence "can only be intended to identify some victims as more worthy of protection than others," which risks sentencing decisions based upon race of victim); *see also McCleskey*, 481 U.S. at 367 (Stevens, J., dissenting). *See generally*, Diane Marie Amann, *John Paul Stevens and Equally Impartial Government*, 43 UC DAVIS L. REV. 885 (2010) (tracing course of Justice Stevens's opinions on race and Constitution from his clerkship with Justice Wiley B. Rutledge, Jr. to his dissent in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007)).

<sup>28</sup> *Baze v. Rees*, 128 S. Ct. 1520, 1551 (2008) (Stevens, J., concurring); *see also Callins v. Collins*, 510 U.S. 1141, 1159 (1994) (Blackmun, J., dissenting from denial of certiorari); *Gregg v. Georgia*, 428 U.S. 153, 230-31 (1976) (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting); JOHN C. JEFFERIES, JR., JUSTICE LEWIS F. POWELL, JR. 451 (Macmillan Publ'g 1994). Professor Carol Steiker describes the powerful "cumulative effect of Powell, Stevens and Blackmun's conversions," observing that the "three Justices together formed half of *Furman's* dissenting block and two-thirds of *Gregg's* plurality reviving the modern American death penalty as we now know it." Carol S. Steiker, *The Marshall Hypothesis Revisited*, 52 HOW. L.J. 525, 552 (2009) [hereinafter Steiker, *Marshall Hypothesis*].

<sup>29</sup> Because Justice Powell did not retract his view that the death penalty is constitutional until after his retirement, and then only by way of comments to his biographer, I do not compare Justice Stevens's concurring opinion in *Baze* with Justice Powell's out-of-court statements. *See* JEFFERIES, *supra* note 28, at 451; David Von Drehle, *Retired Justice Changes Stand on Death Penalty: Powell Is Said to Favor Ending Executions*, WASH. POST, June 10, 1994, at A1.

<sup>30</sup> *Baze*, 128 S. Ct. at 1552 (Stevens, J., concurring in judgment).

reason, he did not adopt the policy of Justices Marshall, Brennan, and Blackmun, who dissented from every affirmance, every denial of certiorari, and every denial of a stay of execution in a capital case.<sup>31</sup> As I discuss, notwithstanding Justice Stevens's announcement in *Baze* that he will adhere to the Court's precedents, his resolve that the death penalty cannot be salvaged as a constitutionally viable institution is as unqualified as that of any of his *Gregg* predecessors.

It may yet be premature to call Justice Stevens's concurring opinion in *Baze* a capstone to his death penalty jurisprudence. Despite speculation that he will soon retire, it appears that Justice Stevens "still draws fresh strength from winning cases and making his mark on a divided court."<sup>32</sup> From his more recent statements respecting the denial of stays and petitions for certiorari in several capital punishment cases, his opinion for the majority in *In re Davis*, and his dissenting opinion in *Wood v. Allen*, one can infer that Justice Stevens's engagement in the capital punishment issue is not over.<sup>33</sup> The

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<sup>31</sup> Justice Marshall began each of his post-*Gregg* capital punishment opinions with the following phrase: "Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments . . ." Steiker, *Marshall Hypothesis*, *supra* note 28, at 526 n.7 (quoting *McCleskey v. Bowers*, 501 U.S. 1282, 1282 (1991) (Marshall, J., dissenting from denial of stay of execution and from denial of certiorari)); *see also* *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (Brennan, J., concurring in judgment) ("Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments . . ."). In almost every death penalty decision following *Callins*, Justice Blackmun included the phrase: "Adhering to my view that the death penalty cannot be imposed fairly within the constraints of our Constitution, see my dissent in *Callins v. Collins* . . ." LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* 179 (Times Books, Henry Holt & Co. 2005). In some opinions, beyond referring to *Callins*, Justice Blackmun elaborated on the reasons for his dissent. *See, e.g.,* *McCullum v. North Carolina*, 512 U.S. 1254, 1255 (1994) (Blackmun, J., dissenting from denial of certiorari) (citing *Callins*, but rather than using his standard language, telling "the story" of petitioner, who had mental retardation and "was far from the most culpable of the four accomplices," and further observing that disproportionality of system that "would single out Buddy McCullom to die for this brutal crime only confirms my conclusion that the death penalty experiment has failed").

<sup>32</sup> Greenhouse, *supra* note 5, at A22; Tony Mauro, *Slowing Down? Hardly. Justice John Paul Stevens Is Playing a Lead Role This Term*, *LEGAL TIMES*, Mar. 9, 2009, at 1; *see* Adam Liptak, *A Justice Slows His Hiring, and Some Wonder About His Future*, *N.Y. TIMES*, Sept. 2, 2009, at A14; *see also* David G. Savage, *Speculation Rises that Supreme Court Justice Stevens Will Retire*, *L.A. TIMES*, Sept. 3, 2009, at 14.

<sup>33</sup> For example, in *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2645, 2650 (2008), Justice Stevens joined the majority, voiding Louisiana's child rape death penalty statute. He did not offer as an independent basis for his vote, however, his view that capital punishment is unconstitutional under all circumstances. He has thus far

retirement of Justice David Souter, who was replaced by Justice Sonia Sotomayor, however, has not altered the balance of power on the Court.<sup>34</sup> “The votes are not there now and will not be there soon . . . [to] deliver the constitutional coup de grace to capital punishment.”<sup>35</sup> Therefore, Justice Stevens's concurring opinion in *Baze* may be influential first, and in the near term, in lower federal and state courts and in the legislatures.

Part I of this Article reviews the two years between the publication of the Liebman–Marshall article and *Baze* for insights into Justice Stevens's resolution that “narrowing” capital punishment could not rectify the deficiencies identified in *Furman* sufficient to avoid having to take what Liebman and Marshall termed “the more controversial step of declaring the death penalty unconstitutional.”<sup>36</sup> Following in Liebman and Marshall's tracks, Part I surveys the activities on the Court — its opinions and change in personnel — and the developments at ground level, that is, in state courts, legislatures, prosecutors' offices, jury deliberation rooms, and in public opinion.<sup>37</sup> Part II argues that Justice Stevens's judicial philosophy and his analysis in *Baze* illuminate his choice of the case to take that step. Part

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followed this approach in his statements respecting the denial of certiorari and dissents from applications for stays of execution. See *In re Davis*, 130 S. Ct. 1, 1 (2009) (ordering that federal district court conduct hearing on Davis's original federal habeas corpus petition, which raised “actual innocence” claim); *Wood v. Allen*, No. 08-9156, 2010 WL 173369, at \*10 (Jan. 20, 2010) (Stevens, J., dissenting, joined by Kennedy, J.) (noting that trial counsel's decision to forgo investigation of petitioner's “mental deficiencies” — evidence that had “powerful mitigating value” — was not “strategic”); Adam Liptak, *Justices Tell Federal Court to Step into Death Row Case*, N.Y. TIMES, Aug. 18, 2009, at A15 (describing “sharp debate” between Justices Stevens and Scalia about “the reach of a federal law meant to limit death row appeals and the proper treatment of claims of innocence”); see, e.g., *Johnson v. Bredesen*, 130 S. Ct. 541, 542-43 (2009) (Stevens, J., statement respecting denial of certiorari); *Thompson v. McNeil*, 129 S. Ct. 1299, 1299-1300 (2009) (Stevens, J., statement respecting denial of certiorari); *Bey v. Bagley*, 129 S. Ct. 621 (2008) (Stevens, J., dissenting from denial of applications for stay of execution); *Green v. Johnson*, 128 S. Ct. 2527 (2008) (Stevens, J., dissenting from application of stay of execution); *Kelly v. California*, 129 S. Ct. 564 (2008) (Stevens, J., statement respecting denials of certiorari). It has never been Justice Stevens's practice to dissent from the denial of certiorari; he has expressed concern that doing so would give unwarranted significance to those writings. See, e.g., *Singleton v. Comm'r*, 439 U.S. 940, 944-45 (1978) (Stevens, J., opinion respecting denial of certiorari).

<sup>34</sup> Adam Liptak, *Justices Allow Execution, with Sotomayor Opposed*, N.Y. TIMES, Aug. 19, 2009, at A13 (observing that Sotomayor's appointment did not alter “the ideological fault line at the court”).

<sup>35</sup> Amsterdam, *supra* note 15, at 48.

<sup>36</sup> Liebman & Marshall, *supra* note 1, at 1673.

<sup>37</sup> See *infra* Part I.

III is a snapshot of the administration of capital punishment post-*Baze*. Justice Stevens was convinced that the decision would “generate debate not only about the constitutionality of the three-drug protocol . . . but also about the justification for the death penalty itself.”<sup>38</sup> And he aimed to promote that conversation beyond the courtroom.<sup>39</sup> Since *Baze* was issued, events in the judicial and political arenas have reflected the wisdom and influence of Justice Stevens’s concurring opinion; his expectations have proved largely correct.<sup>40</sup>

#### I. FROM THERE TO HERE: 2006 TO 2008

Liebman and Marshall opened their article not with Justice Stevens’s participation in the *Gregg* trilogy and his embrace of the “narrowing” approach, but with his speech to the American Bar Association in 2005, at the Thurgood Marshall Awards Dinner.<sup>41</sup> There, Justice Stevens offered a critique of capital punishment that was based upon the “features of death penalty litigation that create special risks of unfairness.”<sup>42</sup> Arguably, his reservations about capital punishment suggested that Justice Stevens would, in some manner, some day, come to the same conclusion that Justice Blackmun reached in *Callins v. Collins*, where he wrote: “From this day forward, I no longer shall tinker with the machinery of death.”<sup>43</sup>

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<sup>38</sup> *Baze v. Rees*, 128 S. Ct. 1520, 1548-49 (2008) (Stevens, J., concurring in judgment) (calling upon “the Court and legislatures to reexamine” continued imposition of capital punishment).

<sup>39</sup> See *infra* Part III.

<sup>40</sup> See *infra* Parts II-III.

<sup>41</sup> Justice John Paul Stevens, Address to the American Bar Association, Thurgood Marshall Awards Dinner (Aug. 6, 2005), [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_08-06-05.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_08-06-05.html) [hereinafter Stevens, 2005 ABA Address].

<sup>42</sup> *Id.* Justice Stevens catalogued the “profoundly significant” revelations “that a substantial number of death sentences have been imposed erroneously,” the “significant number of defendants in capital cases” who have been denied constitutionally adequate trial counsel, the process of death qualification of jurors, which produces a guilt-prone jury and “creates a risk that a fair cross-section of the community will not be represented on the jury,” and “[t]wo aspects of the sentencing process [that] tip the scales in favor of death” — judicial elections and victim impact evidence. See John Flynn Rooney, *Stevens Voices Doubts About Death Penalty*, CHI. DAILY L. BULL., Aug. 8, 2005, at 3.

<sup>43</sup> Justice Blackmun gave two principle reasons for concluding that the death penalty “as currently administered, is unconstitutional”: the Court’s inability to “reconcile the Eighth Amendment’s competing constitutional commands” for both consistency and individualized sentencing, and the absence of “meaningful [federal judicial] oversight” over state courts. *Callins v. Collins*, 510 U.S. 1141, 1158-59 (1994).

I suggest that there are several reasons, aside from the folly of prognostication, why Liebman and Marshall did not make this prediction. First, by 2005, Justice Stevens's personal doubts about capital punishment were long-standing and well known.<sup>44</sup> Almost a decade earlier, he told an ABA audience that "the special risk of error" inherent in capital cases, the "disturbing number" of executions of innocent persons, and the "extraordinary burden" on the criminal justice system called into question whether the penalty's asserted deterrent or retributive purpose warranted its public support.<sup>45</sup> In his 2005 speech to the ABA, Justice Stevens did not suggest by any measure that he was prepared to decide that capital punishment violated the Eighth Amendment. He included recollections of Justice Marshall, whose "rejection of the death penalty rested on principles that would be controlling even if error never infected the criminal process,"<sup>46</sup> which Stevens distinguished from his own reservations about the institution.<sup>47</sup> Second, Justice Stevens never hesitated to dissent based upon "the value he places on transparency in judicial decision making."<sup>48</sup> For more than twenty years before *Baze*, he had been a frequent and vigorous dissenter in death penalty opinions, including in cases following Justice Blackmun's 1994 dissent from the denial of certiorari in *Callins*.<sup>49</sup> Indeed, Justice Stevens's dissents were often precipitated by the same disputes that were central to Justice Blackmun's repudiation of capital punishment in *Callins*: the intractable infection of racial bias,<sup>50</sup> the Court's withdrawal from

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<sup>44</sup> See Amann, *Human Rights Judge*, *supra* note 17, at 1582-83, 1599 (discussing "seeds of doubt" in Justice Stevens's views about capital punishment, based upon his military experience in World War II); Stevens, Orlando ABA Address, *supra* note 17, at 31 ("I have pondered, but have never been able to explain, why our country must assume [the] appalling risk [of executing an innocent person]."); Abdou M. Pallasch, *High Court Justice: U.S. Would Be Better off Without Death Penalty*, CHI. SUN TIMES, May 12, 2004, at 12 (quoted in Liebman & Marshall, *supra* note 1, at 1674-75, 1675 n.284).

<sup>45</sup> Stevens, Orlando ABA Address, *supra* note 17, at 31.

<sup>46</sup> Stevens, 2005 ABA Address, *supra* note 41.

<sup>47</sup> *Id.*

<sup>48</sup> See Amann, *Human Rights Judge*, *supra* note 17, at 1575 (quoting John Paul Stevens, *Foreword to KENNETH A. MANASTER, ILLINOIS JUSTICE*, at xii (2001)) ("If there is disagreement within an appellate court about how a case should be resolved, I firmly believe that the law will be best served by an open disclosure of that fact, not only to the litigants and their lawyers, but to the public as well."); Jeffrey Rosen, *The Dissenter*, N.Y. TIMES MAG., Sept. 23, 2007, § 6, at 50 (stating that since his appointment, Justice Stevens "has written more dissenting and separate concurring opinions than any of his colleagues").

<sup>49</sup> See Liebman & Marshall, *supra* note 1, at 1632 n.116.

<sup>50</sup> *Callins v. Collins*, 510 U.S. 1141, 1153-55 (1994) (Blackmun, J., dissenting);

efforts to reconcile the “constitutional requirements of consistency and fairness,”<sup>51</sup> the “now limited ability of federal courts to remedy constitutional errors,”<sup>52</sup> and the risk of irrevocable mistakes in death penalty cases.<sup>53</sup> But in 2006, Liebman and Marshall saw the diminishing use of the death penalty in many jurisdictions as an opportunity for the Court “to follow the pragmatic incrementalism” of Justice Stevens, “and, for now, at least, to narrow without abolishing the death penalty.”<sup>54</sup> At that juncture, their thesis was sound: Justice Stevens had not been inching his way towards Justice Blackmun’s position.<sup>55</sup>

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Payne v. Tennessee, 501 U.S. 808, 866 (1991) (Stevens, J., dissenting), joined by Blackmun, J.; see, e.g., Liebman & Marshall, *supra* note 1, at 1646 (discussing relationship between Justice Stevens’s *McCleskey* dissent and his “less-is-better approach to constitutional capital sentencing”).

<sup>51</sup> *Callins*, 510 U.S. at 1156 (Blackmun, J., dissenting). See generally Liebman & Marshall, *supra* note 1, at 1630-48 (tracing the ascendance of Justice White’s “numerousness” approach).

<sup>52</sup> *Callins*, 510 U.S. at 1146 & n.2, 1157-59 (Blackmun, J., dissenting) (discussing nature and extent of Court’s “unprecedented and unwarranted barriers” to federal judicial review). Justice Stevens’s opposition to “excessive proceduralism” was not asserted as early as that of Justices Marshall, Brennan, and Blackmun, but grew more pointed over time, particularly after the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified at scattered sections of 18, 21, and 28 U.S.C.). See, e.g., *Uttecht v. Brown*, 551 U.S. 1, 35-36 (2007) (Stevens, J., dissenting); *Shriro v. Landrigan*, 550 U.S. 465, 499-500 (2007) (Stevens, J., dissenting); *Brecht v. Abrahamson*, 507 U.S. 619, 640-41 (1993) (Stevens, J., concurring); *Graham v. Collins*, 506 U.S. 461, 500-04 (1993) (Stevens, J., dissenting); *Coleman v. Thompson*, 501 U.S. 722, 758 (1991) (Blackmun, J., dissenting, joined by Marshall & Stevens, JJ.); *Teague v. Lane*, 489 U.S. 288, 318 (1989) (Stevens, J., concurring in part and in judgment); *Murray v. Carrier*, 477 U.S. 478, 497 (1986) (Stevens, J., concurring in judgment).

<sup>53</sup> *Callins*, 510 U.S. at 1158-59 (Blackmun, J., dissenting) (quoting his dissent in *Herrera v. Collins*, 506 U.S. 390, 431 n.1, 446 (1993), connecting Court’s “obvious eagerness to do away with any restriction on the States’ power to execute whomever and however they please” and the fact that “innocent people have been executed”). Justice Stevens joined Parts I-IV of Blackmun’s dissent in *Herrera*. See *Herrera v. Collins*, 506 U.S. 390, 430-46 (1993). He has expressed this reservation about capital punishment in public remarks for well over a decade. See, e.g., Stevens, Orlando ABA Address, *supra* note 17, at 31. The issue was “decisive” in *Baze v. Rees*, 128 S. Ct. 1520, 1551 (2008) (Stevens, J., concurring in judgment), and, most recently, in *In re Davis*, 130 S. Ct. 1, 1 (2009) (Stevens, J., concurring, joined by Ginsburg & Breyer, JJ.) (granting capital habeas petition and transferring case to district court for hearing and determination of actual innocence).

<sup>54</sup> Liebman & Marshall, *supra* note 1, at 1611-12.

<sup>55</sup> *Id.* at 1608. In the authors’ view, Justice Stevens’s “nuanced position on the death penalty” had “triumph[ed] . . . on the ground” — in terms of public opinion and policy — even as it had been rejected by a majority of the Court. *Id.*

A final, perhaps overarching, reason that Justice Stevens's announcement in *Baze* was unexpected: in 1994, he became the Senior Associate Justice, which gave him, along with the Chief Justice, a role in assigning opinions.<sup>56</sup> The strategic considerations that figure into the Court's decisionmaking process are not a feature of the Liebman-Marshall analysis. In the wake of *Baze*, however, it is worthwhile to take into account the observations of those who are tracking Justice Stevens's active engagement in the Court's docket, particularly his authority to designate authors for majority and dissenting opinions and his stated preference to "assign majorities."<sup>57</sup> In the view of one commentator: "It is safe to conclude that Justice Stevens is tinkering with the balance of power on the Court through strategic concurring opinions."<sup>58</sup> Given Justice Kennedy's pivotal seat on the Court, it is also reasonable to ask whether Justice Stevens would lose intellectual suasion if, based upon his conclusion in *Baze*, he were to adopt the policy of issuing a separate dissenting opinion in all death penalty cases. A hint at the answer to this question may be found in *Wood v. Allen*, in which Justice Kennedy, alone, joined Justice Stevens's dissent from the opinion, which, applying the Antiterrorism and Effective Death Penalty Act, upheld the state court's finding that trial counsel's failure to investigate evidence of his client's mental deficiencies was a "strategic decision."<sup>59</sup>

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<sup>56</sup> See Rosen, *supra* note 48, § 6, at 51 ("[Justice Stevens] is second in authority only to the chief justice. When the chief justice is in the majority and Stevens is in the minority, Stevens decides who will write the principal dissent; when the roles are reversed, Stevens assigns the majority opinion."). As a result of Chief Justice Rehnquist's illness for nearly a year, Justice Stevens effectively served as Acting Chief Justice. See Timothy M. Phelps, *Rehnquist Still Too Ill to Preside*, SOUTH FLORIDA SUN - SENTINEL [BROWARD METRO EDITION], Nov. 2, 2004, at 3A; Shankar Vedantam & Charles Lane, *Rehnquist's Illness Forces Absence: Chief Justice's Treatment Suggests Thyroid Cancer at Its Most Serious*, WASH. POST, Nov. 2, 2004, at A01; Robert Longley, *Rehnquist's Death Will Not Delay Supreme Court: Law Requires Only Six Justices for Court to Act*, ABOUT.COM, Sept. 4, 2005, <http://usgovinfo.about.com/od/supremecourtjustices/a/scotustogo.htm>.

<sup>57</sup> See Rosen, *supra* note 48, at 51-52 ("[I]n close cases, Justice Stevens has wielded this power strategically, assiduously courting Kennedy to maximize the chances of winning five votes."); see also Jeff Bleich et al., *Justice John Paul Stevens: A Maverick, Liberal, Libertarian, Conservative Statesman on the Court*, 67 OR. ST. B. BULL. 26, 30 (2007) ("[D]espite his habit of striking out on his own, he has demonstrated great skill at assembling a majority in close cases, [which may be attributable to] his apparent willingness to give the opinion-writing responsibility to a 'swing' vote in close cases.").

<sup>58</sup> Marceau, *supra* note 2, at 200.

<sup>59</sup> *Wood v. Allen*, No. 08-9156, 2010 WL 173369, at \*6 (Jan. 20, 2010) (applying 18 U.S.C. § 2254 (d)(2) and holding that state court finding that trial counsel made

A. *The View in Early 2006*

Liebman and Marshall detailed how Justice Stevens embraced the “less-is-better” conception of capital sentencing — the narrowing solution — that Justice Stewart had formulated in *Furman*.<sup>60</sup> The result was the ascendance of “muscular mitigation” until the early 1980s, when a majority of the Court aligned decisively with Justice White’s view and “veered sharply in the more-is-better direction.”<sup>61</sup> The opinions achieved this objective, *inter alia*: by allowing jurors both to consider non-statutory aggravating factors<sup>62</sup> and to rely on statutory aggravating factors that duplicated the elements of the capital crime already established at the guilt phase;<sup>63</sup> by turning the narrowing requirement on its head to achieve the result of amplifying jurors’ discretion to vote for death;<sup>64</sup> by either expanding the list of aggravating circumstances or the definition of those factors, e.g., permitting the introduction of “victim impact” evidence;<sup>65</sup> and by sanctioning mandatory death sentences “unless the offender could prove that mitigation outweighed aggravation.”<sup>66</sup> Twenty-five years after *Furman*, the result was the defection from a capital punishment system that inclined toward the presumption of life to one that “enshrined the opposite principle, favoring a presumption of death.”<sup>67</sup>

Liebman and Marshall determined that, by early 2006, the capital punishment regime looked remarkably the same as it had in 1972.<sup>68</sup> First, there were no rational differences between similarly situated

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“strategic decision” not to investigate potentially mitigating evidence was “not an unreasonable determination of the facts”; *id.* at \*9 (Stevens, J., dissenting, joined by Kennedy, J.) (faulting majority for failure to determine whether record can “reasonably support finding that counsel’s decision was a strategic one” and arguing that it does not).

<sup>60</sup> Liebman & Marshall, *supra* note 1, at 1610.

<sup>61</sup> *Id.* at 1632.

<sup>62</sup> *Id.* at 1633-34 (discussing *Zant v. Stephens*, 462 U.S. 862, 890-91 (1983)).

<sup>63</sup> *Id.* at 1635 (discussing *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988)).

<sup>64</sup> *Id.* at 1636-38.

<sup>65</sup> *Id.* at 1638 n.139 (citing *Payne v. Tennessee*, 510 U.S. 808, 830 (1991) (overruling *Booth v. Maryland*, 482 U.S. 496 (1987))).

<sup>66</sup> *Id.* at 1639 n.146 (citing *Walton v. Arizona*, 497 U.S. 639, 655-56 (1990), *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584 (2002), and *Blystone v. Pennsylvania*, 494 U.S. 299, 308-09 (1990)) (noting Court’s recent grant of certiorari in *Kansas v. Marsh*, 544 U.S. 1060 (2005) (mem.) (ordering briefing on whether Court has jurisdiction to review state court judgment and, if so, whether judgment was “adequately supported” by independent state grounds)); *see infra* Part II (discussing *Kansas v. Marsh*, 548 U.S. 163 (2006)).

<sup>67</sup> Liebman & Marshall, *supra* note 1, at 1639-41.

<sup>68</sup> *Id.* at 1647.



defendants who were awaiting execution and those serving a term of life imprisonment without the possibility of parole.<sup>69</sup> Second, race influenced outcomes in cases across the nation.<sup>70</sup> Critically, however, the pattern of discrimination and arbitrariness found unconstitutional in *Furman* was now “constitutionally required.”<sup>71</sup> Finally, Liebman and Marshall recounted the “events on the ground,”<sup>72</sup> specifically: the decline in public support based in large measure on the growing number of exonerations in capital and non-capital cases; a public drive for reform manifested in legislation that ended the death penalty for juveniles and people with mental retardation; the proliferation of state-based studies; the uptick in bills providing for a moratorium or for abolition; the 2003 commutation by then-Governor George Ryan of all 167 death sentences in Illinois; the New York legislature’s decision not to reinstate the death penalty after a state appellate court invalidated the capital punishment statute; and the New Jersey legislature’s declaration of a moratorium on executions in 2006.<sup>73</sup>

In response to those developments, Liebman and Marshall suggested, hopefully if not optimistically, that the Court might be “resurrecting the Stewart-Stevens brand of narrowing.”<sup>74</sup> They cited as examples the Court’s decisions both to bar the execution of persons who have mental retardation<sup>75</sup> and of persons who committed their crimes as juveniles,<sup>76</sup> and to reverse three death judgments based upon counsel’s ineffectiveness in failing to present mitigating evidence that

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<sup>69</sup> *Id.* at 1647 n.178.

<sup>70</sup> *Id.* at 1647 n.179.

<sup>71</sup> *Id.* at 1647-48 (noting that both race of victim and defendant produced “racially skewed death-sentencing patterns”).

<sup>72</sup> *Id.* at 1668. The authors describe how legislative activity, prosecutorial charging rates, jury verdicts, and public opinion all pointed in the “narrowing” direction, albeit not uniformly in the sense that Justices Stewart and Stevens defined it. *Id.* at 1658-65.

<sup>73</sup> *Id.* at 1650-60. In December 2007, Governor Jon Corzine signed into law the New Jersey Legislature’s bill abolishing the death penalty, making that state the first to end capital punishment since Gregg. See George W. Conk, *Herald of Change? New Jersey’s Repeal of the Death Penalty*, 33 SETON HALL LEGIS. J. 21, 21-23 (2008).

<sup>74</sup> Liebman & Marshall, *supra* note 1, at 1668.

<sup>75</sup> *Id.* at 1665-66; see *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). The American Association on Intellectual and Developmental Disabilities now uses the term “intellectual disability,” instead of “mental retardation,” the term employed in *Atkins*, which I likewise use in this Article. See Robert L. Schalock et al., *The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability*, 45 INTELL. & DEVELOPMENTAL DISABILITIES 116, 120 (2007) (noting that although medical profession has used different nomenclature over years, “three essential elements . . . [of diagnosis] have not changed substantially”).

<sup>76</sup> Liebman & Marshall, *supra* note 1, at 1666; see *Roper v. Simmons*, 543 U.S. 551, 508 (2005).

likely would have altered the sentencing outcomes.<sup>77</sup> Liebman and Marshall acknowledged, however, that much depended on the then-imminent change in the composition of the Court.<sup>78</sup>

For most if not all of Justice Stevens's tenure on the Court, it could be said that five votes could not be found to strike down the death penalty. As long as Justice Stevens adhered to the view that narrowing both was a constitutionally acceptable solution to arbitrariness and was achievable, he could be expected to stay his course through more than twenty years of "more-is-better," until the winds from ground level moved the Court back in the direction that he and Justice Stewart had charted.<sup>79</sup> The issue then is why, in *Baze*, Justice Stevens resolved that capital punishment is unconstitutional. Was he persuaded that the Court, with the additions of Chief Justice John G. Roberts, Jr., in 2005 and Justice Samuel A. Alito, Jr. in 2006, would not return to the narrowing approach?<sup>80</sup> Or had he come to believe that even narrowing could not save the institution from the Eighth Amendment's Cruel and Unusual Punishment Clause? These questions are interrelated, and I propose to answer both in the affirmative. Justice Stevens's concurring

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<sup>77</sup> Liebman & Marshall, *supra* note 1, at 1666-67; see *Rompilla v. Beard*, 545 U.S. 374, 393 (2005); *Wiggins v. Smith*, 539 U.S. 510, 535-36 (2003); *Williams v. Taylor*, 529 U.S. 362, 398-99 (2000).

<sup>78</sup> Liebman & Marshall, *supra* note 1, at 1667-68.

<sup>79</sup> *Id.* at 1611.

<sup>80</sup> John G. Roberts, Jr. was sworn in as Chief Justice of the United States on September 29, 2005. See [Supremecourtus.gov](http://www.supremecourtus.gov), Members of the Supreme Court of the United States, <http://www.supremecourtus.gov/about/members.pdf> (last visited Feb. 8, 2010). The following day, Justice Stevens spoke at a Fordham University Law School symposium devoted to his jurisprudence. See John Paul Stevens, *Symposium: The Jurisprudence of Justice Stevens: Learning on the Job*, 74 *FORDHAM L. REV.* 1561 (2006) [hereinafter Stevens, *Learning on the Job*]. His remarks about the ongoing nature of the "judicial learning process" were collegial, but artfully so. *Id.* at 1563. Justice Stevens made no mention of the Court's opinions in death penalty or abortion rights cases. The Justice described how he had come to understand that the breadth of constitutional rights are not always "defined in constitutional text," his appreciation of the unreliability of "pre-argument predictions" if a judge is willing to "analyze the cases with an open mind and with respect for the law as it exists at the time of the decision," and how he relished "learning on the bench" as one of "the most important and rewarding aspects" of judicial tenure. *Id.* at 1561, 1563, 1567; see Jeffrey Toobin, *No More Mr. Nice Guy: The Supreme Court's Stealth Hard-Liner*, *NEW YORKER*, May 25, 2009, at 42, 43, available at [http://www.newyorker.com/reporting/2009/05/25/090525fa\\_fact\\_toobin](http://www.newyorker.com/reporting/2009/05/25/090525fa_fact_toobin) (describing Chief Justice Roberts as "doctrinaire conservative" who "[i]n every major case since he became the nation's seventeenth Chief Justice . . . has sided with the prosecution over the defendant, the state over the condemned . . . [and] [e]ven more than Scalia . . . has served the interests, and reflected the values, of the contemporary Republican Party"). Justice Samuel A. Alito, Jr. joined the Court on January 31, 2006. See [Supremecourtus.gov](http://www.supremecourtus.gov), *supra* note 11.

opinion, however, was more than the sum of those two parts. And he did not neatly adopt the reasoning of any of his *Gregg* colleagues. Rather, his concurring opinion was uniquely a product of his evolution as a jurist.

### B. *Developments at the Court*

Between the publication of the Liebman-Marshall article and *Baze*, the Court issued nineteen opinions in death penalty cases.<sup>81</sup> Justice

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<sup>81</sup> This period encompasses the 2005 October Term (beginning with opinions issued in 2006 not discussed in the Liebman-Marshall article), the 2006 October Term (October 2, 2006 through September 30, 2007), and the 2007 October Term (opinions issued prior to *Baze*, which was decided April 16, 2008). *Snyder v. Louisiana*, 128 S. Ct. 1203, 1206 (2008). (reversing — in seven-Justice majority opinion authored by Justice Alito and joined by Justice Stevens — Snyder's conviction and death sentence based upon violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), and applying Court's decision in *Miller-El v. Dretke*, 545 U.S. 231 (2005)); *Medellín v. Texas*, 128 S. Ct. 1346, 1352 (2008) (reviewing decision by International Court Justice ("ICJ") that United States had violated provision of Vienna Convention on Consular Relations by failing to inform Medellín and other named Mexican nationals of their Convention rights and Executive Order that Texas review convictions and death sentences were not directly enforceable as domestic law in state court); *id.* at 1374-75. Justice Stevens concurred in the judgment, but urged that "Texas would do well" to respect ICJ judgment that United States had violated provision of Vienna Convention on Consular Relations and Executive Order by conducting review; after his second state application for habeas relief was dismissed, Medellín filed a petition for writ of certiorari and application for stay, which the Court denied. *See Medellín v. Texas* 129 S. Ct. 360, 362 (2008) (per curiam) (Stevens, J., dissenting from denial of stay application) ("Texas retain[s] the authority — and, indeed, the duty — as a matter of international law to remedy the potentially significant breach of the United States' treaty obligations."); *Arave v. Hoffman*, 552 U.S. 117, 118 (2008) (per curiam) (granting petitioner's motion to vacate Ninth Circuit's grant of relief based upon finding of ineffective assistance of counsel and remanding to district court to dismiss that claim with prejudice); *Allen v. Siebert*, 552 U.S. 3, 4-5 (2007) (per curiam) (holding death-sentenced inmate's untimely state post-conviction was not "properly filed" under 18 U.S.C. § 2244(d)(2) — tolling provisions of AEDPA — despite fact that state rule operates as affirmative defense, rather than statute of limitations); *id.* at 5 (Stevens, J., dissenting) (arguing that Alabama's timeliness requirement for filing capital post-conviction petition is distinguishable from time limit at issue in *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), and *Pace* should not be read to hold that federal habeas petition was not "properly filed" under 28 U.S.C. § 2244(d)(2)); *Panetti v. Quarterman*, 551 U.S. 930, 935 (2007) (holding in 5-4 majority opinion by Justice Kennedy — joined by Justice Stevens — that state court proceedings were inadequate to prevent execution of prisoner who is insane and to enforce principles of *Ford v. Wainwright*, 477 U.S. 399 (1986)); *Uttecht v. Brown*, 551 U.S. 1, 10 (2007) (holding Ninth Circuit "failed to respect the limited role of federal habeas relief" by declining to adhere to provisions of 18 U.S.C. § 2254(d)(1)-(2), which require deference to state court judgment); *id.* at 43 (Stevens, J., dissenting) (noting that majority "fundamentally redefined . . . the meaning of 'substantially impaired' " as basis of for-cause challenge

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under *Wainwright v. Witt*, 469 U.S. 412 (1985), and, in so doing, encouraged trial courts to include only those jurors “willing to impose a death sentence in every situation in which a defendant is eligible for that sanction”); *Roper v. Weaver*, 550 U.S. 598, 601-02 (2007) (per curiam) (declining to decide under “this unusual procedural history,” whether AEDPA standard is “simply inapplicable to this case,” and thereby ensuring that “three virtually identically situated” death-sentenced individuals would not be “treated in a needlessly disparate manner”); *Schriro v. Landrigan*, 550 U.S. 465, 481 (2007) (applying AEDPA and reversing Ninth Circuit’s grant of evidentiary hearing because state court’s determination of facts was not unreasonable under 18 U.S.C. § 2254(d)(2), and “the mitigating evidence [Landrigan] seeks to introduce would not have changed the result”); *id.* at 482, 499 (Stevens, J., dissenting) (arguing that petitioner, at minimum, was entitled to evidentiary hearing to “explore prejudicial impact of his counsel’s inadequate representation” and pointing out that “Court’s decision can only be explained by its increasingly familiar effort to guard the floodgates of litigation,” notwithstanding fact that evidentiary hearings have been few and no burden to federal courts); *Smith v. Texas (Smith II)*, 550 U.S. 297, 315-16 (2007) (Kennedy, J., writing for majority, joined by Stevens, J.) (ruling that Texas court mischaracterized holding in *Smith v. Texas (Smith I)*, 543 U.S. 37 (2004), and therefore petitioner was entitled to relief under *Penry v. Lynaugh (Penry I)*, 492 U.S. 302 (1989) and *Penry v. Johnson (Penry II)*, 532 U.S. 782 (2001)); *Brewer v. Quarterman*, 550 U.S. 286, 289 (2007) (Stevens, J., writing for majority) (holding that statutory instructions prevented petitioner’s sentencing jury “from giving meaningful consideration to mitigating factors,” which has been required by Court, at least, since its opinion in *Penry I*); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 237 (2007) (same); *Lawrence v. Florida*, 549 U.S. 327, 338 (2007) (Ginsburg, J., dissenting, joined by Stevens, J.) (disagreeing with holding that if state court has entered final judgment on post-conviction petition and petition for certiorari has been filed in Supreme Court, state application is no longer “pending” within meaning of 18 U.S.C. § 2244(d)(2) of AEDPA and AEDPA’s one-year statute of limitations for filing federal habeas petition continues to run during this period); *Ayers v. Belmontes*, 549 U.S. 7, 26-27 (2006) (Stevens, J., dissenting) (disagreeing with majority’s reversal of grant of penalty phase relief because statute “sent the unmistakable message that California juries could properly give no mitigating weight to evidence that did not extenuate the severity of the crime,” contrary to requirements of *Lockett v. Ohio*, 438 U.S. 586 (1978)); *see also* *Wong v. Belmontes*, 130 S. Ct. 383, 387-88 (2009) (per curiam). On remand following the Court’s decision in *Belmontes*, the Ninth Circuit granted habeas relief based upon its finding that Belmontes’s counsel had performed deficiently. The Supreme Court granted the state’s petition for certiorari and reversed based upon its conclusion that Belmontes had not established prejudice. *Id.* at 390-91. Justice Stevens concurred on the issue before the Court, but restated his dissenting view in *Belmontes*, 549 U.S. at 39; *Kansas v. Marsh*, 548 U.S. 163, 200-01 (2006) (Stevens, J., dissenting) (arguing that judicial restraint should have been exercised to allow state’s highest court to be “final decisionmaker in a case of this kind” and joining Justice Souter’s dissenting opinion that Kansas statute violates the Eighth Amendment because it requires death verdict when jury finds aggravating evidence and mitigating evidence are in equipoise); *Brown v. Sanders*, 546 U.S. 212, 228 (2006) (Stevens, J., dissenting) (disagreeing with majority’s unwarranted modification of “settled law” used to determine which states are “weighing” and “nonweighing”, and with its failure to take into account “the dual role played by aggravating circumstances in California’s death penalty regime”); *Hill v. McDonough*, 547 U.S. 573, 576 (2006) (holding unanimously that claim challenging Florida’s three-drug lethal injection

Stevens dissented on seven occasions (six times writing separately and once joining in Justice Ginsburg's dissenting opinion).<sup>82</sup> He was in the majority eleven times, authoring two principal opinions and once concurring in the Court's judgment.<sup>83</sup>

To understand the influence of these decisions on Justice Stevens's concurring opinion in *Baze*, however, one should remove *Arave v. Hoffman*,<sup>84</sup> *Snyder v. Louisiana*,<sup>85</sup> *Holmes v. South Carolina*,<sup>86</sup> and *Hill v. McDonough*<sup>87</sup> from the count. In *Hoffman*, there was no controversy. A unanimous court granted Hoffman's motion to withdraw his culpability phase claim and remanded the case for resentencing based upon the earlier grant of penalty relief by the U.S. Court of Appeals for the Ninth Circuit.<sup>88</sup> *Snyder* and *Holmes*, although they arose from and ultimately resulted in the reversal of the petitioners' convictions and death sentences, implicated neither the narrowing approach to capital jurisprudence nor the procedural rules affecting access to federal habeas corpus review.<sup>89</sup> *Snyder* is the Court's most recent application of *Batson v. Kentucky*,<sup>90</sup> and *Holmes* clarified that the constitutional

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protocol was properly brought under 42 U.S.C. § 1983 rather than by petition for habeas relief, as it did not challenge the sentence itself); *House v. Bell*, 547 U.S. 518, 521 (2006) (finding that petitioner met *Schlup* standard for obtaining review of his actual innocence claim in his first federal habeas petition despite procedural default); *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006) (reaching unanimous opinion invalidating South Carolina's limitation on evidence of third party culpability as violation of defendant's constitutional right to " 'a meaningful opportunity to present a complete defense' ") (internal citation omitted); *Oregon v. Guzek*, 546 U.S. 517, 523 (2006) (upholding, against Eighth and Fourteenth Amendment challenges, Oregon's rule prohibiting capital defendant from introducing alibi evidence at his resentencing hearing that was inconsistent with his conviction and had not been introduced at trial).

<sup>82</sup> *Allen*, 552 U.S. at 8; *Uttecht*, 551 U.S. at 35; *Landrigan*, 550 U.S. at 482; *Lawrence*, 549 U.S. at 337; *Belmontes*, 549 U.S. at 25; *Marsh*, 548 U.S. at 199; *Sanders*, 546 U.S. at 225.

<sup>83</sup> *Snyder*, 128 S. Ct. at 1206; *Medellin*, 128 S. Ct. at 1352; *Panetti*, 551 U.S. at 934; *Roper v. Simmons*, 550 U.S. 551, 554 (2005); *Smith*, 550 U.S. at 299; *Brewer*, 550 U.S. at 288; *Abdul-Kabir*, 550 U.S. at 236; *Hill*, 547 U.S. at 575; *House*, 547 U.S. at 520; *Guzek*, 546 U.S. at 518; *Holmes*, 547 U.S. at 320.

<sup>84</sup> 552 U.S. 117.

<sup>85</sup> 128 S. Ct. 1203.

<sup>86</sup> 547 U.S. 319.

<sup>87</sup> 547 U.S. 573.

<sup>88</sup> *Hoffman*, 552 U.S. at 118. The Ninth Circuit had granted sentencing relief based upon trial counsel's deficient performance during plea bargaining and at the sentencing phase. The prosecution sought and obtained a certiorari grant on the latter claim, which Hoffman then moved to withdraw. *Id.*

<sup>89</sup> *Snyder*, 128 S. Ct. at 1206; *Holmes*, 547 U.S. at 330-31.

<sup>90</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986). *Snyder* is a 7-2 opinion authored by

right to present a defense encompasses the right to present evidence of third-party culpability when that evidence has probative value in deciding the key issues in the case.<sup>91</sup> Both opinions thus apply equally to capital and noncapital defendants. The Court's unanimous decision in *Hill* was the second of two lethal injection opinions issued before *Baze*, but it did not address the validity of the inmate's conviction or death sentence.<sup>92</sup>

Of the remaining fifteen death penalty decisions, Justice Stevens was in the majority seven times.<sup>93</sup> As had been widely predicted after Justice Sandra Day O'Connor's retirement and Justice Alito's appointment, Justice Kennedy became the only available fifth vote for

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Justice Alito. The Court reversed the conviction and sentence based upon a single peremptory challenge, which was "motivated in substantial part on discriminatory intent." *Snyder*, 128 S. Ct. at 1212. The majority opinion made but two references to the capital context, and only one to the fact that the prosecutor excluded every African American from the jury. *Id.* at 1206-07. The absence of a concurring opinion by Justice Stevens in a case in which one would have expected to find a discussion of the racially incendiary conduct of the prosecutor that gave rise to the *Batson* claim leads me to believe that Justice Stevens had a hand in achieving the favorable outcome for *Snyder*, the size of the majority, and the designation of Justice Alito as the author of the majority opinion. See, e.g., Brief for the Constitution Project as Amicus Curiae in Support of Petitioner, *Snyder v. Louisiana*, 128 S. Ct. 1203 (2008) (No. 06-10119), 2007 WL 2605446, at \*5 ("This brief emphasizes the unusual, unethical, and unconstitutional nature of the prosecutor's conduct in this case, beginning with his comments to the media comparing Mr. Snyder to O.J. Simpson, and culminating in his rebuttal penalty phase argument referencing the O.J. Simpson case and implicitly urging the jury not to let Mr. Snyder 'g[e]t away with it' like O.J. Simpson did . . . . This provocative and impermissible conduct was powerful evidence of the prosecutor's discriminatory intent to use his peremptory challenges to purge Mr. Snyder's capital jury of all African Americans."); Diane Marie Amann, *What Snyder Did Not Say About Race*, CONVICTIONS, Mar. 19, 2008, <http://www.slate.com/blogs/blogs/convictions/archive/2008/03/19/what-em-snyder-em-did-not-say-about-race.aspx> (describing prosecutor's misconduct, which rose to level of *Batson* violation, in alluding to then-recent O.J. Simpson acquittal and suggesting that all-white jury should not let Snyder "get away with it").

<sup>91</sup> *Holmes*, 547 U.S. at 330-31 (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)).

<sup>92</sup> *Hill*, 547 U.S. at 580; see *Nelson v. Campbell*, 541 U.S. 637, 644-45 (2004) (finding that Eighth Amendment challenge to specific lethal injection procedure was properly brought under 42 U.S.C. § 1983, rather than by petition for writ of habeas corpus, where petitioner did not challenge lethal injection as method of execution or his death sentence).

<sup>93</sup> See *Panetti v. Quarterman*, 551 U.S. 930 (2007); *Roper v. Weaver*, 550 U.S. 598 (2007); *Smith v. Texas (Smith II)*, 550 U.S. 297 (2007); *Brewer v. Quarterman*, 550 U.S. 286 (2007); *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); *House v. Bell*, 547 U.S. 518 (2006); *Oregon v. Guzek*, 546 U.S. 517 (2006).

relief in closely divided capital punishment cases.<sup>94</sup> In the ten judgments handed down between Justice Alito's appointment and *Baze*, in which the Court divided 5-4, Justice Kennedy supplied the deciding vote.<sup>95</sup> Had Justice Kennedy not done so, Justice Stevens would have been in the majority in only one case, *Oregon v. Guzek*.<sup>96</sup> For example, in *Smith v. Texas (Smith II)*, *Brewer v. Quarterman*, and *Abdul-Kabir v. Quarterman*, Justice Kennedy joined Justices Stevens, Breyer, Souter and Ginsburg to hold the line against persistent defiance — by the Texas Court of Criminal Appeals and the Fifth Circuit — of the rule that jurors may not be limited in their consideration of or reliance on mitigating evidence in deciding the penalty verdict.<sup>97</sup> Chief Justice Roberts and Justice Alito sided with

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<sup>94</sup> See Goodwin Liu, *Life and Death and Samuel Alito*, L.A. TIMES, NOV. 27, 2005, at M-5 (reviewing ten capital punishment opinions Justice Alito had participated in as judge on Third Circuit). Professor Liu wrote:

Although O'Connor's approach to capital punishment has been solidly conservative, she has at times supplied a crucial vote in contentious cases in favor of greater care and fairness in the application of the death penalty. . . . Yet it is precisely in the most contentious cases that Alito has shown an unbroken pattern of excusing errors in capital proceedings and eroding norms of basic fairness.

*Id.*; see also Testimony of Professor Goodwin Liu Before the U.S. Senate Committee on the Judiciary on the Nomination of Judge Samuel A. Alito, Jr. to the U.S. Supreme Court, Jan. 10, 2006, available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=1725&writ\\_id=4902](http://judiciary.senate.gov/hearings/testimony.cfm?id=1725&writ_id=4902).

<sup>95</sup> In *Panetti*, *Smith II*, and *House*, Justice Kennedy authored the majority opinion, granting relief, and joined the majority in doing so in *Brewer* and *Abdul-Kabir*. In *Uttecht*, he wrote the majority opinion, reversing the lower court's decision in favor of the petitioner, and joined the majority in doing so in *Landrigan*, *Lawrence*, *Belmontes*, and *Marsh*. In each case, except *House*, the Court split 5-4. Justice Alito did not take part in *House*, and the split was 5-3.

<sup>96</sup> 546 U.S. 517.

<sup>97</sup> *Smith II*, 550 U.S. at 312 (“The special issues through which Smith's jury sentenced him to death did not meet constitutional standards, as held in *Penry I*; and the nullification charge did not cure that error, as held in *Penry II*. This was confirmed in *Smith I*.”); *Brewer*, 550 U.S. at 293 (“[I]t may well be true that Brewer's mitigating evidence was less compelling than Penry's, but, contrary to the view of the [Texas Court of Criminal Appeals], that difference does not provide an acceptable justification for refusing to apply the reasoning in *Penry I* to this case.”); *Abdul-Kabir*, 550 U.S. at 260 (holding that Fifth Circuit's decision to affirm petitioner's death sentence was “unsupported by either the text or the reasoning of *Penry I*”). In *Penry I*, the Court upheld the death penalty for persons with mental retardation, concluding that “[s]o long as sentencers can consider and give effect to mitigating evidence of mental retardation in imposing sentence,” the defendant will receive the benefit of the “individualized determination” to which he is constitutionally entitled. *Penry v. Lynaugh (Penry I)*, 492 U.S. 302, 340 (1989). In *Penry II*, the Court found that the

Justices Scalia and Thomas, dissenting in all three cases.<sup>98</sup> *Panetti v. Quarterman*<sup>99</sup> was a 2007 decision in which the author, Justice Kennedy, again, provided the necessary fifth vote. The opinion clarified the Court's categorical exemption from execution of those who are insane by insisting that states may not "disregard evidence of psychological dysfunction," which may bear on whether the inmate has a "rational understanding" of why he is being put to death.<sup>100</sup> Chief Justice Roberts and Justices Alito, Scalia, and Thomas dissented.<sup>101</sup>

Ten of the fifteen cases entailed procedural obstacles. With one exception, whether they were in the majority or dissent in death penalty opinions, Chief Justice Roberts and Justice Alito confirmed that they share Justices Scalia's and Thomas's ambition to deploy provisions of the AEDPA to shield virtually all state court judgments from federal scrutiny.<sup>102</sup> In nine of the fifteen cases, Chief Justice

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jury instructions given at Penry's resentencing trial did not comply with *Penry I* such that "a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." *Penry v. Johnson (Penry II)*, 532 U.S. 782, 804 (2001) (quoting *Penry I*, 492 U.S. at 326). Between *Penry II* and the 2007-2008 Term, the Supreme Court twice held that the Texas Court of Criminal Appeals (CCA) and the Fifth Circuit had persisted in constraining jurors' ability to consider or give weight to mitigating factors. See *Smith I*, 543 U.S. 37, 44-45 (2004) (per curiam) (reviewing only decision by CCA); *Tennard v. Dreke*, 542 U.S. 274, 288-89 (2004) (reviewing decisions by CCA and Fifth Circuit).

<sup>98</sup> *Smith II*, 550 U.S. at 316 (Alito, J., dissenting, joined by Roberts, CJ., and Scalia & Thomas, JJ.); *Brewer*, 550 U.S. at 296 (Roberts, CJ., dissenting, joined by Scalia, Thomas & Alito, JJ.); *Abdul-Kabir*, 550 U.S. at 265 (Roberts, CJ., dissenting, joined by Scalia, Thomas & Alito, JJ.).

<sup>99</sup> 551 U.S. 930 (2007).

<sup>100</sup> *Id.* at 958, 959 ("A prisoner's awareness of the State's rationale for an execution is not the same as a rational understanding of it."); see also Liebman & Marshall, *supra* note 1, at 1641-43 (discussing rift between members of Court that emerged in 1988, over exemption of classes of offenders — persons with mental retardation and minors at time of their offenses — from reach of death penalty).

<sup>101</sup> *Panetti*, 551 U.S. at 963 (Thomas, J., dissenting, joined by Roberts, CJ., and Scalia & Alito, JJ.) (finding that petition should have been dismissed for failure to meet AEDPA's "statutory requirements for filing a 'second or successive' habeas application" (internal citation omitted)).

<sup>102</sup> In *Roper v. Weaver*, Chief Justice Roberts, while not in accord "with all the reasons given in the *per curiam*," concurred in the result, dismissing the writ of certiorari as improvidently granted. *Roper v. Weaver*, 550 U.S. 598, 602 (2007) (Roberts, CJ., concurring in result). Justice Alito joined with Justice Thomas in Justice Scalia's dissent, which would have decided the case under the provisions of the AEDPA and reversed the circuit court's grant of penalty relief based upon the state court's reasonable application of clearly established Supreme Court precedent. *Id.* at 602, 607 (Scalia, J., dissenting, joined by Thomas & Alito, JJ.); see *Baze v. Rees*, 128 S.



Roberts utilized either a procedural argument to reach an outcome unfavorable to the inmate or to dissent from a result granting merits relief.<sup>103</sup> Justice Alito did so eight times.<sup>104</sup> Justice Stevens championed

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Ct. 1520, 1542 (2008) (Alito, J., concurring) (describing capital litigation post-*Gregg* as “seemingly endless” and quoting Justice Stevens’s characterization of Congress’s intent in enacting AEDPA “to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases” (internal citation omitted)); *see also* *Allen v. Siebert*, 552 U.S. 3, 3 (2007) (presenting opinion in which Chief Justice Roberts and Justice Alito were in majority); *Uttecht v. Brown*, 551 U.S. 1, 3 (2007) (same); *Schriro v. Landrigan*, 550 U.S. 465, 467 (2007) (same); *Lawrence v. Florida*, 549 U.S. 327, 328 (2007) (same); *Panetti*, 551 U.S. at 963-64 (Thomas, J., dissenting, joined by Roberts, CJ., and Scalia & Alito, JJ.) (finding that petition should have been dismissed because it was second federal habeas application, which was not authorized by court of appeal as required by AEDPA, and did not satisfy either of AEDPA’s exceptions for successive petitions); *Smith II*, 550 U.S. at 316-18 (Alito, J., dissenting, joined by Roberts, CJ., and Scalia & Thomas, JJ.) (finding that petitioner’s failure to object to trial court’s constitutionally erroneous instruction permitted the state court to apply its “heightened standard of ‘egregious harm’”; state court’s determination that petitioner’s proof did not meet test is “an adequate and independent state-law ground” to deprive Court of jurisdiction to hear case (internal citation omitted)); *Brewer*, 550 U.S. at 296 (Roberts, CJ., dissenting, joined by Scalia, Thomas & Alito, JJ.) (“In today’s decisions, the Court trivializes AEDPA’s requirements and overturns decades-old sentences on the ground that they were contrary to clearly established federal law at the time — even though the same Justices who form the majority today were complaining at that time that *this* Court was changing that ‘clearly established’ law.” (internal citation omitted)); *Abdul-Kabir*, 550 U.S. at 280 (Roberts, CJ., dissenting, joined by Scalia, Thomas & Alito, JJ.) (same); *House*, 547 U.S. at 556, 571 (Roberts, CJ., concurring in judgment in part and dissenting in part, joined by Scalia & Thomas, JJ.) (concurring with majority that, assuming “freestanding innocence claim” exists, petitioner has not met “the higher threshold” for establishing such claim, but dissenting from majority’s conclusion that petitioner had met legal standard of *Schulp v. Delo*, 513 U.S. 298 (1995)); *see also* *Schulp v. Delo*, 513 U.S. 298 (1995). Justice Alito took no part in the opinion in *House*, 547 U.S. at 518.

<sup>103</sup> *See supra* note 102. Professor John Blume concluded that the effect of the AEDPA on the availability of federal habeas relief has been less catastrophic than originally predicted for two reasons. John Blume, *AEDPA: The “Hype” and the “Bite,”* 91 CORNELL L. REV. 259 (2006). First, for four decades prior to the passage of the AEDPA, the Court “had already significantly curtailed the writ habeas corpus.” *Id.* at 262. Thus, the Court’s “very narrow view of the great writ’s scope,” has been more responsible than Congress’s action in “limit[ing] a federal habeas court’s ability to disturb state court convictions.” *See id.* at 262, 266 (listing some of Rehnquist Court’s “cutbacks on habeas corpus”). Second, even the “conservative majority” believes that, congressional intervention notwithstanding, “it is primarily the Court’s responsibility to say how much habeas is enough”; at least as of 2006, the majority was not ready to wholly insulate state court decisions from federal review. *Id.* at 282. Professor Blume agreed, however, that one area where the AEDPA has taken a huge “bite” out of the writ results from its one-year statute of limitations. *See* 28 U.S.C. § 2244(d)(1) (2006). Blume, *supra*, at 292. Between 1999 and this writing, at least six men have been executed without federal habeas review because they did not file their petitions within the one-year limitations period. Those men are: Johnny Ray Johnson, executed Feb.

prisoners who increasingly found themselves shut out of the federal courts. He may have been at his most direct in *Schriro v. Landrigan*: “In the end, the Court’s decision can only be explained by the increasingly familiar effort to guard the floodgates of litigation.”<sup>105</sup> Justice Stevens concluded that the low number of evidentiary hearings held in federal habeas cases — 1.1 percent — “makes it abundantly clear that doing justice does not always cause the heavens to fall.”<sup>106</sup>

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12, 2009, see *Johnson v. Quarterman*, 483 F.3d 278 (5th Cir. 2007), *cert. denied*, *Johnson v. Quarterman*, 128 S. Ct. 709 (Dec. 3, 2007); Willie Marcel Shannon, executed Nov. 8, 2006, see *Shannon v. Dretke*, 177 Fed. App’x 431, 2006 WL 1160467 (5th Cir. Apr. 24, 2006), *cert. denied*, *Shannon v. Quarterman*, 549 U.S. 1027 (2006); Robert Lookingbill, executed Jan. 22, 2003, see *Lookingbill v. Cockrell*, 293 F.3d 256, 264 (5th Cir. 2002), *cert. denied*, *Lookingbill v. Cockrell*, 537 U.S. 116 (2003); Leonard Rojas, executed Dec. 4, 2002, see *Rojas v. Cockrell*, 44 Fed. App’x 652, 2002 WL 1396972 (5th Cir. June 7, 2002), *cert. denied*, *Rojas v. Cockrell*, 537 U.S. 1032 (2002); Spencer Goodman, executed Jan. 18, 2000, see *Goodman v. Johnson*, No. 99-20452 (5th Cir. Sept. 16, 1999); *cert. denied*, *Goodman v. Johnson*, 528 U.S. 1131 (2000); Andrew Cantu-Tzin, executed Feb. 16, 1999, see *Cantu-Tzin v. Johnson*, 162 F.3d 295, 300 (5th Cir. 1998), *cert. denied*, *Cantu-Tzin v. Johnson*, 525 U.S. 1091 (1999)). From Blume’s vantage point in 2006, the Court had yet to resolve “a number of significant [AEDPA] issues,” particularly relating to the interpretation of § 2254 (d) and (e), e.g., how “incorrect” does the state court have to be before its decision is “‘objectively unreasonable,’” and how little “process” must a petitioner receive in state post-conviction proceedings to escape the AEDPA’s highly deferential standard of review? *Id.* at 292-96 (internal citation omitted). The votes of Chief Justice Roberts and Justice Alito with the majorities in *Siebert*, *Uttecht*, *Landrigan*, and *Lawrence* answered some of these questions, all adversely to habeas petitioners. See *supra* note 81. This term, the Court has already decided one case relevant to these issues. See *Wood v. Allen*, No. 08-9156, 2010 WL 173369 (Jan. 20, 2010). In her first authored capital opinion as a member of the Court, Justice Sotomayor voted with the majority to uphold the Eleventh Circuit’s decision under 28 U.S.C. § 2254 (d)(2) that the state court judgment was not an “unreasonable” determination of the facts regarding trial counsel’s performance, and that the Court did not need to reach the more complicated procedural question about the relationship between 28 U.S.C. §§ 2254 (d)(2) and (e)(10). *Id.* at \*7-8. In *Holland v. Florida*, No. 09-5327, the Court will decide whether the facts constitute “extraordinary” circumstances that would justify “equitable tolling” of the one-year statute of limitations for filing a federal habeas petition under § 2244(d)(1) of the AEDPA.

<sup>104</sup> See *supra* note 102.

<sup>105</sup> *Landrigan*, 550 U.S. at 499 (Stevens, J., dissenting).

<sup>106</sup> *Id.* at 499-500 (citing Richard A. Posner, *Report to the Federal Courts Study Committee of the Subcommittee on the Role of the Federal Courts and Their Relation to the States* 468-515 (Federal Courts Study Committee, Working Papers and Subcommittee Reports, July 1, 1990)). This figure is consistent with Professor Blume’s analysis that the Court was largely responsible for constricting federal habeas review, including the number of evidentiary hearings, and with Justice Kennedy’s dissenting opinion in *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 24 (1992), which Justice Stevens also quoted in *Landrigan*, 550 U.S. at 500 (Stevens, J., dissenting).

### 1. Double Deference

For purposes of reflecting on Justice Stevens's decision in *Baze*, it is noteworthy that, post-2006, while the procedural skirmish was on the front line of the battlefield at the Court, the war was over whether the newly reconstituted hard-line conservative<sup>107</sup> majority had any interest in addressing systemic deficiencies in the capital punishment system by reinvigorating the narrowing approach.<sup>108</sup> Chief Justice Roberts's and Justice Alito's negative answer is unmistakable not only in the cases that the conservatives won on substantive issues, but also in some that were decided on procedural points, in which those on the extreme right of the Court blazed past the procedural game-ender to discuss the merits in a way that signaled their readiness to abandon narrowing altogether. For example, in *Uttecht v. Brown*, the majority held that a prospective juror had been properly excused because his views on the death penalty "substantially impaired" him from imposing the punishment in the appropriate case.<sup>109</sup> The double dose of deference owed to state court judgments under the majority's interpretation of the *Witherspoon-Witt* rule and the AEDPA led inexorably to this outcome.<sup>110</sup>

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<sup>107</sup> Contrary to the terminology employed by many legal commentators and the mainstream media, the notion that the Court is comprised of "conservatives" and "liberals" is a fiction. Also, this word choice does not jibe with how Justice Stevens describes his "general politics" ("pretty darn conservative") or his judicial philosophy ("conservative"). Rosen, *supra* note 48, § 6, at 50. In an interview conducted before Justice Souter's retirement, Justice Stevens remarked that the labels have meaning only in a relative sense: with the possible exception of Justice Ginsburg, "every judge who's been appointed to the court since Lewis Powell," who was nominated in 1971, "has been more conservative than his or her predecessor." *Id.* Based upon her career as an advocate for women's rights, a case can be made for describing Justice Ginsburg as a "liberal," but only before she was appointed to the Court of Appeals for the District of Columbia Circuit in 1980. There are only hard-line conservatives, less-hard-line conservatives and moderates on the current Court. See, e.g., Editorial, *Extending the Pain*, LOUISVILLE COURIER J., July 3, 2008, at 6A (applauding decision in *Kennedy* and describing dissenting opinion by Justice Alito, with whom Justices Scalia and Thomas and Chief Justice Roberts joined, as that of the "four down-the-line-conservatives"). To attach the word "liberal" to any current member airbrushes away the intense political fear-mongering that has pushed Democratic Presidents to avoid any suggestion that their judicial nominees fit that description. See, e.g., Peter Baker & Jeff Zeleny, *Obama Chooses Hispanic Judge for Supreme Court*, N.Y. TIMES, May 27, 2009, at A1 (reporting that Obama Administration sent evangelical Christian leader information "emphasizing evidence of moderation in Judge Sotomayor's record, including a ruling against an abortion-rights group").

<sup>108</sup> Liebman & Marshall, *supra* note 1, at 1635, 1665.

<sup>109</sup> *Uttecht v. Brown*, 551 U.S. 1, 18 (2007).

<sup>110</sup> *Wainwright v. Witt*, 469 U.S. 412, 424-26 (1985); *Witherspoon v. Illinois*, 391

Writing for the dissent in *Uttecht*, Justice Stevens responded that the majority had “fundamentally redefined” or “misunderstood” the *Witt* standard, and had deferred reflexively to the state court judgment, which neither the record nor the federal habeas statute required.<sup>111</sup> In other words, in order to prevail on the procedural issue, the majority had rewritten the substantive law of capital juror disqualification to ensure that only jurors who are “willing to impose a death sentence in every situation in which a defendant is eligible for that sanction” can survive a challenge for cause.<sup>112</sup> Justice Stevens opened his dissent with the observation that the majority’s revision of the *Witt* standard came at a time when “[a] cross section of virtually every community in the country includes citizens who firmly believe the death penalty is unjust but who nevertheless are qualified to serve as jurors in capital cases.”<sup>113</sup> Quoting this statement in his concurring opinion in *Baze*, Justice Stevens identified procedures that remove these men and women from capital jury service as the first of four “special concerns” that led him to conclude the death penalty is unconstitutional.<sup>114</sup>

## 2. More Numerousness

Narrowing took direct hits in favor of numerousness in *Brown v. Sanders*, *Kansas v. Marsh*, and *Ayers v. Belmontes*.<sup>115</sup> Before *Sanders* reached the Supreme Court, California’s highest court invalidated two of the four “special circumstances” found true by the jury at the guilt phase, but which the jurors had been instructed to consider in reaching their penalty verdict.<sup>116</sup> Relying, however, on *Zant v.*

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U.S. 510, 522 (1968). The majority held that *Witt* and its progeny impose a “rule of deference” on the trial court’s decision to excuse a juror based upon his or her views on the death penalty. *Uttecht*, 551 U.S. at 7, 10. The AEDPA then created “additional, and binding, directions to accord deference,” which the Ninth Circuit had failed to respect. *Id.* at 10.

<sup>111</sup> *Uttecht*, 551 U.S. at 35-36, 43 (Stevens, J., dissenting, joined by Souter, Ginsburg & Breyer, JJ.).

<sup>112</sup> *Id.* at 44.

<sup>113</sup> *Id.* at 35.

<sup>114</sup> *Baze v. Rees*, 128 S. Ct. 1550, 1523 (2008) (Stevens, J., concurring in judgment).

<sup>115</sup> 546 U.S. 212 (2006); 548 U.S. 163 (200); 549 U.S. 7 (2006).

<sup>116</sup> *People v. Sanders*, 797 P.2d 561, 565-66, 587, 589-90 (Cal. 1990) (invalidating “burglary-murder” special circumstance finding and “heinous, atrocious and cruel” special circumstance finding, latter based upon court’s earlier opinion in *People v. Superior Court (Engert)*, 647 P.2d 76 (Cal. 1982), that “terms . . . are unconstitutionally vague”). See generally Richard A. Rosen, *The “Especially Heinous” Aggravating Circumstance in Capital Cases — The Standardless Standard*, 64 N.C. L. REV. 941, 943-44 (1986) (discussing use in most states of aggravating factor intended

*Stephens*, the California Supreme Court upheld the death judgment.<sup>117</sup> Historically, the U.S. Supreme Court has employed the distinction between “weighing” and “nonweighing” states to determine whether to employ a harmless error analysis when a death sentence rests in part on an invalid aggravating circumstance.<sup>118</sup> In a nonweighing state, an aggravating circumstance served the “sole function” of determining death-eligibility.<sup>119</sup> In a weighing state, the finding of an aggravating factor was integral to the jury’s sentencing determination as it “is required to weigh any mitigating factors against the aggravating circumstances.”<sup>120</sup> Contrary both to the plain language of the California statute and to the text-based determination by the U.S. Court of Appeals for the Ninth Circuit that California is a weighing state,<sup>121</sup> the *Sanders* majority tossed the rule as “needlessly complex” and inadequate in light of the variations that have developed among the state sentencing schemes.<sup>122</sup> In its place, it established a presumption that, under any capital punishment model, courts may not find constitutional error based upon the consideration of an invalid aggravating factor, absent a showing that the invalidated factor allowed the sentencer to give aggravating weight to *evidence* that it would not otherwise have considered.<sup>123</sup> Whether the weighing and

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to convey, “that the murder was, in some ill-defined way, worse than other murders”).

<sup>117</sup> *Sanders*, 797 P.2d at 520 (citing *Zant v. Stephens*, 462 U.S. 862 (1983) and California Supreme Court cases that are in accord).

<sup>118</sup> *Brown v. Sanders*, 546 U.S. 212, 228 (2006) (Breyer, J., dissenting, joined by Ginsburg, J.). Justice Stevens argued that the majority had gone beyond the question presented — is California a weighing state — and, disregarding the plain statutory language, had modified the Court’s “settled law,” which had drawn a “simple categorical distinction” between weighing and nonweighing states. *Id.* at 227-28 (Stevens, J., dissenting, joined by Souter, J.).

<sup>119</sup> *Zant v. Stephens*, 462 U.S. 862, 874 (1983).

<sup>120</sup> *Clemons v. Mississippi*, 494 U.S. 738, 754 (1990).

<sup>121</sup> California distinguishes between “special circumstances,” which ostensibly narrow the class of death-eligible offenses, and “aggravating circumstances,” which are defined as much by case law as by statute, and are among the factors the jury may consider in deciding penalty. See CAL. PENAL CODE § 190.2 (West 2009) (“Death penalty or life imprisonment without parole; special circumstances.”); *id.* § 190.3 (West 2009) (listing aggravating and mitigating circumstances and requiring sentencer to base its verdict on weighing of those circumstances); *Sanders v. Woodford*, 373 F.3d 1054, 1064 (9th Cir. 2004); see, e.g., *People v. Hillhouse*, 27 Cal. 4th 469, 479 (2002) (“[M]ajority of the 11 statutory factors can only be mitigating.” (internal citation omitted)). The Court in *Sanders* acknowledged the difference, under the California statutory scheme, between “special circumstances” and aggravating factors or circumstances in aggravation. See *Sanders*, 546 U.S. at 216 n.2.

<sup>122</sup> *Sanders*, 546 U.S. at 219.

<sup>123</sup> *Id.* at 220.

nonweighing distinction has outlived its utility or, as Justice Stephen G. Breyer concluded, it is “unrelated” to the real world of capital decisionmaking, the majority achieved its numerousness objective by tethering the new rule solely to the evidence considered by the sentencer, without regard to the “improper emphasis” placed on that evidence by the prosecutor’s argument or the trial court’s instructions based upon the unconstitutional aggravating factors.<sup>124</sup>

In *Marsh*, the Court upheld a Kansas statute that mandated a death verdict when jurors find the aggravating and mitigating circumstances are “in equipoise.”<sup>125</sup> As it had done in *Sanders*, the majority in *Marsh* reaffirmed the dominance of numerousness, embracing capital punishment schemes “even when they create a realistic possibility of wrangling death sentences out of otherwise reluctant sentencers.”<sup>126</sup> Writing for the majority, Justice Thomas announced that the Court’s 1990 decision in *Walton v. Arizona* controlled the outcome in *Marsh*. A plurality in *Walton* had ratified a statute requiring that defendants bear “the burden of establishing, by a preponderance of the evidence, the existence of mitigating circumstances sufficiently substantial to call for leniency.”<sup>127</sup> Liebman and Marshall expressed the view, with which I concur, that the “presumption of death” had been “enshrined” in a series of opinions, including *Walton*, more than a decade before *Marsh*.<sup>128</sup> However, the dissenters in *Marsh*, including Justice Stevens, who had also dissented in *Walton*, argued that *Walton* did not go so far. The vice of the plurality’s opinion in *Walton*, they maintained, was the departure from the “settled” *Woodson-Lockett* principles that mandate heightened reliability and individualized consideration of all mitigating circumstances in capital sentencing decisionmaking.<sup>129</sup> In

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<sup>124</sup> *Id.* at 231 (Breyer, J., dissenting, joined by Ginsburg, J.). Whereas Justice Stevens’s dissent focused on the majority’s departure from the weighing/nonweighing distinction, Justice Breyer argued that the Court’s decision could not be reconciled with its opinion in *Clemons*, 494 U.S. at 753-54, and had “the potential for a tilting of the scales toward death.” *Id.* at 227-28, 241.

<sup>125</sup> KAN. STAT. ANN. § 21-4624(e) (1995); *Kansas v. Marsh*, 548 U.S. 163, 173 (2006). The opinion probably will not have great effect on the ground — i.e., other state legislatures are unlikely to rush to enact copycat statutes. See George H. Kendall, *The High Court Remains as Divided as Ever over the Death Penalty*, 105 MICH. L. REV. FIRST IMPRESSIONS 79, 80 (2006) (“[T]he *Marsh* holding is narrow and its impact *de minimus* outside of Kansas.”); *infra* Part III (discussing national trend toward decreased imposition of capital punishment, fewer executions, and, perhaps, abolition).

<sup>126</sup> Liebman & Marshall, *supra* note 1, at 1638.

<sup>127</sup> *Walton v. Arizona*, 497 U.S. 639, 644 (1990) (plurality opinion).

<sup>128</sup> Liebman & Marshall, *supra* note 1, at 1639-40.

<sup>129</sup> *Marsh*, 548 U.S. at 199-200 (Stevens, J., dissenting); *id.* at 203 n.1 (Souter, J.,

*Marsh*, Justice Stevens agreed that although the Arizona statute “did present exactly the same issue,” the *Walton* plurality had assiduously declined to resolve it.<sup>130</sup> The majority’s default position was that even if *Walton* was not controlling, the Constitution does not constrain the states’ right to configure how jurors will choose between life and death; the Kansas statute is in line with *Furman* because death eligibility is narrowed; and, in reaching their penalty verdict, jurors’ consideration of relevant mitigating evidence is unrestricted.<sup>131</sup>

Justice Souter’s dissent in *Marsh*, in which Justice Stevens joined, argued that the majority had cut the Court’s precedents off at the knees in three respects, all deriving from *Furman*’s prohibition against capital punishment schemes that produce arbitrary results.<sup>132</sup> First, the Kansas statute does not require that the jury break the tie by making a sentencing “choice,” which Justice Souter defined as a “reasoned moral response”<sup>133</sup> based on an individualized consideration of the offense and the offender.<sup>134</sup> Next, the statute removes from the sentencing process the requirement that, before jurors can bring in a death verdict, they must affirmatively conclude that the verdict “must be death.”<sup>135</sup> Finally, Justice Souter asserted that the Court has entered

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dissenting, joined by Stevens, Ginsburg & Breyer, JJ.); see *Walton*, 497 U.S. at 677-80 (Blackmun, J., dissenting, joined by Brennan, Marshall, & Stevens, JJ.). Justice Stevens wrote a separate dissent, foreshadowing the decision in *Ring v. Arizona*, 536 U.S. 584 (2004), in which he argued that the Sixth Amendment requires “a jury determination of facts that must be established before the death penalty may be imposed.” *Walton*, 497 U.S. at 708-09 (Stevens, J., dissenting).

<sup>130</sup> *Marsh*, 548 U.S. at 199, 200 (Stevens, J., dissenting).

<sup>131</sup> *Id.* at 175. In other words, “narrowing” does not apply to the exercise of jurors’ discretion to choose death. Justice Stevens’s dissenting opinion added another question to the mix: when should the Court review state capital punishment decisions? In Justice Stevens’ view, the Court was not required to take the case and its only reason for doing so was “facilitating the imposition of the death penalty in [Kansas].” *Id.* at 201 (quoting *California v. Ramos*, 463 U.S. 992, 1031 (1983) (Stevens, J., dissenting)). Justice Scalia, instead, saw the need to “vindicate” the proper application of federal constitutional law. *Id.* at 184 (Scalia, J., concurring).

<sup>132</sup> *Id.* at 204 (Souter, J., dissenting, joined by Stevens, Ginsburg & Breyer, JJ.).

<sup>133</sup> See *id.* at 206.

<sup>134</sup> See *id.* at 205 (quoting *Gregg v. Georgia*, 428 U.S. 153, 206 (1976)).

<sup>135</sup> *Id.* at 206 (quoting *Spaziano v. Florida*, 468 U.S. 447, 461 (1984)); see Kendall, *supra* note 125, at 83. (“These opinions stake out vastly different views as to what the Eighth Amendment requires of the states. The majority is satisfied so long as two procedural protections are in place: the class of eligible offenders is adequately narrowed and the sentencer is permitted to consider a defendant’s background and character. The four dissenters believe these procedural elements are necessary but not sufficient: the states’ schemes cannot require a death sentence when the prosecution fails to show that the facts mandate it.”).

into a “period of new empirical argument about how ‘death is different,’”<sup>136</sup> and that this empirical inquiry necessitates reckoning with evidence about the risk of sentencing to death or executing individuals who are factually innocent.<sup>137</sup> Two years later, in *Baze*, this same risk of error emerged as the fourth and dispositive factor that led Justice Stevens to reach his judgment about the death penalty “on the basis of data that falls short of absolute proof.”<sup>138</sup>

At least as important as whether Liebman and Marshall or the dissenting Justices in *Marsh* were correct about when death became a constitutionally acceptable sentencing presumption, the opinion signaled that, on the death penalty, “[t]he Roberts Court will divide as often and as sharply as did the Burger and Rehnquist Courts.”<sup>139</sup> In a bare-fisted response to Justice Souter’s dissent, Justice Scalia reiterated his oft-stated position that the Eighth Amendment demands little more than capital punishment’s appearance in the text of the Constitution and, as an exercise in democracy, its adoption by state and federal legislative bodies.<sup>140</sup> For Justice Scalia, however, some

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<sup>136</sup> *Marsh*, 548 U.S. at 210 (Souter, J., dissenting) (quoting *Gregg v. Georgia*, 428 U.S. 153, 188 (1976)) (joint opinion of Stewart, Powell, and Stevens, JJ.).

<sup>137</sup> See *id.*; see also CRAIG HANEY, *DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM*, 1-25 (Oxford Univ. Press 2005) (describing *Gregg* as “the beginning of a long line of capital cases in which a majority of Justices made it increasingly clear that they simply were not interested in the social realities of capital punishment”). Post-*Furman*, a majority of the Court consistently delegitimized the relationship between the law and social science. *Id.* at 10-11.

<sup>138</sup> *Baze v. Rees*, 128 S. Ct. 1520, 1551 (2008) (Stevens, J., concurring in judgment).

<sup>139</sup> Kendall, *supra* note 125, at 80. For example, neither Chief Justice Roberts nor Justice Alito joined in Justice Scalia’s concurring opinion. They did, however, join Justice Thomas’s opinion for the majority.

<sup>140</sup> *Marsh*, 548 U.S. at 186 (Scalia, J. concurring) (asserting that “the vast majority of the American people” support the death penalty); see *Uttecht v. Brown*, 551 U.S. 1, 35 (2007) (Stevens, J., dissenting, joined by Souter, Ginsburg & Breyer, JJ.) (discussion about popularity of capital punishment); *Baze*, 128 S. Ct. at 1550 & n.18 (quoting his dissent in *Uttecht* with nuanced discussion about popularity of capital punishment); see also [Deathpenaltyinfo.org](http://www.deathpenaltyinfo.org), New National Polls Show Decrease in Support for Capital Punishment, <http://www.deathpenaltyinfo.org/national-polls-and-studies#october2008gallup> (listing 11 years of public opinion polling). See generally Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) [hereinafter Scalia, *Originalism*] (arguing that even if “the Constitution was originally meant to expound evolving rather than permanent values . . . I see no basis for believing that supervision of the evolution would have been committed to the courts”; that “originalism” coheres with “the nature and purpose of a Constitution in a democratic system,” in which elections, rather than “constitutional guarantees . . . insure that its laws will reflect ‘current values’”; and that “[t]he purpose of constitutional guarantees — and in particular . . . constitutional guarantees of



democratic principles do not extend to the Court's members: Justice Scalia saw no contradiction in insisting that the dissenters refrain from criticizing the death penalty's "lack of 100% perfection."<sup>141</sup> The majority was satisfied to dismiss Justice Souter's Eighth Amendment risk-of-error argument as a "moral" objection that fell outside the Court's constitutional purview.<sup>142</sup> Justice Scalia went further, asserting that, when it comes to execution of the factually innocent, he is confident the death penalty in this country is error free.<sup>143</sup> He wrote that, in its determination to lambaste the nation's justice system and to identify exonerees, the dissent was "willing to accept anybody's say-so,"<sup>144</sup> The "anybody" to which Justice Scalia referred was the Commission on Capital Punishment, appointed by George Ryan, then Governor of Illinois, whose members included former state and federal prosecutors and federal judges, current state prosecutors and defense attorneys, and other representatives of the bar and the community.<sup>145</sup> In addition to the Illinois Commission, Justice Souter referenced a "growing literature" that documents wrongful convictions and sentences and explained the criteria utilized in some of the studies.<sup>146</sup>

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individual rights . . . — is precisely to prevent the law from reflecting certain changes in original values that the society adopting the Constitution thinks fundamentally undesirable").

<sup>141</sup> *Marsh*, 548 U.S. at 198 (Scalia, J., concurring). Chief Justice Roberts and Justice Alito were in the majority, but did not join Justice Scalia's concurring opinion.

<sup>142</sup> *Id.* at 181 (majority opinion).

<sup>143</sup> *Id.* at 198-99 (Scalia, J., concurring).

<sup>144</sup> *Id.* at 193. For some of the scholarly responses to Justice Scalia's concurring opinion, see, for example, Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008) (examining in empirical study criminal proceedings, from trial to exoneration, of individuals found innocent through post-conviction DNA testing); Lawrence C. Marshall, *Litigating in the Shadow of Innocence*, 68 PITT. L. REV. 191, 195-99 (2006) [hereinafter, Marshall, *Litigating in the Shadow*] (explaining (1) objective criteria and "official means of exoneration" employed by Death Penalty Information Center (DPIC) for including case in its list of "exonorees"; (2) why "absence of official mechanisms for post-mortem exoneration" led DPIC to exclude executed individuals from its list; and (3) why "adjudicative process" by which guilt is determined must also apply to "public discourse"); Michael D. Risinger, *Convicting the Innocent: An Empirically Justified Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761 (2007) (establishing empirically justified wrongful conviction rate for capital rape-murders between 1982 and 1989).

<sup>145</sup> *Marsh*, 548 U.S. at 208 (referencing Governor Ryan's COMM'N ON CAPITAL PUNISHMENT, FINAL REPORT (2002)). See Members of the Commission on Capital Punishment, [http://www.idoc.state.il.us/ccp/ccp/reports/commission\\_report/members.pdf](http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/members.pdf) (last visited Feb. 6, 2010).

<sup>146</sup> *Marsh*, 548 U.S. at 202-210 & nn.2-3 (Souter, J., dissenting, joined by Stevens, Ginsburg, & Breyer, JJ.).

In the context of the narrowing-versus-numerousness tug-of-war, the outcome in the last of the three opinions, *Belmontes*, perpetuated the line of cases that emerged in the 1990s, ratifying instructions that constrained “jurors from considering some, as long as the jurors were not kept from considering all, of the extenuating value of particular mitigating factors.”<sup>147</sup> At the penalty phase, *Belmontes* had introduced evidence of his positive behavior while in a juvenile facility and of the sincerity of his religious beliefs.<sup>148</sup> The central question was whether the jury had applied the instruction defining mitigating evidence in a way that precluded consideration of “constitutionally relevant evidence.”<sup>149</sup> Writing for the majority, Justice Kennedy found that the Ninth Circuit had adopted an erroneously crabbed reading of the instruction, which was inconsistent with the evidence, the arguments, and other jury instructions.<sup>150</sup> Dissenting, Justice Stevens explained that *Belmontes*’s trial took place only four years after *Lockett*, at a time of “significant residual confusion” as to the nature and scope of mitigating evidence that the Constitution requires juries to take into account.<sup>151</sup> The California statute then in effect and the instructions at *Belmontes*’s trial reflected more than confusion; they delivered an unambiguous signal to the jury that the defendant’s evidence was entitled to no mitigating weight.<sup>152</sup> Unwilling to tolerate the “risk of error” condoned by the majority, Justice Stevens raised another objection that he had expressed a decade earlier, would reiterate in *Baze*, and thereafter.<sup>153</sup> “The incremental value to California of

<sup>147</sup> Liebman & Marshall, *supra* note 1, at 1640.

<sup>148</sup> *Ayers v. Belmontes*, 549 U.S. 7, 29-30 (2006) (Stevens, J., dissenting). The evidence was fully admissible and relevant under *Skipper v. South Carolina*, 476 U.S. 1 (1986), which was decided two years after the trial, but was applicable to *Belmontes* whose case was still on appeal at the time *Skipper* was decided. *Belmontes*, 549 U.S. at 28 (Stevens, J., dissenting).

<sup>149</sup> *Id.* at 12-13 (majority opinion) (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990)). The instruction concerned what is commonly referred to as California’s “catchall” mitigation provision that permits the sentencer to consider “[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.” CAL. PENAL CODE, § 190.3(k) (West 2009).

<sup>150</sup> *Belmontes*, 549 U.S. at 15-16.

<sup>151</sup> *Id.* at 25-26 (Stevens, J., dissenting); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (invalidating Ohio’s statute because it “prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant’s character and record and to circumstances of the offense proffered in mitigation”).

<sup>152</sup> *Belmontes*, 549 U.S. at 26-27 (Stevens, J., dissenting). Moreover, both the prosecutor and defense counsel agreed that the evidence did not reduce *Belmontes*’s culpability for the crime. *Id.* at 32-33.

<sup>153</sup> See *Lackey v. Texas*, 514 U.S. 1045 (1995) (mem.) (Stevens, J., statement respecting denial of certiorari, joined by Blackmun & Powell, JJ.) (arguing that “the

carrying out a death sentence at this late date,” Justice Stevens wrote, “is far outweighed by the interest in maintaining confidence in the fairness of any proceeding that results in a State’s decision to take the life of one of its citizens.”<sup>154</sup>

### 3. A Court Divided

Finally, Justice Stevens’s majority opinions and Chief Justice Roberts’s dissents in two companion cases, *Abdul-Kabir* and *Brewer*, exemplify the fierceness of the conflict between those Justices who view the Court’s decisions as having “firmly established that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty” and those who see “instead a dog’s breakfast of divided, conflicting, and ever-changing analyses.”<sup>155</sup> In *Abdul-Kabir*, authored by Justice Stevens, the majority traced the jurisprudential line from the 1976 decision in *Jurek*, which had

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question whether executing a prisoner who has already spent some 17 years on death row violates the Eighth Amendment” is “not without foundation,” but should be considered by lower courts as “laboratories . . . [for] further study before it is addressed by this Court” (quoting *McCray v. New York*, 461 U.S. 961, 963 (1983)). In *Baze*, Justice Stevens called for a reasoned “comparison of the enormous costs that death penalty litigation imposes on society with the benefits that it produces.” *Baze v. Rees*, 128 S. Ct. 1520, 1548-49 (2008) (Stevens, J., concurring in judgment). With regard to the length of time capital cases take to reach finality, Justice Stevens observed that the protracted review process results “in large part from the States’ failure to apply constitutionally sufficient procedures at the time [of trial].” *Id.* at 1549 n.17 (internal citations omitted). In 2009, Justice Stevens twice addressed the duration and conditions of confinement on death row. *See Johnson v. Bredesen*, 130 S. Ct. 541, 542 (2009) (Stevens, J., statement respecting denial of certiorari) (describing Johnson’s Eighth Amendment claim, which he brought under 42 U.S.C. § 1983 (2006), as “compelling a case as I have encountered for addressing the constitutional concerns that I raised in *Lackey*”); *Thompson v. McNeil*, 129 S. Ct. 1299, 1299-1301 (2009) (Stevens, J., statement respecting denial of certiorari) (concluding that, taken together with risk of error, “executing defendants after such delays is unacceptably cruel”).

<sup>154</sup> *Belmontes*, 549 U.S. at 45-46 (Stevens, J., dissenting).

<sup>155</sup> *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246; (2007) *id.* at 267 (Roberts, C.J., dissenting); *see also Brewer v. Quarterman*, 550 U.S. 286, 289 (2007); *id.* at 1720 (Roberts, C.J., dissenting, joined by Scalia, Thomas & Alito, JJ.) (arguing that “the meaning and scope of *Penry I*” was not “clearly established” in 1999, when *Brewer* was tried, and therefore under AEDPA, Court must defer to state court judgment). As discussed *supra* note 102, the question presented in both cases had to be decided within the confines of the AEDPA: whether the Texas state court’s decision on the merits of the petitioner’s claim “was contrary to, or involved an unreasonable application of, clearly established” Supreme Court precedent. *Abdul-Kabir*, 550 U.S. at 246 (quoting 28 U.S.C. § 2254(d)(1) (2006)); *see Brewer*, 550 U.S. at 289.

affirmed the Texas “special issues” capital punishment scheme, to 1989, when *Penry I* held that the special issues questions submitted to the jury at Penry’s trial did not permit jurors “a meaningful opportunity to give effect” to his mitigating evidence as a reason for a life verdict.<sup>156</sup> The fact that Justice Kennedy agreed with Justice Stevens in *Abdul-Kabir* and *Brewer* was, of course, decisive for the petitioners. Later in the term in *Kennedy v. Louisiana*, Justice Kennedy conceded that the Court’s “failure” to adhere more strictly to narrowing rules had “raised doubts about the constitutionality of capital punishment itself” for Justices Stevens and Blackmun.<sup>157</sup>

In sum, the Court’s capital punishment opinions between 2006 and *Baze* offered Justice Stevens no expectation that a majority would fulfill Liebman and Marshall’s vision of a renewed, rigorous application of the narrowing approach.<sup>158</sup> During this period, Chief Justice Roberts and Justice Alito displayed an emphatic allegiance to more-is-better by any means necessary. They favored the exertion of procedural rules, primarily the AEDPA, to leave state court judgments intact.<sup>159</sup> When squarely faced with the choice between narrowing and numerosness, the two Justices consistently selected the latter, even when the result was vitiating precedent.<sup>160</sup> Justice Kennedy was a sometime ally of Justice Stevens, but by no means a dependable one. He was, at times, insistent on adherence to narrowing precedents. At others, he was willing to redefine them. And the Justice was by no

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<sup>156</sup> *Abdul-Kabir*, 550 U.S. at 251 n.13 (discussing *Jurek v. Texas*, 428 U.S. 262 (1976)); *id.* at 254-55 (discussing *Penry v. Lynaugh* (*Penry I*), 492 U.S. 302, 323-24 (1989)); *id.* at 248 n.10 (quoting *Penry v. Lynaugh* (*Penry I*), 492 U.S. 302, 318-19 (1989), to explain that decision was “not ‘a new rule’ under *Teague v. Lane*, 498 U.S. 288 (1989)] because it [was] dictated by *Eddings v. Oklahoma*, 455 U.S. 104 (1982)] and *Lockett*”).

<sup>157</sup> *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2659 (2008) (citing *Baze*, 128 S. Ct. at 1532-34 (Stevens, J., concurring in judgment)); *Callins v. Collins*, 510 U.S. 1141, 1144-45 (1994) (Blackmun, J., dissenting from denial of certiorari).

<sup>158</sup> *Cf.* Liebman & Marshall, *supra* note 1, at 1667-68.

<sup>159</sup> *See, e.g.*, *Panetti v. Quarterman*, 551 U.S. 930, 962 (2007) (Thomas, J., dissenting, joined by Roberts, C.J., and Scalia & Alito, JJ.) (arguing that federal and state court standard for competency should be respected); *Schriro v. Landigran*, 550 U.S. 465, 481-82 (2007); *Smith v. Texas* (*Smith II*), 550 U.S. 297, 316-18 (Alito, J., dissenting, joined by Roberts, C.J., and Scalia & Thomas, JJ.); *Abdul-Kabir*, 550 U.S. at 265 (Roberts, C.J., dissenting, joined by Scalia, Thomas & Alito, JJ.); *Brewer*, 550 U.S. at 296 (Roberts, C.J., dissenting, joined by Scalia, Thomas & Alito, JJ.).

<sup>160</sup> *See, e.g.*, *Belmontes*, 549 U.S. at 15-16; *Marsh*, 548 U.S. at 175-77; *Sanders*, 546 U.S. at 219-20.

means averse to a reading of the AEDPA that was hostile to capital habeas petitioners.<sup>161</sup>

### C. *Developments on the Ground*

From a national perspective, during the two years between the publication of the Liebman-Marshall article and the decision in *Baze*, the events on the ground continued as the authors had described. Popular support for capital punishment declined.<sup>162</sup> There were fewer capital prosecutions, fewer death sentences, fewer executions, growth in legislative activity to abolish the death penalty, and additional exonerations of death row inmates.<sup>163</sup> Because others have catalogued these developments, I offer a short list for purposes of contextualizing the nation's capital punishment terrain when *Baze* was decided.<sup>164</sup>

The operative phrase is “national trend,” which is one of the “objective criteria” the Supreme Court considers in determining whether a punishment is an excessive sanction.<sup>165</sup> In his 2002 opinion

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<sup>161</sup> See *Siebert*, 552 U.S. at 4-5; *Panetti*, 551 U.S. at 945; *Uttecht*, 551 U.S. at 10; *id.* at 16-17; *Landrigan*, 550 U.S. at 481; *Smith II*, 550 U.S. at 315; *Brewer*, 550 U.S. at 294-95; *Abdul-Kabir*, 550 U.S. at 237-38 (adherence to narrowing); *Lawrence*, 549 U.S. 327, 337 (restrictive interpretation of AEDPA); *Belmontes*, 549 U.S. 7, 14-15; *Marsh*, 548 U.S. 163, 172; *House*, 547 U.S. at 539 (applying *Schlup* standard, rather than more onerous test under AEDPA, to first federal habeas petition seeking consideration of defaulted claims based on a showing of actual innocence); *Sanders*, 546 U.S. 212 (rejection of narrowing precedents).

<sup>162</sup> Liebman & Marshall, *supra* note 1, at 1650-60.

<sup>163</sup> *Id.*

<sup>164</sup> See generally data collected by the Death Penalty Information Center, whose Web site is at <http://www.deathpenaltyinfo.org>, and its annual year-end reports, found at <http://www.deathpenaltyinfo.org/reports> [hereinafter DPIC], as well as the NAACP–Legal Defense and Education Fund, Death Row U.S.A., quarterly reports available at <http://www.naacpldf.org/content.aspx?article=1341>.

<sup>165</sup> See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 315-16 (2002) (citing “large number of States prohibiting the execution of mentally retarded persons, . . . overwhelming[]” rejection of bills to sanction punishment, and “uncommon” practice of such executions as evidence that “a national consensus has developed against it”); *Harmelin v. Michigan*, 501 U.S. 957, 1000 (1991) (stating review under evolving standards should be informed as much as possible by “objective factors” (quoting *Rummel v. Estelle*, 445 U.S. 236, 274-75 (1980))); *Penry I*, 492 U.S. at 333-35 (stating “objective evidence” such as statutes, charging decisions, and jury verdicts were lacking to support “an emerging national consensus against the execution of the mentally retarded”); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion) (stating whether punishment is “excessive” takes into account “legislative attitudes and the response of juries” (internal citation omitted)); *Gregg v. Georgia*, 428 U.S. 152, 173, 179-82 (1976) (opinion of Stewart, Powell & Stevens, JJ.) (discussing “objective indicia that reflect the public attitude toward a given sanction,” such as legislation and jury verdicts); *Woodson v. North Carolina*, 428 U.S. 280, 298-99 (1976) (plurality

for the Court in *Atkins*, Justice Stevens enumerated the states that had banned the death penalty for persons with mental retardation during the thirteen years following *Penry I*. He wrote: "It is not so much the number of these States that is significant, but the consistency of the direction of change."<sup>166</sup>

In the months leading up to *Baze*, the nation was, of course, nowhere near the cusp of massive state-by-state abolition. Still, Justice Stevens's call to "the Court and legislatures" to reexamine the death penalty had ample support based upon the "direction of change."<sup>167</sup> The number of death sentences and executions declined.<sup>168</sup> There were 128 death sentences in 2005, and there were 115 death sentences each in 2006 and in 2007, the fewest since *Gregg*.<sup>169</sup> In addition, in 2005 and 2006, there were sixty and fifty-three executions, respectively.<sup>170</sup> The drop to forty-two executions in 2007 reflected the de facto moratorium that was in place following September 25 of that year, when the Supreme Court agreed to review *Baze*.<sup>171</sup> After the opinion

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opinion) (discussing rejection of mandatory death penalty statutes by most "American juries and legislatures").

<sup>166</sup> *Atkins*, 536 U.S. at 315 (Stevens, J., writing for majority); *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2656 (2008) (relying on "objective indicia of consensus," particularly "the small number of States that have enacted the death penalty for child rape" and execution statistics, pointing out that no one has been executed for rape since 1964); see *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (concluding that "evidence of a national consensus against the death penalty for juveniles is similar, and in some respects parallel to the evidence" against death penalty for persons with mental retardation).

<sup>167</sup> *Baze v. Rees*, 128 S. Ct. 1520, 1548 (Stevens, J., concurring in judgment).

<sup>168</sup> The peak in the modern era was reached in 1999, when 98 people were put to death. See DPIC, Executions by Year, <http://deathpenaltyinfo.org/executions-year> (last visited Feb. 6, 2010).

<sup>169</sup> See DPIC, THE DEATH PENALTY IN 2008: YEAR END REPORT 1 (2008) available at <http://www.deathpenaltyinfo.org/2008YearEnd.pdf> [hereinafter DPIC 2008]; DPIC, THE DEATH PENALTY IN 2007: YEAR END REPORT 1 (2007) available at <http://www.deathpenaltyinfo.org/2007YearEnd.pdf> [hereinafter DPIC 2007]; DPIC, THE DEATH PENALTY IN 2006: YEAR END REPORT 1 (2006) available at <http://www.deathpenaltyinfo.org/2006YearEnd.pdf> [hereinafter DPIC 2006]. As of 2006, death sentences in Texas, which, every year since 1986, has put more people to death than any other state, had declined by 65 percent. DPC 2006, *supra*, at 2; see, e.g., *Ohio Prosecutors Using New Life Without Parole Option*, ONNtv.com, June 22, 2008, [http://www.10tv.com/live/content/onnews/stories/2008/06/22/Life\\_WO\\_Parole.html?sid=102](http://www.10tv.com/live/content/onnews/stories/2008/06/22/Life_WO_Parole.html?sid=102) (reporting that "[t]he number of death penalty indictments sought statewide dropped 32 percent from 2004 to 2007, according to figures compiled by Ohio Public Defender's Office").

<sup>170</sup> See DPIC 2007, *supra* note 169.

<sup>171</sup> *Id.* Similarly, the decrease in 2008, to thirty-seven executions, reflects the fact that executions did not resume until May 6, 2008, which was about three weeks after

was issued in April of 2008, the assumption — certainly on the part of the plurality — was that the logjam created by the grant of certiorari had been broken, and that states could and would resume promptly executions at their pre-*Baze* pace.<sup>172</sup> As I discuss in Part III.B, that assumption has not been borne out.

On December 17, 2007, New Jersey became the first state in four decades to abolish the death penalty by legislative action.<sup>173</sup> That year, the Nebraska legislature got within one vote of enacting a repeal bill.<sup>174</sup> In New Mexico, Montana, and Colorado, antideath penalty bills gained traction, although they failed.<sup>175</sup> Early in 2007, Martin O'Malley, the Governor of Maryland, appeared before the legislature to support a repeal bill.<sup>176</sup>

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*Baze* was decided on April 16. DPIC 2008, *supra* note 169, at 1. On May 6, 2008, with no Justices dissenting, the Court issued its first post-*Baze* denial of an application for stay of execution in *Lynd v. Hall*, 128 S. Ct. 2107 (2008). The order cleared the way for the lethal injection execution of William Earl Lynd, which took place in Georgia that evening. Robert Barnes, *Execution Is First Since Ruling: Lethal Injection in Georgia Ends 7-Month Pause*, WASH. POST, May 7, 2008, at A2. Lynd's was the first execution since that of Michael Richard, which was carried out by Texas on September 25, 2007, the same day that the Court granted certiorari in *Baze*. See David R. Dow, *The Last Lethal Injection*, WASH. POST, Nov. 1, 2007, at A21 ("The moratorium began to take shape when the court announced Sept. 25 that it would review . . . *Baze* . . . . Perversely, though, the justices refused to intervene in a Texas case that came before them that evening."); Adam Liptak, *States Hesitate to Lead Change on Executions*, N.Y. TIMES, Jan. 3, 2008, at A1 (describing "de facto national moratorium on executions").

<sup>172</sup> See *Baze*, 128 S. Ct. at 1537 (plurality opinion) (prohibiting stay of execution unless inmate can satisfy plurality's Eighth Amendment test, and, announcing that if state's lethal injection protocol is "substantially similar" to Kentucky's, it "would not create a risk that meets this standard"). Abolitionist organizations also feared a "surge of executions" if *Baze* was decided adversely to the petitioners. See Cara B. Drinan, "Backlog" *Death-Penalty Rationale Fatally Flawed*, ATLANTA J.-CONST., May 16, 2008, at 13A (commenting that, in light of recent exonerations in North Carolina and Texas, and Georgia's "collapsing" indigent defense system, "it's downright embarrassing" that Georgia, which was first state to resume executions — three weeks after *Baze* — is focused on "clearing execution backlogs" rather than whether defendants received constitutionally adequate representation); DPIC 2008, *supra* note 169, at 2; *infra* Part III (discussing executions in post-*Baze* era of lethal injection challenges).

<sup>173</sup> See Conk, *supra* note 73, at 21-22; DPIC 2007, *supra* note 169, at 1.

<sup>174</sup> DPIC 2007, *supra* note 169, at 2.

<sup>175</sup> *Id.* at 2.

<sup>176</sup> See John Wagner & Ovetta Wiggins, *O'Malley Seeks End To Md. Executions: Death Penalty Repeal Splits Assembly*, WASH. POST, Feb. 22, 2007, at B01 (reporting that during first of two appearances before legislative committees, O'Malley questioned justification for death penalty "when it inherently necessitates the occasional taking of a wrongly convicted, innocent life"). See generally Martin O'Malley, *Why I Oppose the Death Penalty*, WASH. POST, Feb. 21, 2007, at A15 (arguing that evidence of death row exonerations, absence of evidence that capital punishment deters, costs of maintaining

In 2006 and 2007, researchers published a number of studies that examined the administration of capital punishment at the state level.<sup>177</sup> All found system-wide failings.<sup>178</sup> The research identified the same

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death penalty regime, and “fundamental belief” in “human dignity” favor abolition).

<sup>177</sup> Between 2006 and *Baze*, the American Bar Association Moratorium Implementation Project issued reports on the death penalty in Alabama, Arizona, Georgia, Indiana, Ohio, Pennsylvania and Tennessee. *See, e.g.*, Am. Bar. Assoc., Death Penalty Moratorium Implementation Project, <http://www.abanet.org/moratorium/assessmentproject/home.html> (last visited Feb. 8, 2010); *see also* DEATH PENALTY SUBCOMM., WASH. STATE BAR ASSOC. COUNCIL ON PUB. DEF., FINAL REPORT (2006), available at <http://www.wsba.org/lawyers/groups/finalreport.pdf>; N.J. DEATH PENALTY STUDY COMM’N, COMMISSION REPORT (2007), available at [http://www.njleg.state.nj.us/committees/dpsc\\_final.pdf](http://www.njleg.state.nj.us/committees/dpsc_final.pdf). (releasing findings of commission created by legislative enactment in 2006); Michael Radelet et al., *Race, Gender, Religion and Death Sentencing in Colorado, 1980-1999*, 77 U. COLO. L. REV. 549 (2006); Michael J. Songer & Isaac Unah, *The Effect of Race, Gender and Location of Prosecutorial Decision to Seek the Death Penalty in South Carolina*, 58 S.C. L. REV. 161 (2006); John J. Donohue, *Capital Punishment in Connecticut, 1973-2007: A Comprehensive Evaluation from 4600 Murders to One Execution* 53 (June 4, 2008) (unpublished manuscript), available at [http://works.bepress.com/cgi /viewcontent.cgi?article=1054&context=john\\_donohue](http://works.bepress.com/cgi/viewcontent.cgi?article=1054&context=john_donohue) (releasing data prior to *Baze*); DPIC, *Tennessee Legislature Overwhelmingly Approves Death Penalty Study*, (June 7, 2007), <http://www.deathpenaltyinfo.org/legislative-activity-tennessee>.

<sup>178</sup> *See, e.g.*, DEATH PENALTY SUBCOMM., *supra* note 177, at 33-35 (including series of recommendations that tracked guidelines by American Bar Association); N.J. DEATH PENALTY COMM’N, *supra* note 177, at 24-30, 31-34, 41, 48-50 (finding, inter alia, no evidence that state’s death penalty serves goals of deterrence or retribution and that costs of death penalty are greater than those of LWOP, though not precisely measurable; questioning efficacy of state’s judicial proportionality review process; and finding intolerable risk of arbitrary administration, but not finding race discrimination in administration of death penalty in New Jersey); Donohue, *supra* note 177, at 4, 7, 29 (finding, inter alia, that “there is no meaningful basis for distinguishing the few who receive sentences of death from the many capital eligible murders who do not,” that there are statistically significant race-of-defendant and race-of-victim effects, and that “arbitrariness of geography is a dominant factor in the Connecticut death penalty scheme”); Am. Bar Assoc., Executive Summary of the Alabama Death Penalty Report iii, <http://www.abanet.org/moratorium/assessmentproject/alabama/executivesummary.doc> (last visited Feb. 6, 2010) (finding “minimal qualifications and non-existent training” for capital defense lawyers); Am. Bar. Assoc., Executive Summary of the Florida Death Penalty Report iv, <http://www.abanet.org/moratorium/assessmentproject/florida/executivesummary.pdf> (last visited Feb. 6, 2010) (finding “the proportion exonerated exceeds thirty percent of the number executed”); Am. Bar. Assoc., Executive Summary of the Georgia Death Penalty Report 3, <http://www.abanet.org/moratorium/assessmentproject/georgia/executivesummary.doc> (last visited Feb. 6, 2010) (finding inadequate defense counsel at trial and in post-conviction proceedings, and inadequate proportionality review that is incapable of ferreting out disparities based upon arbitrary or discriminatory factors such as geography and race); Am. Bar. Assoc., Executive Summary of the Ohio Death Penalty Report v-vi, <http://www.abanet.org/moratorium/assessmentproject/ohio/executivesummary.pdf> (last visited Feb. 8, 2010) (finding, inter alia, “inadequate procedures to protect the innocent,” inadequate



deficiencies as those that had long troubled Justice Stevens — e.g., race discrimination, inadequate representation, and the risk of executing innocent persons — some of which Justice Stevens highlighted in *Baze*.<sup>179</sup>

Although diminished use of capital punishment was a national trend, there were jurisdictions in which prosecutors and politicians resisted moving in that direction.<sup>180</sup> Federal capital prosecutions

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standards, compensation, and access to experts for defense counsel, “gross disparity” in sentencing based upon race of victim, and geographic disparities); Am. Bar. Assoc., Executive Summary of the Pennsylvania Death Penalty Report 4-5, <http://www.abanet.org/moratorium/assessmentproject/pennsylvania/executivesummary.pdf> (last visited Feb. 8, 2010) (finding, inter alia, “inadequate procedures to protect innocent,” statutory deficiencies that deny appointment of two counsel and sufficient resources for representation, excessive restrictions to state-post conviction review, and racial and geographic disparities in operation of death penalty); Am. Bar. Assoc., Executive Summary of the Tennessee Death Penalty Report iii, v-vi, <http://www.abanet.org/moratorium/assessmentproject/tennessee/executivesummary.pdf> (last visited Feb. 8, 2010) (finding, inter alia, inadequate judicial review of innocence claims; inadequate representation due to excessive caseloads, limited access to experts and investigators, insufficient standards to ensure qualified counsel, “lack of meaningful proportionality review,” and racial and geographic disparities in imposition of death penalty).

<sup>179</sup> See *Baze v. Rees*, 128 S. Ct. 1520, 1550-51 (2008) (Stevens, J., concurring in judgment); see, e.g., *Schiro v. Landrigan*, 550 U.S. 465, 483-84 (2007) (Stevens, J., dissenting); *Kansas v. Marsh*, 548 U.S. 163, 207-11 (2006) (Souter, J., dissenting, joined by Stevens, Ginsburg & Breyer, JJ.); *Williams v. Taylor*, 529 U.S. 362, 395-98 (2000); *McCleskey v. Kemp*, 481 U.S. 279, 367 (1987) (Stevens, J., dissenting); Stevens, 2005 ABA Address, *supra* note 41; Stevens, Orlando ABA Address, *supra* note 17, at 31.

<sup>180</sup> In 2005, Republicans in the House and Senate introduced the Streamlined Procedures Act, which was intended to speed up executions by reducing access to federal habeas review far beyond that which could be accomplished through existing judicially-imposed restrictions or the AEDPA. See Streamlined Procedures Act of 2005, S. 1088, 109th Cong. (2005) (as introduced by Sen. Jon Kyl); Streamlined Procedures Act of 2005, H.R. 3035, 109th Cong. (2005) (as introduced by Rep. Dan Lungren). For example, the legislation would have stripped federal courts of jurisdiction to hear claims alleging federal constitutional sentencing error — in other words, the claims most often raised in death penalty cases — if a state court had found that the error was “not prejudicial.” It would have overturned a raft of pre- and post-AEDPA Supreme Court cases establishing procedural rules for federal habeas review and replaced them with rules that entirely cut off many claims from federal court consideration. See S. 1088, § 2 (overruling *Rhines v. Weber*, 544 U.S. 269, 278 (2005)); *id.* § 4 (overruling *Artuz v. Bennett*, 531 U.S. 4, 11 (2000)); *id.* § 7 (overruling *Lindh v. Murphy*, 521 U.S. 320, 322-23 (1997)). The bills precluded federal habeas review of any ineffective assistance of counsel claim or one held by a state court to have been procedurally defaulted absent “clear and convincing evidence” that no reasonable factfinder would find the petitioner guilty of the underlying crime. *Id.* § 4(a)(2). Although the legislation gained an early, “alarming momentum,” it was largely defeated after almost a year. See Editorial, *Stop This Bill*,

during this period offer one of the more prominent and widely publicized examples of swimming upstream. Beginning with Attorney General John Ashcroft, the Bush Administration's Department of Justice aggressively pursued federal capital cases, particularly in jurisdictions such as Massachusetts, New York, Puerto Rico, and the District of Columbia, which either did not have the death penalty or where it was on the books but rarely used.<sup>181</sup> The number of federal capital prosecutions increased from 182 during the Clinton Administration to 246 during the Bush Administration.<sup>182</sup> The latter aimed to replace an independent Department of Justice with one staffed at the national and district levels by attorneys loyal to the President's political agenda.<sup>183</sup> Formal inquiries by the Department and

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WASH. POST, July 10, 2005, at B06 ("The legislation would be simply laughable, except that it has an alarming momentum."); James Kuhnhehn, *Additions Slipped into Patriot Act*, SEATTLE TIMES, Feb. 1, 2006, [http://seattletimes.nwsourc.com/html/politics/2002775079\\_patriot01.html](http://seattletimes.nwsourc.com/html/politics/2002775079_patriot01.html) (describing how Senator Kyl had inserted language into amended Patriot Act that would "fast-track" federal habeas review, in part, by authorizing U.S. Attorney General to determine when states qualify to adopt expedited procedures). The renewed Patriot Act required the adoption of regulations for the Attorney General's approval process. See Adam Liptak, *Sidebar, Greasing the Wheels on the Machinery of Death*, N.Y. TIMES, Aug. 20, 2007, <http://select.nytimes.com/2007/08/20/us/20bar.html>.

<sup>181</sup> See Eric Tirschwell & Theodore Hertzberg, *Politics and Prosecution: A Historical Perspective on Shifting Federal Standards for Pursuing the Death Penalty in Non-Death Penalty States*, 12 J. CONST. L. 57, 62, 63-64 (2009) (explaining that prosecution of federal death penalty in non-death penalty states is "very recent phenomenon" and was explicit policy of Department of Justice under Bush Administration, which employed rationale that policy was intended "to ensure consistency and fairness" in the application of the federal death penalty"); *id.* at 81-85 (discussing change in Department protocol under Attorney General Gonzalez, "reversing the Department's policy of general deference to non-death penalty states"); *id.* at 85-94 (describing overwhelming hostility by non-death penalty jurisdictions to federal capital prosecutions, opposition by U.S. Attorneys to Main Justice's refusal to defer to local decisions, and dismissal of nine U.S. Attorneys in 2006).

<sup>182</sup> See Declaration of Kevin McNally Regarding Defendants Approved for the Federal Death Penalty, Exhibit I to Motion Prohibiting the Government from Seeking the Death Penalty Against Mr. Cyrus as Prior DOJ Administration Improperly Decided to Prosecute this Case as a Capital Case at 1, *United States v. Raymon Hill No. CR-05000324-MMC* (N.D. Cal filed May 26, 2009).

<sup>183</sup> See also Stephen Ohlemacher, *Testimony: Rove Central in U.S. Attorney Firing*, S.F. CHRON., Aug. 12, 2009, at A5. See generally U.S. DEP'T OF JUSTICE, AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006 (2008), available at <http://www.usdoj.gov/oig/special/s0809a/final.pdf> [hereinafter REMOVAL INVESTIGATION REPORT]; U.S. DEP'T. OF JUSTICE, AN INVESTIGATION OF ALLEGATIONS OF POLITICIZED HIRING BY MONICA GOODLING AND OTHER STAFF IN THE OFFICE OF THE ATTORNEY GENERAL (2008), available at <http://www.usdoj.gov/oig/special/s0807/final.pdf> (issued by Department's Office of Professional Responsibility and Office of the Inspector General after conducting 18-month investigation into hiring practices).

by Congress into these practices followed news reports about a series of terminations of U.S. Attorneys, which the public came to know as the "U.S. Attorney Firing Scandal."<sup>184</sup> There is no mystery about the relationship between the thirty-five percent upturn in capital prosecutions and the White House's strategy to assume control of the Department of Justice.<sup>185</sup> In its investigative report, released in 2008, the Department concluded that when the "most significant factor" in the decision to terminate a U.S. Attorney is his or her perceived failure to seek the death penalty aggressively, the decisionmaking process impermissibly turns upon political considerations.<sup>186</sup>

Leading up to and following the certiorari grant in *Kennedy v. Louisiana*, there was a campaign to enact child rape capital punishment legislation in order to increase the number of states with these statutes and thereby strengthen the argument that a national trend favored their constitutionality.<sup>187</sup> In April 2008, when the parties argued the case, six states had child rape death penalty laws; three of

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<sup>184</sup> See, e.g., Eric Lipton & David Johnston, *Justice Dep't Announces Inquiry into Its Hiring Practices*, N.Y. TIMES, May 3, 2007, at A18 (reporting on DOJ internal investigation into whether former advisor to then-Attorney General Alberto Gonzalez "improperly tried to fill vacancies for career prosecutors at the agency with Republicans loyal to the Bush administration"); Mike Scarcella, *DOJ: Politicized Hiring Decisions a "Dark Chapter" as Justice*, BLOG LEGAL TIMES, Aug. 18, 2009, <http://legaltimes.typepad.com/blt/2009/08/doj-politicized-hiring-decisions-a-dark-chapter-at-justice.html> (reporting on motion by government lawyers to dismiss class action suit by rejected DOJ applicants, which alleged improper political criteria had been used in hiring decisions).

<sup>185</sup> REMOVAL INVESTIGATION REPORT, *supra* note 183, at 358 ("The Department's removal of the U.S. Attorneys and the controversy it created severely damaged the credibility of the Department and raised doubts about the integrity of Department prosecutive decisions.").

<sup>186</sup> *Id.* at 244, 325-26.

<sup>187</sup> The Supreme Court granted certiorari on January 4, 2008. See *Kennedy v. Louisiana*, 552 U.S. 1087 (2009) (mem.); DPIC 2008, *supra* note 169, at 5 (reporting that after review in *Kennedy* was granted, "at least five states (Alabama, Missouri, Colorado, Mississippi, and Tennessee) considered" such legislation and that all bills were defeated); see also *Blunt Files SCOTUS Brief Favoring Death Penalty for Child Rapists*, KANSAS CITY STAR, Mar. 19, 2008, <http://primebuzz.kcstar.com/?q=node/10579> (discussing amicus brief signed by Missouri Governor Roy Blunt and other state lawmakers and bill proposed by Governor Blunt in December 2007 to authorize death penalty for child rape). See generally Brief of Amici Curiae Missouri Governor Matt Blunt & Members of the Missouri General Assembly in Support of Respondent, at \*8, *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) (No. 07-343), 2008 WL 742922 (arguing that states such as Missouri should be allowed to debate propriety of such legislation before Court determines whether "national consensus" exists against death penalty for rape of child).

the states had approved the bills in 2006 or 2007.<sup>188</sup> Child rape death penalty legislation was pending in Alabama, Mississippi and Missouri.<sup>189</sup> For example, although the Mississippi legislature had amended the state's capital punishment statute in 1998 to eliminate the death penalty for the rape of a child,<sup>190</sup> a bill to reinstate the punishment was introduced in 2007.<sup>191</sup> Ultimately, the numbers were insufficient to persuade the Court that a "national consensus" favored the death penalty for the offense of child rape.<sup>192</sup> And, across the country, legislators mostly rejected bills to expand the death penalty.<sup>193</sup>

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<sup>188</sup> The six states were Texas, Oklahoma, South Carolina, Montana, Louisiana, and Georgia; most required that the defendant have a prior conviction for child sexual abuse. Oklahoma and South Carolina had enacted legislation in 2006 and Texas in 2007. See GA. CODE ANN. § 16-6-1 (2007), cited in *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2651 (2008); LA. REV. STAT. ANN. § 14:42 (1996); MONT. CODE ANN. § 45-5-503 (2007); OKLA. STAT. ANN. tit. 21, § 843.5 (West 2007); S.C. CODE ANN. § 16-3-655(C)(1) (2007); TEX. PENAL CODE ANN. § 22.021(a) (Vernon 2007); see also Brief of Respondent at \*36-37 & nn.22-26, *Kennedy v. Louisiana*, 128 S. Ct. 2641, (No. 07-343), 2008 WL 727814.

<sup>189</sup> See H.B. 456, 2008 Leg., Reg. Sess. (Ala. 2008); S.B. 2596, 2008 Leg., Reg. Sess. (Miss. 2008); S.B. 1194, 94th Gen. Assem., 2d. Reg. Sess. (Mo. 2008). These bills were defeated in Colorado, Mississippi, and Missouri. See, e.g., Virginia Young, *Lame Ducks, Term Limits, Means Slow Session*, ST. LOUIS POST-DISPATCH, May 18, 2008, at A1; Assoc. Press, *Lawmakers Reject Death Penalty for Child Sex Abusers*, DENVER POST, Apr. 11, 2008, available at [http://www.denverpost.com/legislature/ci\\_8891266](http://www.denverpost.com/legislature/ci_8891266).

<sup>190</sup> Brief of Respondent, *supra* note 188, at \*27 n.14 (citing MISS. CODE ANN. § 97-3-65 (1972)).

<sup>191</sup> *Id.*

<sup>192</sup> *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2653 (2008).

<sup>193</sup> For example, in 2007, the Georgia, Missouri, Utah, and Virginia legislatures defeated expansion bills. See *People v. LaValle*, 817 N.E.2d 341, 359 (N.Y. 2004) (holding New York's statutorily mandated instruction unconstitutional under state constitution); Alan Feuer, *State's Highest Court Tosses Out Death Sentence in Killings at a Queens Wendy's*, N.Y. TIMES, Oct. 24, 2007, at B3 (reporting that, consistent with decision in *LaValle*, court reversed death sentence of John B. Taylor, last person on state's death row); DPIC 2007, *supra* note 169, at 2-3 ("A bill to reinstate the death penalty in Massachusetts was defeated by the strongest majority in 10 years."). Legislative efforts to reinstate the death penalty failed in New York. See, e.g., Michael Powell, *In N.Y., Lawmakers Vote Not to Reinstate Capital Punishment*, WASH. POST, Apr. 13, 2005, at A3.

II. WHY THE BREAK, WHY *BAZE*, AND WHY NOT DISSENT?

## A. Overview

A fair summary of Justice Stevens's judicial philosophy, expressed principally through his public statements, is as follows: First, a judge must be open to the process of "learning on the job," which means that he or she should be open-minded in each case, approaching a controversy with the view that there is often more to the litigation than the initial papers suggest.<sup>194</sup> Second, a judge should be open-minded in applying the law; the Constitution as a whole, not only the Eighth Amendment, is a living document.<sup>195</sup> Third, open-mindedness should be tempered by respect for precedent.<sup>196</sup> Last, although dissenting opinions should not be suppressed, a judge should first exert his or her intellectual capacity to develop majorities.<sup>197</sup> These guiding principles may explain best why Justice Stevens ultimately broke with the death penalty, why he chose *Baze* in which to do so, why he concurred in the judgment in the narrowest possible way rather than file a dissent, and why he has not followed the practice of Justices Brennan, Marshall, and Blackmun in subsequent death penalty opinions.<sup>198</sup>

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<sup>194</sup> See Stevens, *Learning on the Job*, *supra* note 80, at 1561-63.

<sup>195</sup> Justice John Paul Stevens, *Judicial Predilections*, Address to the Clark County Bar Ass'n 14-16 (Aug. 18, 2005), available at [http://seflorida.uli.org/events06/Redev/USSC\\_JusStevens\\_Aug18\\_2005.pdf](http://seflorida.uli.org/events06/Redev/USSC_JusStevens_Aug18_2005.pdf) [hereinafter Stevens, *Judicial Predilections*] (discussing and contrasting cases in which "intent of the Framers . . . should be given controlling weight," with those in which Constitution is described as "a living document, [in which] the views that prevail today should be decisive," and stating that cases implicating Eighth Amendment are examples of latter because "the scope of the principle enacted into law . . . contemplated changing responses to changes in society"). Justice Stevens's approach, of course, is wholly at odds with Justice Scalia's "originalism." See Scalia, *Originalism*, *supra* note 140.

<sup>196</sup> See, e.g., John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 9 (1983) (explaining nature of examination by Court required before precedent should be overruled); Rosen, *supra* note 48, at 54 (stating that Justice Stevens views himself as "someone who tries to follow precedents and 'who submerges his or her own views of sound policy to respect those decisions by the people who have authority to make them'").

<sup>197</sup> See Rosen, *supra* note 48, at 52, 56. (commenting that, during his Supreme Court tenure, Justice Stevens has authored more dissenting and concurring opinions than any other Justice, but noting his success at using his "intellectual rather than personal" powers of persuasion to build majorities).

<sup>198</sup> Given Justice Stevens's candor, it would not be surprising if, at some point, he were to speak to a public audience about why he chose *Baze* to express his conclusion that the time for abolition has arrived. His first post-*Baze* comments were offered in an address to the Sixth Circuit Judicial Conference; there, he discussed the procedure

Justice Stevens began by announcing his expectation that *Baze* would “generate more debate” not only about the constitutionality of lethal injection as a method of execution, particularly with regard to the continued use of a paralytic in the three-drug protocol, “but also about the justification for the death penalty itself.”<sup>199</sup> His concurring opinion reflects, although it does not cite, the reasoning of Justice Blackmun, who lamented “how far afield the Court has strayed from its statutorily and constitutionally imposed obligations” in the administration of the death penalty.<sup>200</sup> Justice Stevens likewise came to recognize that the Court would not insist upon procedures, which “actually will provide consistency, fairness, and reliability in a capital sentencing scheme.”<sup>201</sup> But in *Baze*, Justice Stevens did more than reject the faulty machinery of death. The words of Justices Brennan and Marshall reverberate in the Justice’s conclusion that the societal justifications for capital punishment are no longer sufficiently viable and the risks of error are too great.<sup>202</sup>

The first objective of the conservatives in *Baze* was to put an end both to the de facto moratorium on executions occasioned by the

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used to euthanize Eight Belles, the horse that had collapsed during the Kentucky Derby. The Justice suggested that the animal “had probably experienced a more humane death than those who die on death row.” Diane Marie Amann, *Up the Road from Scottsboro, Justice Stevens Speaks Out Against Capital Punishment*, INTLAWGIRRLS, May 12, 2008, <http://intlwgrrls.blogspot.com/2008/05/up-road-from-scottsboro-stevens-speaks.html>.

<sup>199</sup> *Baze v. Rees*, 128 S. Ct. 1520, 1550-51 (2008) (Stevens, J., concurring in judgment); see Berger, *supra* note 2, at 310 (arguing that “pancuronium not only protects this particular method of lethal injection from attack but also helps preserve the death penalty itself,” and that if pancuronium was not administered and executions “did not appear peaceful . . . public support for the death penalty might suffer”).

<sup>200</sup> *Callins v. Collins*, 510 U.S. 1141, 1158 (1994) (Blackmun, J., dissenting from denial of certiorari).

<sup>201</sup> *Id.* at 1159.

<sup>202</sup> *Baze*, 128 S. Ct. at 1547 (Stevens, J., concurring in judgment) (questioning legitimacy of deterrence as rationale for death penalty); *id.* at 1547-48 (questioning legitimacy of retribution); *id.* at 1551 (announcing that risk of wrongful executions is “of decisive importance for me”); *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring) (writing that “the finality of the death penalty precludes relief” for those who are innocent of their crimes, but also objecting to capital punishment because individuals who were guilty but whose sentences were unconstitutional have also been executed); *id.* at 300-02 (1972) (rejecting legitimacy of deterrence); *id.* at 304-05 (rejecting retribution); *id.* at 342, 344 (Marshall, J., concurring) (rejecting retribution); *id.* at 345-55 (rejecting legitimacy of deterrence); *id.* at 366-68 (discussing, inter alia, certainty that “innocent persons have been executed” and range of causes for wrongful convictions beyond those ascertainable by current scientific methods).

grant of certiorari and, along with it, future challenges to lethal injection as a method of execution. Second, they wanted to affirm their support for the institution of capital punishment.<sup>203</sup> As to the first goal, Professor Eric Berger analyzed the significance of the Court's decision to grant certiorari in *Baze* rather than in *Taylor v. Crawford*, a case from the Eighth Circuit, which "unquestionably presented more evidence suggesting an Eighth Amendment violation."<sup>204</sup> He postulated that *Baze* was an "unfriendly grant, in which four pro-death penalty Justices deliberately selected a case with an undeveloped record, because such a case would make it easier to uphold the procedure and articulate a stricter legal standard."<sup>205</sup> Having set the constitutional bar high, the plurality dismissed Justice Stevens's prediction that *Baze* would spawn further litigation, including opportunities for stays of execution based upon its view that an inmate who challenges a "lethal injection protocol substantially similar" to Kentucky's would be unlikely to meet its new standard.<sup>206</sup> Justice Alito concurred separately with the express purpose of highlighting the imperative that the lower courts adhere strictly to the plurality's standard.<sup>207</sup> Justices Thomas and Scalia were wary that the Court's failure to uphold all methods of execution, unless they are "deliberately designed to inflict pain," would generate successive lawsuits based upon whatever might be the most recent development in methods of execution.<sup>208</sup> As I discuss in Part III.A, below, eighteen months after *Baze*, while executions have resumed — primarily in the

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<sup>203</sup> See Deborah W. Denno, *For Execution Methods Challenges, the Road to Abolition Is Paved with Paradox*, [hereinafter Denno, *Abolition Paradox*] in *THE ROAD TO ABOLITION 183, 184* (Charles J. Ogletree, Jr. & Austin Sarat eds., New York Univ. Press 2009) (observing about *Baze* that "many of the Justices' splintered rationales reflected deep concerns about avoiding future lethal injection or insulating the death penalty itself").

<sup>204</sup> Berger, *supra* note 2, at 279 n.102 (referring to *Taylor v. Crawford*, 128 S.Ct. 2047 (2008), which was pending certiorari at the same time as *Baze*).

<sup>205</sup> *Id.* Berger notes that the Kentucky attorneys, who had "received incomplete discovery" and "were unable to depose the executioners," nonetheless "represented in [*Baze's*] petition for certiorari that the record was, in fact, uniquely complete in comparison to other legal injection cases." *Id.* at 27 & n.70; see also *supra* note 131 (discussing Justice Stevens's view that Court granted certiorari in *Kansas v. Marsh* solely to "facilitate[e] the imposition of the death penalty in [*Kansas*]" (quoting *Kansas v. Marsh*, 548 U.S. 163, 201 (2006) (Stevens, J., dissenting)).

<sup>206</sup> *Baze*, 128 S. Ct. at 1537 (plurality opinion).

<sup>207</sup> *Id.* at 1538 (Alito, J., concurring).

<sup>208</sup> *Id.* at 1556, 1562 (Thomas, J., concurring, joined by Scalia, J.) (arguing that plurality's departure from "the original understanding of the Eighth Amendment" will allow abolitionists to "embroil the States in never-ending litigation concerning the adequacy of their execution procedures").

states that had the highest execution rates before the de facto moratorium — lethal injection challenges have not halted. Some have had favorable results in the courts; others have added leverage to abolition efforts.<sup>209</sup> Both developments validate Justice Stevens's expectations.<sup>210</sup>

With regard to the conservatives' second objective, the plurality, in a passage that does not mention Justice Stevens by name, objected to mistaking "one's personal disapproval" of the death penalty for a "prevailing condemnation."<sup>211</sup> Elsewhere, directly addressing Justice Stevens's concurring opinion, the plurality insisted that no aspect of its opinion "undermines or remotely addresses the validity of capital punishment."<sup>212</sup> Justice Alito's separate concurrence emphasized the need to keep method-of-execution challenges "separate from the controversial issue of the death penalty itself."<sup>213</sup> However, the section of his opinion that discusses this point begins with a broad swipe at capital post-conviction litigation, in which Justice Alito expressed his disapproval of the "seemingly endless" proceedings in the post-*Gregg* era.<sup>214</sup> He saw a direct relationship between lethal injection litigation, which had produced a six-month moratorium on executions, and the prospect of post-*Baze* challenges "that would go a long way toward bringing about the end of the death penalty as a practical matter."<sup>215</sup>

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<sup>209</sup> *Id.* at 1546 & n.8 (Stevens, J., concurring in judgment) (observing that debate about New Jersey's lethal injection protocol may have had part in decision to create state-wide capital punishment study commission and in New Jersey's subsequent abolition of death penalty).

<sup>210</sup> *Id.* at 1548 (stating that "[f]ull recognition of the diminishing force of the principal rationales for retaining the death penalty should lead this Court and legislatures to reexamine the question [of abolition]," and urging "a dispassionate, impartial" cost-benefit analysis of administration of capital punishment).

<sup>211</sup> *Id.* at 1537 (plurality opinion) (quoting *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 471 (1974) (Frankfurter, J., concurring)).

<sup>212</sup> *Id.* at 1538 n.7 ("The fact that society has moved to progressively more humane methods of execution does not suggest that capital punishment itself no longer serves valid purposes.").

<sup>213</sup> *Id.* at 1542 (Alito, J., concurring).

<sup>214</sup> *Id.* at 1538.

<sup>215</sup> *Id.* at 1542. Justice Alito's concurring opinion leaves little doubt that he views lethal injection litigation as a surrogate for abolition efforts. *See, e.g., id.* at 1539-40 (arguing that modification of lethal injection protocols to require participation by medical professionals cannot be regarded as "feasible" or "readily available" alternative to existing protocols because medical professionals are barred by ethical rules from participating in executions). *But see* Ty Alper, *The Truth About Physician Participation in Lethal Injection Executions*, 88 N.C. L. REV. 11, 11 (2009) [hereinafter Alper, *Physician Participation*] (explaining that requiring physician participation in lethal injection executions is not simply abolitionist strategy).



Justices Scalia and Thomas yielded no ground on their originalist view that the Constitution's "very text" leaves no room for the Court to meddle in the legislative prerogative to choose death.<sup>216</sup> Acknowledging that the constitutionality of the death penalty was not before the Court and, indeed, was assumed by petitioners, Justice Breyer, concurring in the judgment, nonetheless remarked on the "serious risks" inherent in capital punishment.<sup>217</sup> The two dissenters, Justices Ginsburg and Souter, made no mention of the issue.<sup>218</sup>

### B. *An Answer Only to the Second Question Presented*

Part I of Justice Stevens's concurrence is an indictment of pancuronium bromide, the paralytic (second) drug used in the three-chemical protocol by the federal government, and all but one of the states that authorized the death penalty when *Baze* was decided.<sup>219</sup> Justice Stevens began with the observation "that Kentucky may well kill petitioners using a drug that it would not permit to be used on their pets."<sup>220</sup> He concluded this part with an admonition that "[s]tates

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<sup>216</sup> *Baze*, 128 S. Ct. at 1552 (Scalia, J., concurring, joined by Thomas, J.); *id.* at 1556 (Thomas, J., concurring, joined by Scalia, J.) (stating that "it is clear that the Eighth Amendment does not prohibit the death penalty," citing "the ubiquity of the death penalty in the founding era" and "the Constitution's express provision for capital punishment").

<sup>217</sup> *Id.* at 1563, 1566-67 (Breyer, J., concurring in judgment) (listing risks of executing innocent persons, race discrimination infecting process, and prolonged incarceration on death row before cases are resolved).

<sup>218</sup> *Id.* at 1567-72 (Ginsburg, J., dissenting, joined by Souter, J.).

<sup>219</sup> *Id.*, 128 S. Ct. at 1527-28 (plurality opinion); see Denno, *Abolition Paradox*, *supra* note 203, at 189. In 2009, New Mexico abolished the death penalty, reducing the total number of states to 35. See Trip Jennings, *Richardson Abolishes N.M. Death Penalty*, N.M. INDEP., Mar. 18, 2009, <http://newmexicoindependent.com/22487/guv-abolishes-death-penalty-in-nm>. In February 2008, before *Baze* was decided, the Nebraska Supreme Court ruled that electrocution is cruel and unusual punishment. See *State v. Mata*, 745 N.W.2d 229, 278 (Neb. 2008); see also Adam Liptak, *Electrocution Is Banned in Last State to Rely on It*, N.Y. TIMES, Feb. 9, 2008, at A9. On May 28, 2009, the governor signed legislation adopting lethal injection as that state's method of execution. See Laurie Dutcher, *In Nebraska Lethal Injection Law Passed*, CORRECTIONS.COM, May 29, 2009, <http://www.corrections.com/articles/21672>. Currently, lethal injection is either the only method or one of the alternate methods of execution employed by all states that impose the death penalty. *Baze*, 128 S. Ct. at 1526-27 & n.1; see also Berger, *supra* note 2, at 264 & n.17. The federal government also has a lethal injection protocol. *Baze*, 128 S. Ct. at 1527. In November 2009, the Ohio Department of Corrections and Rehabilitation adopted a single-drug lethal injection protocol. See *infra* Part III.A.

<sup>220</sup> *Baze*, 128 S. Ct. at 1543 (Stevens, J. concurring in judgment). Kentucky prohibits the use of pancuronium bromide in animal euthanasia. See *Baze*, 128 S. Ct.

wishing to decrease the risk that future litigation will delay executions or invalidate their protocols” consider eliminating the use of pancuronium bromide and “reconsider the sufficiency of their procedures for checking the inmate’s consciousness.”<sup>221</sup> Of necessity, Justice Stevens’s analysis relied largely on facts outside the Kentucky record, although, in *Baze* and other lethal injection challenges, it was undisputed that an inmate will suffer “a constitutionally unacceptable risk of suffocation from the administration of the pancuronium bromide and pain from the injection of potassium chloride” if he is not adequately anesthetized when the paralytic is administered.<sup>222</sup>

It is fair to say that most of the lawyers involved in the *Baze* Supreme Court litigation on behalf of the petitioners shared a concern — validated during oral argument and in the plurality, concurring, and dissenting opinions — about the paucity of the record.<sup>223</sup> Given

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1543 (Stevens, J. concurring in judgment) (stating no states explicitly permit its use); 201 KY. ADMIN. REGS. 16:090, § 51(1) (2004). See generally Ty Alper, *Anesthetizing the Public Conscience: Lethal Injection and Animal Euthanasia*, 35 *FORDHAM URB. L.J.* 817, 841 (2008) [hereinafter Alper, *Anesthetizing the Public Conscience*].

<sup>221</sup> *Baze*, 128 S. Ct. at 1546 n.9 (Stevens J., concurring in judgment); see Berger, *supra* note 2, at 274, 276.

<sup>222</sup> *Baze*, 128 S. Ct. at 1533, 1543 n.1, 1544 nn.3-5, 1546, 1549 n.9; see, e.g., *Baze*, 128 S.Ct. at 1543 n.1 (Stevens, J., concurring in judgment) (citing reports of professional organizations, amicus curiae briefs, and law review articles); *Harbison v. Little*, 511 F. Supp. 2d 872, 883 (M.D. Tenn. 2007), *rev’d Harbison v. Little*, 571 F.3d 531 (6th Cir. 2009); *Morales v. Tilton*, 465 F. Supp. 2d 972, 978 (N.D. Cal. 2006). Justices Breyer and Alito relied on a study from the Netherlands, where physician-assisted euthanasia is lawful. See *Baze*, 128 S. Ct. at 1535 (plurality opinion); *id.* at 1566 (Breyer, J., concurring in judgment); *id.* at 1541 (Alito, J., concurring). But see Berger, *supra* note 3, at 37-38 (explaining that “comparison to euthanasia in the Netherlands is inapposite, because it is a different kind of procedure from lethal injection”).

<sup>223</sup> See Brief for Michael Morales et al. as Amici Curiae Supporting Petitioners at \*1, *Baze v. Rees*, 128 S. Ct. 1520 (2008) (No. 07-5439), 2007 WL 3407042 at \*i; Oyez.org, *Baze v. Rees Oral Argument*, [http://www.oyez.org/cases/2000-2009/2007/2007\\_07\\_5439/argument/](http://www.oyez.org/cases/2000-2009/2007/2007_07_5439/argument/) (last visited Feb. 8, 2010). For example, when Donald Verilli, counsel for petitioners in the Supreme Court, argued that the “practical alternative” to the three-drug protocol would be to use a “single dose of barbiturate,” Justice Alito responded that the argument had not been raised in state court and that “there is virtually nothing in the record” to show this procedure is “practical or that it’s preferable.” In response to a question from Justice Scalia, Verilli pointed out that the vacuum in the record resulted from the trial court’s failure to address evidence presented by petitioners. Oyez.org, *supra*; see also *Baze*, 128 S. Ct. at 1534-35 (plurality opinion) (concluding that record contained “no findings on the effectiveness of petitioners’ barbiturate-only protocol”); *id.* at 1542 (Stevens, J., concurring in judgment) (asserting that constitutionality of three-drug protocol “may well be answered differently in a future case on the basis of a more complete record”); *id.* at 1566 (Breyer, J., concurring in judgment) (agreeing with plurality and Justice

the limited evidence, would five Justices find that Kentucky's three-drug protocol violated the Eighth Amendment under whatever constitutional standard the Court adopted? Professor Eric Berger explains why the "decidedly clean" Kentucky record could not satisfy the plurality's two-part test.<sup>224</sup> Justice Stevens's refusal to answer the first question presented — respecting the standard for deciding the constitutionality of a method of execution — and comments by Justices Breyer and Ginsburg in their respective opinions support Professor Berger's theory that *Baze* was a hostile grant.<sup>225</sup> Berger's discussion of the Court's seven opinions brings to light what the *Baze* record did not: "[H]aphazard practices and untrained, unqualified personnel greatly heighten the risk that the procedure will cause an excruciating death."<sup>226</sup> Justice Stevens's decision not to answer the first question presented coheres with his view that the question should not have been resolved on the record in that case. On the evidence before the Court, Kentucky's protocol did not violate the Eighth Amendment, whether the test was that proposed by Justices Ginsburg, Souter, and Breyer or the one approved by the plurality opinion.<sup>227</sup> By declining to

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Stevens that "the record provides too little reason" to require additional safeguards in Kentucky's procedure); *id.* at 1567 (Ginsburg, J., dissenting) (arguing that "risk at stake" coupled with Kentucky's failure to adopt "basic safeguards used by other States" warrants remand for further fact-finding).

<sup>224</sup> Berger, *supra* note 2, at 273-74 (explaining that Kentucky had conducted only one execution; plaintiffs "received incomplete discovery"; and state's protocol included some "precautionary measures, which, in contrast to other states, created "decidedly clean" record). Professors Berger and Marceau agree that "it is difficult to know what the law is." Berger, *supra* note 2 at 279 (attributing difficulty to "incomplete record and . . . seven different opinions" and concluding that "[e]ven to the extent, though, that the three-Justice plurality's opinion may be viewed as the holding, it offers incomplete clarification"); see Marceau, *supra* note 2, at 209 ("Because *Baze* was a plurality opinion, it is an open question as to how lower state and federal courts should apply the Marks rule, and the confusion as to the content is tangible.")

<sup>225</sup> *Baze*, 128 S. Ct. at 1563-67 (Breyer, J., concurring in judgment) (discussing, at several points, lack of evidence and turning to extra-record literature for answers to constitutional question); *id.* at 1567-72 (Ginsburg, J., dissenting, joined by Souter, J.) (arguing insufficient evidence was before Court to determine whether, under Eighth Amendment standard proposed by dissent, inmates in Kentucky are sufficiently anesthetized before administration of second two drugs).

<sup>226</sup> See Berger, *supra* note 2, at 262. See generally Brief for Michael Morales et al., *supra* note 223, at \*4 (describing "what is known to have gone awry, and why" in lethal injection executions). Berger also explains why, notwithstanding *Baze*, judicial intervention remains necessary, and how this intervention can be accomplished. Berger, *supra* note 2, at 262, 274, 280-96, 314-31.

<sup>227</sup> *Baze*, 128 S. Ct. at 1552 (Stevens, J., concurring in judgment) (referring to Justice Ginsburg's dissenting opinion, joined by Justice Souter, that method of

select among the proposed Eighth Amendment tests, Justice Stevens maximized the likelihood that some lower courts would not consider themselves bound by the plurality's Eighth Amendment standard and would see *Baze* as limited to its facts.<sup>228</sup> Therefore, the disaccord on the Court might serve as a catalyst for debate about lethal injection as a method of execution and the capital punishment regime.<sup>229</sup>

### C. "Societal Purposes" for Capital Punishment

In the second part of his concurrence in *Baze*, Justice Stevens dismantled "three societal purposes for death as a penal sanction: incapacitation, deterrence, and retribution."<sup>230</sup> Although each will be considered in turn, overall, the Justice's reasoning reflects his philosophy that "the Constitution is a living document," which requires that the "constitutional principle" at issue be applied based upon "the views that prevail today."<sup>231</sup>

#### 1. Incapacitation

Justice Stevens dispatched the incapacitation rationale by demonstrating that the universal availability of the alternative punishment of life without possibility of parole in capital cases has eliminated the legitimacy of this objective, which was dubious, even in 1976.<sup>232</sup> Of note, incapacitation was not one of the "social purposes" identified by a majority of the Court in *Atkins v. Virginia*<sup>233</sup> or *Roper v.*

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execution is unconstitutional if it "creates an untoward, readily avoidable risk of inflicting severe and unnecessary pain," and to Chief Justice Roberts's definition of constitutional test, which was also approved by Justices Kennedy and Alito); *id.* at 1563 (Breyer, J., concurring in judgment).

<sup>228</sup> Marceau, *supra* note 2, at 211-12 (arguing that Justice Stevens's refusal to choose among the proposed constitutional standards enhanced "the Court's flexibility in future cases").

<sup>229</sup> *Baze*, 128 S. Ct. at 1542-43 (Stevens, J., concurring in judgment); *see infra* Part III.

<sup>230</sup> *Baze*, 128 S. Ct. at 1547 (Stevens, J., concurring in judgment) (citing *Gregg v. Georgia*, 428 U.S. 153, 183 n.28 (1976) (opinion of Stewart, Powell & Stevens, JJ.)).

<sup>231</sup> Stevens, *Judicial Predilections*, *supra* note 195, at 15-16 (citing as example "Eighth Amendment's ban on the infliction of cruel and unusual punishment, which take into account the evolving standards of decency in a civilized society").

<sup>232</sup> *Baze*, 128 S. Ct. at 1547 (observing that 48 states now have some form of permanent imprisonment "with the majority of statutes enacted within the last two decades"). Justice Stevens also relied upon the "significant" drop in support for the death penalty when permanent imprisonment is an option as well as the "sociological evidence" that death verdicts are less likely life without possibility of parole is available as an alternative sentence. *Id.*

<sup>233</sup> 536 U.S. 394, 319 (2002).

*Simmons*,<sup>234</sup> the two most recent categorical exemption decisions issued prior to *Baze*. Justice Scalia's dissenting opinion in *Atkins*, which quoted the joint opinion of Justices Stewart, Powell, and Stevens in *Gregg*, criticized the *Atkins* majority for omitting any consideration of incapacitation.<sup>235</sup> Justice Scalia was incorrect. The three Justices in *Gregg* did not embrace incapacitation as one of the constitutionally acceptable rationales for capital punishment. Rather, they identified "retribution and deterrence" as the "two principal social purposes" for the death penalty.<sup>236</sup> In a footnote in *Gregg*, Justices Stewart, Powell, and Stevens, citing two state court cases,<sup>237</sup> simply observed that incapacitation "has been discussed" as another objective.<sup>238</sup>

Justice Scalia's comment in *Atkins* may explain why Justice Stevens chose to make explicit in *Baze* his refutation of the incapacitation rationale. However, many capital punishment supporters consider incapacitation to be a subset of deterrence, rather than a separate justification for the penalty.<sup>239</sup> For example, proponents who concede the lack of empirical support for the hypothesis that the death penalty deters future offenders, argue that the inmate's execution is the basis of the punishment's actual value.<sup>240</sup>

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<sup>234</sup> 543 U.S. 551, 571 (2005) ("We have held there are two distinct social purposes served by the death penalty: 'retribution and deterrence of capital crimes by prospective offenders.'" (quoting *Atkins*, 536 U.S. at 319)).

<sup>235</sup> *Atkins*, 536 U.S. at 349-50 (Scalia, J., dissenting) (observing that Court's conclusion that death penalty for people with mental retardation does not serve "social purposes" of retribution and deterrence "conveniently ignores a third 'social purpose' of the death penalty — 'incapacitation of dangerous criminals and the consequent prevention of crimes that they may otherwise commit in the future'").

<sup>236</sup> *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (opinion of Stewart, Powell & Stevens, JJ.).

<sup>237</sup> *Id.* at 183 n.28 (citing *People v. Anderson*, 493 P.2d 880, 896 (Cal. 1972), *cert. denied*, 406 U.S. 958 (1972) and *Commonwealth v. O'Neal*, 339 N.E.2d 676, 685-686 (Mass. 1975)).

<sup>238</sup> *Id.*

<sup>239</sup> See, e.g., Derooy Murdock, *A Sure Way to Prevent Prison Escapes*, PRODEATHPENALTY.COM, Mar. 30, 2001, <http://www.prodeathpenalty.com/murdock.htm>. ("Life sentences too often are mere challenges for prisoners to escape, terrify law-abiding citizens and sometimes kill again. The death penalty's detractors cannot refute this fact: Even the toughest criminals become remarkably docile once separated from society by six feet of soil.").

<sup>240</sup> Dudley Sharp, the death penalty resource director of Justice for All, places incapacitation and deterrence in the same category, distinguishing between "the individual deterrent effect," which is achieved by "executing murderers [to] prevent them from murdering again," and "the general, or systemic, deterrent effect," which, he argues, "is proven by individual deterrence." He argues that deterrence studies are

In *Baze*, Justice Stevens also discussed how the life-without-parole, or LWOP, alternative has contributed to reducing both death verdicts and popular support for the death penalty.<sup>241</sup> Recently, Professor Carol Steiker surveyed several years of national and state polling to determine whether a change in the form of the question regarding the death penalty from “the abstract support question” to one that includes the alternative either of LWOP or LWOP with restitution to the victim’s family affects responses.<sup>242</sup> She found that, with “a simple shift in the framing of the polling question,” support for the death penalty drops significantly.<sup>243</sup> Steiker identified at least three additional phenomena that may well contribute to further declines: first, the availability of LWOP in every jurisdiction that has capital punishment; second, the public recognition, over time, that life without possibility of parole for means no possibility of release; and third, the “innocence revolution,” that is, the “powerful impact” of exonerations on public attitudes toward capital punishment.<sup>244</sup>

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“inconclusive” because the United States executes too few people. Dudley Sharp, *Death Penalty and Sentencing Information*, PRODEATHPENALTY.COM, Oct. 1, 1997, <http://www.prodeathpenalty.com/DP.html#B.Deterrence>.

<sup>241</sup> *Baze*, 128 S. Ct. at 1547 (Stevens, J., concurring in judgment).

<sup>242</sup> See Steiker, *Marshall Hypothesis*, *supra* note 28, at 539-41 nn.51-54 (reviewing polling data that shows “shift” away from support of capital punishment when LWOP is alternative).

<sup>243</sup> *Id.* at 539-41 (discussing how “responsiveness of public opinion to a simple shift in the framing of the polling question” may support the “spirit” and “particulars” of Justice Marshall’s hypothesis that informed public would reject capital punishment).

<sup>244</sup> *Id.* at 537, 541-44 (discussing Justice Marshall’s “extraordinary” identification of innocence in *Furman* as one of three “key pieces of information” that he believed would turn public away from support for capital punishment; observing that he did so at time when innocence was not part of death penalty debate “either on or off the Court”); see Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573, 574 (2004). Professor Marshall, whose central role in a number of the Illinois death row exonerations is well known, was one of the first, if not the first, to so designate the public’s “newfound appreciation of the system’s fallibility.” *Id.* at 576 (discussing Justice Thurgood Marshall’s belief that public would reject capital punishment once informed about realities surrounding its administration). In 2009, Professor Craig Haney released the results of a poll of Californians’ attitudes toward capital punishment. It replicated a survey that he had conducted in 1989 and showed a decline in support for the death penalty. See Press Release, Univ. of Cal., Santa Cruz, New Poll by UCSC Professor Reveals Declining Support for the Death Penalty (Sept. 1, 2009), available at [http://www.ucsc.edu/news\\_events/press\\_releases/text.asp?pid=3168](http://www.ucsc.edu/news_events/press_releases/text.asp?pid=3168). His findings about Californians are consistent with Professor Steiker’s survey of the national data, particularly as they relate to respondents’ concerns about the risk of executing innocent people and respondents’ understanding that LWOP means permanent imprisonment. Professor Haney has been engaged for more than two decades in empirical research about

Life without possibility of parole has become the de facto punishment for a majority of the men and women under sentence of death, who will die in prison before they are executed.<sup>245</sup> It is the post-*Furman* form of incapacitation, not only for most death-sentenced inmates, but for in excess of 40,000 prisoners who have been sentenced to LWOP, and thousands more who, although they have parole-eligible terms, will likely never be released.<sup>246</sup> Abolition should improve the odds that federal and state governments will come to terms with the societal toll of mass incarceration.

## 2. Deterrence

In 1972, the two Justices prepared in *Furman* to declare the death penalty unconstitutional under all circumstances — Justices Brennan and Marshall — were unconvinced that either individual or general deterrence sufficed as a justification for the death penalty.<sup>247</sup> They agreed that the validity of general deterrence rested on the premise that executions are “invariably and swiftly imposed,” when, in fact, the

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attitudes toward the death penalty, particularly as they affect capital trials. See, e.g., Craig Haney, *Juries and the Death Penalty: Readdressing the Witherspoon Question*, 26 CRIME & DELINQUENCY 512 (1980); Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of Death Qualification*, 8 LAW & HUM. BEHAV. 121-132 (1984); Craig Haney & Mona Lynch, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 LAW & HUM. BEHAV. 481 (2009); Craig Haney et al., “Modern” Death Qualification: New Data on Its Biasing Effects, 18 LAW & HUM. BEHAV. 619 (1994).

<sup>245</sup> See *Baze*, 128 S. Ct. 1549 n.17 (Stevens, J., concurring) (discussing length of time on death row); see e.g., *Thompson v. McNeil*, 129 S. Ct. 1299, 1300 (2009) (Stevens, J., statement respecting denial of certiorari) (citing U.S. Department of Justice statistics that, in 2007, average time on death row before execution was nearly 13 years). In California, which has the nation’s largest death row, now numbering 698, 13 men have been executed and 73 inmates have died of natural or other causes. See CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATIONS, CONDEMNED INMATE LIST (2010), [http://www.cdcr.ca.gov/Reports\\_Research/docs/CondemnedInmateListSecure.pdf](http://www.cdcr.ca.gov/Reports_Research/docs/CondemnedInmateListSecure.pdf); CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATIONS, CONDEMNED INMATES WHO HAVE DIED SINCE 1978 (2010), [http://www.cdcr.ca.gov/Reports\\_Research/docs/CIWHD.pdf](http://www.cdcr.ca.gov/Reports_Research/docs/CIWHD.pdf).

<sup>246</sup> See A. Nellis & R. King, SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 1, 3 (2009), available at [http://www.sentencingproject.org/doc/publications/publications/inc\\_noexitseptember2009.pdf](http://www.sentencingproject.org/doc/publications/publications/inc_noexitseptember2009.pdf) 2009 (reporting that of 2.3 million people incarcerated in the United States, 41,095 individuals are serving LWOP sentences, and that of, those 66.4 percent are people of color); Adam Liptak, *To More Inmates, Life Term Means Dying Behind Bars*, N.Y. TIMES, Oct. 2, 2005, at A1 (reporting that as of 1993, “about 20 percent of all lifers had no chance of parole;” in 2004, “the number rose to 28 percent”).

<sup>247</sup> *Furman v. Georgia*, 408 U.S. 238, 300-02 (1972) (Brennan, J., concurring); *id.* at 345-55 (Marshall, J., concurring).

opposite was true.<sup>248</sup> Four years later, in *Gregg*, Justices Stewart, Powell, and Stevens acknowledged that, notwithstanding the vigorous debate about deterrence as a rationale for capital punishment, the scientific data were “inconclusive.”<sup>249</sup> Conceding the want of empirical support, the three Justices fell back on the assumption that some offenders will be deterred by the threat of capital punishment and others will not.<sup>250</sup> Ultimately, the Justices deferred to “[c]onsiderations of federalism,” allowing state legislatures to assess the utility of the studies.<sup>251</sup> Over time, this lukewarm endorsement of deterrence became integral to the Court’s Eighth Amendment capital punishment lexicon, much as its members refer to the “holding” in *Furman*.<sup>252</sup>

In *Baze*, Justice Stevens observed that, after more than thirty years of empirical research, social scientists have yet to produce any “reliable statistical evidence that capital punishment in fact deters potential offenders.”<sup>253</sup> Absent such data, he concluded, deterrence “cannot serve as a sufficient penological justification” for the ultimate penalty.<sup>254</sup> Justice Scalia, as he had done in *Atkins*, posited that the *Gregg* plurality’s acceptance of this rationale is consistent with the Constitution’s text, which for all time makes capital punishment “a permissible legislative choice.”<sup>255</sup> Although he maintained that legislatures need not require proof positive to conclude that the death

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<sup>248</sup> *Furman*, 408 U.S. at 301-02 (Brennan, J., concurring); see *id.* at 354 n.124 (Marshall, J., concurring) (relying on evidence that executions did not follow capital sentences with certitude or speed; also observing that “most persons who commit capital crimes are not executed”).

<sup>249</sup> *Gregg v. Georgia*, 428 U.S. 153, 184-85 (1976) (opinion of Stewart, Powell & Stevens, JJ.).

<sup>250</sup> *Id.* at 186 n.34, 185-86.

<sup>251</sup> *Id.* at 186-87; see HANEY, DEATH BY DESIGN, *supra* note 137, at 12 n.29 (explaining Justice Stewart’s view in *Gregg* that studies on deterrence were “‘inconclusive’ is simply wrong and was at the time Justice Stewart expressed it”).

<sup>252</sup> See Liebman & Marshall, *supra* note 2, at 1614 & nn.45-46 (observing that “the Court has repeatedly discerned a common thread connecting *Furman*’s three critical opinions, and even a ‘holding’ (beyond the technical one that preexisting death verdicts and discretionary statutes were invalid”).

<sup>253</sup> *Baze v. Rees*, 128 S. Ct. 1520, 1547 (2008) (Stevens, J., concurring in judgment).

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 1552 (Scalia, J., concurring in judgment, joined by Thomas, J.); see *Atkins v. Virginia*, 536 U.S. 304, 337 (2002) (Scalia, J., dissenting, joined by Roberts, C.J., and Thomas, J.) (arguing that decision has “no support in the text or history of the Eighth Amendment”). In Justice Scalia’s view, other than the Court’s misguided moment when it decided *Furman*, “[t]here is simply no legal authority for the proposition that the imposition of death as a criminal penalty is unconstitutional.” *Id.* at 1152, 1155-56; see also Scalia, *Originalism*, *supra* note 140, at 863.



penalty deters,<sup>256</sup> Justice Scalia made a point of enumerating the studies that claim to demonstrate capital punishment's deterrent value.<sup>257</sup> Notably, in an op-ed published a few months after *Baze* was decided, Cass Sunstein, a legal scholar whom Justice Scalia had cited, and Justin Wolfers, whose studies Justice Stevens had referenced,<sup>258</sup> agreed that "the best reading of the accumulated data is that they do not establish a deterrent effect of the death penalty."<sup>259</sup>

In *Furman*, Justice Marshall remarked that deterrence was the "most hotly contested issue" in the capital punishment debate.<sup>260</sup> The flurry of publications on the topic in the past several years suggests that the Justice's observation remains true today.<sup>261</sup> Even if a majority of the

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<sup>256</sup> *Baze*, 128 S. Ct. at 1554 (Scalia, J., concurring in judgment, joined by Thomas, J.).

<sup>257</sup> *Id.* at 1553 (noting that there is "significant body of recent evidence that capital punishment may well have a deterrent effect, possibly a quite powerful one" (quoting Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 705 (2005))). Justice Scalia did not mention that, in the same issue of the journal, Professors Sunstein and Vermeule conceded that they "do not know whether deterrence has been shown." Cass R. Sunstein & Adrian Vermeule, *Deterring Murder: A Reply*, 58 STAN. L. REV. 847, 848 (2005). They do not conclude that "evidence of deterrence has reached some threshold of reliability that permits or requires government action upon it right now." *Id.* They argue, rather, that the "recent evidence" warrants consideration of "the moral implications" — i.e., "how the moral issues should be assessed if deterrence could be established." *Id.* at 848-49.

<sup>258</sup> *Baze*, 128 S. Ct. at 1547 n.13 (Stevens, J., concurring in judgment) (citing John J. Donohue & Justin Wolfers, *The Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2005), as example of scholarship critical of recent studies "asserting the deterrent effect of the death penalty").

<sup>259</sup> Cass R. Sunstein & Justin Wolfers, *A Death Penalty Puzzle: The Murky Evidence for and Against Deterrence*, WASH. POST, June 30, 2008, at A11, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/06/29/AR2008062901476.html>. The authors also agreed "with Scalia that if a strong deterrent effect could be demonstrated, a plausible argument could be made on behalf of executions." The problem, they wrote, is that "the evidence is inconclusive."

<sup>260</sup> *Furman v. Georgia*, 408 U.S. 238, 345 (1972) (Marshall, J., concurring).

<sup>261</sup> See, e.g., Jeffrey Fagan, *Death and Deterrence Redux: Science Law, and Causal Reasoning on Capital Punishment*, 4 OHIO ST. J. CRIM. L., 255, 261 (2006) (demonstrating "flaws and omissions" in recent studies claiming that the death penalty is a deterrent); Michael L. Radelet & Traci L. Lacoock, *Do Executions Lower Homicide Rates?: The Views of Leading Criminologists*, 99 J. CRIM. L. & CRIMINOLOGY 489, 490-500 (2009) (reviewing deterrence studies with focus on those conducted beginning in 2002, surveying "ninety-four distinguished" criminologists to determine whether "the weight of empirical research studies supports the deterrence justification for the death penalty" and reporting that "10% or less, depending on how the question is phrased," answer question affirmatively); Criminal Justice Legal Foundation, *Articles on Death Penalty Deterrence*, <http://www.cjlf.org/deathpenalty/DPDeterrence.htm> (last visited Feb. 8, 2010) (posting research that purports to establish deterrent effect of capital

Court aligns with Justice Stevens and jettisons deterrence as a rationale for capital punishment, we can expect that social scientists will continue to wrangle over the issue.

### 3. Retribution

Justice Stevens began his analysis of retribution by stating that this rationale is the emotional engine of popular support for capital punishment.<sup>262</sup> He quoted *Gregg's* explanation: “[S]ome crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not.”<sup>263</sup> However, Justice Stevens suggested that, today, this intellectualized definition is not what accounts for “much of the remaining enthusiasm for the death penalty.”<sup>264</sup> Rather, the driving factor is “a thirst for vengeance,” which he viewed as the logical outcome of narrowing death-eligibility to the most “outrageous crimes” and “the cruel treatment of victims.”<sup>265</sup>

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punishment); *see also* American Law and Economics Review, Advance Access, <http://aler.oxfordjournals.org/papbyrecent.dtl> (last visited Feb. 8, 2010) (providing advance copies of American Law and Economics Review Death Penalty Symposium, which includes deterrence studies published subsequent to *Baze*).

<sup>262</sup> *Baze*, 128 S. Ct. at 1547, 1548 & n.14 (2008) (Stevens, J., concurring in judgment).

<sup>263</sup> *Id.* at 1548 (quoting *Gregg v. Georgia*, 428 U.S. 153, 184 n.30 (1976)).

<sup>264</sup> *Id.* at 1547.

<sup>265</sup> *Id.* at 1547-48 nn.14-15 (including views of some Oklahoma City bombing victim members that execution was not adequate punishment for Timothy McVeigh). Justice Stevens’s comment about the efficacy of the Court’s jurisprudence in restricting the reach of the death penalty is either untethered to his consideration of retribution or he is arguing that the Court’s success in restricting the death penalty to the “worst of the worst” has amped up the retributive noise level. Whatever his intention, the assertion strikes me as peculiarly “un-Stevensean.” *See* Amann, *Human Rights Judge*, *supra* note 17, at 1571 (coining phrase in honor of “the Justice’s favorite bard”). Liebman and Marshall devoted their article to Justice Stevens as champion of the “narrowing” approach, including his decades of resisting the Court’s “abandonment of its commitment” to this analytic framework. *See* Liebman & Marshall, *supra* note 1, at 1611. Justice Stevens’s opinions during the two years prior to *Baze* held true to his view. *See supra* Part II. There is surfeit of data to support the conclusion that, with regard to death-eligibility, “numerousness” has prevailed in the states and at the Court. *See, e.g.,* Dana K. Cole, *Expanding Felony-Murder in Ohio: Felony-Murder or Murder-Felony*, 63 OHIO ST. L.J. 15 (2002) (arguing that Ohio Supreme Court’s broad interpretation of capital felony-murder statute fails to narrow death-eligibility consistent with constitutional requirements); Steven F. Shatz, *The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study*, 59 FLA. L. REV. 719 (2007) (relying in part on empirical studies, and concluding that California’s death penalty scheme is unconstitutional under Court’s Eighth Amendment “narrowing” and “proportionality” principles); Steven F. Shatz & Nina

It is here that the connection between the question presented in *Baze* and Justice Stevens's choice of *Baze* as his line in the sand becomes apparent. One of the very few points of agreement in the seven *Baze* opinions is that the states and the federal government had altered their methods of execution — resulting in the nearly universal adoption of lethal injection — as a progressive move toward achieving a “more humane means of carrying out the sentence.”<sup>266</sup> Thus the constitutional quandary for Justice Stevens. He wrote that this development, which accords with the requirements of the Eighth Amendment, “actually undermines the very premise on which public approval of the retribution rationale is based.”<sup>267</sup> The premise that

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Rivkind, *The California Death Penalty Scheme: Requiem for Furman*, 72 N.Y.U. L. REV. 1283, 1286-88 (1997) (arguing that despite “venerability of the *Furman* principle and the support it appears to enjoy on the Court, over the years the Court has only rarely, and in a limited fashion tested state death penalty schemes against the principle,” and reporting on empirical study of California murder convictions, which shows that California death penalty scheme “cannot be squared” with *Furman*); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 373-75 (1995) (discussing how Court's failure to applying “narrowing doctrine” resulted in “expansive statutes characteristic of the pre-*Furman* era” ). The Court's retreat from narrowing was not among the more fleshed out, specific concerns that led Justice Stevens to exercise “his own judgment” to conclude that the death penalty violates the Eighth Amendment. See *Baze*, 128 S. Ct. at 1550-51 (Stevens, J., concurring in judgment). This development was, however, implicit in the Justice's criticism of numerous decisions that have “endorsed procedures,” which have, inter alia, supplanted those adopted by the Court to avoid the discriminatory and excessive application of the death penalty. *Id.*

<sup>266</sup> *Baze*, 128 S. Ct. at 1525-26 (plurality opinion); *id.* at 1538 (Alito, J., concurring); *id.* at 1548 (Stevens, J., concurring in judgment) (remarking that plurality and Justice Ginsburg's dissenting opinion make this point “pellucidly clear”); *id.* at 1561-63 (Thomas, J., concurring in judgment, joined by Scalia, J.) (without conceding that alterations in methods of execution were constitutionally required); *id.* at 1567-69 & n.1. See generally Brief for the Fordham University School of Law, Louis Stein Center for Law and Ethics as Amicus Curiae Supporting Petitioner at \*4, *Baze v. Rees*, 128 S. Ct. 1520 (2008) (No. 07-5439), 2007 WL 3407041 (showing that move from one method of execution to next establishes societal consensus in favor of method that is “free of severe and unnecessary pain and suffering”). But see Denno, *Abolition Paradox*, *supra* note 203, at 183, 191-92 (describing how states' motives for switching to another method of execution were not always prompted “their purported humanity,” but rather, inter alia, by desire to retain capital punishment or “to stay one step ahead of constitutional challenges to a particular method of execution”); Deborah Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 375 (1997) (arguing that political motives were more complex, and included economic considerations and goal of executions that appeared humane, irrespective of whether they were).

<sup>267</sup> *Baze*, 128 S. Ct. at 1548 (Stevens, J., concurring in judgment); see AUSTIN SARAT, *WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION* 60-84

Justice Stevens addressed is the infliction of some equivalent form of killing on those who kill: as society evolves to use “even more humane forms of punishment, State-sanctioned killing is therefore becoming more and more anachronistic.”<sup>268</sup>

In his reply to Justice Stevens’s discussion of retribution, Justice Scalia argued that, consistent with *Gregg*, the comparable-suffering premise is not retribution’s only societal purpose.<sup>269</sup> Justice Scalia expressed incredulity that Justice Stevens would “repudiate his prior view to adopt the astounding position that a criminal sanction expressly mentioned in the Constitution violates the Constitution.”<sup>270</sup> On the latter point, Justice Stevens’s rejection of capital punishment in *Baze* may have been unexpected, but, given his understanding of the Eighth Amendment, it was not “astounding.” Justice Scalia also read into Justice Stevens’s concurring opinion a wholesale disavowal of retribution as a constitutionally permissible rationale for the death penalty, which is more than appears on the page.<sup>271</sup> Nor, as Justice Scalia would have it, did Justice Stevens adopt the position that the Eighth Amendment prohibits the “infliction of any pain.”<sup>272</sup> Justice Stevens wrote only that “by requiring that an execution be relatively

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(2001); Timothy Kaufman-Osborn, *Regulating Death: Capital Punishment and the Late Liberal State*, 111 YALE L.J. 681, 704 (2001).

<sup>268</sup> *Baze*, 128 S. Ct. at 1548 & n.16 (Stevens, J., concurring in judgment) (citing victim family members’ statements that lethal injection did cause enough suffering); see also Robert Blecker, *Killing Them Softly: Meditations on a Painful Punishment of Death*, 35 FORDHAM URB. L.J. 969, 991, 993 (2008) [hereinafter Blecker, *Killing Them Softly*] (“Pain that the killer intentionally caused the victim later gives us just cause to bring pain upon him. [Therefore, “h]ow we kill those we rightly detest should in no way resemble how we kill or euthanize beloved parents or pets.”); Jeremy Fogel, *In the Eye of the Storm: A Judge’s Experience in Lethal-Injection Litigation*, 35 FORDHAM URB. L.J. 735, 755 (2008) (describing letters from public to federal judge, who was presiding over lethal injection challenge, urging that “manner of [inmate’s] death should be no better than that of his victim”).

<sup>269</sup> *Baze*, 128 S. Ct. at 1554 (Scalia, J., concurring, joined by Thomas, J.); see Robert Blecker, *But Did They Listen?: The New Jersey Death Penalty Commission’s Exercise in Abolitionism: A Reply*, (July 24, 2007) (unpublished manuscript), available at: <http://works.bepress.com/robertblecker/1> (arguing that retribution “remains the primary justification for the death penalty,” presents most compelling case for death penalty, and that “[r]etributivists would only execute a person because s/he deserves to die”).

<sup>270</sup> *Baze*, 128 S. Ct. at 1553 (Scalia, J., concurring in judgment, joined by Thomas, J.).

<sup>271</sup> *Id.* at 1554.

<sup>272</sup> *Id.* at 1554 (attributing to Justice Stevens view that “if a punishment is not retributive enough, it is not retributive at all”).

painless,” the method used “cannot satisfy the intuitive sense of equivalence that informs this conception of justice.”<sup>273</sup>

In sum, because all death penalty jurisdictions have adopted lethal injection as a method of execution, a dichotomous view of retribution’s purposes no longer accurately reflects the current public understanding of this rationale. Justice Stevens did not go so far as to embrace Justice Marshall’s view that retribution is a constitutionally impermissible goal of punishment.<sup>274</sup> But he came close to suggesting, based upon the melding of the two aspects of retribution, that “[r]etaliation, vengeance, and retribution” are now synonymous.<sup>275</sup> Ultimately, Justice Stevens relied upon the “diminishing force of the principal rationales for retaining the death penalty” to call for a reexamination of the institution.

#### D. “Exercising My Own Judgment”

In Part III of his concurring opinion, Justice Stevens delivered the linchpin of his argument that capital punishment is unconstitutional.<sup>276</sup> When he made his constitutional break with the death penalty, Justice Stevens did not quote his most admired colleague, Justice Stewart.<sup>277</sup> He turned to Justice White, whose numerousness approach to capital punishment Justice Stevens had opposed steadfastly since 1976.<sup>278</sup> Now, Justice Stevens was guided by

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<sup>273</sup> *Id.* at 1548; *id.* at 1548 nn.15-16 (Stevens, J., concurring in judgment) (discussing some family members’ desire that Timothy McVeigh experience pain and suffering comparable to that he inflicted on his victims).

<sup>274</sup> *Furman v. Georgia*, 408 U.S. 238, 344 (1972) (Marshall, J., concurring) (“It is plain that the view of the Weems Court was that punishment for the sake of retribution was not permissible under the Eighth Amendment . . . . To preserve the integrity of the Eighth Amendment, the Court has consistently denigrated retribution as a permissible goal of punishment.”); *see also* Steiker, *Marshall Hypothesis*, *supra* note 28, at 541 (discussing Justice Marshall’s view that, at this point in history, public would not “knowingly support purposeless vengeance” (quoting *Furman*, 408 U.S. at 363 (Marshall, J., concurring))).

<sup>275</sup> *Furman*, 408 U.S. at 343-44 (Marshall, J., concurring); *see Baze*, 128 S. Ct. at 1547-48 (Stevens, J., concurring in judgment) (arguing that retribution is now “primary rationale” for capital punishment).

<sup>276</sup> *Baze*, 128 S. Ct. at 1548 (Stevens, J., concurring in judgment).

<sup>277</sup> *See* John Paul Stevens, *Random Recollections*, 42 SAN DIEGO L. REV. 269, 271-72 (2005) (describing Justice Stewart’s separate opinion in *Furman* as example of “exercise of judgment”).

<sup>278</sup> *Baze*, 128 S. Ct. at 1551 (Stevens, J., concurring in judgment) (quoting *Furman*, 408 U.S. at 312 (White, J., concurring)) (“[T]he imposition of the death penalty represents ‘the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes . . . . A penalty with such

Justice White, whose independent judgment had provided the “decisive vote in *Furman*.”<sup>279</sup> Justice Stevens also embraced Justice White’s reliance on “data that falls short of absolute proof” to explain his conclusion that the death penalty is “patently excessive” under the Eighth Amendment.<sup>280</sup> As I discuss in sections 1 and 2, below, both points of reference by Justice Stevens to Justice White’s opinion may have implications for the future of the Court’s death penalty jurisprudence, perhaps especially in categorical exemption cases. As to the first point, Justice Stevens’s exercise of his “own judgment” in *Baze* is consonant with the view of the majority of Justices that the Court must ultimately conduct this analysis to determine whether a punishment is “excessive” under “evolving standards of decency.”<sup>281</sup> The second reference point, an analysis based upon empirical evidence, further elucidates Justice Stevens’s choice of *Baze* as his bridge to the other side of the death penalty divide.

### 1. The Resurrection of *Trop v. Dulles*

Stepping back twenty years from *Baze* to the 1988 judgment in *Thompson v. Oklahoma*, a plurality of the Court, applying the two-part test that it had employed since *Trop v. Dulles*, concluded that the death penalty was “excessive” under “evolving standards of decency” for individuals who were under sixteen years of age at the time of their crimes.<sup>282</sup> The Court first surveyed “objective signs” of society’s attitudes and then exercised its “own judgment” to decide the Eighth Amendment question.<sup>283</sup> Regarding the first prong, Justice Stevens

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negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment.’ ”); see Liebman & Marshall, *supra* note 1, at 1613, 1622-23, 1627-30 (providing examples of conflict between “solutions” to “arbitrariness” in administration of capital punishment — Justices Stewart’s and Stevens’s “less is better” approach and Justice White’s “more is better” formulation).

<sup>279</sup> *Baze*, 128 S. Ct. at 1550 (Stevens, J., concurring in judgment).

<sup>280</sup> *Id.* (quoting *Furman*, 408 U.S. at 312 (White, J., concurring)).

<sup>281</sup> *Id.* at 1548, 1550. The term “majority” refers to the composition of the Court prior to Justice Souter’s retirement. *Id.*

<sup>282</sup> *Thompson v. Oklahoma*, 487 U.S. 815, 875 (1988) (plurality opinion); *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion).

<sup>283</sup> *Thompson*, 487 U.S. at 823 nn.6-8 (relying on *Furman*, 408 U.S. at 277-79); *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (plurality opinion); *Coker v. Georgia*, 433 U.S. 584, 596, 598 (1977) (plurality opinion); *Furman*, 408 at 268-69; Justice Kennedy had been appointed to the Court, but took no part in the decision in *Thompson*. See *Thompson*, 487 U.S. at 817. Justice O’Connor concurred in the judgment on narrow grounds that did not require her to squarely decide whether the Eighth Amendment barred the imposition of the death penalty for defendants who

wrote for the plurality in *Thompson* that while contemporary standards, as reflected by the actions of legislatures and juries, are an important measure, other indicators, such as the views of professional organizations and international norms, are relevant.<sup>284</sup> Second, the plurality found that contemporary values and its own judgment were in accord; “the ultimate penalty” could not be justified for “such a young person.”<sup>285</sup> Dissenting, Justice Scalia argued that, in ascertaining societal values, the Court is confined to the text of the Eighth Amendment and legislative enactments.<sup>286</sup> And he insisted that the Court’s independent judgment has no place in the Eighth Amendment inquiry.<sup>287</sup>

A year later, the newly appointed Justices Kennedy and O’Connor took part in the decisions in *Stanford v. Kentucky* and *Penry v. Lynaugh*.<sup>288</sup> A plurality of the Court in *Stanford* and a majority in *Penry* found no basis, under the Eighth Amendment, to bar the death penalty for persons less than eighteen years of age at the time of their crimes or for persons who have mental retardation.<sup>289</sup> The Court held that “individualized consideration” of mitigating factors such as youth and mental retardation afforded sentencers sufficient guidance to reach constitutionally sound life-or-death verdicts.<sup>290</sup> Justice Scalia’s opinion for the plurality in *Stanford* went further and made it impossible to

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were fifteen years old at the time of their crimes. *Id.* at 857-58 (O’Connor, J., concurring in judgment).

<sup>284</sup> *Thompson*, 487 U.S. at 823 n.7, 830 n.31 (citing *Trop*, 356 U.S. at 102 & n.35 (plurality opinion) and *Coker*, 433 U.S. at 596 n.10 (plurality opinion)) (recognizing “the relevance of the views of the international community in determining whether a punishment is cruel and unusual”).

<sup>285</sup> *Id.* at 823.

<sup>286</sup> *Id.* at 864-65 (Scalia, J., dissenting, joined by Rehnquist, C.J., and White, J.); see also *Baze*, 128 S. Ct. at 1552 (Scalia, J., concurring in judgment, joined by Thomas, J.) (“[T]he very text of the [Constitution] recognizes that the death penalty is a permissible legislative choice.”).

<sup>287</sup> *Thompson*, 487 U.S. at 865 (Scalia, J., dissenting, joined by Rehnquist, C.J., and White, J.) (limiting consideration of “evolving standards” to “objective signs of how today’s society views a particular punishment”).

<sup>288</sup> *Stanford v. Kentucky*, 492 U.S. 361, 363 (1989) (plurality opinion); *Penry v. Lynaugh (Penry I)*, 492 U.S. 302, 306 (1989).

<sup>289</sup> *Stanford*, 492 U.S. at 380 (plurality opinion); *Penry I*, 492 U.S. at 340; Liebman & Marshall, *supra* note 1, at 1642-43.

<sup>290</sup> *Stanford*, 492 U.S. at 375 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)) (plurality opinion); *Penry I*, 492 U.S. at 320, 340 (O’Connor, J., writing majority opinion) (holding that jury instructions did not permit consideration of *Penry*’s mental retardation as mitigating circumstance); see Liebman & Marshall, *supra* note 2, at 1642-43.

revisit categorical exemption for more than a decade.<sup>291</sup> Justice Scalia announced that “evolving standards of decency” are to be measured only by text of the Constitution or “the demonstrable current standards of our citizens,” which he all but limited to statutes, affording token significance to prosecutorial decisionmaking and jury verdicts, and dismissing scientific evidence outright.<sup>292</sup> In short, the *Stanford* plurality simply dropped the second part of the *Trop* test.<sup>293</sup> Justice Kennedy agreed with the plurality’s reasoning in both respects.<sup>294</sup> Justice O’Connor concurred in the judgment, but objected to the plurality’s elimination of the Court’s “constitutional obligation to conduct proportionality analysis.”<sup>295</sup> Justice Stevens joined with Justices Marshall and Blackmun in Justice Brennan’s dissenting opinion, which argued that the Court should broadly define objective indicators of society’s values and that it could not abdicate its Eighth Amendment decisionmaking responsibility to “political majorities.”<sup>296</sup>

It was not until *Atkins*, in 2002, that the Court resurrected *Trop*’s two-part analysis.<sup>297</sup> Justice Stevens authored the opinion for a majority that included Justice Kennedy.<sup>298</sup> Drawing upon *Coker v. Georgia* and *Enmund v. Florida*, thereby reaching back to *Trop*, Justice Stevens wrote that, after assessing the objective measures of society’s values, the Court must ask whether there is reason for the Court to diverge from the national consensus.<sup>299</sup> As the Court had in *Coker*,

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<sup>291</sup> Chief Justice Rehnquist and Justices White, Scalia, and Kennedy comprised the plurality, with Justice O’Connor concurring separately on somewhat narrower grounds. See *Stanford*, 492 U.S. at 374 (plurality opinion); *id.* at 381-82 (O’Connor, J., concurring in part and in judgment).

<sup>292</sup> *Id.* at 369-70 (plurality opinion) (stating that only “American conceptions of decency” are relevant to inquiry); see, e.g., *id.* at 374 (stating that statistics showing sentences and executions “carry little significance”); *id.* at 377-78 (refusing to consider non-statutory indicators, such as public opinion and views of profession organizations and concluding that “even purely scientific evidence is not an available weapon”).

<sup>293</sup> *Id.* at 378 (“[W]e emphatically reject petitioner’s suggestion that the issues in this case permit us to apply our ‘own informed judgment.’”).

<sup>294</sup> *Id.* at 363 (Scalia, J., writing plurality opinion, joined by Kennedy, J.).

<sup>295</sup> *Id.* at 381-82 (O’Connor, J., concurring in part and in judgment).

<sup>296</sup> *Id.* at 388, 391-92 (Brennan, J., dissenting, joined by Marshall, Blackmun & Stevens, JJ.).

<sup>297</sup> *Atkins v. Virginia*, 536 U.S. 304, 312-13 (2002).

<sup>298</sup> *Id.* at 305.

<sup>299</sup> *Id.* at 313; *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (plurality opinion) (“Although the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty.”); *Coker v. Georgia*, 433 U.S. 584, 596 (1977) (plurality opinion); *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).



*Enmund*, and *Thompson*, the majority determined that its own judgment was consonant with the objective indicators that weighed in favor of a categorical exemption from capital punishment.<sup>300</sup> In its identification of contemporary values, the *Atkins* majority emphasized present-day legislation, which, since 1989 when *Penry I* was decided, had moved uniformly toward excluding individuals who have mental retardation.<sup>301</sup> In the Court's revitalization of the two-pronged analysis of *Trop*, *Coker*, *Enmund*, and *Thompson*, Justice Scalia saw a "glimpse" of the future in which what he characterized as the "feelings and intuition" of the unelected judicial elite would be substituted for the "original meaning" of the Eighth Amendment and views of the public expressed through the actions of their elected representatives.<sup>302</sup> Indeed, six years later, in *Baze*, Justice Scalia wrote that Justice Stevens's rejection of the death penalty exemplified "rule by judicial fiat," the very outcome he had predicted in *Atkins*.<sup>303</sup>

Justice Kennedy authored the majority opinion in the next two categorical exemption cases, *Roper v. Simmons*, issued in 2005, and *Kennedy v. Louisiana*, issued two months after *Baze*.<sup>304</sup> In both opinions, consistent with *Atkins*, the Court took into account a range of indicators of contemporary values, holding, for example, that *Stanford* was wrong to exclude abolitionist states from the consensus determination.<sup>305</sup> *Simmons* made explicit what had been implied in *Atkins*: the Court, with Justice Kennedy as its voice, repudiated *Stanford's* one-step analysis. It "returned to the rule, established in

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<sup>300</sup> *Atkins*, 536 U.S. at 321; *Thompson v. Oklahoma*, 487 U.S. 815, 823 (1988) (plurality opinion); *Enmund*, 458 U.S. at 797 (plurality opinion); *Coker*, 433 U.S. at 597 (plurality opinion).

<sup>301</sup> *Atkins*, 536 U.S. at 312 (quoting *Coker*, 433 U.S. at 596 (plurality opinion)); *id.* at 315 ("It is not so much the number of these States that is significant, but the consistency of the direction of change.")

<sup>302</sup> *Id.* at 348-49 (Scalia, J., dissenting, joined by Rehnquist, C.J., and Thomas, J.); *id.* at 337-38 ("Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its Members.")

<sup>303</sup> *Baze v. Rees*, 128 S. Ct. 1520, 1555 (2008) (Scalia, J., concurring in judgment, joined by Thomas, J.). *But see* Ristroph, *supra* note 4 (criticizing Justice Scalia's use of the term "judicial fiat" to describe Justice Stevens's concurrence).

<sup>304</sup> *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008); *Roper v. Simmons*, 543 U.S. 551 (2005); *see* Liebman & Marshall, *supra* note 1, at 1666 (noting that assignment in *Simmons* was made by Justice Stevens as "senior Justice in the majority").

<sup>305</sup> *Roper v. Simmons*, 543 U.S. 551, 574 (2005) ("To the extent *Stanford* was based on review of the objective indicia of consensus that obtained in 1989, . . . those indicia have changed."); *id.* at 575 (observing that "at least from the time of . . . *Trop*," foreign law and "international authorities" have been "instructive" in interpreting Eighth Amendment).

opinions predating *Stanford*,” that, ultimately, the Eighth Amendment requires the Court to exercise its “own judgment,” and that its independent judgment may be dispositive.<sup>306</sup> I note that, in *Furman*, Justice Marshall offered his concluding argument about the death penalty as an excessive punishment by stating that there comes a time when “deference to the legislatures is tantamount to abdication of our judicial roles as factfinders, judges, and ultimate arbiters of the Constitution.”<sup>307</sup> Before Justice Souter’s retirement, one could say that, at least in categorical exemption cases, a majority of the Court agreed with Justice Marshall.<sup>308</sup> In *Baze*, Justice Stevens employed this two-part proportionality test; he considered more expansive indicators of societal consensus, which pointed toward the “diminishing force” of deterrence and retribution, followed by the exercise of his “own judgment.”<sup>309</sup>

At the risk of digressing from Justice Stevens’s concurring opinion in *Baze*, there is more to say about the two-part proportionality analysis, as the Court applied it in *Kennedy v. Louisiana*, which may be useful in capital punishment litigation, at least with regard to categorical exemption.<sup>310</sup> For a majority of the Court, including Justice Kennedy, the “restrained use of the death penalty” is at the baseline of

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<sup>306</sup> *Id.* at 552 (quoting *Atkins*, 536 U.S. at 312).

<sup>307</sup> *Furman v. Georgia*, 408 U.S. 228, 359 (1972) (Marshall, J., concurring); *see also id.* at 258 (Brennan, J., concurring) (stating that under Eighth Amendment, duty to determine constitutional validity of particular punishment “inescapably” falls upon Court).

<sup>308</sup> *Atkins v. Virginia*, 536 U.S. 304, 313, (2002) (stating Court exercises its “own judgment . . . by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators”); *see also Kennedy*, 128 S. Ct. at 2658-59; *Simmons*, 543 U.S. at 563-64. It remains to be seen whether Justice Sotomayor’s appointment will alter the majority on this issue. *See* Ramesh Ponnuru, *When Judicial Activism Suits the Right*, N.Y. TIMES, June 23, 2009, at A29, <http://www.nytimes.com/2009/06/24/opinion/24ponnuru.html> (pointing out that “[m]any conservatives oppose Judge Sotomayor’s nomination because she does not appear to support originalism”). *But see* Tony Mauro, *Hearing Portrays Three Different Sotomayors*, NAT’L L.J., July 20, 2009, [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202432356803&Hearing\\_portrays\\_three\\_different\\_Sotomayors&slreturn=1&hblogin=1](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202432356803&Hearing_portrays_three_different_Sotomayors&slreturn=1&hblogin=1) (“At times she sounded like more of an originalist than Justice Antonin Scalia . . . . The exact text of the Constitution, she told the Senate, is ‘the most important aspect of judging. You follow what they said in their words, and you apply it to the facts you’re looking at.’”).

<sup>309</sup> *Kennedy*, 128 S. Ct. at 2658 (quoting *Atkins*, 536 U.S. at 315).

<sup>310</sup> It would be a grave error to overstate what is certainly tealeaf reading. One cannot discount Justice Kennedy’s frequent, unreserved agreement with his hard-line conservative colleagues in capital AEDPA cases such as *Siebert*, *Landrigan*, and *Uttecht*, which, as some of Justice Stevens’s dissents point out, have the effect of endorsing numerosness at the penalty phase, as well as Justice Kennedy’s rejection of narrowing in recent decisions, including *Marsh*, *Sanders*, and *Belmontes*.

“evolving standards of decency.”<sup>311</sup> Two animating principles mandate that restraint. Both have a moral core.<sup>312</sup> The first acknowledges the “dignity of the individual” — not the victim, but the defendant.<sup>313</sup> The rule is not new; the Court announced it plainly in *Trop v. Dulles*.<sup>314</sup> It had not, however, grounded decisionmaking at the Court for a very long time.<sup>315</sup> In *Kennedy*, Justice Kennedy wrote for the majority that respect for human dignity also assumes, most often, that “justice is not better served” by execution but rather by imprisonment, which does not foreclose the opportunity for the individual to come to terms with the magnitude and gravity of his crime.<sup>316</sup> If this sentence was more

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<sup>311</sup> *Kennedy*, 128 S. Ct. at 2664-65.

<sup>312</sup> See *Furman*, 408 U.S. at 296 (Brennan, J., concurring) (asserting that core debate over capital punishment is based on “moral grounds . . . whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death”).

<sup>313</sup> *Kennedy*, 128 S. Ct. at 2649 (citing *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion)); see also *Weems v. United States*, 217 U.S. 349, 369 (1910) (discussing debate on Cruel and Unusual Punishment Clause in Congress, in which one member registered opposition to clause as lacking meaning and as unnecessary, though not objecting to fact that it “seems to express a great deal of humanity”).

<sup>314</sup> *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).

<sup>315</sup> In the post-*Gregg* death penalty debate, the Court’s chief advocates of “human dignity” as a constitutional basis for abolition, were, of course, Justices Marshall and Brennan. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 240-41 (1976) (Marshall, J., dissenting) (“Under [the majority’s] standards, the taking of life ‘because the wrongdoer deserves it’ surely must fall, for such a punishment has as its very basis the total denial of the wrong-doer’s dignity and worth.”); *id.* at 229 (Brennan, J., dissenting) (“[F]oremost among the ‘moral concepts’ recognized in our cases and inherent in the Clause is the primary moral principle that the State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings a punishment must not be so severe as to be degrading to human dignity.”).

<sup>316</sup> *Kennedy*, 128 S. Ct. at 2665. The opinion is Justice Kennedy’s most recent iteration of the role that “human dignity” plays in the enforcement of constitutional rights. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 560 (2005) (“By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.”); *Lawrence v. Texas*, 539 U.S. 538, 575 (2003) (voiding Texas sodomy statute, observing that criminal sanction offends “the dignity of the persons charged”). But see Eva S. Nilson, *Decency, Dignity, and Desert: Restoring Ideals of Human Punishment to Constitutional Discourse*, 41 UC DAVIS L. REV. 111, 140-41, 146 n.187 (2007) (contrasting Court’s prison conditions cases and evisceration of Eighth Amendment in non-capital cases such as *Harmelin* with Justice Kennedy’s public remarks that acknowledge over-incarceration and prisoners’ humanity); Richard J. Bonnie, *Panetti v. Quarterman: Mental Illness, the Death Penalty and Human Dignity*, 5 OHIO ST. J. CRIM. L. 256, 277-81 (2007) (arguing Eighth Amendment bar on executing persons who are presently mentally incompetent best understood as “violation of human dignity,” although not clearly articulated as such

than words in print, it may reintroduce rehabilitation into the Court's proportionality analysis as an affirmative penological justification for life. Except for Justice Blackmun's dissent in *Callins* and Justice Stevens's concurring opinion in *Baze*, this counterweight to deterrence and retribution had been all but absent from the debate since Justice Marshall was on the Court.<sup>317</sup> The second animating principle — reservation about the retributive justification for capital punishment — also explains why the use of the penalty must be circumscribed.<sup>318</sup> Justice Kennedy has now acknowledged that not only vengeance, but retribution, its less virulent relation, may conflict with the constitutional imperatives of “decency and restraint,” and that the risk of the law’s “sudden descent into brutality” is most acute when the punishment is death.<sup>319</sup> A fair reading of *Kennedy* is that a majority of

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by any members of Court except Justice Marshall).

<sup>317</sup> *Kennedy*, 128 S. Ct. at 2649-50 (citing *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and in judgment)). Justice Kennedy concurred in the decision to affirm *Harmelin*'s sentence of life without possibility of parole for possession for slightly more than a pound and a half of cocaine. *Harmelin v. Michigan*, 501 U.S. 957, 1009 (1991) (Kennedy, J., concurring in part and in judgment). His concurring opinion acknowledged that “competing” penological theories “have been in varying degrees of ascendancy or decline since the beginning of the Republic.” *Id.* at 999; see, e.g., *Furman v. Georgia*, 408 U.S. 238, 346 (1972) (Marshall, J., concurring) (“Death . . . makes rehabilitation impossible; life imprisonment does not.”); *id.* at 355 (arguing in opposition to deterrence rationale that most people convicted of murder “are known to become model citizens” upon release from prison). The re-emergence of rehabilitation as a consideration in the proportionality analysis is, of course, distinct from the Court's opinions that this factor and its opposite, i.e., future dangerousness, are relevant to the jury's individualized penalty determination. See, e.g., *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (writing for majority, Justice White reversed death judgment because exclusion from penalty phase of evidence of petitioner's good behavior in jail following arrest was relevant to “probable future conduct” in prison and therefore “mitigating”); *Barefoot v. Estelle*, 463 U.S. 880, 897-98 (1983) (writing for majority, Justice White upheld introduction in evidence of opinion of psychiatrists who had not examined petitioner that petitioner represented future danger against claim that such opinions were professionally and scientifically unreliable).

<sup>318</sup> *Kennedy*, 128 S. Ct. at 2650.

<sup>319</sup> *Id.* In Justice Kennedy's view, the need to restrain the retributive impulse explains why capital punishment must “be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’” *Id.* (internal citations omitted). As discussed throughout this Article and by commentators on whom the Article relies, the Court has largely opted out of narrowing in either respect. See also Shatz & Rivkind, *supra* note 265, at 1290-96 (discussing Court's refusal to limit risk of arbitrary imposition of the death penalty). See generally Shatz, *supra* note 265, at 722-23 (distinguishing between two distinct but complementary narrowing requirements: (1) under *Furman* and *Zant*, that states must use state-specific criteria to restrict death-eligible class to

the Court would not welcome expanded capital punishment statutes. The thornier question, of course, is how far, in line with the principles reaffirmed in that opinion, Justice Kennedy will go in constraining the death penalty's reach.<sup>320</sup>

2. Constitutionally Unacceptable Risk: The Reemergence of "Social Realities" in the Court's Capital Punishment Jurisprudence<sup>321</sup>

The constitutional question in *Baze* pivoted on a "risk factor" analysis.<sup>322</sup> The plurality's choice of a standard turned on what magnitude of pain was permissible, on how great a risk of pain the

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"the most aggravated murders"; (2) under *Enmund* and *Tison*, "proportionality principle").

<sup>320</sup> As several commentators have proposed, felony-murder and mental illness may offer the two most promising opportunities for further categorical exemption. With regard to the former, I take note in the majority opinion in *Kennedy* of the single mention of *Tison v. Arizona*, 481 U.S. 137 (1987), and the prominence of *Enmund*, in which a plurality of the Court agreed that "it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation.'" *Enmund v. Florida*, 458 U.S. 782, 799 (1982) (plurality opinion) (internal citation omitted). See generally John H. Blume & Sheri Lynn Johnson, *Killing the Non-Willing: Atkins, the Volitionally Incapacitated and the Death Penalty*, 55 S.C. L. REV. 93 (2003) (arguing that reasoning in *Atkins* applies to mentally ill defendants and that they should be exempt from execution under Eighth Amendment); Christopher Slobogin, *What Atkins Could Mean for People with Mental Illness*, 33 N.M. L. REV. 293 (2003) (arguing that, in application of death penalty, distinction between individuals with serious mental illness, those with mental retardation and juveniles violates Equal Protection Clause). In 2006, prior to the decision in *Panetti*, the American Bar Association adopted a resolution calling upon death penalty jurisdictions to prohibit capital punishment for or execution of individuals who have mental disorders or diseases that "significantly" impaired their cognitive functioning at the time of the offense or has that impact in post-conviction proceedings. AMERICAN BAR ASSOCIATION, Resolution 122A, available at <http://www.abanet.org/media/docs/122A.pdf> (last visited Feb. 8, 2010).

<sup>321</sup> HANEY, *supra* note 137, at 16 (explaining that "greatest strength" of social science studies, which examine overall patterns of aggregate data [to] reach conclusions that are based on risks and probabilities," is their ability to demonstrate "the tendency of a system or process to produce one kind of outcome versus another").

<sup>322</sup> See generally Craig Haney, *Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation*, 36 HOFSTRA L. REV. 835, 858 (2008) (discussing how "risk factor" analysis serves to explain individual's life course, including criminogenic consequences, such as capital offenses); Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547 (1995) (bringing together range of social science data on risks that social factors such as poverty, childhood maltreatment, race discrimination, and community violence create for "profoundly disabling long-term effects in those who are its victims"); *id.* at 569 (debunking myths about individuals who commit capital crimes).

Eighth Amendment would tolerate, and on whether the availability of options that would decrease the risks was relevant to the outcome.<sup>323</sup> Three Justices — Kennedy, Roberts, and Alito — agreed on the standard laid out in the plurality opinion.<sup>324</sup> Three others — Justices Souter, Ginsburg, and Breyer — essentially adopted the test proposed by the petitioners, which was based on the same factors but deployed differently.<sup>325</sup> It is not a stretch to infer that had Justice Stevens made a choice, he would have sided with Justices Souter, Ginsburg, and Breyer, who argued in favor of balancing the three considerations against each other because they are “interrelated.”<sup>326</sup> Solely for purposes of reflecting on Justice Stevens’s concurring opinion, I suggest that the split over how to configure the risk factors model matters less than the fact that six Justices utilized that mode of analysis, which places significance on feasible alternatives to the disputed method of execution, and that Justice Stevens employed a risk factor model to reach his own judgment about capital punishment. Rather than the risk of a painful death, Justice Stevens measured the risk of error in death penalty cases.<sup>327</sup> Relying upon “data that falls short of absolute proof” — a hallmark of this analytical framework — he identified four “risk[s] that are of particular “concern” to him: (1) capital trials that are biased in favor of conviction; (2) life or death decisions in which emotion trumps reason; (3) the application of the death penalty in a racially discriminatory manner; and (4) the risk that innocent people will be executed.<sup>328</sup>

Empirical data were the centerpiece of Justice Stevens’s explanation of the risks of race discrimination and the execution of innocent defendants.<sup>329</sup> Social science research was at least implicit in his

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<sup>323</sup> *Baze v. Rees*, 128 S. Ct. 1520, 1530 (2008) (plurality opinion). Justice Thomas and Scalia rejected “a risk-based” test “as unprecedented and unworkable.” *Id.* at 1561, 1563 (Thomas, J., concurring in judgment, joined by Scalia, J.).

<sup>324</sup> *Id.* at 1532 (plurality opinion).

<sup>325</sup> *Id.* at 1563 (Breyer, J., concurring in judgment); *id.* at 1567 (Ginsburg, J., dissenting, joined by Souter, J.).

<sup>326</sup> *Id.* at 1563 (Breyer, J., concurring in judgment).

<sup>327</sup> *Id.* at 1550-51 (Stevens, J., concurring in judgment). Framed in “narrowing” terms, the Court’s abandonment of procedures intended to maximize reliability and reduce arbitrariness had produced an untenable risk that “innocent and legally undeserving defendants” would “be sentenced to die and executed.” Liebman & Marshall, *supra* note 1, at 1660-61.

<sup>328</sup> *Baze*, 128 S. Ct. at 1550-51 (Stevens, J., concurring in judgment) (describing first three as “special,” “serious,” or “significant” “concern” and last as “decisive”).

<sup>329</sup> *Id.* at 1551 (citing empirical studies).

discussion of the risk of wrongful convictions produced by rules that unduly narrow the cross-section of the community eligible to serve on capital juries.<sup>330</sup> Over the decades, and as recently as the prior term, when the Court eliminated procedures that were designed to ameliorate these risks or sanctioned rules that exacerbated them, Justice Stevens, consistent with his narrowing approach, dissented.<sup>331</sup> Retrenchment in the Court's capital punishment jurisprudence in the first three areas of concern, which increased the likelihood of erroneous death sentences, also increased the likelihood that juries would convict innocent men and women.<sup>332</sup> With regard to these first three concerns, however, in *Baze*, Justice Stevens honed in on the Court's abandonment of the foundational premise that "death is different," which had led to the adoption of a set of protections to ameliorate the "risk of error" in both the guilt and the penalty determinations.<sup>333</sup> The need for absolute proof that innocent individuals have been executed is unnecessary because, if that error occurs, it is "irrevocable"; the number of death row exonerations is sufficient to establish an "unacceptable" risk.<sup>334</sup> This, Justice Stevens wrote, was "of decisive importance" to him.<sup>335</sup> Finally, Justice Stevens turned to the alternative of life without possibility of release, which, to

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<sup>330</sup> *Id.* at 1550 n.18 (quoting *Uttecht v. Brown*, 127 S. Ct. 2218, 2238 (2007) (Stevens, J., dissenting)). Justice Stevens quoted his opening sentence in *Uttecht* — "Millions of Americans oppose the death penalty" — to underscore the enormity of the risk to fair trials that results when a sizeable percentage of the eligible pool are excluded from jury service juries in capital cases. *Id.* To be clear, in this part of the opinion, Justice Stevens did not cite to any empirical evidence. Earlier in his critique of incapacitation as a rationale for capital punishment, however, Justice Stevens referred to polling data and studies concerning public opinion and LWOP. *Id.* at 1547 nn. 11-12.

<sup>331</sup> See *supra* Parts I-II.

<sup>332</sup> *Baze*, 128 S. Ct. at 1550-51 (Stevens, J., concurring in judgment).

<sup>333</sup> *Id.* at 1550 (citing *Gardner v. Florida*, 430 U.S. 349, 356-58 (1977)).

<sup>334</sup> *Id.* at 1551; see *Furman v. Georgia*, 408 U.S. 238, 367-68 (1972) (Marshall, J., concurring) ("Proving one's innocence after a jury finding of guilt is almost impossible. . . . If an innocent man has been found guilty, he must then depend on the good faith of the prosecutor's office to help him establish his innocence. There is evidence, however, that prosecutors do not welcome the idea of having convictions, which they labored hard to secure, overturned, and that their cooperation is highly unlikely.").

<sup>335</sup> *Baze*, 128 S. Ct. at 1550 (Stevens, J., concurring in judgment); see also, Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927, 946 (2008) (explaining problems involved in obtaining data on wrongful convictions and estimating that "the long-term post-*Furman* capital exoneration rate in the United States is 2.3 percent").

borrow the language of the plurality in *Baze*, is “feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of [error].”<sup>336</sup>

Justice Stevens’s embrace of empirical data in *Baze* was not a breakthrough moment. Rather, that moment occurred in *Atkins* when social science research was, perhaps for the only time since *Thompson*, pivotal to answering a constitutional question in a death penalty case favorably for the defendant.<sup>337</sup> As noted above, *Thompson*’s diverse indicia of societal values were rejected in *Stanford* and readopted in *Atkins*. Professor Craig Haney points out, however, that *Furman* represented the Court’s zenith vis-à-vis its willingness to give weight to “the real facts and actual operation of the system of capital punishment” in its decisionmaking. In contrast, *McCleskey* was its nadir. At least until recently, a majority of the Court “was not interested in the social realities of capital punishment.”<sup>338</sup> *Thompson* was decided by a plurality in 1988, the year after *McCleskey*. Therefore, to the extent that Justice Stevens’s opinion for the plurality in *Thompson* took into account the social science and scientific evidence on child development, it was a jurisprudential anomaly. In *Atkins* and *Simmons*, under Justice Stevens’s pen, science, including social science research, reemerged as a legitimate measure in the

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<sup>336</sup> *Baze*, 128 S. Ct. at 1532 (plurality opinion); *id.* at 1551 (Stevens, J., concurring in judgment). The Kentucky record contained no findings on the single-drug alternative method of lethal injection execution. *Id.* at 1534-35 (plurality opinion). As Eric Berger points out, by linking the first “substantial risk” prong to the second, alternative method prong, the plurality set “a difficult legal standard that was unnecessary to the resolution of *Baze*,” and went further “to articulate a legal standard that raised the bar for future lethal injection plaintiffs.” Berger, *supra* note 2, at 286.

<sup>337</sup> *Atkins v. Virginia*, 536 U.S. 304, 318-21 nn.23-24 (2002) (relying on research to explain diagnosis, which warrants determination that constitutionally sanctioned objectives of retribution and deterrence are not served by executing persons who have mental retardation); *Thompson v. Oklahoma*, 487 U.S. 815, 834 nn.42-43 (1988), 487 U.S. at 834 nn.42-43 (plurality opinion) (relying on research to support “broad agreement on the proposition that adolescents as a class are less mature and responsible than adults”).

<sup>338</sup> HANEY, *supra* note 137, at 10 (observing that “*Furman* included over 60 footnotes citing published social science research, statistical data, and expert social science opinions and commentaries,” but that “*Gregg* was the beginning of a long line of capital cases in which a majority of Justices made it increasingly clear that they simply were not interested in the social realities of capital punishment,” and that in *McCleskey*, by requiring that capital defendants prove intentional racial discrimination to succeed on Equal Protection claim, majority of Court adopted hostile view of social scientific analysis that was fatal not only to Warren McCleskey, but to future constitutional challenges to death penalty).



Court's proportionality analysis.<sup>339</sup> The presentation of empirical data was also a powerful factor in *Kennedy*, in which the majority turned to studies that did not amount to "absolute proof" to explain the exercise of its judgment that the Eighth Amendment bars the death penalty for the rape of a child. Casting retribution more as a societal "desire" than a wholly legitimate penal objective, Justice Kennedy balanced that objective against requiring a child to assume what may be the dispositive role in the process of deciding whether a defendant will live or die.<sup>340</sup> Research demonstrating that testimony by children carries a "special risk of wrongful execution" provided the evidentiary counterweight against retribution.<sup>341</sup> Similarly in considering deterrence, Justice Kennedy relied on empirical data, here, the factors that encourage or discourage reporting sexual abuse, to conclude that the objective is not served by the imposition of the death penalty.<sup>342</sup>

### III. REEXAMINING CAPITAL PUNISHMENT

#### A. *Lethal Injection Challenges and Justice Stevens's Expectations in Baze*

It has been nearly a year since I delivered the talk that formed the basis for this Article. During this period, much has happened to validate Justice Stevens's expectations that *Baze* would catalyze debate about lethal injection execution procedures and the death penalty.<sup>343</sup> One commentator observed that courts have returned largely to the pre-*Baze* "divide," with states that had previously been concerned about the constitutional question allowing litigation to proceed and those that "only reluctantly stayed executions even when *Baze* was pending," resuming executions "in the same manner and with the same frequency as before *Baze*."<sup>344</sup> Currently, to be sure, in some states, with Texas, as always, way ahead of the pack, death gurneys are

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<sup>339</sup> *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005) (relying on empirical research to explain "[t]hree general differences" between juveniles and adults that warrant exemption of juveniles from death penalty); *Atkins*, 536 U.S. at 318 nn.23-24, 318-21 (relying on research to explain diagnosis which warrants a determination that the constitutionally permissive objectives of retribution and deterrence are not served by executing persons who have mental retardation).

<sup>340</sup> *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2662-63 (2008).

<sup>341</sup> *Id.* at 2663.

<sup>342</sup> *Id.* at 2663-64.

<sup>343</sup> See Denno, *Abolition Paradox*, *supra* note 203, at 184 ("The road leading to *Baze* is well traveled with lethal injection litigation; however, post-*Baze*, there appear to be many more litigation miles still to go.")

<sup>344</sup> Marceau, *supra* note 2, at 210-11 (relying on data from 2008).

in use again.<sup>345</sup> There were thirty-seven executions in 2008, the fewest since 1999, when the greatest number of people were executed in the post-*Gregg* era.<sup>346</sup> Although 2009 saw an increase to fifty-two executions, the six-month de facto moratorium and the fact that some active death penalty states, such as Missouri, Ohio and Alabama, did not restart executions quickly after *Baze* account for this spike.<sup>347</sup>

The execution divide is not exactly as it was before *Baze*. For example, although Arizona, Montana and North Carolina carried out executions during the two years before the de facto moratorium, as of this writing, none has executed anyone since *Baze* was decided.<sup>348</sup> The controversy surrounding lethal injection has not abated in these three states.<sup>349</sup> Challenges against lethal injection protocols are pending in at least ten states and in the federal system.<sup>350</sup> A number of states have

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<sup>345</sup> Between the decision in *Baze* and the end of 2009, Texas executed 42 people. Alabama, Florida, Georgia, Indiana, Kentucky, Mississippi, Missouri, Ohio, Oklahoma, South Carolina, Tennessee, and Virginia also carried out executions. Next to Texas, Virginia had the highest number (seven) of executions and Kentucky, Indiana, and Missouri (one each) had the fewest. See DPIC, THE DEATH PENALTY IN 2009: YEAR END REPORT 1-2 (2009), available at <http://www.deathpenaltyinfo.org/documents/2009YearEndReport.pdf> [hereinafter DPIC 2009].

<sup>346</sup> The South has historically been responsible for the overwhelming number of executions. See BANNER, *supra* note 9, at 278-79 (regarding executions that took place between 1977 and 1999). Between 2006 and 2009, the South was responsible for between 83 and 95 percent of executions. See DPIC 2008, *supra* note 169, at 1; DPIC 2007, *supra* note 169, at 2; DPIC 2006, *supra* note 169, at 2. In each of those years, Texas was responsible for more than half of the total number. *Id.*

<sup>347</sup> See DPIC 2009, *supra* note 345, at 1.

<sup>348</sup> Indiana carried out its first post-*Baze* execution on December 11, 2009. See DPIC 2009, *supra* note 345.

<sup>349</sup> See, e.g., N.C. Dep't of Corr. v. N.C. Med. Bd., 675 S.E.2d 641, 192-94 (N.C. 2009) (discussing various lethal injection related challenges in North Carolina); *Dickens v. Brewer*, No. CV07-1770-PHX-NVW, 2009 WL 1904294, at \*19-20 (D. Ariz. July 1, 2009) (discussing lethal history of challenge to lethal injection protocol in Arizona); Susan Gallagher, *ACLU Sues Over Montana Executions*, FLATHEAD BEACON, Apr. 3, 2008, [http://www.flatheadbeacon.com/articles/article/aclu\\_sues\\_to\\_challenge\\_lethal\\_injection\\_in\\_montana/2981](http://www.flatheadbeacon.com/articles/article/aclu_sues_to_challenge_lethal_injection_in_montana/2981).

<sup>350</sup> Challenges are pending in the following states: Arizona, Arkansas, California, Delaware, Louisiana, Maryland, Missouri, North Carolina, Ohio, and Washington. See Court Orders, available at <http://www.law.berkeley.edu/clinics/dpclinic/LethalInjection/LI/orders.html>. As this Article went to press, the Court of Appeals for the Third Circuit denied the Delaware lethal injection challenge and lifted a stay of all executions in that state. See *Jackson v. Danberg*, Nos. 09-1925, 09-2052, 2010 WL 337319 (3d Cir. 2010)). A challenge to the federal government's lethal execution procedures is pending in *Roane v. Holder*, Civ. No. 04-2337 (RWR); see 607 F. Supp. 2d 216 (D.D.C. 2009) for most recent published order. Current information about challenges to lethal injection across the country, as well posts of mainstream press and journal articles can be found at <http://www.lethalinjection.org>, which is the Web Site

not carried out executions because stays remain in place or execution dates have not been set.<sup>351</sup>

Ohio exemplifies Justice Stevens's admonition in *Baze* that "States . . . would do well to reconsider their continued use of pancuronium bromide."<sup>352</sup> Post-*Baze*, litigation in Ohio proliferated. One court found Ohio's three-drug protocol unlawful because the combined use of pancuronium bromide and potassium chloride violate the state's lethal injection statute. Ohio had dramatic, well-publicized problems with three executions, including one that had to be aborted, which brought significant attention and scrutiny to its administration of lethal injection, and ultimately resulted in its switch to a single-drug protocol.

To understand the relationship between Ohio's problems with lethal injection executions, which, as I explain, appear at first blush to relate to intravenous access and not necessarily to the use of pancuronium bromide — the focus of Justice Stevens's criticism in *Baze* — it bears emphasis that the two issues are inextricably linked.<sup>353</sup> In lethal

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of the Berkeley Law Death Penalty Clinic Lethal Injection Project.

<sup>351</sup> See *Bowling v. Ky. Dep't of Corr.*, No. 2007-SC-000021-MK, 2009 WL 4117353, at \*12 (Ky. 2009) (holding that Kentucky's execution protocol must be promulgated as administrative regulation, and is subject to state's APA requirements); see, e.g., *Morales v. Cal. Dep't. of Corr. and Rehab.*, 85 Cal. Rptr. 3d 724, 732-33 (Ct. App. 2008) (holding that California's execution protocol was not adopted in compliance with state APA); *Evans v. State*, 914 A.2d 25, 80 (Md. 2006) (finding Maryland Division of Corrections protocol invalid until adopted in compliance with APA); Paul Davenport, *Judge Rejects Challenge to Executions*, ARIZ. DAILY STAR, Oct. 9, 2009, <http://www.azstarnet.com/news/312486> (discussing two-year hold on executions in Arizona pending constitutional challenge to method of execution); David A. Lieb, *Mo. Executions on Hold Because of Federal Review*, ABC NEWS, June 23, 2009, <http://abcnews.go.com/US/wireStory?id=7912056>; John Lyon, *Court Clears Way for Williams Execution; AG in No Rush*, ARK. NEWS, Oct. 29, 2009, <http://arkansasnews.com/2009/10/29/state-supreme-court-rejects-challenge-to-lethal-injection-procedure/> (discussing how lethal injection litigation that has stayed executions in Arkansas since at least 2008); Carol J. Williams, *State Opens Comment Period on Lethal Injection Procedures*, L.A. TIMES, May 2, 2009, <http://articles.latimes.com/2009/may/02/local/me-lethal-injection2?pg=2> (discussing three-year hold on executions in California).

<sup>352</sup> *Baze v. Rees*, 128 S. Ct. 1520, 1546 (2008) (Stevens, J., concurring in judgment). Justice Stevens also agreed with Justice Ginsburg's suggestion that states "reconsider the sufficiency of their procedures for checking the inmate's consciousness." *Id.* at 1546 n.9. As discussed *infra*, problems with Ohio's lethal injection procedures mirror those identified in jurisdictions where lethal injection challenges had been allowed to proceed to evidentiary hearings.

<sup>353</sup> *Baze*, 128 S. Ct. at 1543-46 (Stevens, J., concurring in judgment). Even the *Baze* plurality acknowledged that its opinion was based upon the belief that there was no substantial risk that the IV catheters will not be properly inserted. *Id.* at 1533-34

injection executions, most of the risk of an excruciatingly painful death stems from improper, inadequate or failed intravenous (“IV”) access because that is what leads to unsuccessful delivery of any and all of the drugs into the circulatory system.<sup>354</sup> In many respects, a properly functioning IV is the *sine qua non* of a humane lethal injection execution, but the use of pancuronium makes it impossible to know whether the IV delivered a full and adequate dose of the anesthetic drug before the inmate experiences cardiac arrest.<sup>355</sup> In other words, the pancuronium operates like an insurance policy for the states: in the event that the inmate is conscious and suffering, the pancuronium makes it appear that he is unconscious and tranquil.<sup>356</sup> The *Baze* plurality understood the importance of a functioning IV and a proper dose of the anesthetic drug. The Justices stated correctly: “Petitioners agree that, if administered as intended, the procedure will result in a painless death.”<sup>357</sup> The opinion did not, however, make explicit the converse.<sup>358</sup> That is, if the thiopental is improperly administered and the inmate is inadequately anesthetized, he “will suffer excruciating pain before death occurs,” but show no “outward sign of distress” because the pancuronium bromide has paralyzed him.<sup>359</sup>

Even before *Baze* could be cited to support the state’s three-drug protocol, the federal courts in Ohio had exhibited an unwillingness to entertain lethal injection litigation. In 2007, in *Cooey v. Strickland*, the U.S. Court of Appeals for the Sixth Circuit set an onerous limitations

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(plurality opinion).

<sup>354</sup> See, e.g., Mark Dershwitz & Thomas K. Henthorn, *The Pharmacokinetics and Pharmacodynamics of Thiopental as Used in Lethal Injection*, 35 *FORDHAM URB. L.J.* 931, 949-50 (2008) (explaining necessity of obtaining and maintaining intravenous access to ensure inmate is unconscious when second of two drugs are administered). Florida’s well-publicized “botched” execution of Angel Diaz exemplifies the cascade of problems that occur because of faulty IV access. See, e.g., Brief for Michael Morales, *supra* note 223, at \*32; see *id.* at \*29-36 (listing other examples of what goes wrong “[w]hen unqualified personnel working in inadequate facilities perform a complicated and dangerous procedure with little margin for error”).

<sup>355</sup> Alper, *Anesthetizing the Public Conscience*, *supra* note 220, at 819 & nn.15-17.

<sup>356</sup> *Id.*

<sup>357</sup> *Baze*, 128 S. Ct. at 1537 (plurality opinion).

<sup>358</sup> The plurality treated the pain and suffering that would result from inadequate anesthesia as a risk, not a certainty: “It is uncontested that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride.” *Id.* at 1533.

<sup>359</sup> *Id.* at 1543 (Stevens, J., concurring in judgment); see also Brief of Petitioners at \*11-12, *Baze v. Rees*, 128 S. Ct. 1520 (2008) (No. 07-5439), 2007 WL 3307732.

date for challenging Ohio's lethal injection procedures through a federal civil rights action under 42 U.S.C. § 1983.<sup>360</sup> The Sixth Circuit's ruling effectively insulated Ohio from any accountability for its method of execution.<sup>361</sup> While the state was carrying out executions and refusing to hear the federal civil rights claims of time-barred plaintiffs, questions about its protocol were brewing. Before *Baze*, Ohio had carried out two highly publicized "botched" lethal injection executions. The first occurred on May 2, 2006, when it took prison staff almost ninety minutes and nineteen puncture wounds to execute Joseph Clark.<sup>362</sup> A year later, on May 24, 2007, correctional staff spent ninety minutes before they were able to insert an intravenous line into Christopher Newton.<sup>363</sup> Although it was evident from the IV access problems that the state had done nothing of consequence in the intervening eleven months to improve prison staff competence, oversight, or contingency planning, the director of Ohio's Corrections

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<sup>360</sup> *Cooley v. Strickland*, 479 F.3d 412, 422 (2007), *reh'g denied en banc*, 489 F.3d 775 (6th Cir. 2007) (holding that statute of limitations for bringing lethal injection challenge is later of either "conclusion of direct review in the state court or the expiration of time for seeking such review" or when the inmate "knew or should have known" that he had a cause of action "based upon reasonable inquiry, and could have filed suit and obtained relief"); *id.* at 428-29 (Gillman, J., dissenting) (arguing that opting for "judicial efficiency" over "justice" — here, the right to execution that complies with Eighth Amendment — was "counterintuitive, unduly harsh, and just plain wrong"). The lawsuit brought by Richard Cooley was the most prominent and dispositive because most plaintiffs intervened in his challenge. In addition to Richard Cooley, nineteen other intervenor plaintiffs were dismissed following the Sixth Circuit's decision. See Judgment in *Cooley v. Strickland*, No. 2:04-cv-1156 (S.D. Ohio Dec. 12, 2008).

<sup>361</sup> See *Cooley*, 479 F.3d at 426-28 (Gillman, J., dissenting); see also Berger, *supra* note 2, at 260, 281 (dissecting reasons for "[j]udicial reluctance to strike down states' lethal injection procedures," responding to each, and explaining how and why "judicial intervention is necessary").

<sup>362</sup> See Brief for Michael Morales, *supra* note 223, at \*33-34 (citing Adam Liptak, *Trouble Finding Inmate's Vein Slows Lethal Injection in Ohio*, N.Y. TIMES, May 3, 2006, at A16, and Autopsy Report for Joseph Clark, Dr. L.J. Dragovic, Office of the Medical Examiner, Oakland County, Mich., at 2 (Aug. 15, 2006), <http://www.law.berkeley.edu/clinics/dpclinic/LethalInjection/LI/documents/kit/botched.pdf>). Initially, there was a twenty-two minute delay because technicians could not find a suitable vein for an intravenous line. *Id.* "Four minutes after the execution team began administering the lethal chemicals, Clark lifted his head up and said, '[i]t's not working.'" *Id.* Paramedics discovered that the vein had collapsed and then spent more than thirty minutes before they were able to insert an IV. *Id.*; see also John Mangels, *Condemned Killer Complains Lethal Injection "Isn't Working,"* CLEVELAND PLAIN DEALER, May 3, 2006, at A1.

<sup>363</sup> Alan Johnson, *Prisoner Executed After IV Lines Cause Delay*, COLUMBUS DISPATCH, May 25, 2007, at 1B, available at 2007 WLNR 9839435 (also reporting that execution team took break to allow Newton to use restroom).

Department maintained that the difficulties were “handled in line with procedural changes he made after Clark’s execution.”<sup>364</sup>

Lawyers in Ohio sought avenues for lethal injection challenges other than federal civil rights suits and grounds for relief other than the Eighth Amendment. Shortly after the *Baze* decision, during the summer of 2008, the Lorain County Court of Common Pleas held a pretrial hearing on claims by co-defendants Ruben Rivera and Ronald McCloud that lethal injection, as practiced in Ohio, violated not only the state and federal constitutions, but also Ohio state law, which requires that lethal injection be carried out by “a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death.”<sup>365</sup> Judge James M. Burge ruled that, in the event death sentences were delivered and affirmed, the defendants “may only be executed by the use of a lethal injection of a single, anesthetic drug.”<sup>366</sup> The litigation in *Rivera* had commenced before the Supreme Court granted review in *Baze*, and while the findings of fact made no reference to Justice Stevens, they validated his concerns, particularly with regard to use of pancuronium.<sup>367</sup> The *Rivera* decision was limited to the two defendants on trial in that case, and Judge Burge’s opinion has been appealed.

Kenneth Biros, one of the intervening plaintiffs in the *Cooley* litigation, managed find his way inside the Sixth Circuit’s narrow limitations door.<sup>368</sup> In April 2009, following a hearing on his

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<sup>364</sup> *Id.*; see, e.g., Brief for Michael Morales, *supra* note 223, at \*6-7, \*11-12, \*31-36 (explaining level of care and medical expertise required to ensure that IV catheter is successfully inserted into inmate’s veins and range of adverse consequences that are foreseeable when procedure is not properly performed); Berger, *supra* note 2, at 265-72 (same). As discussed, the *Baze* record allowed the plurality to conclude that Kentucky used “qualified personnel” to insert the IV catheters. *Baze v. Rees*, 128 S. Ct. 1520, 1528 (2008) (plurality opinion).

<sup>365</sup> OHIO REV. CODE ANN. § 2949.22 (West 2009).

<sup>366</sup> Judgment Entry at 9, *State v. Rivera*, Nos. 04CR065940 & 05CR068067, (Ohio Ct. Com. Pl. June 10, 2008), available at <http://www.law.berkeley.edu/clinics/dpclinic/LethalInjection/LI/documents/courtorders/ohio/2008.06.10.oh.rivera.pdf> [hereinafter *Rivera Order*].

<sup>367</sup> *Id.* at 5-6, 8-9. This is not to imply that Judge Burge simply parroted Justice Stevens’s concurring opinion in *Baze*. However, the findings of fact are consistent with Justice Stevens’s criticism of pancuronium bromide and reflect his optimism that a challenge to the three-drug protocol “on the basis of a more complete record” might well result in a different outcome. *Baze*, 128 S. Ct. at 1542, 1546 (Stevens, J., concurring in judgment).

<sup>368</sup> The preliminary injunction and stay had been issued December 21, 2006. *Cooley v. Taft*, No. 2:04-CV-1156, 2006 WL 3762133, at \*1, \*3-4 (S.D. Ohio Dec. 21, 2006) (staying execution of Kenneth Biros). Following *Baze*, the State of Ohio asked the Sixth Circuit to lift the stay. A panel of the circuit court remanded the case for a

preliminary injunction motion, the federal district court ruled that although “Ohio’s method of lethal injection is a flawed system,” Biros had not made the necessary showing to maintain a stay of execution and to require a full trial on his claim.<sup>369</sup> In an eerie forecast of what would transpire six months later, the judge expressed “significant pragmatic concern” about the fact that the corrections staff have two hours to complete the execution.<sup>370</sup>

Ohio promulgated a new three-drug protocol in May 2009.<sup>371</sup> The State purported to address the grievous missteps that had occurred in the Clark and Newton executions. As discussed in Part II, the plurality in *Baze* intended to embolden courts like the Sixth Circuit that preferred to leave lethal injection, from conception to execution, to the political branch of government. The harshness of *Cooley* played out in the wake of *Baze*. Litigation in Ohio continued, but executions resumed as the federal court of appeals dismissed lawsuits based upon *Cooley*.<sup>372</sup>

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determination of that issue. *Cooley II v. Strickland*, No. 06-4660 (6th Cir. July 9, 2009) (remanding case for determination of Biros preliminary injunction).

<sup>369</sup> *Cooley v. Strickland*, 610 F. Supp. 2d 853, 936 (2009) (stating that its “decision therefore neither holds that Ohio’s method of execution by lethal injection is constitutional nor unconstitutional,” and cautioning that “Ohio’s procedures ‘*must*’ be improved to achieve the State’s goal of humane executions” (citing *Baze*, 128 S. Ct. at 1537 (plurality opinion))). Judge Frost acknowledged the absence of a “clear holding” in *Baze*. *Id.* at 937. Although he heard evidence about the one-drug protocol, the judge concluded that its use was not “constitutionally compelled,” and also found, consistent with the *Baze* plurality, that pancuronium “serves a useful purpose” by ameliorating “possible effect of involuntary muscle contractions caused by . . . potassium chloride.” *Id.* at 926.

<sup>370</sup> *Id.* at 923. Judge Frost agreed that Biros might prevail if he were able to “produce additional evidence at the subsequent trial on the merits,” and agreed that a different outcome might result if the State deviated “from the unwritten custom and practice that props up its teetering written procedures.” *Id.* at 932.

<sup>371</sup> See State of Ohio Department of Rehabilitation and Corrections Protocol, ORC 2949.22, May 12, 2009, at 1, 4, available at <http://www.law.berkeley.edu/clinics/dpclinic/LethalInjection/LI/Ohio/documents/2009.05.14.oh.protocol.pdf>.

<sup>372</sup> The Court of Appeals for the Sixth Circuit held that *Baze* did not create a new Eighth Amendment right, but only “clarified the standards that should apply to the merits” of method-of-execution challenges. *Getsy v. Strickland*, 577 F.3d 309, 311 (6th Cir. 2009) (relying on *Baze*, 128 S. Ct. at 1556 (Thomas, J., concurring in judgment)). Therefore, alterations to the state’s lethal injection procedures in 2009 did not change the statute of limitations accrual date. Post-*Furman*, executions in Ohio did not resume until 1999, but between that year and the 2007 de facto moratorium, Ohio executed an average of four men each year. There were 32 executions in Ohio, which has the nation’s fifth largest death row, between 1999 and the attempted execution of Romell Broom. See DPIC, Death Row Inmates By State, <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year#> state (last visited Feb. 6, 2010); DPIC, Executions in the United States 1608-1976, By

The train derailed on September 15, 2009.<sup>373</sup> After Ohio correctional staff tried for more than two hours to execute Romell Broom by lethal injection, Governor Ted Strickland intervened and granted Broom a one-week reprieve.<sup>374</sup> According to a reporter who watched the ordeal, it was apparent within the first half hour that the execution team was having difficulty finding a suitable vein.<sup>375</sup> On October 5, the governor granted reprieves to two other men, postponing their executions until March and April 2010, to allow the corrections department to come up with a “back-up” plan, but he left in place executions that were scheduled as early as December 8, 2009, which was the date set for Kenneth Biros.<sup>376</sup> The Broom reprieve was not only unprecedented in

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State, <http://www.deathpenaltyinfo.org/executions-united-states-1608-1976-state> (last visited Feb. 6, 2010).

<sup>373</sup> On September 1, 2009, two weeks before Broom’s scheduled execution, the circuit court dismissed his lethal injection challenge as time-barred. *Broom v. Strickland*, 579 F.3d 553, 557-58 (6th Cir. 2009). Broom’s lethal injection challenge was filed in federal district court in 2007. *Id.*

<sup>374</sup> See Andrew Welsh-Huggins, *2d Attempt to Execute Ohio Killer Further Delayed*, S.F. CHRON., Sept. 22, 2009, <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2009/09/21/national/a092348081.DTL>; Office of the Governor, State of Ohio, Warrant of Reprieve, Sept. 15, 2009, <https://www.law.berkeley.edu/clinics/dpclinic/LethalInjection/LI/documents/developments/Broom%20Reprieve.pdf>; Stephen Majors, *Governor Delays Execution After Suitable Vein Can’t Be Found*, CHILLICOTHEGAZETT.COM, Sept. 16, 2009, <http://ejournal.org/ejournal/files/09.16.09%20Chillicothe%20Gazette%20-%20Governor%20delays%20execution%20after%20suitable%20vein%20can%27t%20be%20found.pdf>. During the two hours that Broom was strapped to the gurney, one of his attorneys wrote to the Chief Justice of the Ohio Supreme Court, asking the Justice to halt the execution to avoid “a repeat of the cruelty that occurred during the Joseph Clark execution.” Letter from Timothy F. Sweeney to Thomas Moyer, Chief Justice, Supreme Court of Ohio (Sept. 15, 2009), available at <http://www.law.berkeley.edu/clinics/dpclinic/LI/Ohio/documents/CJ%20Moyer%2009.15.09.pdf>.

<sup>375</sup> See Affidavit of Romell Broom, *Broom v. Strickland*, No. 2:09-cv-00823-GLF-MRA, (S.D. Ohio Sept. 18, 2009), available at <https://www.law.berkeley.edu/clinics/dpclinic/LethalInjection/LI/documents/Ohio/broomaffidavit.pdf>. When the execution team finally accessed a vein, but it collapsed, the staff attempted to inject saline fluid into the vein. “Broom then became visibly distressed, turning over on his back and covering his face with his hands while crying.” Welsh-Huggins, *supra* note 374.

<sup>376</sup> Press Release, Ohio Office of the Governor, Governor’s Statement Regarding Reprieves (Oct. 5, 2009), <http://www.governor.ohio.gov/News/PressReleases/2009/October2009/News10509/tabid/1265/Default.aspx>. The governor ordered reprieves for Lawrence Reynolds, who was scheduled to be executed on October 8, 2009, and Darryl Durr, whose execution was scheduled for November 10, 2009. *Id.* He left in place the execution dates for Kenneth Biros, Vernon Smith, and Mark Brown (December 8, 2009, January 7 and February 4, 2010, respectively.) The reprieve followed the Sixth Circuit’s stay of execution for Reynolds.



Ohio, it was the first time in the post-*Furman* era that authorities who had “botched” an execution did not persist until they succeeded.<sup>377</sup>

Further actions by the Governor and the federal courts produced additional stays and an order by the Sixth Circuit for a full evidentiary hearing on Ohio's three-drug protocol in a challenge brought by Lawrence Reynolds.<sup>378</sup> Acknowledging that, under its earlier *Cooley* decision, Reynolds was out of time to bring a civil rights action, a majority of the circuit court panel concluded that the experiences of Clark, Newton, and Broom raised questions about whether the State was competently following its protocol and whether the “troubling difficulties” presented new evidence sufficient to “revive Reynolds' Eighth Amendment claims.”<sup>379</sup> Plainly, some of these deficiencies had been before the Sixth Circuit in *Cooley*.<sup>380</sup> Answers could have been obtained before Ohio carried out seven more executions, and before the “botched” attempt to execute Broom, had the court acknowledged, as it finally did in *Reynolds*, that in light of “the important constitutional and humanitarian issues at stake in all death penalty

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<sup>377</sup> See Bob Driehaus, *Ohio Plans to Try Again as Execution Goes Wrong*, N.Y. TIMES, Sept. 17, 2009, at A16, available at 2009 WLNR 18235332; Welsh-Huggins, *supra* note 374; see also *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462-66 (1947); Deborah H. Denno, *When Willie Francis Died: The “Disturbing” Story Behind One of the Eighth Amendment’s Most Enduring Standards of Risk*, in DEATH PENALTY STORIES 17, 43-44 (John H. Blume & Jordan M. Steiker eds., Found. Press 2009) (describing failed attempt to execute Francis by electrocution); *id.* at 90 (arguing that *Resweber* did not determine whether method of execution violated Eighth Amendment, but only whether “the State of Louisiana could constitutionally execute [Francis] after the electric chair had malfunctioned during the first attempt”).

<sup>378</sup> See *Reynolds v. Strickland*, 583 F.3d 956, 957 (6th Cir. 2009) (staying Lawrence Reynolds's execution and remanding for evidentiary hearing); *id.* at 957 (Cole, J., concurring) (stating that “the State's eighteen unsuccessful efforts to run an intravenous line into Romell Broom's veins over the course of two hours” suggest “the possibility that Broom has already suffered an Eighth Amendment violation”); Agreed Order at 1-2, *Broom v. Strickland*, No. 2:09-cv-823, (S.D. Ohio Sept. 18, 2009), <http://www.law.berkeley.edu/clinics/dpclinic/LethalInjection/LI/Ohio/documents/2009.09.18.tro.order.pdf>; Welsh-Huggins, *supra* note 374 (stating federal district court issued temporary restraining order, first staying Broom's execution until September 28, and then extended stay for evidentiary hearing).

<sup>379</sup> *Reynolds*, 583 F.3d at 957. The court identified two concrete indicators of maladministration — the absence of a contingency plan if the execution team cannot obtain peripheral vein access and “issues related to the competence of the lethal injection team” — and one non-specific concern, which it simply called “other potential deficiencies.” *Id.*

<sup>380</sup> See *Cooley v. Strickland (Cooley II)*, 479 F.3d 412, 423-24 (2007); *id.* at 427 (Gilman, J., dissenting).

cases, these problems in the Ohio lethal injection protocol are certainly worthy of meaningful consideration.”<sup>381</sup>

The botched attempt to execute Broom also brought to the surface Justice Stevens’s expectation that *Baze* would fuel the larger debate about the death penalty.<sup>382</sup> Some opponents of a second attempt to execute Broom argued that lethal injection executions are no less barbaric than other methods, but also that capital punishment does not deter, is “revenge, not justice,” and that, across the nation, the recognition of death row exonerations is “putting death sentences on hold.”<sup>383</sup>

Two months after the failed Broom execution, Ohio officials did an unexpected about-face and announced a new, single-drug, lethal injection protocol, which requires that executions be carried out by administering intravenously an overdose of an anesthetic, sodium thiopental.<sup>384</sup> If the execution team cannot obtain intravenous access, the new procedure includes an alternative method involving the intramuscular injection of two drugs. As of this writing, the second protocol is “a complete unknown.”<sup>385</sup> Ohio has not released any information about the review that led it to select this alternate lethal injection method. It is not only the first state to move to a single chemical, it is the first to propose this back-up plan.<sup>386</sup>

The Sixth Circuit lifted the stay of execution for *Biros* after Ohio successfully argued that the new one-drug lethal injection procedure mooted the lawsuit, which was based on the three-drug protocol.<sup>387</sup>

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<sup>381</sup> *Reynolds*, 583 F.3d at 957.

<sup>382</sup> See Alan Johnson, *Which Is More Humane: Botched Execution Stirs Debate Over What Is Cruel Death for the State’s Cold-Blooded Killers*, COLUM. DISPATCH, Oct. 6, 2009, [http://www.dispatchpolitics.com/live/content/local\\_news/stories/2009/10/06/copy/LET\\_HAL\\_RULING.ART\\_ART\\_10-06-09\\_A1\\_UNF9QH1.html?adsec=politics&sid=101](http://www.dispatchpolitics.com/live/content/local_news/stories/2009/10/06/copy/LET_HAL_RULING.ART_ART_10-06-09_A1_UNF9QH1.html?adsec=politics&sid=101); Carol J. Williams, *Is a Second Execution Cruel Effort?*, L.A. TIMES, Sept. 19, 2009, at 16, available at 2009 WLNR 18462754.

<sup>383</sup> Editorial, *End Capital Punishment in America*, AURORA (OHIO) SENTINEL, Sept. 15, 2009, <http://www.aurorasentinel.com/articles/2009/09/15/opinion/editorials/doc4ab0438cee63f885545507.txt>.

<sup>384</sup> See Memorandum in Support of Defendants’ Second Motion for Summary Judgment at 1, *Cooley (Biros) v. Strickland*, No. 2:04-CV-1156 (S.D. Ohio Nov. 13, 2009), available at <http://www.law.berkeley.edu/clinics/dpclinic/LethalInjection/LI/Ohio/gov.uscourts.ohsd.98761.601.0.pdf> (arguing that *Biros*’s challenge to Ohio’s lethal injection protocol is now “moot”).

<sup>385</sup> *Id.* at 1; Aaron Marshall, *New Lethal Injection Policies Put Ohio at Center of Legal and Ethical Debate over Executions*, CLEVELAND PLAIN DEALER, Nov. 23, 2009, at B1, available at 2009 WLNR 23672077 (quoting Ty Alper, associate director of Berkeley Law Death Penalty Clinic).

<sup>386</sup> Marshall, *supra* note 385.

<sup>387</sup> See *Cooley (Biros) v. Strickland*, 588 F.3d 291, 923 (6th Cir. 2009) (per

Biros filed an amended complaint challenging the single-drug protocol, but the district and appellate courts concluded that he had failed to demonstrate a strong likelihood of prevailing on the merits and rejected his stay application.<sup>388</sup> He was executed on December 8, 2009, with a single dose of thiopental.<sup>389</sup> Observers reported that the prison staff “struggled” for about thirty minutes to locate a suitable vein,<sup>390</sup> which suggests that problems with execution team competence remain. Death was pronounced about nine minutes after the staff obtained IV access.<sup>391</sup> Ohio has since executed two other individuals, Vernon Smith and Mark Brown, using the single-drug lethal injection procedure.<sup>392</sup>

Doubts will always linger about whether Newton and Clark suffered horrific pain during their executions. First, it is undisputed that in each execution, the prison staff was unable to achieve a functioning IV line for nearly ninety minutes. Second, the longer the executioners poke around at the veins and make failed attempts, the more likely it is that the resulting IV will be faulty or non-functioning.<sup>393</sup> Finally, of course, if the IV is faulty, the execution will likely be botched, but, because of the pancuronium, observers will be unaware that the inmate experienced a torturous death. The three botched lethal injection executions that occurred in Ohio can happen in any

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curiam).

<sup>388</sup> *Cooley (Biros) v. Strickland*, 589 F.3d 210, 215 (6th Cir. 2009); Opinion and Order at 101, *Cooley*, No. 2:04-CV-1156 (S.D. Ohio Dec. 7, 2009). I offer a few observations about the Sixth Circuit's lengthy opinion: The court (1) concluded that what it called “accidents” and “misfortunes,” which had marked prior executions, did not support the assumption that the new protocol “gives rise to a ‘substantial risk of serious harm,’” 589 F.3d. at 224-25 (quoting *Baze v. Rees*, 128 S. Ct. 1520, 1531 (2008) (plurality opinion)); (2) made no mention of Justice Stevens's concurrence in *Baze* and; (3) was not persuaded that Ohio's statutory requirement, which led to the *Rivera* decision, created a substantive federal due process right *Id.* at 233.

<sup>389</sup> See Aaron Marshall, *Kenneth Biros Becomes First Inmate Executed Using Single-Drug Method*, CLEVELAND PLAIN DEALER, Dec. 8, 2009, [http://blog.cleveland.com/metro/2009/12/biros\\_becomes\\_first\\_inmate\\_exe.html](http://blog.cleveland.com/metro/2009/12/biros_becomes_first_inmate_exe.html).

<sup>390</sup> *Id.*

<sup>391</sup> *Id.*

<sup>392</sup> Alan Johnson, *Convenience-Store Killer Executed by Lethal Injection*, COLUMBUS (OHIO) DISPATCH, Feb. 4, 2010, 2010 WLNR 2404634 (describing Brown's execution and reporting that it was thirty-fifth execution in Ohio since reinstatement of capital punishment).

<sup>393</sup> See, e.g., Brief for Michael Morales, *supra* note 223, at \*31-35 (providing examples of multiple, unsuccessful efforts to establish and maintain venous access, resulting in infiltration of thiopental into tissues surrounding vein and inadequate anesthesia).

jurisdiction that uses the three-drug formula — and they have.<sup>394</sup> As Justice Stevens's concurrence in *Baze* urged, by removing pancuronium, the inmate will not be paralyzed.<sup>395</sup> The execution will be transparent, and it will be far easier to ascertain whether the individual is insufficiently anesthetized.

### B. *The Very Long Haul*

I had envisioned that the last part of this Article would look beyond *Baze*, and offer an assessment of how Justice Stevens's concurring opinion might influence the long-term prospects for abolition. I considered, of course, the likelihood that the Justice would not welcome either thoughts about his legacy or prognostications about his influence. In 2007, he told a reporter: "You write what you think is correct and important . . . I don't consider myself a mobilizer."<sup>396</sup> However, Justice Stevens's exhortation in *Baze* for a reexamination of the death penalty is a departure for him. It makes sense, therefore, to consider the potential impact of Justice Stevens's concurrence, as he did, across several dimensions.

The national trend is still toward a decreased use of the death penalty.<sup>397</sup> More telling than the execution rate, which has been somewhat skewed by lethal injection litigation, death sentences

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<sup>394</sup> See *id.* at \*29-36. See generally Berkeley Death Penalty Clinic, Botched Executions, <http://www.berkeley.edu/clinics/dpclinic/LethalInjection/LI/documents/kit/botched.pdf> (last visited Feb. 8, 2010).

<sup>395</sup> Cf. *Baze v. Rees*, 128 S. Ct. 1520, 1527 (2008) (plurality opinion) (describing pancuronium, second drug, "as a paralytic agent that inhibits all muscular-skeletal movements and, by paralyzing the diaphragm, stops respiration").

<sup>396</sup> Rosen, *supra* note 48, § 6, at 50.

<sup>397</sup> Information about sentencing rates and executions is available at <http://www.deathpenaltyinfo.org/death-penalty-sentences-have-dropped-considerably-current-decade>, and <http://www.deathpenaltyinfo.org/executions-year>. See also Diane Jennings, *Is the Death Penalty a Dying Breed?*, DALLAS MORNING NEWS, Jan. 7, 2009, at 1B, available at 2009 WLNR 327170 (reporting that there was not one death verdict in 2008 in Harris County, "which has led the state in death sentences for years," and discussing debate between defense lawyers and prosecutors about whether decrease in capital sentences represents sustainable trend or "the cyclical nature of criminal justice"). See generally William J. Bowers & Scott E. Sundby, *Why the Downturn in Death Sentences?*, in THE FUTURE OF AMERICA'S DEATH PENALTY: AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH 47 (Charles S. Lanier et al., 2009). Information about abolition, moratorium and reform legislation is available at <http://www.deathpenaltyinfo.org/recent-legislative-activity#2009>. See Frank Green, *Va. Goes 20 Months Without a Death Verdict from a Jury*, RICHMOND TIMES-DISPATCH, Nov. 14, 2009, [http://www2.timesdispatch.com/rtd/news/local/crime/article/DEAT14\\_20091113-220804/305600/](http://www2.timesdispatch.com/rtd/news/local/crime/article/DEAT14_20091113-220804/305600/) (reporting that this is longest period without death verdict since capital punishment was reinstated).

declined in 2009 for the seventh consecutive year to the fewest number since *Gregg*.<sup>398</sup> New Mexico abolished capital punishment, and Connecticut and Maryland came close.<sup>399</sup> Overall, more abolition bills were introduced and made headway than in previous years.<sup>400</sup>

The direction of change is manifest not only in the data, but in decisions such as *Atkins*, *Simmons*, and *Kennedy*, in opinions expressed by lower federal and state court judges,<sup>401</sup> and other members of the legal establishment. For example, in 2009, Oliver Diaz, Jr., then-Presiding Justice of the Mississippi Supreme Court, used the occasion of his dissent from the court's denial of relief in a death penalty case to align himself with Justice Stevens in calling for "a national reexamination of the propriety of capital punishment."<sup>402</sup> Sixth Circuit

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<sup>398</sup> There were 111 death sentences in 2008 and an estimated 109 in 2009. See BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT, 2008 — STATISTICAL TABLES (2009), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cp08st.pdf>; DPIC 2009, *supra* note 345, at 1. In 2006, before the de facto moratorium had a direct effect on the execution rate, there were 53 executions. See DPIC 2006, *supra* note 169, at 1. Forty-two executions were carried out in 2007, 37 in 2008, and 52 in 2009. See DPIC 2007, *supra* note 169, at 1; DPIC 2008, *supra* note 169, at 1; DPIC 2009, *supra* note 345, at 1. On average, there were 43 executions each year.

<sup>399</sup> See Christopher Keating, *Rell Vetoes Bill to Abolish Capital Punishment*, HARTFORD COURANT, June 6, 2009, at A3 ("For the first time, both chambers of the General Assembly voted this year to abolish the death penalty for future cases."); Jennings, *supra* note 218; John Wagner, *Md. Lawmakers Approve Tighter Death Penalty Rules*, WASH. POST, Mar. 26, 2009, [http://www.washingtonpost.com/wp-dyn/content/article/2009/03/26/AR2009032601896\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/03/26/AR2009032601896_pf.html) (reporting abolition legislation rejected in favor of restriction and reform bills).

<sup>400</sup> See DPIC 2009, *supra* note 345, at 1-2.

<sup>401</sup> In 2009, retired Judge Ronald Reagan spoke in favor of legislation in Nebraska to repeal capital punishment. See Paul Hammel, *Judge Put Execution Views Aside*, OMAHA WORLD-HERALD, Feb. 2, 2009, 2009 WLNR 1933917 (testifying that, despite personal, "philosophical" opposition to capital punishment, he had imposed death penalty in cases because judges are "supposed to apply the law that is given us," and "aren't supposed to be political activists"); see also *United States v. Quinones*, 205 F. Supp. 2d 256, 257 (S.D.N.Y. 2002), (dismissing capital charges because of undue risk of execution of innocent defendant), *rev'd and remanded*, 313 F.3d 49 (2d Cir. 2002); John Schwartz, *Judges' Dissents for Death Row Inmates Are Rising*, N.Y. TIMES, Aug. 13, 2009, at A1 (reporting on increased number of dissenting opinions by judges who conclude that Congress and Court have gone too far in excluding so many defendants from federal review of capital convictions and sentences).

<sup>402</sup> See *Doss v. State (Doss I)*, No. 2007-CA-00429-SCT, 2008 WL 5174209 (Miss. Dec. 11, 2008), *opinion withdrawn and superseded on rehearing; substituted opinion*, *Doss v. State (Doss II)*, 19 So.3d 690 (Miss. 2009). In *Doss I*, the Mississippi Supreme Court affirmed petitioner's conviction and death sentence, holding that he did not have mental retardation and was not denied effective assistance of counsel. Several justices dissented from the denial of relief, including then-Presiding Justice Oliver Diaz, Jr., who wrote that the majority's decision compelled him "to make a closer

Court of Appeal Judge Boyce F. Martin, Jr., concurring in the affirmance of a death judgment, did likewise.<sup>403</sup> He detailed the costs of capital punishment and wrote: “Moral objections aside, the death penalty simply does not justify its expenses.”<sup>404</sup> Also in 2009, the American Law Institute (“ALI”) delivered what Professor Franklin Zimring calls “a quiet blockbuster” when it withdrew the capital punishment scheme that it had approved for the 1963 *Model Penal Code*.<sup>405</sup> As Professor Zimring explains, states copied these provisions in their attempts to satisfy *Furman*, and the ALI framework became the predominant model.<sup>406</sup> The recommendation to ALI was based on a report by Professors Carol and Jordan Steiker that documented “the

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examination of the application of the death penalty in Mississippi,” and, particularly, to “join” Justice Stevens’s call for “a national reexamination of the propriety of capital punishment.” *Doss I*, 2008 WL5174209, at \*15. In *Doss II*, the Mississippi Supreme Court vacated the death judgment based upon a claim of ineffective assistance of counsel, and remanded the case for a new sentencing hearing. *See Doss II*, 19 So. 3d at 708.

<sup>403</sup> *Wiles v. Bagley*, 561 F.3d 636, 642 (6th Cir. 2009) (Martin, J., concurring in judgment) (writing that petitioner had failed to establish trial counsel’s constitutionally deficient performance, but “joining Justice Stevens in calling for ‘a dispassionate, impartial comparison of the enormous costs that death penalty litigation imposes on society with the benefits that it produces’” (quoting *Baze v. Rees*, 128 S. Ct. 1520, 1548-49 (2008) (Stevens, J., concurring in judgment))). Four years earlier, Judge Martin, citing Justice Blackmun’s dissent in *Callins* and Justice Stevens’s 2005 Address to the ABA, announced that, after more than a quarter century on the bench, he had come to the conclusion that “the death penalty in this country is arbitrary, biased, and so fundamentally flawed at its very core that it is beyond repair.” *Moore v. Parker*, 425 F.3d 250, 268-69 (6th Cir. 2005) (Martin, J., dissenting). He also wrote that he would adhere to the Supreme Court’s capital punishment precedent, and has not dissented based upon his view that the death penalty is unconstitutional. *Id.* at 269-70.

<sup>404</sup> *Wiles*, 561 F.3d at 642-46 (Martin, J., concurring in judgment).

<sup>405</sup> On October 23, 2009, the American Law Institute voted to withdraw § 210.6 (capital punishment statutes) from the Model Penal Code. *See* REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY, at 1 (2009), available at [http://www.ali.org/doc/Capital%20Punishment\\_web.pdf](http://www.ali.org/doc/Capital%20Punishment_web.pdf) [hereinafter ALI COUNCIL REPORT] (recommending withdrawal of § 210.6 from the Model Penal Code); Franklin E. Zimring, *Pulling the Plug on Capital Punishment*, NAT’L. L.J., Dec. 7, 2009, at Col.1, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202436026535&slreturn=1&hblogin=1> (stating that ALI’s decision “pulled the intellectual rug out from under the current system of deciding between life and death in 30 death penalty states”); *see also* Adam Liptak, *Shapers of Death Penalty Give Up on Their Work*, N.Y. TIMES, Jan. 4, 2010, at A11, available at 2010 WLNR 168394 (calling ALI’s decision “a tectonic shift in legal theory”).

<sup>406</sup> *Zimring*, *supra* note 405 (noting that, after *Gregg*, state capital punishment schemes expanded far beyond what Institute had contemplated).

major reasons why many thoughtful and knowledgeable individuals doubt whether the capital-punishment regimes in place in three-fourths of the states, or in any form likely to be implemented in the near future, meet or are ever likely to meet basic concerns of fairness in process and outcome.”<sup>407</sup> News reports about politicians and other prominent figures, including those in law enforcement, who now oppose capital punishment appear regularly.<sup>408</sup>

Shortly after the decision in *Baze*, Rudolf Gerber, a former Arizona prosecutor and judge, and drafter of Arizona's post-*Furman* capital punishment statute, wrote that Justice Stevens's opinion “ought to give pause to resuming executions” and that the pause ought to become permanent.<sup>409</sup> In January 2010, Montana state senator Roy Brown, who was the 2008 Republican nominee for governor, joined other conservatives at the annual conference of the National Coalition to Abolish the Death Penalty.<sup>410</sup> Brown announced that his opposition to

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<sup>407</sup> ALI COUNCIL REPORT, *supra* note 405, at 5; see CAROL S. STEIKER & JORDAN M. STEIKER, REPORT TO THE ALI CONCERNING CAPITAL PUNISHMENT, Annex B (Nov. 2008).

<sup>408</sup> See, e.g., Casper Taylor, op-ed, *Correct a Terrible Mistake*, BALTIMORE SUN, Feb. 17, 2009, [http://articles.baltimoresun.com/2009-02-17/news/0902160063\\_1\\_penalty-in-maryland-death-penalty-maryland-death](http://articles.baltimoresun.com/2009-02-17/news/0902160063_1_penalty-in-maryland-death-penalty-maryland-death) (“I cast thousands of votes. I have few regrets. But there is one vote I wish I could take back — my 1978 vote to reinstate the death penalty in Maryland . . . Capital punishment is rightfully on its way out in the United States. Maryland can and should be a national leader. I hope our state legislators will correct the mistake my colleagues and I made 31 years ago.”); Jeanne Woodford, *Death Row Realism, Do Executions Make Us Safer?*, L.A. TIMES, Oct. 2, 2008, at 23, available at 2008 WLNR 18702490 (former director of California Department of Corrections and Rehabilitation and former warden of San Quentin State Prison, who presided over four executions, describes how she came to oppose death penalty); Richard Dieter, DPIC, *Smart on Crime: Reconsidering the Death Penalty in a Time of Economic Crisis*, <http://www.deathpenaltyinfo.org/reports> (last visited Feb. 6, 2010) [hereinafter Dieter, *Smart on Crime*] (reporting on poll of police chiefs, which ranked “insufficient use of the death penalty” as least of their law enforcement concerns). See generally DPIC, *New Voices*, <http://www.deathpenaltyinfo.org/new-voices> (last visited Feb. 6, 2010) (providing regularly updated information about new individual and institutional opposition to death penalty).

<sup>409</sup> Rudolph J. Gerber, *Let's Stop, Reconsider: Should Executions Continue?*, SAC. BEE, Apr. 21, 2008, at B5, available at 2008 WLNR 7437349; see also Ronald J. Tabak, *Finality Without Fairness: Why We Are Moving Towards Moratoria on Executions, and the Potential Abolition of Capital Punishment*, 33 CONN. L. REV. 733, 752-63 (2001) (discussing how new public discourse on capital punishment may lead to sustainable moratoria, as in Illinois, and, ultimately, to abolition).

<sup>410</sup> Assoc. Press, *Anti-Death Penalty Movement Woos Conservatives Like Brown*, BILLINGS GAZETTE, Jan. 18, 2010, [http://www.billingsgazette.com/news/state-and-regional/montana/article\\_c71829ee-0437-11df-997a-001cc4c03286.html](http://www.billingsgazette.com/news/state-and-regional/montana/article_c71829ee-0437-11df-997a-001cc4c03286.html) (reporting that Brown's views are shared by other conservatives, based upon religious beliefs, as well concerns about costs and about wrongful convictions).

capital punishment is wholly compatible with his “conservative ideology.”<sup>411</sup>

The “innocence revolution” is not over.<sup>412</sup> The risk of wrongful executions has become as “decisive” for some opinionmakers,<sup>413</sup> members of the public<sup>414</sup> and government actors,<sup>415</sup> as it was for Justice

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<sup>411</sup> *Id.*

<sup>412</sup> DPIC reported nine exonerations of death-sentenced individuals in 2009, more than double the number reported the previous year, which brought the total on its list to 139. See <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row>; see also Gross & O'Brien, *supra* note 335, at 946 (explaining difficulties involved in obtaining data on wrongful convictions).

<sup>413</sup> See, e.g., David Brooks, *The Sidney Awards*, N.Y. TIMES, Dec. 25, 2009, at A31, available at 2009 WLNR 25899645 (discussing David Grann's New Yorker article, *Trial By Fire*, which recounts Cameron Todd Willingham case and describes trial evidence that led to Willingham's conviction, death sentence, and execution in Texas and the later-revealed evidence that he did not set the fire that killed his three children). Brooks wrote, “If you can still support the death penalty after reading this piece, you have stronger convictions than I do.” Grann's article is available at [http://www.newyorker.com/reporting/2009/09/07/090907fa\\_fact\\_grann](http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann).

<sup>414</sup> See Steiker, *Marshall Hypothesis*, *supra* note 28, at 541-45 (discussing shift in public opinion as example of Justice Marshall's “prescience” in identifying factors that would lead Americans to reject capital punishment); *id.* at 10 n.69 (citing DPIC poll reporting that, out of 1,000 person sample, 87% said they believed innocent person has been executed, and 55% said that belief “affected” their views on death penalty); see also Richard Dieter, *The Future of Innocence*, in *THE FUTURE OF AMERICA'S DEATH PENALTY* 225, 227 (Charles Lanier et al., eds., Carolina Academic Press 2009) (discussing polling that shows “[m]ost Americans have been affected by the news of the many exonerations in death penalty cases”); Kevin Johnson, *In lieu of DNA evidence, Exoneration Proves Tougher*, USA TODAY, Aug. 6, 2008, [http://www.usatoday.com/news/nation/2008-08-05-DNAside\\_N.htm](http://www.usatoday.com/news/nation/2008-08-05-DNAside_N.htm) (reporting that innocence projects are investigating increasing number of cases that do not have DNA evidence).

<sup>415</sup> See, e.g., *Cooper v. Brown*, 565 F.3d 581, 581 (9th Cir. 2009), *cert. denied*, *Cooper v. Ayers*, 2009 WL 3092461 (U.S. 2009) (denying petition for rehearing and petition for rehearing en banc over dissenting opinions of several judges including William A. Fletcher, who wrote, “The State of California may be about to execute an innocent man”); DPIC, *Governor Bill Richardson Signs Repeal of Death Penalty*, Mar. 18, 2009, <http://www.deathpenaltyinfo.org/documents/richardsonstatement.pdf> (“Faced with the reality that our system for imposing the death penalty can never be perfect, my conscience compels me to replace the death penalty with a solution [a sentence of life without possibility of parole] that keeps society safe.”); Raymond Lesniak, *Why Abolition of the Death Penalty was Important*, N.J. VOICES: OPINIONS FROM NEW JERSEY, Oct. 15, 2008, [http://blog.nj.com/njv\\_raymond\\_lesniak/2008/10/why\\_abolition\\_of\\_the\\_death\\_pen.html](http://blog.nj.com/njv_raymond_lesniak/2008/10/why_abolition_of_the_death_pen.html) (reporting on speech at Rutgers University School of Criminal Justice, during which New Jersey State Senator listed risk of executing innocent people as second reason he supported abolition). For perspectives on the “innocence movement,” which raise concerns that I share, see David R. Dow, *The End of Innocence*, N.Y. TIMES, June 16, 2006, at A31, available at 2006 WLNR 10405231 (arguing that focus on innocence obscures “the far more pervasive problem” of “appalling violations of legal principals” throughout



Stevens. The salience of this issue for Justice Kennedy is unknown. It may, however, be clarified after a district court conducts an evidentiary hearing to determine whether Troy Davis can establish a claim of factual innocence, and the case returns to the Court, where the question — does the Constitution prohibit the execution of an individual who is factually innocent but has no other claim of legal error — could be front and center.<sup>416</sup>

In April 2008, when Justice Stevens wrote about “the enormous costs that death penalty litigation imposes on society,” he made no mention of the fact that the nation was in a severe recession.<sup>417</sup> He was, to be sure, concerned about more than the price tag.<sup>418</sup> Comparative financial data on the death penalty and life imprisonment without parole had been in circulation for years.<sup>419</sup> But, in 2009, state financial meltdowns became the “tipping point” for some long-time supporters of capital punishment.<sup>420</sup> The matter of costs is now a predominant theme in the national debate.<sup>421</sup>

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capital punishment system); Marshall, *Litigating in the Shadow*, *supra* note 144, at 215 (“In our zeal to expose wrongful convictions, we must not ignore the epidemic of wrongful death sentences.”); Carole S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitation of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 619-21 (2005) (discussing, as examples of limitations, innocence projects’ rejection of cases lacking claims of “total innocence,” “lack of inculcation” in law students who work in innocence clinics in “traditional criminal defense values”).

<sup>416</sup> See *In re Davis*, 130 S. Ct. 1, 1 (2009); see also *Herrera v. Collins*, 506 U.S. 390, 400-01 (1993) (leaving unresolved question of whether free-standing innocence claim is constitutionally cognizable); Bill Rankin, *Troy Davis Case Raising Novel Legal Issues*, ATLANTA J.-CONSTITUTION, Dec. 20, 2009, at B3, available at 2009 WLNR 25592147 (reporting on district court pleadings filed in advance of hearing).

<sup>417</sup> *Baze v. Rees*, 128 S. Ct. 1520, 1548-49 (2008) (Stevens, J., concurring in judgment); see, e.g., Chris Isidore, *It's Official: Recession Since Dec. 07*, CNNMONEY.COM, Dec. 1, 2008, <http://money.cnn.com/2008/12/01/news/economy/recession/index.htm> (reporting start date, according to National Bureau of Economic Research).

<sup>418</sup> See, e.g., *Baze*, 128 S. Ct. at 1549 n.17 (Stevens, J., concurring in judgment).

<sup>419</sup> See generally Richard Dieter, *Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty* (1992, updated 1994), <http://www.deathpenaltyinfo.org/node/599> (last visited Feb. 6, 2010) (relying on data from cases, studies and news reports to discuss costs in states such as California).

<sup>420</sup> See generally MALCOLM GLADWELL, *THE TIPPING POINT* (Little Brown & Co. 2000). Gladwell did not coin the phrase, but he can be credited with popularizing the concept, which had been used in other contexts such as epidemiology, applying it to how we think more broadly about human behavior, and doing so in a manner that is decidedly hopeful about the prospect for social change.

<sup>421</sup> See generally Dieter, *Smart on Crime*, *supra* note 408, at 14-18 (reporting on state-by-state costs based upon academic research and news reports); see also

Circling back to what brought us to *Baze*, it is plain that many death penalty proponents and institutional actors, including members of the Court, view lethal injection challenges as a stalking horse for delay and ultimately abolition.<sup>422</sup> Professor Deborah Denno, who has written more about methods of execution than any other scholar, argues that conflation of lethal injection challenges with the issue of abolition has been an obstacle to “providing a humane and civilized execution the way the Eighth Amendment originally intended.”<sup>423</sup> Analyzing how

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CALIFORNIA COMMISSION ON THE FAIR ADMINISTRATION OF JUSTICE, FINAL REPORT 146 (June 20, 2008), available at <http://www.ccfaj.org/rr-dp-official.html>, (estimating annual cost of current “dysfunctional system” to be \$137.7 million and the annual cost of system in which LWOP is maximum penalty to be \$11.5 million); Assoc. Press, *Continuation of death penalty scheduled for debate in Kansas Legislature*, Kansas City.com, Dec. 20, 2009, available at <http://www.kansascity.com/news/politics/story/1642226.html> (reporting on up-coming hearings in Kansas Legislature on death penalty and that “budget problems have more states talking about whether the death penalty is worth the expense”); Philip J. Cook, *Potential Savings from Abolition of the Death Penalty in North Carolina*, AM. L. & ECON. REV., Dec. 11, 2009, at 1, available at <http://aler.oxfordjournals.org/cgi/reprint/ahp022v1> (study by Duke University economist that will be presented to state legislature, which found North Carolina could save \$11 million annually by ending death penalty); Editorial, *Is an execution worth the price?*, VIRGINIAN-PILOT, Dec. 11, 2009, <http://hamptonroads.com/2009/12/execution-worth-price> (arguing that in face of \$3.5 billion state budget deficit, life imprisonment without release could be achieved “for less than half the price” of death penalty); Steve Mills, *Cost Is Slowly Killing Death Penalty; Price Tag of Trial and Execution Driving States to Repeal Law*, CHI. TRIB., Mar. 8, 2009, at 10). (reporting that, in recession, debate about capital punishment has shifted to cost); Jon Murray, *Is Death Penalty Worth the Price? Single Case Can Cost Taxpayers as Much as \$1 Million*, INDIANAPOLIS STAR, Dec. 10, 2009, available at <http://www.indystar.com/article/20091210/NEWS02/912100486/Is-death-penalty-worth-the-price> (discussing cost of Indiana’s capital punishment system); David Pittman, *Death Penalty Pursuit; Cost vs. Certainty*, AMARILLO.COM, Feb. 1, 2010, available at [http://www.amarillo.com/stories/020110/new\\_news3.shtml](http://www.amarillo.com/stories/020110/new_news3.shtml) (“Many prosecutors weigh the lack of certainty in securing a conviction against the high cost of litigation as reasons for not seeking the death penalty when available.”); Randy Schultz, *Kill the death penalty?* PALM BEACH POST, Dec. 18, 2009, available at <http://www.palmbeachpost.com/opinion/columnists/kill-the-death-penalty-132413.html> (arguing that money is driving force behind “new debate in Florida about criminal justice” and “new look nationwide” at capital punishment); Annmarie Timmons, *Counting Costs in Death Penalty Cases*, HARTFORD MONITOR, Dec. 5, 2009, available at <http://www.concordmonitor.com/apps/pbcs.dll/article?AID=/20091205/FRONTPAGE/912050341> (describing inquiry underway by legislatively appointed New Hampshire panel to study cost of death penalty).

<sup>422</sup> See Alper, *Physician Participation*, *supra* note 215, at 22-23 (discussing claims by death penalty supporters and lawyers representing states that attorneys who argue need for physician participation to ensure humane executions using three-drug procedure are engaged in “a cynical ploy” to end capital punishment); Denno, *Abolition Paradox*, *supra* note 203, at 198-201 (analyzing *Baze* opinions); *supra* Part II.A.

<sup>423</sup> Denno, *Abolition Paradox*, *supra* note 203, at 204.

courts, legislatures and corrections departments have wrestled with challenges to the three-drug lethal injection protocol, she observes that they “cling to troublesome execution methods to blanket the death penalty’s flaws” out of fear that any exposure of deficiencies in their methods of execution will be the undoing of capital punishment.<sup>424</sup> For example, the director of Ohio’s Corrections Department announced that he had agreed to the switch because he was “getting sued either way.”<sup>425</sup> It is far more likely that the change was made to extricate the State from the imminent judicial inquiry into its three-drug method of execution.<sup>426</sup> Ohio’s decision and the reactions of other states to the change in Ohio’s procedures exemplify the truth of the matter. For correctional officials and their legal representatives — state attorneys general who also defend against capital appeals and petitions for post-conviction relief — political agendas, far broader and more complex than the method of execution, are at stake. A spokesperson for Kentucky announced that the State has no plan to switch to a single-drug procedure. According to at least one news account, Florida, Kentucky, South Carolina, Texas and Virginia will continue to employ the three-drug lethal injection method.<sup>427</sup> Indeed, in the face of judicial orders and the recommendations of at least one commission and several experts, the states have uniformly resisted the adoption of a one-drug, anesthetic only procedure.<sup>428</sup> Their responses also confirm the accuracy of Justice

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<sup>424</sup> *Id.* at 184.

<sup>425</sup> See Julie Carr Smyth, *Ohio Executions Back on with 1-drug Method*, NEWS VINE.COM, Nov. 14, 2009, [http://www.newsvine.com/\\_news/2009/11/14/3500825-ohio-executions-back-on-with-1-drug-method](http://www.newsvine.com/_news/2009/11/14/3500825-ohio-executions-back-on-with-1-drug-method) (reporting on prison director’s explanation for switch to single-drug procedure).

<sup>426</sup> See Denno, *Abolition Paradox*, *supra* note 203, at 192; see also, Assoc. Press, *National Briefing South: Alabama Optional Execution by Injection*, N.Y. TIMES, Apr. 26, 2002, at A20 (reporting on Alabama’s legislature’s addition of lethal injection as option to execution by electrocution after Supreme Court agreed to review constitutionality of state’s sole method of execution); Sara Rimer, *Florida Lawmakers Reject Electric Chair*, N.Y. TIMES, Jan. 7, 2000, at A13 (reporting on same response by Florida legislature).

<sup>427</sup> See Assoc. Press, *Update: Prison Director Calls First One-Drug Execution Problem Free*, CHRONICLE-TELEGRAM, Dec. 8, 2009, <http://chronicle.northcoastnow.com/2009/12/08/todays-execution-could-take-longer-be-more-somber/> (reporting on Ohio’s switch to single-drug lethal injection method); Brett Barrouquerre, *Ky. to Stick with 3-Drug Execution Protocol*, LEXINGTON HERALD LEADER, Dec. 7, 2009, [http://www.kentucky.com/latest\\_news/story/1050053.html](http://www.kentucky.com/latest_news/story/1050053.html). Kentucky’s three drug protocol is now undergoing the process of public comment and hearings required by the state’s Administrative Procedures Act (“APA”). *Id.*; see *Bowling v. Ky. Dep’t of Corr.*, No. 2007-SC-000021-MK, 2009 WL 4117353, at \*12 (Ky. 2009).

<sup>428</sup> See Alper, *Anesthetizing the Public Conscience*, *supra* note 220, at 831-32 & nn.

Stevens's expectation that *Baze* would not put an end to lethal injection challenges.

Professor Denno's description of the interplay between efforts to ensure a constitutionally sound method of execution and the realpolitik of capital punishment is also illustrated by U.S. District Court Judge Jeremy Fogel's reaction to the lawsuit challenging California's lethal injection protocol, which was filed eight days before the scheduled execution of the plaintiff, Kevin Cooper.<sup>429</sup> The judge denied the temporary restraining order, which would have put Cooper's execution on hold.<sup>430</sup> He wrote that, in addition to the method-of-execution challenge, the timing of the action "suggests that an equally important purpose" was to allow Cooper to continue to seek judicial relief from his conviction.<sup>431</sup> A year later, the allegations in the next lethal injection challenge did not lessen Judge Fogel's skepticism; he again declined to allow the litigation to proceed and the inmate was executed.<sup>432</sup> In 2006, however, a lawsuit brought on behalf of Michael Morales that presented a more developed record of California's eleven lethal injection executions persuaded the judge to conduct a full hearing.<sup>433</sup> In a recent article chronicling aspects of the litigation, Judge Fogel acknowledges that his wariness of the lawyers' motives initially hindered his ability to "recognize the nature and significance" of the Eighth Amendment challenge.<sup>434</sup> He is resolute

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93-94 (discussing legal arguments in support of anesthetic-only protocol, testimony by experts, order in *Morales v. Tilton*, 465 F. Supp. 2d 972, 983 (N.D. Cal. 2006); and recommendation by Tennessee commission, which was rejected by head of state department of corrections out of concern for "political ramifications").

<sup>429</sup> See Fogel, *supra* note 268, at 736-38 (discussing Cooper's civil rights claim challenging California's lethal injection execution protocol).

<sup>430</sup> See *Cooper v. Rimmer*, No. C04436JF, 2004 WL 231325, at \*2 n.1 (N.D. Cal. Feb. 6, 2004). The Ninth Circuit affirmed the ruling in *Cooper v. Rimmer*, 379 F.3d 1029 (9th Cir. 2004), but subsequently ordered further proceedings based on its determination that Cooper was entitled to file a successive habeas petition. See *Cooper v. Woodford*, 358 F.3d 1117, 1119-20 (9th Cir. 2004) (en banc). Judge Fogel has been presiding over challenges to the state's lethal injection procedures since 2004. See Fogel, *supra* note 268, at 737.

<sup>431</sup> Fogel, *supra* note 268, at 737.

<sup>432</sup> *Beardslee v. Woodford*, No. C04-5381JF, 2005 WL 40073, at \*3-4 (N.D. Cal. Jan. 7, 2005); Fogel, *supra* note 268, at 738-39. Beardslee's appeal to the Ninth Circuit was unsuccessful, and he was executed on January 19, 2005. See *Beardslee v. Woodford*, 395 F.3d 1064 (9th Cir. 2005), *cert. denied*, 543 U.S. 1096 (2005); Bob Egelko et al., *Murderer Beardslee Executed: Lethal Injection at San Quentin After Governor, High Court Deny Final Appeals*, S.F. CHRON., at A1, available at 2005 WLNR 732999 (reporting on execution).

<sup>433</sup> Fogel, *supra* note 268, at 740.

<sup>434</sup> *Id.* at 743; see also Fernando J. Gaitan, Jr., *Challenges Facing Society in the*

that judges should decide method-of-execution challenges “independently” of the broader political questions surrounding the death penalty.<sup>435</sup> But he agrees that the lethal injection controversy has “contributed to a renewed national dialogue about the death penalty itself,” and he regards this as a positive development.<sup>436</sup>

Some might argue that Justice Stevens's concurring opinion in *Baze* exacerbated the tension that Professor Denno describes by revealing a nexus, under the evolving standards of decency, between lethal injection as a method of execution and the constitutionality of the penalty itself. I would disagree. Notwithstanding claims drafted scrupulously to raise only a method-of-execution challenge, government officials see a bigger threat and respond accordingly. Judge Fogel's concession that members of the bench may not recognize the legal and evidentiary merits of a claim because they are distrustful of capital defense lawyers is, at least, a forthright acknowledgment of the politics of the death penalty.

The Sixth Amendment obliges defense lawyers to ensure both that any sentence and the means by which it may be carried out comply with the Eighth Amendment.<sup>437</sup> Often those issues are distinct, but not inevitably so.<sup>438</sup> If constitutional questions about a method of inflicting a penalty also raise constitutional questions about the penalty itself — as *Baze* did for Justice Stevens — the defense attorney must address those questions.<sup>439</sup> If winning a stay of execution based on a method-

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*Implementation of the Death Penalty*, 35 *FORDHAM URB. L.J.* 763, 765 (2008) (describing “assumptions” he made at outset of Missouri lethal injection litigation that “did not withstand the rigors of discovery and examination”).

<sup>435</sup> Fogel, *supra* note 268, at 757.

<sup>436</sup> *Id.* at 761.

<sup>437</sup> See Alper, *Physician Participation*, *supra* note 215, at 65-66 (explaining that when all other issues are lost and execution is imminent, “lawyers must continue to vindicate their clients' rights,” including the right to execution that complies with Eighth Amendment).

<sup>438</sup> *Id.* at 21-22 (explaining that because “lawyers have a duty to ensure that if an execution of their client proceeds, it is conducted humanely and in conformity with the mandates of the Eighth Amendment,” they “have generally argued that there are human ways to execute prisoners, and they have routinely presented expert testimony to support this position”).

<sup>439</sup> See, e.g., American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 *HOFSTRA L. REV.* 913, 1028-34 (2003) (imposing duty to assert claims “calling for a change in existing precedent” and “object to anything that appears unfair or unjust even if it involves challenging well-accepted practices”); Monroe Freedman, *The Professional Obligation to Raise Frivolous Issues in Death Penalty Cases*, 31 *HOFSTRA L. REV.* 1167, 1173-76 (2003) (discussing frequency with which Rehnquist Court “overruled itself” in capital cases, and lawyer's duty under ABA Model Rules of Professional Conduct and Model Code to

of-execution challenge or on any other legal theory may open a new avenue for relief from the conviction or sentence, the lawyer must seek a stay and pursue the new opportunity for relief.<sup>440</sup> And because an end to the death penalty is the outcome most certain to save the life of a client, lawyers will and must continue to litigate to achieve that result.<sup>441</sup> In the judicial arena, then, Justice Stevens's concurrence in *Baze* shows how the Eighth Amendment's mandate that leads to the adoption of increasingly humane methods of execution also delegitimizes the retributive purpose of capital punishment. While a few of the concerns that brought the Justice to his conclusion are hypothetically remediable, were the Court only to resurrect and assiduously apply the narrowing approach, most, including race discrimination and the "irrevocable consequences" of executing an innocent person, are not.

#### CONCLUSION

With the addition of Justice Stevens, a majority of the *Gregg* Court has now rejected capital punishment.<sup>442</sup> Though he might not put it this way, Justice Stevens's opinion in *Baze* brings us closer to the day that Justice Marshall did not live to see, when "we achieve 'a major milestone in the long road up from barbarism' and join the approximately [135] other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment."<sup>443</sup> Terse though it may be, Justice Stevens's concurring opinion in *Baze* is long on impetus to, and guidance for, a national reexamination of capital punishment by all branches of government. It also fortifies those of us who believe that the world is not such "an immovable, implacable place," and who "share a bedrock belief that change is possible."<sup>444</sup>

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resolve "any doubts about the bounds of the law . . . in favor of the client's interests").

<sup>440</sup> Freedman, *supra* note 439, at 1173-76.

<sup>441</sup> *Id.*

<sup>442</sup> See STEIKER & STEIKER, *supra* note 407, at 20 ("The best evidence of the inadequacies of constitutional regulation of capital punishment is the sheer number of Justices who have either abandoned the enterprise, in whole or in part, or raised serious questions about its feasibility.").

<sup>443</sup> When *Furman* was decided, 70 countries were abolitionist. See *Furman v. Georgia*, 408 U.S. 238, 370 (1972) (Marshall, J., concurring); DPIC, Abolitionist and Retentionist Countries, <http://deathpenaltyinfo.org/abolitionist-and-retentionist-countries> (last visited Feb. 6, 2010).

<sup>444</sup> GLADWELL, *supra* note 420, at 258-59.