

*A journal of
legal theory
and practice
“to the end
that human
rights shall
be more
sacred than
property
interests.”*

—Preamble, NLG
Constitution



**The Color of Pain: Blacks
and the U.S. Health Care
System— Can the Affordable
Care Act Help to Heal a
History of Injustice? Part II** 1
Jennifer M. Smith

**Watching the Watchers:
Monitoring Police
Performance as
Public Servants** 23
Karl T. Muth &
Nancy Jack

**Ending the Unconstitutional
Torture of Three-Drug Lethal
Injections: A Rebuke of
*Glossip v. Gross*** 36
Lisa Lindhorst

**Book Review—*Just Mercy:
A Story of Justice
and Redemption*** 59
Alan W. Clarke

editor's preface

In the first installment of “The Color of Pain: Blacks and the U.S. Health Care System—Can the Affordable Care Act Help to Heal a History of Injustice?,” which appeared in our last issue, Jennifer M. Smith explored the history of anti-black racism in U.S. healthcare. In the second installment she focuses specifically on the extent to which Obamacare will remedy the continuing symptoms of this racist history.

“Watching the Watchers: Monitoring Police Performance as Public Servants” by Karl T. Muth and Nancy Jack makes the case that, as their employers, citizens have a right to video record the police, their employees, during the public performance of their duties. While not discounting the strong First Amendment inherent in this issue, the authors instead proffer a legal argument rooted in the role of police officers as public servants accountable to the taxpayers. From this perspective recording police encounters is more than a right private citizens enjoy—it’s a civic responsibility the practice of which improves our democracy.

The modern-day execution of a prison inmate is the ultimate act of bullying. However strong or cruel the offender was when he committed his crime, when the chains have been replaced by leather straps and the needle enters his arm he’s been rendered inevitably pathetic by his helplessness in the face of the ultimate act of power being visited upon him. While individual inmates die with more or less dignity, depending on the particular circumstances of their killing and the fortitude with which they carry themselves, it always ends the same way, with the absolutely powerful annihilating the totally helpless. There can be no greater power disparity than that of the state executioner and the convict ushered into the death chamber. The former acts with all the force and righteous violence a nation can muster against a single person. The latter has been altered by years—often decades—of captivity, chains, ubiquitous surveillance, and, often, protracted solitary confinement, only to brought to

Continued on the inside back cover

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Jennifer M. Smith

**THE COLOR OF PAIN: BLACKS AND
THE U.S. HEALTH CARE SYSTEM—
CAN THE AFFORDABLE CARE ACT HELP
TO HEAL A HISTORY OF INJUSTICE? PART II**

Part I of this article can be found in the last issue of the *National Lawyers Guild Review*. See Jennifer M. Smith, *The Color of Pain: Blacks and the U.S. Health Care System—Can the Affordable Care Act Help to Heal a History of Injustice? Part I*, 72 NLG REV. 238 (2015).

IV. The general state of health care in the United States before reform

The state of Americans' health care has been troubling, especially before health care reform. The Affordable Care Act (ACA) is often touted as universal health care, and the initial intention was for the U.S. to have universal health care. However, with all of the compromises involved in its passage, the ACA resulted in comprehensive health insurance reform, significantly increasing the accessibility, affordability, and quality of health care for most, but not all, Americans. The ACA is a substantial step toward universal health care—a near-universal mandate—that may soon provide coverage to all Americans, and even include undocumented immigrants.¹⁴⁶

Americans can find excellent health care—if they can afford it. The key is health insurance. For those without health insurance, inadequate health care has been determined to be a chief cause of death, putting it statistically ahead of HIV/AIDS and diabetes.¹⁴⁷ Uninsured adults often forego needed medical care or preventive care, and are twice as likely to have poor health as their privately insured counterparts.¹⁴⁸ Furthermore, uninsured Americans with chronic conditions, such as diabetes, cancer, or heart disease, have difficulty managing their ailments precisely because they have no insurance.¹⁴⁹

Lack of health insurance has been linked to “developmental and educational deficits for children, reductions in workforce productivity, and significant familial and community stresses.”¹⁵⁰ By the time uninsured adults reach the age of sixty-five and are able to qualify for Medicare, they generally require

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more care than their insured counterparts.¹⁵¹ Uninsured patients are three times more likely to die during their hospital stays than insured patients, and they are 25 percent more likely to die prematurely than those with insurance.¹⁵²

In addition, uninsured citizens use the emergency room as their primary source of care, placing a huge burden on medical facilities. Indeed, uninsured persons receive billions of dollars in care from emergency room services, for which they do not pay.¹⁵³ Finally, uninsured individuals receive about \$100 billion in health care services annually for diseases that could have been treated more cheaply and efficiently had they been diagnosed earlier, and that would have been more likely to occur if they had insurance and utilized preventative health care services.¹⁵⁴

The number of uninsured Americans has soared due to rising “health insurance premiums, a changing labor market, and underfunded health care safety net programs” such as Medicaid and the Children’s Health Insurance Program (“CHIP”).¹⁵⁵ In the mid-2000s, America’s uninsured population swelled to nearly 47 million, representing about 16 percent of the population.¹⁵⁶ There were an additional 16 million Americans who were underinsured.¹⁵⁷ Incomes of many uninsured individuals are below \$25,000.¹⁵⁸ While all racial and ethnic groups are impacted,¹⁵⁹ these problems disproportionately affect African Americans and Hispanics,¹⁶⁰ who have significantly greater uninsured rates than whites.¹⁶¹

America’s health care crisis is a societal concern, because Americans collectively shoulder the health care costs of its uninsured and underinsured citizens.¹⁶² Faced with the possibility of creating a permanent “health and health care underclass” consisting of African Americans, Hispanics, and the working poor,¹⁶³ Americans needed a solution—a national health care system for its citizens.

V. Patient Protection and Affordable Care Act (“ACA”)

In the first few weeks of his administration, President Obama, who firmly believes that “health care is a right for every American,”¹⁶⁴ called for an overhaul of the United States health care system.¹⁶⁵ Days before the historic vote on the Affordable Care Act in the United States, President Obama declared:

And in just a few days, a century-long struggle will culminate in a historic vote. We’ve had historic votes before We had a historic vote to put Social Security in place to make sure that our elderly did not live out their golden years in poverty. We had a historic vote in civil rights to make sure that everybody was equal under the law. As messy as this process is, as frustrating as this process is, as ugly as this process can be, when we have faced such decisions in our past, this nation, time and time again, has chosen to extend its promise to more of its people.¹⁶⁶

President Obama’s “century-long struggle” referred to then-presidential candidate Theodore Roosevelt’s call for national health insurance in 1912.¹⁶⁷ Indeed, since 1912, there have been periodic discussions about providing

universal health care in the United States. Prior to the passage of the Hill-Burton Act in 1946, liberals were pressing for universal health care, and the charity care provisions of the Hill-Burton Act were the compromise provided by the conservatives to placate the liberals.¹⁶⁸

On March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act (“ACA”). On March 30, 2010, he signed into law the Health Care and Education Reconciliation Act (“HCERA”), which amended various provisions of the ACA.¹⁶⁹ These two pieces of groundbreaking legislation comprise America’s new health care system

As previously noted, universal health care in the United States has been a highly controversial topic for a century, and the passage of the ACA was fraught with disputation. Nonetheless, the ACA has survived contentious and heavily funded attacks spearheaded largely by conservatives.¹⁷⁰ Indeed, the ACA was passed by congress without a single Republican vote.¹⁷¹ Contrary to its decades-long opposition to a national health program,¹⁷² the American Medical Association (AMA) championed comprehensive health care reform and supported ACA.¹⁷³ Because of the reputation and influence the AMA has over the medical community, its support was critical. Similarly, the National Medical Association (NMA), which for decades had championed a national health care program, also played a key role in shifting the national consensus.

Subsequent to the enactment of the ACA, several states’ attorneys general filed state and federal lawsuits challenging its constitutionality.¹⁷⁴ The individual mandate of the ACA, requiring Americans to purchase insurance or pay a penalty, was the most challenged provision. The U.S. Supreme Court accepted certiorari and decided the matter in 2012.

Prior to the Court’s decision, President Obama stated:

Ultimately I am confident that the Supreme Court will not take what would be an unprecedented, extraordinary step of overturning a law that was passed by a strong majority of a democratically elected Congress. And I just remind conservative commentators that for years what we have heard is that the biggest problem on the bench was judicial activism or a lack of judicial restraint; that an unelected group of people would somehow overturn a duly constituted and passed law. Well, this is a good example. And I’m pretty confident that this court will recognize that and not take that step.¹⁷⁵

Obama’s prescience was affirmed by the Court. The Court upheld the constitutionality of ACA with a 5–4 vote, finding the individual mandate within Congress’s power under the Taxing Clause. The justices broke along partisan lines, save for the conservative Chief Justice Roberts, who sided with the liberal justices to garner a majority to uphold the constitutionality of the Act, albeit on narrow and unexpected grounds.¹⁷⁶

The ACA was unsuccessfully challenged once again. On June 25, 2015, the U.S. Supreme Court held that federal subsidies for health insurance

premiums could be used in the 34 states which did not set up their own insurance exchanges.¹⁷⁷

However, in a 2016 federal district court opinion, *U.S. House of Representatives v. Burwell*, Judge Rosemary Collyer found that part of the ACA is unconstitutional in that it provides for subsidies which the ACA did not provide for as an appropriation. Specifically, Judge Collyer, a George W. Bush appointee, found that Section 1402, which reduces deductibles, co-pays, and other means of “cost sharing” by insurers, needed its own direct appropriation from Congress before it can be funded: “Paying out Section 1402 reimbursements without an appropriation thus violates the Constitution. Congress authorized reduced cost sharing but did not appropriate monies for it, in the FY 2014 budget or since. Congress is the only source for such an appropriation, and no public money can be spent without one.”¹⁷⁸ However, the Obama administration believed that it could fund Section 1402 (Offset Program payments) from the same account as Section 1401 (Refundable Tax Credit Program payments).

The impact of Judge Collyer’s ruling, if it is not reversed, is far-reaching. The ACA provides cost-sharing subsidies intended to reduce consumers’ out-of-pocket medical bills. If these are withheld, as the Republicans are seeking to do, then low-income individuals covered under the ACA would likely experience higher co-payments, deductibles and other costs at hospitals and doctors’ offices, thus making the ACA not so affordable for those who most need assistance in obtaining health care.

The Obama administration has spent significant time in the last several years contending against more than sixty attempts to repeal all or part of the ACA.¹⁷⁹ These attacks against the ACA have sometimes even been bipartisan.¹⁸⁰ Time spent defending the ACA “could have been better spent working to improve our healthcare and economy.”¹⁸¹

VI. The ACA and minority inclusion

As set forth earlier, health statistics confirm that even after fifty years of progress, the vestiges of racism in health care remain. Neither desegregation, litigation, legislation, the passage of time, nor the election of America’s first African American president has eradicated racism in health care and other aspects of society. Racism still thrives and the health of blacks and other people of color has been compromised.¹⁸²

The ACA is one of the most important pieces of legislation in American history. President Obama ensured a great legacy through his leadership in passing comprehensive health care reform that past American presidents had been unable to achieve. Health care reform carries a promise that America’s health, and thus wealth, will only improve and increase now that America has

joined other industrialized nations in securing greater and more affordable access to health care for most citizens.

The ACA is long and complex. The Act is 906 pages and HCERA is 55 pages long (also including educational reforms)—a total of 381,517 words. Moreover, the Obama administration has published an additional 11,588,500 words of final ACA regulations, making the regulations 30 times longer than the statute.¹⁸³

As evidenced by its length and complexity, the ACA is one of the most sophisticated and strategic reform laws, and it extends well beyond health care. It not only seeks to ensure health access for all Americans, but it also seeks to right many wrongs that have existed within the health care system. It has built in cost-saving and cost-fairness mechanisms to prevent overreaching by insurance companies and to aid citizens in obtaining health care by prohibiting denial of coverage due to preexisting conditions. It regulates discriminatory pricing. It prohibits annual and lifetime coverage limits, but requires annual out-of-pocket limits for covered services. It also institutes cost-sharing controls with minor financial assistance.¹⁸⁴ The Act seeks to improve health care by emphasizing preventative care. It expands community health centers, where people of color and the poor so often end up. It obtains national statistics for health care enforcement. It invests in the National Health Services Corps, which provides financial assistance for those committing to work in rural and urban communities, investing in research and a Public Health Trust Fund to encouraging community initiatives. It extends nonprofit hospitals' community benefit obligations.¹⁸⁵ The Act requires policies to be explainable and summarized for policy holders and protects policy holders against plan rescissions except for fraud or intentional misrepresentation.¹⁸⁶ Just as Medicare played a key role in desegregating hospitals and the medical care system in general,¹⁸⁷ the ACA will do the same and much more. Many individuals do not realize the sheer breadth of the Act—it is a complete overhaul of the current health care structure.

The ACA—now fondly called “Obamacare,” although “Obamacare” began as a derogatory attack on the Act—was rejected wholesale by most Republicans. Yet some Republicans (many personal beneficiaries of the Act) are now admitting and even celebrating the benefits of Obamacare. New Hampshire Republican state representative, Herb Richardson, praised Obamacare for restoring his health and wealth:

Richardson was injured on the job and was forced to live on his workers' comp payments for an extended period of time, which ultimately cost the couple their house on Williams Street. The couple had to pay \$1,100 a month if they wanted to maintain their health insurance coverage under the federal COBRA law. Richardson said he only received some \$2,000 a month in workers' comp payments, however, leaving little for them to live on. “Thank God for Obamacare!” his wife

exclaimed. Now, thanks to the subsidy for which they qualify, the Richardsons only pay \$136 a month for health insurance that covers them both.¹⁸⁸

The slow start of ACA was partly due to Republican leaders convincing their constituents to oppose President Obama and his agenda, even at the expense of their own health interests. “[T]hrough inadequate funding, opposition to routine technical corrections, excessive oversight, and relentless litigation, Republicans undermined ACA implementation efforts.”¹⁸⁹ Consequently, many citizens rejected “Obamacare,” but supported “the Affordable Care Act,” not understanding they were the same. Though the ACA has some flaws, few in America want to return to the days when insurance companies denied coverage for those with preexisting health conditions.¹⁹⁰ President Obama’s race and popularity as the most admired man in the world for seven years have skewed conservative voters’ concept and appreciation for the ACA.¹⁹¹ Hatred, born out of jealousy and racism, has driven Republicans to oppose the most President Obama and his bills.¹⁹² In addition, the Act merges health insurance and taxes—two areas most consumers find complex, thus spawning various opportunities for fraud.¹⁹³ Notwithstanding staunch conservative opposition and complicated provisions, the ACA has survived.

While studies reveal that Republican constituents who have used Obamacare are satisfied with their plans, in those states where primarily Republican governors declined the ACA’s Medicaid expansion plan, the poor remain uninsured.¹⁹⁴ Two-thirds of impoverished blacks and single mothers and over half of uninsured low wage workers will be left out of the national effort to provide health care to millions of citizens.¹⁹⁵ Other than Arkansas, every state in the Deep South rejected the Medicaid expansion, and these states are home to nearly 70 percent of the poor, uninsured African Americans and single mothers—that is “435,000 cashiers, 341,000 cooks, and 253,000 nurses’ aides.”¹⁹⁶ Thus, the states with the largest populations of poor and uninsured people are the very states that are rejecting the Medicaid expansion—rejecting the opportunity to help those most in need of health care.¹⁹⁷ These are individuals with significant health care needs, and who will therefore have a significant impact on the health care system.¹⁹⁸ Expanding Medicaid was intended to provide coverage for the poorest citizens, those who are too poor to participate in the subsidies and new health exchanges for low and middle-income earners.¹⁹⁹ (By contrast, about half of Latinos who are poor and uninsured reside in states expanding Medicaid, except for Texas.²⁰⁰) Universal Medicaid expansion would have saved thousands of lives. It could have prevented nearly 20,000 unnecessary deaths if it had been expanded in every state.²⁰¹

Enrollment under the ACA has exceeded initial expectations. Nearly 11.4 million citizens signed up for coverage for 2015.²⁰² This total includes automatic re-enrollees and first time users.²⁰³ Meanwhile, the uninsured rate has dropped from 17.1 percent to 12.9 percent since 2014, when the ACA

took effect.²⁰⁴ Even more recent numbers indicate an historic low of 9.1 percent—nearly 7.4 million uninsured less since 2014.²⁰⁵ In addition, there is some evidence that the uninsured rate went down the greatest among blacks and other lower-income Americans.²⁰⁶ Nevertheless, racial and ethnic minorities remain overrepresented among those uninsured, even after the 2014 initial enrollment.²⁰⁷ Individuals below the poverty line are the most likely to be uninsured.²⁰⁸ Much of that has to do with the cost of health insurance. Although people of color comprise 40 percent of the population, they account for over half of the uninsured.²⁰⁹ People of color have significantly higher rates of being uninsured than whites: Latinos, 25.6 percent, blacks, 17.3 percent and whites 11.7 percent.²¹⁰

ACA opens a door to health care for nearly all citizens. Medicaid and Medicare were significant for health care access as well, but they covered certain populations—the poor and the elderly, respectively—whereas ACA seeks to provide coverage for all categories of Americans. Instead of discarding all of the country’s health care programs, the ACA seeks to use the foundational building blocks (other legal reforms) already in place, such as Medicare, Medicaid, EMTALA, the Children’s Health Insurance Program, health insurance through a private or public employer (including military employment), and the individual coverage market. The ACA builds on all of these health care laws, with its most generous reforms toward the individual and small group markets and Medicaid. Even so, America has a somewhat fragmented health insurance system that remains burdened by high costs significantly greater than those of other nations.

America is still a “color conscious” society, notwithstanding our first African American president. Discrimination persists. Even the president, our highest political office holder, is consistently subjected to consistent racist jokes and comments.²¹¹ Thus, it is to be expected, with the Act’s inclusion under Title VI of the Civil Rights Act of 1964 for remedial action, that discriminatory practices that people of color have historically experienced will continue. Sadly, Title VI has not offered much assistance in ending health care discrimination against minorities.²¹² Its failure was largely because relevant health care statistics demonstrating disparate treatment sufficient to meet the legal standard were unavailable.

To remedy this, the ACA mandates collecting and reporting race statistics in health care treatment, but that has thus far been stymied by political and implementation hurdles.²¹³ Yet there must be more than mere remedial action pursuant to Title VI. The ACA reproduces the anti-discrimination obligations imposed by the civil rights laws, but it must give those obligations teeth. Health insurers may continue to thwart the anti-discriminatory obligations of the ACA. For example, they may avoid provider networks that cater to minorities, such as community health centers and hospitals serving

underserved communities. Studies have shown, however, that in 2014, racial minorities, low-income workers, and immigrants have benefitted the most from the ACA.²¹⁴

Civil rights leaders have acknowledged that, while race has not been mentioned in the state-level debates on the Medicaid expansion, the disproportionate impact on blacks perpetuates the historic pattern of exclusion of blacks from the American health care system.²¹⁵ The Republican governors and Republican-controlled states retort that health care is a purely economic issue, additionally noting that Medicaid is already burdening their states.²¹⁶ But the sordid history of blacks in America's health care system leaves little doubt that racism, and not merely economics, is influencing outcomes. The U.S. needs real, practical remedies to move forward with the advent of universal health care—for the poor generally, and people of color particularly. The availability of health insurance, by itself, will not cure the separate problem of accessing that system.

VII. Recommendations

Studies consistently reveal that people of color—African Americans in particular—continue to receive substandard care compared to that of white Americans, even if the black patients are enrolled in health plans comparable to their whites counterparts.²¹⁷ It is also estimated that by 2043, people of color will constitute more than half of the population of the United States.²¹⁸ It is therefore imperative that we immediately undertake to find real, practical solutions for all Americans to benefit from the ACA.

There is no doubt that the ACA has allowed more people to obtain medical care. Physicians are reporting that they are seeing more patients and receiving compensation for services that previously went unpaid. Meanwhile, patients are relieved that they can obtain early detection of various illnesses that blacks and other people of color consistently die from.

A. Co-pays and deductibles

Since the deductibles and co-pays of the plans offered under the ACA remain high, many of the newly insured still cannot afford to use the insurance they have.²¹⁹ The insurance is available to the patient, but high co-pays preclude its use. Only the insurance companies benefit under this scenario. In addition, some have taken out policies to avoid the fine, but have not maintained the policy by paying their premiums. In such circumstances, a health care service provider may furnish some services (such as early detection tests), but the claim is denied when submitted for reimbursement because of the unpaid premium. Federal and state governments must continue to work with physicians and insurance companies to reduce deductible and co-pay costs as well as other ways to reduce costs for the poor. This is not a new issue. It endures

under the ACA. The avarice of insurance companies and other ACA partners must be reined in to ensure that the insurance sold can also be used as needed.

In addition, the recent federal district court case, *Burwell*, holding that paying out Section 1402 reimbursements without an appropriation is unconstitutional, places another hurdle to overcome with co-pays and deductibles. *Burwell* is a potentially severe blow to the ACA if it is upheld. As a result, insurers who, by law, were guaranteed reimbursements for offering reduced rates for co-pays and deductibles will not receive their reimbursements until a valid appropriation is in place. The biggest losers will be the millions of low-income Americans who have been benefitting from the cost-sharing subsidies that assist them with out-of-pocket costs.

Even before the *Burwell* decision, there were grumblings from insurance companies as a result of their alleged losses from participating in the ACA. Some companies are threatening to withdraw from the ACA in the next few years.²²⁰ Insurance companies are claiming that the ACA is not sustainable,²²¹ although some of them simply made errors in pricing their health care plans—15 percent lower than the Congressional Budget Office predicted.²²¹ But the additional possibility of disappearing reimbursements may increase the threats of the insurance companies.

Under the threat of insurance companies' unwillingness to participate, the time may be ripe to renew a transparent discussion on a single-payer system. While there are various versions of what a single-payer system means, generally it is a federally-funded health care system. Physicians for a National Health Program describes one:

Single-payer national health insurance is a system in which a single public or quasi-public agency organizes health financing, but delivery of care remains largely private. Under a single-payer system, all Americans would be covered for all medically necessary services, including: doctor, hospital, preventive, long-term care, mental health, reproductive health care, dental, vision, prescription drug and medical supply costs. Patients would regain free choice of doctor and hospital, and doctors would regain autonomy over patient care.²²²

Democratic presidential candidate Bernie Sanders indicated in 2016 that the only way to truly provide universal health care is a “Medicare for all single-payer system,” which would do away with deductibles and co-pays.²²³ But at what cost? Sanders has estimated \$14 trillion.²²⁴ Other countries have single-payer systems, but they have smaller populations than the U.S. Furthermore, millions in the insurance industry would become displaced workers if America moved to a single-payer system.²²⁵ Democratic presidential candidate Hillary Clinton has spoken about potentially expanding Medicare to 50 year old citizens.²²⁶ In addition, because more medical providers are telling Obamacare customers that their Obamacare insurance is not accepted by the medical providers, there is a renewed interest in a public option that would

supplement current offerings.²²⁷ Colorado is gearing up to vote in November 2016 to abandon the ACA and create a taxpayer-financed public-health system—universal health care for Coloradans.²²⁸ And, based on his experience with the ACA, President Obama concluded, “I think Congress should revisit a public plan to compete alongside private insurers in parts of the country where competition is limited.”²²⁹

A proposal for a single-payer system was bandied about before the ACA was passed, but failed to generate enough support among lawmakers. That proposed system could have eliminated co-pays and deductibles. The ACA is really a compromise bill among key stakeholders. As of now, however, co-pays and deductibles are pricing out those the ACA is designed to embrace. Like the ACA, the *Burrell* decision is political, and discontinuing the reimbursements to the insurers will close access to health care for millions of low income individuals. Even without a single-payer system, the ACA should not become unaffordable or health care become inaccessible because of out-of-pocket costs. Health plans must be restructured to meet the end goal of the ACA—health care services for America’s citizens, not simply insurance put to no use.

B. “Fear or fine”

The Individual Shared Responsibility Provision of the ACA requires that individuals either have basic, minimum health insurance for each month or pay a fine when paying federal income tax (assuming no exemption applies to the individual). This “fear or fine” provision is ineffective if the individual simply cannot afford the insurance or the fine. In addition, as noted above, there are some individuals who are opting for basic, minimum health insurance so as to avoid the tax penalty, but the insurance is unusable because the co-pays and deductibles are too high. This tax on the poor is putting money either in the pocket of the insurance companies or the federal government while medical services are not being provided. While there may need to offer an incentive for obtaining health insurance, a penalty will likely be ineffective. There is a tax credit to help those who purchase insurance in the marketplace, but that is a supplement, and not an incentive.

Again, there must be more than just punishment to incentivize maintaining health insurance. This problem may be partially due to a lack of information and positive experience, as well as truly affordable access to health care or affordable insurance plans. While it may be the case that maintaining one’s health through regular check-ups is a security against greater medical needs and costs later, far too many individuals distrust or dislike doctors. These individuals must be persuaded, through experience, that they can receive quality medical care, which will reduce the high rate of early deaths among people of color and the poor.

C. “Pay-for-performance”

The “pay-for-performance” provision of the ACA is an umbrella term for improvement programs targeted to ensure the efficiency, quality, and overall value of health care. In return, these programs may generate financial incentives to health care providers (hospitals and physicians) who meet the predetermined goals. However, since many blacks and other people of color have higher noncompliance rates of treatment than whites,²³⁰ often due to economics, what avenues will providers take to give medical care to those most non-compliant in order to meet the quality goals? For example, amputation is already several times more likely for blacks than nonblacks.²³¹ If doctors suspect that a patient is not likely to fully comply with the therapy, the doctor may choose amputation instead, to prevent the patient’s noncompliance from interfering with the quality goals and appurtenant financial incentives. To end this cycle, “quality of care” must be re-defined to ensure that all patients can both access comparable services and receive similar treatment from providers.

Kidney transplants are illustrative of this circularity problem. Immunosuppressive drug therapy is the most significant health care expense after the three year post-transplant.²³² But, due to the cost of immunosuppressive medications, many individuals fail to comply with their post-transplant medical regimen.²³³ Thus, the therapy has swiftly developed “as a major health care issue with implications for chronic rejection and graft loss.”²³⁴ Chronic rejection is known as “any form of nonspecific late graft dysfunction[,]”²³⁵ and is “the leading cause of late graft failure in renal transplant recipients.”²³⁶ Furthermore, noncompliance with immunosuppressive drug therapy for kidney transplants is the third leading cause of graft loss.²³⁷ Put simply, patients who are noncompliant with their immunosuppressive drug therapy lose their transplants or die at rates much higher than patients who comply.²³⁸ Thus, medical compliance after a kidney transplant is critical to the maintenance of the transplanted kidney and the patient’s life. “The inability to afford immunosuppressive agents is thought to underlie as many as half of all [noncompliance] cases.”²³⁹ If noncompliance is going to be an issue, again largely with blacks, doctors may opt to not seek a transplant for the patient but continue dialysis, with a lesser quality of life than a transplant. And, despite this decision, the doctor would still satisfy the quality of care goals, even though it is apparent that better options are available.

Medical schools, medical educators, medical associations, hospitals and the like must advance remedying medical racism as a topic of education and basic orientation to the medical profession. This will save lives and improve medical care.

D. Litigating health care access

The civil rights movement spawned various legislation, resulting in notable and influential litigation and advocacy to reduce health disparities

due to race.²⁴⁰ At the time, these class-action lawsuits were a substitute for true access to health care in that they were used to open doors in health care that were closed due to discrimination. Unlike the employment and housing contexts, however, there was no independent federal statutory framework governing civil rights enforcement in health care access, other than Title VI of the Civil Rights Act of 1964,²⁴¹ which extended to public accommodations (e.g. hotels, restaurants, but not health care), employment, and federally funded programs, such as Medicare. This resulted in intermittent involvement by the major civil rights advocates, such as the NAACP Legal Defense & Educational Fund (“LDF”).²⁴² Even though the legislative history of Title VI reveals the federal lawmakers’ intent to include health care when they enacted it, organized medicine was able to effect a carve out for physicians in private practice. Organized medicine opposed the idea that receipt of federal funds (e.g. Medicare) would expose them to anti-discrimination laws, thus forbidding physicians from continuing to select their patients as they chose.²⁴³ Thus, the Johnson administration orally pledged not to enforce Title VI against physicians in private practice.²⁴⁴ However, it required every hospital that intended to participate in the Medicare program to sign a Title VI pledge that it would not discriminate.²⁴⁵

The Nixon administration dismantled much of the gains made through the Johnson administration by disconnecting federal spending laws from federal spending programs and stripping away the authority of federal civil rights officials from meaningfully enforcing Title VI, and thus, by the mid 1990s, active government enforcement of Title VI had all but ended.²⁴⁶

The ACA relies upon the same enforcement laws that have been in existence for decades to eradicate discrimination in health care, Title VI of the Civil Rights Act of 1964. Thus, it follows the same course of failure in ensuring that African Americans and other people of color will not be able to fully participate in America’s health care system due to race discrimination. Section 1557 of the ACA prohibits discrimination in health care programs on the basis of race, color, national origin, sex, sex stereotypes, gender identity, age, or disability. The pertinent section of the text is as follows:

Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI,

title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection.²⁴⁷

Section 1557 provides that a person shall not be excluded from participation in, be denied the benefits of, or be subjected to discrimination on the grounds prohibited under, among other laws, Title VI of the Civil Rights Act of 1964, under any health program or activity, any part of which is receiving federal financial assistance, or under any program or activity that is administered by an Executive Agency or any entity established under Title I of the Affordable Care Act or its amendments. Pursuant to Section 1557, the Office of Civil Rights (“OCR”) is responsible for enforcing Section 1557, just as it is for Title VI. The law became effective when ACA was enacted, and OCR has been receiving and investigating complaints under Section 1557.²⁴⁸ But extending Title VI provisions to the ACA is unlikely to result in racial equality within the health care system, since Title VI has historically been unable to create health care access for blacks.

At the time of the enactment of Title VI:

Discrimination against Negro hospital patients was flagrant and widespread. They were housed in segregated wings or floors and forced to use separate waiting rooms, nurseries, cafeterias and clinics. In many cases Negroes were entirely excluded from hospital facilities. Negro physicians were refused staff privileges at any but all-Negro on inner-city hospitals. Most nursing homes were restricted to whites, although over ninety percent had patients supported by federally assisted public welfare agencies. Even state-owned or operated health facilities, such as mental health institutions, tuberculosis sanitariums and charity hospitals were in many cases segregated by law.²⁴⁹

Title VI of the Civil Rights Act prohibited racial discrimination in federally-assisted programs and activities.²⁵⁰ It provides:

No person in the United States shall, on account of race, color, or national origin, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.²⁵¹

Title VI applies to all states and providers receiving federal assistance in various medical facilities or programs, such as hospitals, nursing homes, mental health centers, Medicaid and Medicare, and public assistance programs.²⁵² Title VI was enacted to protect against unlawful race, color and national origin discrimination in access to health care and social services.²⁵³

The Office of Civil Rights is the federal government agency that is responsible for enforcing Title VI and ensuring “that people have equal access to and an opportunity to receive services from all HHS-funded programs and services.”²⁵⁴

Notwithstanding that federal funds accounted for nearly half of hospital care, a third of nursing home care, and nearly a third of physician fees in

the 1990s, Title VI claims have not been frequently utilized in health care matters.²⁵⁵ Thus, federal dollars continued to support racial discrimination, in spite of Title VI. And, although Title VI authorized federal agencies to withhold funding from facilities that discriminate on the basis of race, the federal government has done little to enforce the provisions of Title VI in the health care arena.²⁵⁶ Thus, a year after the passage of Title VI, the United States Commission on Civil Rights found health care discrimination to be widespread, and litigation to be of little help.²⁵⁷

Overall, the application of Title VI to health care has proven insurmountable primarily because of the strict legal standards and the complex organization of the health care system. Because hospitals pledged not to discriminate to receive federal funding, the legal challenges were largely centered on discriminatory impact, rather than intentional discrimination. However, discriminatory impact cases require significant amounts of relevant statistical data, which neither Title VI or Medicare/Medicaid standards required to be collected. Thus proof of racial disparity was virtually impossible to find.

ACA Section 4302, however, requires the collection of data on “race, ethnicity, sex, primary language, and disability status for applicants, recipients and participants” and that this data be reported in a form accessible to researchers and the public.²⁵⁸ The data collection can aid in the reduction of race disparities in health care by identifying and measuring disparities, designing and implementing programs and interventions to address race disparities, monitoring progress in reducing disparities, and tweaking programs and interventions to achieve greater equality on health care. Although there are some barriers to the effective collection of data, such as the concerns and perceptions of the members providing the data, limitations of resources, and inefficient information systems for data gathering, collecting data from health plans, purchasers, and health care providers would provide information to improve medical care, as well as provide evidence of racial disparity. Depending upon how this data is used, it can potentially reveal and begin to repair the discrimination that persists in medical treatment on a large scale.

E. Early detection versus prevention

The ACA requires that most health plans cover preventive care without cost-sharing, which is quite beneficial to patients. In fact, over 71 million Americans directly benefitted from this provision of the ACA.²⁵⁹ However, the ACA views preventive care as early detection care, which is not necessarily coextensive with true preventive care. For example, early detection of cancer is based upon patient education and screenings,²⁶⁰ while preventive care is a bit different. For example, vitamin D and not smoking may help to prevent cancer; and exercise and protecting your eyes may help to prevent glaucoma.²⁶¹ Therefore, there needs to be more emphasis on prevention as well

as early detection, such as screenings and mammograms. Prevention requires education—education in diet, nutrition, exercise and health. Prevention also puts the ball back in the hands of the patient, allowing the individual to take control of his or her health. This could be accomplished with the assistance of community health workers, who could help individuals manage their health plans, unexpected co-pays and deductibles, compliance with treatment plans, and prevention of disease.²⁶² Community health care workers could also assist patients with multiple chronic conditions—often affecting people of color—who commonly lack access to timely, high-quality care due to poverty and homelessness, lack of transportation,²⁶³ and racism.²⁶⁴

VIII. Conclusion

Racism has had a significant negative impact on the health care of blacks and other people of color in the United States. The ACA is truly the first time that African Americans have collectively had significant access to health care. It is noteworthy that America's first African American president is chiefly responsible for this access. The ACA is an aggressive and strategic effort to cure many of the ills affecting blacks and other people of color in health care.

President Obama believes that the ACA is working. His assessment is based on statistics that reveal reductions in hospital admission rates, numerous lives being saved, tens of millions of insured Americans who had not previously had insurance, and a slowdown in the growth of health care spending.²⁶⁵ In addition, the repeated failure of the Republicans to repeal the law is a victory, even with the recent set back from *Burwell*. As President Obama stated:

The bottom line is this for the American people: the Affordable Care Act, this law, is saving money for families and for businesses. This law is also saving lives," the president said. "It's working, despite countless attempts to repeal, undermine, defund and defame this law...it's not the fiscal disaster critics warned about for five years."²⁶⁶

The ACA is working, and even for the most vulnerable among us. Racial minorities, low-income workers, and immigrants are the greatest beneficiaries of the ACA, and because of the ACA, the number of lower-income children getting health coverage continues to rise.

Many will not recognize the ACA's successes for political reasons. When the historic findings were released revealing the record lows for the uninsured in the eight year history of the poll, even the mainstream news media largely ignored it.²⁶⁷ And Obamacare has even been good for the U.S. economy.²⁶⁸

Before the ACA the uninsured population was steadily rising and so were health care costs. For the first time in America's history, health care is, at least theoretically, accessible to nearly all people. The ACA is a great accomplishment, albeit an imperfect one. It is enormous, complex, and ambitious. It is a model of progress, not perfection. However, if Americans continue to support

the ACA and it continues to evolve to meet their needs, it will accomplish its lofty goal: accessible, affordable, quality health care for all.

NOTES

146. Some states, like California and New York, are allowing undocumented immigrants to obtain health care if they have been granted deferred status under the Deferred Action for Childhood Arrivals (DACA) program created by President Obama in July 2012; California is leading the way in seeking avenues to provide health care to all of its undocumented immigrants. See Claire D. Brindis et al., *Realizing the Dream for Californians Eligible for Deferred Action for Childhood Arrivals (DACA): Demographics and Health Coverage*, UC BERKELEY LABOR CENTER, available at http://laborcenter.berkeley.edu/pdf/2014/DACA_health_coverage.pdf.
147. FAMILIES USA, PUB. NO. 07-108, WRONG DIRECTION: ONE OUT OF THREE AMERICANS ARE UNINSURED 17 (2007) [hereinafter FAMILIES USA].
148. See Sara R. Collins et al., *Gaps In Health Insurance: An All American Problem*, THE COMMONWEALTH FUND 11 (Apr. 1, 2006), http://www.commonwealthfund.org/usr_doc/Collins_gapshltins_920.pdf (“For many people with comprehensive insurance coverage, preventive care tests and screens like mammograms, colonoscopies, pap spears, and blood workups for cholesterol are part of their health care routine, performed annually or once every few years and requiring little out-of-pocket expense.”).
149. Maxwell J. Mehlman, “Medicover”: A Proposal for National Health Insurance, 17 HEALTH MATRIX 1, 3 (2007).
150. Ross D. Silverman, *Access to Care: Who Pays for Health Care for the Uninsured and Underinsured?*, 29 J. LEGAL MED. 1, 2 (2008).
151. FAMILIES USA, *supra* note 147, at 17.
152. See AMERICAN COLLEGE OF PHYSICIANS-AMERICAN SOCIETY OF INTERNAL MEDICINE, NO HEALTH INSURANCE? IT’S ENOUGH TO MAKE YOU SICK (Philadelphia: American College of Physicians-American Society of Internal Medicine, Nov. 1999), available at https://www.acponline.org/acp_policy/policies/no_health_insurance_scientific_research_linking_lack_of_health_coverage_to_poor_health_1999.pdf; see also Judy Feder, *Federal Action is Required*, U.S. NEWS & WORLD REPORT, Feb. 2009, at 6; FAMILIES USA, *supra* note 147, at 16.
153. See generally *The Uninsured And Their Access To Health Care*, KAISER COMMISSION ON MEDICAID AND THE UNINSURED (Oct. 2006), <http://www.allhealth.org/briefingmaterials/The-Uninsured-and-Their-Access-to-Health-Care-Oct-2004-614.pdf>; FAMILIES USA, PAYING A PREMIUM: THE INCREASED COST OF CARE FOR THE UNINSURED 13 (June 2005), available at https://www.policyarchive.org/bitstream/handle/10207/6261/Paying_a_Premium_rev_July_13731e.pdf.
154. See INSTITUTE OF MEDICINE, HIDDEN COSTS, VALUES LOST: UNINSURANCE IN AMERICA 3 (Jun. 2003), available at <http://www.iom.edu/Object.File/Master/12/327/Uninsured5FINAL.pdf>.
155. FAMILIES USA, *supra* note 147, at 11, 14.
156. *The Number of Uninsured Americans is at an All Time High*, CENTER ON BUDGET AND POLICY PRIORITIES 1–3 (2006), <http://www.cbpp.org/8-29-06health.pdf> [hereinafter CENTER ON BUDGET AND POLICY PRIORITIES]; Carmen DeNavas-Walt et al., *Income, Poverty and Health Insurance Coverage in the United States: 2006*, U.S. CENSUS BUREAU 18 (Aug. 2007), <http://www.census.gov/prod/2007pubs/p60-233.pdf>.
157. See Mehlman, *supra* note 149, at 2-3; see also Timothy Stoltzfus Jost, *Access to Health Care: Is Self-Help the Answer?*, 29 J. LEGAL MED. 23, 25 (2008) (defining “underinsurance” as “having to spend more than 10 percent of household income on health care costs”).
158. See CENTER ON BUDGET AND POLICY PRIORITIES, *supra* note 156, at 2.
159. FAMILIES USA, *supra* note 147, at 9.
160. W. MICHAEL BYRD & LINDA A. CLAYTON, AN AMERICAN HEALTH DILEMMA, RACE, MEDICINE, AND HEALTH CARE IN THE UNITED STATES, 1900-2000 587 (2002).

161. See *Fact Sheet: Health Disparities in Health Insurance Coverage*, CENTER FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/minorityhealth/reports/CHDIR11/FactSheets/Insurance.pdf> (last visited Apr. 13, 2016); FAMILIES USA, MINORITY HEALTH INITIATIVES, available at [http://www.npaihb.org/images/policy_docs/healthreform/2009/Roundtable/Tab percent20Fact percent20Sheet percent20Health percent20Care percent20Reform.pdf](http://www.npaihb.org/images/policy_docs/healthreform/2009/Roundtable/Tab%20percent20Fact%20Sheet%20Health%20Care%20Reform.pdf) (finding that 40.3 percent of African Americans, 55.1 percent of Hispanics, and 34 percent of other racial minorities lack insurance compared to 25.8 percent of whites).
162. Silverman, *supra* note 150, at 4 (finding that all Americans end up paying for the health care of the uninsured and underinsured through “increased charges for our own care, increased taxes to subsidize appropriations made to health care providers for delivering uncompensated care, and increased burdens such as overcrowded emergency departments and ambulance diversions.”).
163. BYRD & CLAYTON, *supra* note 160, at 587.
164. Joe Klein, *The Obama Surge: Will It Last?*, TIME, Oct. 9, 2008, <http://www.time.com/time/politics/article/0,8599,1848518,00.html>.
165. See *Obama Calls for Overhaul of U.S. Health Care System*, CNN (Mar. 5, 2009, 9:29 PM), http://articles.cnn.com/2009-03-05/politics/health.care.summit_1_health-care-health-reform-health-and-human-services?_s=PM:POLITICS.
166. Remarks by the President on Health Insurance Reform in Fairfax, Virginia (Mar. 19, 2010, 11:27 AM), <http://www.whitehouse.gov/the-press-office/remarks-president-health-insurance-reform-fairfax-virginia>.
167. *History of Attempts to Reform US Health Insurance Coverage*, BOSTON GLOBE (June 28, 2012), <https://www.bostonglobe.com/2012/06/28/healthcare/QoZG14xliMlwREEDkvJgTJ/story.html> (reporting that in 1912 Theodore Roosevelt called for universal health care as a presidential candidate but lost the election); see also *A History of Overhauling Health Care*, N.Y. TIMES, http://www.nytimes.com/interactive/2009/07/19/us/politics/20090717_HEALTH_TIMELINE.html (last visited Apr. 13, 2016).
168. Kenneth R. Wing, *The Community Service Obligation of Hill-Burton Health Facilities*, 23 B.C.L. REV. 577, 578 (1982) (“[T]he language of the original charity care obligations was specifically amended into the original draft of the Hill-Burton legislation, apparently as part of a political compromise to ensure broad-based congressional support for the legislation...”); *The Hill-Burton Act, 1946-1980: Asynchrony in the Delivery of Health Care to the Poor*, 39 MD. L. REV. 316, 319 (1979) (“The sponsors of the [Hill-Burton Act], Senators Lister Hill of Alabama and Harold Burton of Ohio, chose what might be termed a conservative activists’ approach, in direct contrast to the Truman administration’s broad proposal for a national health insurance program, but the Hill-Burton program called for a much more narrow and modest preliminary step toward solution of the problem.”).
169. HCERA was misnamed in Part I of this article. See Jennifer M. Smith, *The Color of Pain: Blacks and the U.S. Health Care System—Can the Affordable Care Act Help to Heal a History of Injustice? Part I*, 72 NLG REV. 240 (2015).
170. See *Healthcare Changes Head to Obama for Signature*, REUTERS (Mar. 26, 2010, 1:05 PM), <http://www.reuters.com/article/idUSN2616625320100326> (“Republicans remained united in their opposition to the sweeping \$940 billion overhaul and have vowed a campaign to repeal it.”).
171. See Renee M. Landers, *Tomorrow’s May Finally Have Arrived—The Patient Protection and Affordable Care Act: A Necessary First Step Toward Health Care Equity in the United States*, 6 J. HEALTH & BIOMEDICAL L. 65, 66 (2010).
172. See *The American Medical Association: Power, Purpose, and Politics in Organized Medicine*, 63 YALE L. J. 937, 1007-12 (1954).
173. See *Getting the Most for Our Health Care Dollars: Shared Decision-Making*, AMERICAN MEDICAL ASSOCIATION, <http://www.ama-assn.org/resources/doc/health-care-costs/access-to-care.pdf> (last visited Apr. 13, 2016); *AMA History Timeline*, AMERICAN MEDICAL ASSOCIATION, <http://www.ama-assn.org/ama/pub/about-ama/our-history/ama-history-timeline.page> (last visited Apr. 13, 2016); *AMA, AARP Back House Health Care Bill*, CNN, <http://www.cnn.com/2009/POLITICS/11/05/health.care/> (last visited Apr. 13, 2016).

174. See Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (noting the numerous court challenges to the Act).
175. Sam Stein, *Barack Obama Confident That Supreme Court Will Let His Health Care Law Stand*, HUFF. POST (Apr. 2, 2012, 3:01 PM), http://www.huffingtonpost.com/2012/04/02/barack-obama-supreme-court-health-care_n_1397548.html.
176. See Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).
177. King v. Burwell, 135 S. Ct. 2480 (2015).
178. U.S. House of Representatives v. Burwell, 2016 WL 2750934, at *7 (D.D.C. May 12, 2016).
179. Barack Obama, *United States Health Care Reform: Progress to Date and Next Steps*, 316 JAMA 530 (Jul. 11, 2016), <http://jama.jamanetwork.com/article.aspx?articleid=2533698>.
180. *Id.*
181. *Id.*
182. See SARA ROSENBAUM ET AL., LAW AND THE AMERICAN HEALTH CARE SYSTEM 18–19 (2d ed. 2012).
183. See Penny Starr, *11,588,500 Words: Obamacare Regs 30x as Long as Law*, CNSNEWS.COM (Oct. 14, 2013, 4:02 PM), <http://cnsnews.com/news/article/penny-starr/11588500-words-obamacare-regs-30x-long-law>.
184. ROSENBAUM ET AL., *supra* note 182, at 218–40.
185. *Id.*
186. *Id.*
187. *Id.* at 450.
188. Sam Stein, *Scott Brown Awkwardly Finds Out That Obamacare Is Also Helping Republicans*, HUFF. POST (Mar. 19, 2014, 6:16 PM), http://www.huffingtonpost.com/2014/03/19/scott-brown-obamacare_n_4995671.html?&ncid=tweetlnkushpmsg00000067; see also Steve Benen, *Republican Voter Thought He Hated 'Obamacare,' Until He Got Sick*, MSNBC (Mar. 4, 2016, 10:01 AM), <http://www.msnbc.com/rachel-maddow-show/republican-voter-thought-he-hated-obamacare-until-he-got-sick> (quoting another beneficiary of Obamacare: "I did not vote for you. Either time. I have voted Republican for the entirety of my life. I proudly wore pins and planted banners displaying my Republican loyalty. I was very vocal in my opposition to you—particularly the ACA. . . . You saved my life. I want that to sink into your ears and mind. My President, you saved my life, and I am eternally grateful. I have a 'pre-existing condition' and so could never purchase health insurance. Only after the ACA came into being could I be covered. Put simply to not take up too much of your time if you are in fact taking the time to read this: I would not be alive without access to care I received due to your law.").
189. Obama, *supra* note 179, at 530.
190. Greg Sargent, *Even in Romney states, more want to keep Obamacare than repeal it*, WASH. POST, Sept 9, 2014, available at <https://www.washingtonpost.com/blogs/plum-line/wp/2014/09/09/even-in-romney-states-more-want-to-keep-obamacare-than-repeal-it/>.
191. See Jeffrey M. Jones, *Barack Obama, Hillary Clinton Extend Run As Most Admired*, GALLUP (Dec. 29, 2014), <http://www.gallup.com/poll/180365/barack-obama-hillary-clinton-extend-run-admired.aspx>; see also Gloria Christie, *Despite GOP Racism, Obama Remains Most Admired Man In The World For Seven Years In A Row*, BIPARTISAN REPORT (Apr. 10, 2016), <http://bipartisanreport.com/2016/04/10/despite-gop-racism-obama-remains-most-admired-man-in-the-world-for-seven-years-in-a-row/> ("Racism is so strong in the US Congress that senate leader Mitch McConnell famously said his first priority was making President Obama a one-term president. Failing at that, the great screeching mechanical sound was Congress grinding the whole government to a near stop for the sole purpose of hindering Obama any successes.").
192. Obama, *supra* note 179, at 530 (noting that Republicans reversed course and rejected their own ideas once they appeared in the text of a bill that "[President Obama] supported.").

193. See Jessica Silver-Greenberg & Susanne Craig, *Con Men Prey On Confusion Over Health Care Act*, N.Y. TIMES, Nov. 9, 2013, <http://www.nytimes.com/2013/11/10/business/conmen-prey-on-confusion-over-health-care-act.html>.
194. See Paige Lavender, *Republicans Who Signed Up For Obamacare This Year Are Pretty Happy*, HUFF. POST (July 10, 2014, 11:00 AM), http://www.huffingtonpost.com/2014/07/10/republicans-health-insurance_n_5574079.html?&ncid=tweetInkushpmg00000067; *Premiums Cost for Affordable Care Act Marketplace Plans Are Similar to Employer Coverage for Lower-Income Enrollees*, COMMONWEALTH FUND, <http://www.commonwealthfund.org/acaTrackingSurvey/index.html> (last visited on Apr. 13, 2016); Jeffrey Young, *In States That Didn't Expand Medicaid, It's As If Obamacare Doesn't Even Exist For The Poor*, HUFF. POST (July 10, 2014, 2:01 AM), http://www.huffingtonpost.com/2014/07/09/obamacare-medicaid-uninsured_n_5572079.html?&ncid=tweetInkushpmg00000067 (“The debate over the Medicaid expansion remains arguably the most consequential unresolved matter related to the Affordable Care Act, as the refusal by Republican governors and state legislatures to accept federal dollars to provide health care to poor people is having real effects on the ground.”); Jeffrey Young, *North Carolina Hospital Closes, Citing No Medicaid Expansion*, HUFF. POST (Sept. 6, 2013, 7:49 PM), http://www.huffingtonpost.com/2013/09/06/north-carolina-medicaid-expansion_n_3882976.html?&ncid=edlinkusaolp00000003 [hereinafter Young, *North Carolina Hospital Closes*].
195. See Sabrina Tavernise & Robert Gebeloff, *Millions of Poor Are Left Uncovered By Health Law*, N.Y. TIMES, Oct. 2, 2013, <http://mobile.nytimes.com/2013/10/03/health/millions-of-poor-are-left-uncovered-by-health-law.html>; Young, *North Carolina Hospital Closes, supra* note 194.
196. Tavernise & Gebeloff, *supra* note 195.
197. *See id.*
198. *See id.*
199. See Sean McElwee, *The Wealthy Are Ruining American Health Care*, ALJAZEERA AMERICA (Jan. 13, 2016, 2:00 AM), <http://america.aljazeera.com/opinions/2016/1/the-wealthy-are-ruining-american-health-care.html>.
200. Tavernise & Gebeloff, *supra* note 195.
201. McElwee, *supra* note 199.
202. Tami Luhby, *Obamacare Sign Ups Top 11 Million*, CNNMONEY (Feb. 18, 2015, 12:58 PM), <http://money.cnn.com/2015/02/17/news/economy/obamacare-enrollment/>.
203. *ObamaCare Enrollment Numbers*, OBAMACARE FACTS, <http://obamacarefacts.com/sign-ups/obamacare-enrollment-numbers/> (last visited on Apr. 13, 2016).
204. See Jenna Levy, *In U.S., Uninsured Rate Sinks to 12.9 percent*, GALLUP (Jan. 7, 2015), <http://www.gallup.com/poll/180425/uninsured-rate-sinks.aspx>.
205. *Key Facts About the Uninsured Population*, KAISER FAMILY FOUNDATION (Oct. 5, 2015), <http://kff.org/uninsured/fact-sheet/key-facts-about-the-uninsured-population/>.
206. *See* Levy, *supra* note 204.
207. KAISER FAMILY FOUNDATION, *supra* note 205.
208. *Id.*
209. *Id.*
210. *Id.*
211. See Michael Tesler, *The Return of Old Fashioned Racism to White Americans' Partisan Preferences in the Early Obama Era*, MICHAEL TESLER, http://mst.michaeltessler.com/uploads/jop_rr_full.pdf (last visited Apr. 13, 2016) (“Finally, and perhaps most importantly, the election of the country’s first black president had the ironic upshot of opening the door for old fashioned racism to influence partisan preferences after [old fashioned racism] was long thought to be a spent force in American politics.”).
212. See Sidney D. Watson, *Reinvigorating Title VI: Defending Health Care Discrimination—It Shouldn't Be So Easy*, 58 FORDHAM L. REV. 939, 942 (1990).

213. Interestingly, disparate impact standards in housing discrimination cases under the 1968 Fair Housing Act are being challenged by the U.S. Supreme Court in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (U.S. 2015).
214. See Michelle Mark, *America's Most Vulnerable Residents Have Made the Biggest Gains Under Obamacare*, AOL.COM (Apr. 20, 2016, 5:31 AM), <http://www.aol.com/article/2016/04/20/americas-most-vulnerable-residents-have-made-the-biggest-gains/21347105/>; *Mainstream Media Completely SILENT As Obamacare Makes Yet Another Historic Achievement*, ADDICTINGINFO.ORG (Apr. 15, 2016, 7:18 PM), <http://www.addictinginfo.org/2016/04/15/mainstream-media-completely-silent-as-obamacare-makes-yet-another-historic-achievement/> (“Not only are the results on the uninsured rate historic overall [the uninsured rate for American adults dropped to 11 percent—the lowest ever], but the largest benefits are among African-Americans, Hispanics, adults under 34 years of age, and adults making less than \$36,000 per year.”).
215. See Sanjay Kishore et al., *Reforming the Way Health Care Is Delivered Can Reduce Health Care Disparities*, FAMILIESUSA (May 2014), <http://familiesusa.org/product/reforming-way-health-care-delivered-can-reduce-health-care-disparities>.
216. *Id.*
217. *Our Work: Health Equity*, FAMILIESUSA, <http://familiesusa.org/issues/health-equity> (last visited on Apr. 13, 2016).
218. *Id.*
219. Obama, *supra* note 179, at 529. (“Despite this progress [with the ACA], too many Americans still strain to pay for their physician visits and prescriptions, cover their deductibles, or pay their monthly insurance bills; struggle to navigate a complex, sometimes bewildering system; and remain insured.”).
220. See Bob Bryan, *The Country's Largest Health Insurance Company Is Almost Entirely Quitting Obamacare*, AOL.COM (Apr. 19, 2016, 12:24 PM), <http://www.aol.com/article/2016/04/19/the-countrys-largest-health-insurance-company-is-almost-entirely/21346741/> (United Healthcare, which now covers the most citizens in the U.S., has pledged to withdraw from Obamacare by 2017, claiming the cost of coverage was too steep and the insureds in the exchange were too sick, thus it paid out more claims).
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**Karl T. Muth
& Nancy Jack**

**WATCHING THE WATCHERS:
MONITORING POLICE PERFORMANCE
AS PUBLIC SERVANTS**

Introduction

If a picture is worth a 1,000 words, what is a video worth? Apparently, quite a bit more.

The proliferation of cell phone cameras has raised a new debate: whether people can record the activities and conduct of police in public areas. Several cases are making their way through the courts in which police officers arrested people for video recording police officers or for refusing to stop recording when asked. Courts have struggled with the appropriate framework to analyze the issue, with no clear consensus.¹

However, the employment relationship is rarely, if ever, explored as a remedy to this jurisprudential confusion. Here, we argue that if employers may record their employees, then people, as employers of the police, likewise should be able to record the police when in public.

History

The importance of such a right by the public should not be understated. As recognized by our Supreme Court:

[E]xposure to public view both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the [citizen]’s fear that, if he [or she] does not cooperate, he [or she] will be subjected to abuse.²

Monitoring police activity is nothing new. From the earliest days of our colonial history, monitoring police activity has been a concern. The Third Amendment addresses, primarily, records kept in Massachusetts and elsewhere, where colonists could register complaints against occupying British officers (similar to today’s military police forces), who were enjoying the

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services of inns and places of hospitality while refusing to compensate innkeepers and landlords.³ The colonial policemen, particularly in the port of Boston, were known for their corruption, violence, and disregard for colonists' safety.⁴ This same misuse of power existed in England, despite training manuals and written orders demanding something substantially different. Consider, for instance, the ideals expressed in the Constables' Manual for His Majesty's London Metropolitan Police Service:

There is no qualification more indispensable to a Police Officer than a perfect command of temper, never suffering himself to be moved in the slightest degree, by any language or threats that may be used; if he does his duty in a quiet and determined manner, such conduct will probably induce well-disposed [*sic*] bystanders to assist him should he require it.⁵

For years, the conversation attempting to reconcile the formal orders to police with the frequently ugly reality of imposing law on the streets sat dormant. The monitoring of police was thought at one time to be expensive, technologically infeasible, and inviting of hearsay. Today, monitoring police activity is cheaper, and feasible, due to the advent of inexpensive audio recording equipment, video cameras, high-resolution photography,⁶ and (eventually) cameras attached to telephones,⁷ lamp posts, taxicabs, stairwells,⁸ police cars,⁹ restaurants,¹⁰ and automatic teller machines.

George Holliday's now-famous videotape in 1991¹¹ only began to restart this conversation in a modern context. Holliday observed and recorded, as Rodney King, an African-American taxi driver, was beaten by eight police officers armed with tasers and batons. The then-year-old organization "Copwatch" (sometimes spelled "Cop Watch" or "CopWatch") of Berkeley, California used the incident to encourage citizens to videotape, photograph, and otherwise make records of police misconduct.

It is notable that, at the time of the famous trial, there is no record of any attorney questioning Mr. Holliday's right to film the events, the public street, or the police officers involved. To be clear, though evidentiary arguments were raised as to the film's admissibility as evidence, no record exists of arguments made at trial as to the (im)propriety of the recording itself as an activity.

Ten years after the Holliday tape, the Supreme Court noted the usefulness of videotapes of alleged police brutality incidents in *Saucier v. Katz*.¹² In that case,¹³ plaintiff's recollection of which officers pushed or shoved him was supported by a television newscast's footage, which included video of the police loading the suspect Katz into the vehicle. The videotape showed that the officer on the passenger side of the van used force, not the officer on the driver's side of the van. The court stated:

Katz's reluctance directly to charge Saucier with pushing or shoving is understandable in view of a television news videotape of the episode Katz presented as an exhibit to his complaint. The videotape shows that the shove, described

by Katz as gratuitously violent, came from the officer on the right side of the police van, not from the officer positioned on the left side. It is undisputed that the officer on the right is Parker, the officer on the left, Saucier.”¹⁴

The value of recording police activity is indisputable. Not only can it protect the public by indelibly documenting police behavior, it can likewise protect the police from exaggerated, fabricated, or unfounded claims of police brutality.

Explanation of analytical framework

The prevailing framework that we propose for citizens interacting with the police is rooted not in civil rights law, but in the employment relationship. It is here that we find the most compelling argument for citizen surveillance of the police. This is not a matter of whether citizens can engage in surveillance of the police force; it is a matter of whether police, as employees, can be held accountable by their employers (the citizenry).

Police are employees of the taxpayers; the streets they patrol are workplaces furnished by the taxpayers. The weapons, walkie-talkies, flashlights, and vehicles they use are assets purchased by the taxpayers. These taxpayers should be able to monitor the behavior (or misbehavior) of these employees, the events (ordinary and extraordinary) occurring in the police workplace, and the use (or misuse) of these assets. The citizen can observe his or her other employees—the man collecting the garbage in the alleyway, the woman collecting the tolls at the bridge, the politician explaining why he should be re-elected. It is unclear at best why police officers should be treated differently from the taxpayer’s other employees or why the citizen’s right to supervise (or scrutinize) the work being done on his or her behalf should be diminished in the presence of one particular type of public employee.¹⁵

While we recognize that the role of police as investigators and (occasionally) adversaries of their employers is unusual, it is not *sui generis*. Other actors drawing remuneration from the public purse (Federal Bureau of Investigation agents, federal and state prosecutors, building inspectors, Internal Revenue Service auditors, patent examiners, and so forth) successfully reconcile their occasionally-adversarial position to the citizens who employ them while embracing processes allowing accountability, appeal, review, and transparency.

A circuit split in the making: pedigree and problems

While no circuit court has held that there is no right to photograph or record police officers as they go about their duties, some have ruled the right is not clearly established. This is problematic, in that unless the right to record the police is clearly *clearly established*,¹⁶ the police violating this right are entitled to qualified immunity protection and hence cannot be sued.¹⁷ The right to record the police in such jurisdictions becomes toothless, as Judge Gerald A. McHugh writes in *Gaymon*: “Suffice it to say that dismissing this Complaint

at the pleading stage given the record before me would risk rendering the Bill of Rights meaningless.”¹⁸

The Third Circuit is likely to be the next battleground for the question of a right to record police officers as they go about their business. In July 2015, a district court judge¹⁹ in Philadelphia ruled a case could move forward involving the arrest of a bystander because she recorded police activities in the absence of guidance from the Third Circuit on the issue.²⁰ While the courts provide “breathing room” for officers to make “reasonable but mistaken judgments” about legal questions, the reasonableness of these mistakes is a valid question.²¹ Video footage and other evidence may help clarify the reasonableness of officers’ actions and give context to officers’ decisions.²²

The District Court in Pennsylvania appeared to root its decision in a theory similar to our own, that auditing the performance of police officers as public employees and public servants is central to the role of the citizen, even in the context of an adversarial scenario between a citizen and police, such as an arrest.²³ Citing *Losch*, that court notes police use of “a criminal action to penalize the exercise of one’s First Amendment rights is a [Constitutional] deprivation.”²⁴ Regarding the importance of video recordings of police activities, the District Court in Pennsylvania noted, “Videotapes by citizens have proven to be *indispensable* in bringing to light instances where police unfortunately misused their power.”²⁵ At oral argument in *Gaymon*, defense counsel (representing the police officers who arrested Gaymon and Purnell for videotaping and insisting that they had the right to videotape) struggled to defend the officers’ actions and did not invoke any arguments as to the officers’ privacy interests while performing their duties.²⁶

The Court: And you would agree with me that standing inside on one’s porch simply videotaping, that could not be considered disorderly conduct by any reasonable definition, could it, sir?

[Defense Counsel]: If [a person is] standing inside [his or her] home and videotaping outside, no, I don’t think so...²⁶

But the locus of the porch, though helpful to plaintiff Gaymon and frequently referenced by Judge McHugh, is not a necessary ingredient to reach this result. The Third Circuit dealt with the pertinent question, albeit in a slightly different context, years ago in *Kelly v. Borough of Carlisle*.²⁷ We call attention to the fact that, in that case, the Third Circuit, referencing Pennsylvania law, noted that even covert recordings of police officers would be allowable.²⁸ However, this change in interpretation is rapid: At least one judge has found the right to record police officers’ activities in public was not clearly established as recently as 2011.²⁹

Meanwhile, the Second Circuit’s silence on this issue forced District Court judges in New York to decide, with little applicable precedent, whether it was

permissible for a mix of professional and amateur videographers to create videos of police activity during the Occupy Wall Street protests. Judge P. Kevin Castel³⁰ ruled that a right to record police exists as they perform their duties.³¹ He invoked a First Amendment framework, concluding, “a reasonable police officer would have been on notice that retaliating against a non-participant, professional journalist for filming an arrest under the circumstances alleged would violate the First Amendment.”³²

Particularly interesting is the intersection of the heightened privacy interest in the plaintiff’s home with the question of whether there is a right to record police activity as in *Gaymon*. Results alternative to the one in *Gaymon* would lead to a special status for police officers – when a police officer wandered into a home security camera’s view and objected to its presence, the homeowner would potentially be in violation of the law (even if the camera had existed for years and even if the homeowner didn’t intend to film police activity). Judge McHugh goes further than to point out this single unusual outcome, asserting, “officials can still be on notice that their conduct violates established law . . . in [new] factual circumstances [whether or not their behavior or misbehavior is being recorded].”³³

When a person arrested for videotaping counters that the arrest itself is illegal, thus insisting the videotaping was not illegal, the police officers cannot make an arrest on other grounds (such as disorderly conduct) simply because the officers dislike the arrestee’s observation.³⁴ A citizen’s observation that a police officer’s conduct is improper cannot itself be disorderly conduct or interference with police operations.³⁵ Nor can a bystander recording an arrest be detained for offering commentary on the police activities, police procedural errors, or police violence he or she witnesses while recording.³⁶ Simply because the statements or opinions offered by the person videotaping may annoy or perturb the officers is not sufficient to make voicing those statements or opinions a crime.³⁷

The current state of affairs is that videotaping or otherwise recording police activities remains a risky activity in some jurisdictions, particularly those where a savvy officer may recognize no clearly-established right to record has been found (and hence qualified immunity holds³⁸).³⁹

The framework in theory and as applied

Rather than adopting First Amendment⁴⁰ or Due Process⁴¹ arguments for the right of citizens to record the behavior of police officers for later scrutiny, we adopt a theory finding this right in the employment relationship. Citizens employ the police and provide the vehicles, firearms, computers, and handcuffs that allow the police to do their work. Citizens also provide more pedestrian support for police work, from laundering soiled police uniforms to paying for the email systems and websites police officers use to communicate with the community.

While this employment framework is a somewhat novel argument in the context of modern American jurisprudence, it is hardly without precedent. Its patrilineage can be traced to Juvenal's most famous quotation (*Quis custodiet ipsos custodes?*), Plato's comments on the duties of the citizen, and Cicero's concerns as to the monopoly on violence. Taking these in turn, Juvenal's oft-quoted passage (originally applied to guarding the purity and monogamy of wives),⁴² taken to its logical end, suggests that a person's actions (or restraints from action) must be governed by his or her own compass rather than by others. Plato's *Republic* suggests at several points that the misuse of power against the citizen is one of the evils against which society must stand watch⁴³—this threat of tyranny risks harm to an “upright citizen” who must both endure and subsidize scrutiny. Cicero commented often on the dangers of delegating a right to violence to the police and the failure of restraint where violence is available.⁴⁴

In Plato's vision of the ideal society, the Guardians (who protect society) are employees of the citizenry and hence accountable to them – yet, the Guardians are also empowered to exert power over the citizens, even using violence. In the United States, there is no question that the police are the employees, directly or indirectly, of the taxpayer. This alloys with Plato's concept but stands in contrast to Sir Robert Peel's ideal⁴⁵ in which the citizens are the police (in essence, the citizens police each other with no delegation of the right to violence). And, in the United States, employers enjoy broad rights in monitoring and controlling how employees use the assets provided to them. Misuse, when identified, can be recorded by the employer for later use in human resources disputes,⁴⁶ civil litigation,⁴⁷ or even as evidence in a criminal matter.⁴⁸

Courts have consistently held that employers enjoy broad latitude in investigating the misuse of resources by their employees. By analogy, citizens should enjoy similarly broad latitude in investigating the performance (or non-performance or mis-performance) of duties by their employees in the police force.

Most police officers are not stealing from the public purse, but the offense need not rise to the level of embezzlement for employer investigation of employees to be appropriate and allowable. The law allows for substantial and invasive investigation of the employer's concerns of employee misuse of resources.⁴⁹ For thirty years, it has been established that public employees (and police officers are public employees) enjoy only a limited expectation of privacy when they are going about their duties—this includes when securing, or investigating improper use of, state property.⁵⁰ A police officer's improper or unnecessary use of force against suspects, unwarranted searches, or harassment of civilians often involves state property – a firearm, a Taser,⁵¹ a motor vehicle, a flashlight, a melee weapon,⁵² and so on. This is not to mention the taxpayers' purchase of the officer's badge itself, entitling the officer to act

properly (or improperly) with the authority of the State. In investigating the use (or misuse) of state property, the observation of, recording of, and audit of a police officer's use of state property is proper. Citizens should feel free to – and empowered to – monitor police behavior (or misbehavior) to ensure police personnel and property are used appropriately.

This right to observe, monitor, and audit the police as employees of the citizenry is especially important when police officers are in public, in uniform, representing the government. The courts have long recognized that interactions between police and the citizenry often happen in public view.⁵³ To the extent that police interact with the public in plain view of onlookers, the police cannot argue the street suddenly becomes the police officer's "office" or place with an expectation of privacy.⁵⁴ If a court were to hold⁵⁵ that a police officer can suddenly expect his or her conduct to be private on the street, when no civilian on the same street moments earlier could invoke or assert an expectation of privacy, it would be counterintuitive at best and would seem to run counter to an overarching cultural expectation that the street is a public place subject to observation.⁵⁶

There is no doubt or question as to whether a citizen has the ability and right to observe the public way (for which he or she paid) and to record (through writing, photography, film, or even poetry) the things he or she observes in plain sight, even crimes.⁵⁷ No interpretation – whether rooted in the Fourth Amendment or other frameworks – adopted by the courts suggests a person, police officer or not, has a heightened expectation of privacy working in the street, moving upon the public way, or in view of bystanders who can spectate without trespassing.⁵⁸ Even things on private land, beyond the bounds of the public way, are vulnerable to the citizen's wandering eye and casual scrutiny. One may walk down the sidewalk while noticing his neighbor's new automobile parked in a private drive or examine the home next door's lawn and compare its greenness to her own lawn's without offense or tort or crime. Similarly, a citizen should be able to observe police roving around the neighborhood, performing their duties, or interacting with his or her fellow citizens.

To reach any other conclusion, one must adopt the view that a citizen's ability to observe and record his or her surroundings is limited by the mere presence of a police officer. If true, the operative mechanism would be *sui generis* in U.S. law. If, when a police officer is nearby, a citizen enjoys fewer rights to observe (and make records of observations about) his or her surroundings, then how would a citizen monitor and audit the performance of the police as his or her employees?⁵⁹

Proposal to avert a circuit split

Although police officers may enjoy some (very limited) expectation of privacy when performing tasks in their offices,⁶⁰ this reasonable expectation

of privacy diminishes to zero when the police officers venture into the street. The matter to be resolved by the Circuits—and perhaps even the Supreme Court—in the coming years can be bifurcated into two fundamental questions. First, whether a police officer should be able to command a citizen to stop recording or photographing the police officer’s conduct of his or her duties. Second, whether, if the citizen does not comply, the police officer can reasonably use force (or threat of force or arrest) to interrupt the recording and detain the citizen.

We suggest, as to the first issue, that a police officer may state his or her preference for a citizen to cease recording or photographing just as a police officer may ask a citizen to talk a bit more loudly or softly or clearly during a non-custodial or pre-custodial⁶¹ interaction. However, as to the second issue, just as the citizen’s failure to adjust the volume or enunciation⁶² of his or her speaking would not itself be grounds for an arrest for disorderly conduct, the citizen’s continued recording or photography is not itself disorderly.

The attitude of police officers around cameras—or belligerence when confronted with cameras, in some cases—may intimidate some videographers and photographers who may discontinue recording, feeling threatened with violence or arrest. This kind of intimidation can be thought of as having a “chilling effect”⁶³ on listening, rather than on speaking.⁶⁴ For instance, in a 2013 incident in Charlotte, North Carolina, a man was videotaping police as they performed their duties at a public campground.⁶⁵ A Darlington County deputy approached the civilian observer and asked, “Do you want to go to jail?” Whether the deputy was actually intending to affect an arrest is irrelevant; as the Court memorably observed in *NAACP v. Button* that “the threat of sanctions may deter...almost as potently as the actual application of sanctions...”.⁶⁶ Then, without further warning, the deputy reportedly ripped the camera out of the bystander’s hands and shoved the bystander to the ground. This kind of harassment, intimidation, and unprofessional behavior may not always be prevented by the presence of a camera, but the utility of a recording after the fact cannot be overstated.

Conclusion

We urge the adoption of a sweeping right—rather than limited privilege—to record police as they go about their duties in public places or in public view. We further urge the creation of a right to record police on the recorder’s private property or on other private property visible from the public way without trespass. We ask that courts find this right not in the First or Fourth Amendments, though both lineages of jurisprudence inform questions as to recording, but in the unique employment relationship between members of the public and the police force.

This approach would lead to the same result in the *Gaymon* and *Higginbotham* cases, but would both unify and simplify the logic applied in those cases and in other similar fact patterns. Further, it would root the right to record police operations in the oversight of the police by the public rather than framing the recording of police as an exercise of First Amendment rights to film in public. While we believe that the recordings at issue in *Gaymon* and *Higginbotham* and other similar cases are protected by the First Amendment, the issue of recording police officers on duty embraces a loftier goal of public servant accountability. It would also elevate the activity of recording police officers from an annoyance about which officers can complain to a mechanism for public examination of police activity; in other words, police should no more be able to complain about being recorded than they should be able to complain about having their marksmanship or physical fitness scrutinized.

The police officers and their equipment are public employees and public property, respectively. They are all funded by the public purse. For citizens to produce and share photographic, cinematic, and other records of their (and fellow citizens') interactions with their employees and public servants should not only be permissible, but encouraged. As citizens do not directly manage the police force, they enjoy power over elected law enforcement officials (and, by extension, their many subordinates). As the recent high-profile events in Ferguson, Missouri illustrate, people can – and will – take action to pressure these managerial intermediaries to alter the behavior, composition, and procedures of the police force.

In sum, we urge that courts to recognize that employers (citizens) have the right to make records to assist in affirmatively discouraging or subsequently investigating the misconduct of their employees (police officers), the misuse of their property (police cars, firearms, etc.), and the risk that the enterprise in which they have invested (the police department) may fall into disrepute. It is fascinating and tragic that this employment relationship – one that has existed for thousands of years in a multitude of societies – is, in America, among the hardest to manage. We suggest finding a right, and perhaps even a responsibility, to monitor police in this employment relationship clarifies and simplifies the relationship between citizen and officer and recognizes the citizen as a stakeholder in the business of policing the community while offering a consistent and easier-to-apply framework to judges faced with an ever-more-diverse range of fact patterns.

NOTES

1. *Compare* *Gaymon v. Borough of Collingdale*, No. 14-5454, 2015 U.S. Dist. LEXIS 93014 (E.D. Pa. July 17, 2015), *with* *In re Sharp v. Baltimore City Police Dep't*, No. CCB-11-2888, 2013 U.S. Dist. LEXIS 58111 (D. Md. Mar. 1, 2013).
2. J. Marshall, writing for the majority in *Berkemer v. McCarthy*, 468 U.S. 420 (1985). *Berkemer v. McCarty*, 468 U.S. 420, 438 (1984).

3. For perhaps the most famous account of brash mistreatment of a landlord by George III's troops, *see* account of King George's troops' treatment of the landlord character in Noyes's *The Highwayman*. ALFRED NOYES, *The Highwayman*, in FORTY SINGING SEAMEN AND OTHER POEMS (1907) 35 (Kessinger Publishing 2010) (1907) ("They said no word to the landlord. They drank his ale instead. But they gagged his daughter, and bound her, to the foot of her narrow bed ... They had tied her up to attention, with many a sniggering jest ... 'Now, keep good watch!' and they kissed her.").
4. Distrust of the police, particularly in Boston's North End, has existed since colonial times and endured into the Twentieth Century. *See* WILLIAM FOOTE WHYTE, STREET CORNER SOCIETY: THE SOCIAL STRUCTURE OF AN ITALIAN SLUM 202-35 (University of Chicago Press 1993) (1943).
5. LONDON METROPOLITAN POLICE SERVICE, CONSTABLES' MANUAL (London, Clerkenwell Publishing, 1st ed. 1829) (on file with the Social Sciences Library of the London School of Economics).
6. *See, e.g.*, Morgan Leigh Manning, *Less Than Picture Perfect: The Legal Relationship Between Photographers' Rights and Law Enforcement*, 78 TENN. L. REV. 105 (2010).
7. *See, e.g.*, today's camera phones feature video, photography, and audio recording capabilities.
8. *See, e.g.*, Ming v. A.E.G. Mgmt., No. 15-CV-643 (E.D.N.Y. Aug. 26, 2015), *available at* <http://cases.justia.com/federal/district-courts/new-york/nyedce/1:2015cv00643/366017/16/0.pdf?ts=1440689747>.
9. *See, e.g.*, dashboard cameras are used by a variety of police departments and other agencies.
10. *See, e.g.*, McGowan v. Miller, 109 F.3d 1168 (7th Cir. 1997).
11. George Holliday created video footage of the Rodney King incident using a home camcorder.
12. *Saucier v. Katz*, 533 U.S. 194, 211-12 (2001).
13. Importantly, this case is cited here only for its fact pattern. For context as to its jurisprudential lineage, *see* *Pearson v. Callahan*, 555 U.S. 223 (2009); *see also* *Morse v. Frederick*, 551 U.S. 393 (2007).
14. *Saucier*, 533 U.S. at 212 (internal citations omitted).
15. The Department of Justice seems to agree. *See* Statement of Interest of the United States at 2, *Sharp v. Baltimore City Police Dept. et al.*, No. 1:11-cv-02888-BEL (D. Md. Jan. 10, 2012) ("[T]he United States has a strong interest in ensuring that citizens' rights under the First, Fourth, and Fourteenth Amendments are not diminished when they record police carrying out their duties in a public setting.").
16. "Clearly established" is, in this context, a term of art drawn from *Bivens* and clarified in *Harlow*. *Compare* *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) *with* *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).
17. In this calculation, a judge properly accepts all plaintiff factual allegations as true and draws all reasonable inferences in plaintiff's favor. *See* *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).
18. *Gaymon v. Borough of Collingdale*, No. 14-5454, 2015 U.S. Dist. LEXIS 93014, at *2 (E.D. Pa. July 17, 2015).
19. *Gaymon v. Borough of Collingdale*, No. 14-5454, 2015 U.S. Dist. LEXIS 93014 (E.D. Pa. July 17, 2015).
20. *Id.*
21. *See* *George v. Rehiel*, 738 F.3d 562, 571 (3d Cir. 2013).
22. *See, e.g.*, Wayne Drash, *The Killing of Laquand McDonald: The Dashcam Video vs. Police Accounts*, CNN (Dec. 19, 2015, 12:32 AM), <http://www.cnn.com/2015/12/17/us/laquan-mcdonald-video-records-comparison/>.
23. A suspect's decision to raise questions as to the propriety of his or her own detention is not, in itself, a criminal act. *See* *Norwell v. City of Cincinnati*, 414 U.S. 14, 16 (1973).

24. *Gaymon*, 2015 U.S. Dist. LEXIS 93014, at *10 (citing *Losch v. Borough of Parkesburg, Pennsylvania*, 736 F.2d 903, 907-08 (3d Cir. 1984)).
25. *Gaymon*, 2015 U.S. Dist. LEXIS 93014, at *1 (emphasis added).
26. Transcript of Oral Argument at 9, *Gaymon v. Borough of Collingdale*, No. 14-5454, 2015 U.S. Dist. LEXIS 93014, at *2 (E.D. Pa. Apr. 10, 2015).
27. See generally *Kelly v. Borough of Carlisle*, 622 F.3d 248 (3d Cir. 2010); *id.* at 258.
28. “Allowable” here means not in violation of the applicable Wiretap Act.
29. See *Montgomery v. Killingsworth*, No. 13-256, 2015 WL 289934 (E.D. Pa. Jan. 22, 2015).
30. *Marom v. City of New York*, No. 15-cv-2017, 2016 U.S. Dist. LEXIS 28466 (S.D.N.Y. Mar. 7, 2016).
31. See, accord, *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 538-42 (E.D. Pa. 2005) (finding right to videotape police in First Amendment). Specifically, the Robinson court discussed that “[i]n sum, there can be no doubt that the free speech clause of the Constitution protected [a citizen] as he videotaped the [police] on October 23, 2002.” *Id.* at 541.
32. *Higginbotham v. City of New York*, 105 F. Supp. 3d 369, 381 (S.D.N.Y. 2015).
33. *Gaymon*, 2015 U.S. Dist. LEXIS 93014, at *6 (quoting *Hope v. Pelzer*, 536 U.S. 730 (2002)).
34. See, e.g., in the *Gaymon* case, after police officers asserted to a citizen, Ms. Purnell, that videotaping the police was a violation of the Wiretap Act, Ms. Purnell replied that she did not believe videotaping the police from inside her home violated that statute. *Gaymon*, 2015 U.S. Dist. LEXIS 93014, at *2. Ms. Purnell, along with her daughter and husband, politely told the policeman he was incorrect and that Ms. Purnell had a right to record. *Id.* at *3. Police then argued that Ms. Purnell’s statement that the police acted incorrectly as a matter of law was, in itself, disorderly conduct. See *id.* at *3. The police threatened both she and her daughter with their Tasers (which they did not activate) and then arrested both women for disorderly conduct. *Id.* at *4.
35. For examples of charges often used to discourage or intimidate those recording police operations, see *Buehler v. City of Austin et al.*, No. A-13-CV-1100-ML (W.D. Tex. Feb. 20, 2015), available at <http://cases.justia.com/federal/district-courts/texas/txwdce/1:2013cv011100/668231/120/0.pdf?ts=1424546473> (“On January 1, 2012, a magistrate for the Municipal Court of Travis County, Austin, Texas issued an arrest warrant finding probable cause to arrest Buehler for third-degree felony harassment of a public servant, in violation of [felony statute]. During the January 2013 term, a grand jury no-billed the charge for felony harassment of a public servant, and indicted Buehler for the lesser charge of knowing failure to obey a lawful order of a peace officer, a [misdemeanor], in violation of [misdemeanor statute], for failing to put his hand behind his back. In October 2014, a jury trial was held on the charge of failure to comply with a lawful order of a peace officer. On October 23, 2014, the jury found Buehler not guilty of the charge.” (internal citations omitted)).
36. See *Norwell v. City of Cincinnati*, 414 U.S. 14, 16 (1973) (per curiam) (“Surely, one is not to be punished for non[-]provocatively voicing his [or her] objection to what he [or she] obviously felt was a highly questionable detention by a police officer.”).
37. *Colten v. Kentucky*, 407 U.S. 104, 111 (1972) (White, J. and Marshall, J. dissenting) (addressing an unrelated procedural issue (*id.* at 122)).
38. Unfortunately, qualified immunity holds even in jurisdictions where filming is protected but where an officer makes a genuine mistake of law or fact as to the filming. See *Butz v. Economou*, 438 U.S. 478, 507 (1978) (noting qualified immunity includes “mere mistakes in judgment, whether the mistake is one of fact or one of law”).
39. It will no doubt be tempting for courts considering these issues to perform a “merger” of issues as identified (and unwound on ultimate appeal) in *Saucier v. Katz*, 533 U.S. 194 (2001). Instead, we suggest the qualified immunity issue must be examined in isolation from the recording or filming issue, just as it was examined properly separately from the excessive force issue in *Saucier*.
40. See *Glik v. Cunniffe*, 655 F.3d 78, 85-87 (1st Cir. 2011).

41. See G.H. Reynolds & J.A. Steakley, *A Due Process Right to Record the Police*, 89 WASH. U. L. REV. 1203 (2012).
42. JUVENAL, SATIRE VI Ins. 347-48 (date disputed).
43. Perhaps most notably, PLATO, REPUBLIC Book VIII, 565c (380 BCE) (“This and no other is the root from which a tyrant springs; when he first appears he is a protector.”).
44. See, e.g., Marcus Tullius Cicero, Pro Milone Ch. IV, § 11 (52 BCE) (“Justice stands mute in the midst of arms.”).
45. See Joseph Goldstein & J. David Goodman, *A London Guide for 1 Police Plaza*, N.Y. TIMES (Apr. 15, 2014), <http://www.nytimes.com/2014/04/16/nyregion/alondon-guide-for-1-police-plaza.html>.
46. See *Rachid v. Jack In the Box, Inc.*, 376 F.3d 305 (5th Cir. 2004) (employer monitored employee email messages and discovered message it believed violated company policy, leading to human resources process through which employee in question was replaced).
47. See *Intel v. Hamidi*, 71 P.3d 296 (Cal. 2003) (employer maintained records of employee’s misuse of company email system for subsequent trespass-to-chattel claim).
48. For information as to how and why this does not violate the Wiretap Act, see Jarrod J. White, *E-Mail @Work.com: Employer Monitoring of Employee E-Mail*, 48 ALA. L. REV. 1079, 1083 (1997); accord *United States v. Steiger*, 318 F.3d 1039 (11th Cir. 2003); see generally Wiretap Act, 18 U.S.C. § 2515 (1968 and as subsequently amended); see also 18 U.S.C. § 2701 (1986 and as amended).
49. See, e.g., *United States v. Forcelle*, 86 F.3d 838 (8th Cir. 1996) (Cretex, the employer, noticed and made records of employee’s misuse of company funds; this was later used as evidence in the criminal prosecution of the same employee).
50. See, e.g., *Chenkin v. Bellevue Hospital Center, New York City Health & Hospitals Corp.*, 479 F. Supp. 207 (S.D.N.Y. 1979) (checking bags and parcels carried by employees to reduce theft of hospital supplies); cf. *O’Connor v. Ortega*, 480 U.S. 709 (1987) (search and seizure of items from employee’s desk and office).
51. TASER, Taser, TASER CEW, TASER Conducted Electrical Weapon (CEW), and related marks are all trademarks of Taser International Inc.
52. “Melee” weapons include “Billy” clubs, batons, riot shields, bats and bars of various types, and so forth.
53. See fact patterns central to *Carroll v. United States*, 267 U.S. 132 (1925) and its progeny.
54. Cf. *Katz v. United States*, 389 U.S. 347, 351 (1967) (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”).
55. The authors failed to find any court that has held such.
56. See *Oliver v. United States*, 466 U.S. 170, 178 n.8 (1984) (Expectations of privacy at home and at work are both “based upon societal expectations [or norms.]”).
57. For a graphic anthropological example, see PHILIPPE BOURGOIS & JEFFREY SCHONBERG, *RIGHTEOUS DOPEFIEND* (2009) (recording, through writing and photographs, habits and identities of people using illicit intravenous drugs in public places).
58. See *Beck v. Ohio*, 379 U.S. 89 (1964); *Rios v. United States*, 364 U.S. 253 (1960); *Henry v. United States*, 361 U.S. 98 (1959); *United States v. Di Re*, 332 U.S. 581 (1948); *Carroll v. United States*, 267 U.S. 132 (1925).
59. For particularly compelling examples of police performance being successfully monitored by cameras, and audited by citizens and media after the fact, see videos of incidents involving Walter Scott, who was shot by an officer in Charleston, South Carolina in 2015; Jecque Howard, who was beaten by an officer in Chicago, Illinois in 2015; an unnamed minor, who was allegedly assaulted by Officer Ben Fields in a classroom at Spring Valley High School in Columbia, South Carolina in 2015; Karolina Obrycka, who was beaten by an off-duty officer in Chicago, Illinois in 2007. Videos of these incidents are available free of charge on YouTube.com and on websites of numerous news agencies.

60. For a detailed account of precisely what expectations of privacy apply in public or government settings, *see* the *New Jersey v. T.L.O.*'s predecessors in jurisprudence. *See* *New Jersey v. T.L.O.*, 469 U.S. 325, 334-35 (1985) (as to school officials); *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967) (as to building inspectors); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312-13 (1978) (as to OSHA inspectors).
61. *See* *Florida v. Bostick*, 501 U.S. 429, 434 (1991).
62. This is a common fact pattern. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 7, 33 (1968) ("McFadden asked Terry his name, to which Terry 'mumbled something.' Whereupon McFadden, without asking Terry to speak louder and without giving him any chance to explain his presence or his actions, forcibly frisked him.>").
63. *See* "chilling effect" lineage of First Amendment jurisprudence, *e.g., NAACP v. Button*, 371 U.S. 415, 432-33 (1963); *cf. Baggett v. Bullitt*, 377 U.S. 360, 378-79 (1964); *Bush v. Orleans School Board*, 194 F. Supp. 182, 185 (1961), *aff'd sub nom, Tugwell v. Bush*, 367 U.S. 907 (1961); *Gremillion v. United States*, 368 U.S. 11 (1961).
64. The later broadcast of relevant footage would, however, be speech. Footage never captured due to police intimidation, or aborted by police intervention, would essentially be speech chilled *ex ante*.
65. *See Man Files Complaint After Darlington County Deputy Snatches Camera Threatens Arrest*, WISTV.COM, <http://www.wistv.com/story/22670489/wis-investigates-man-files-complaint-after-darlington-county-deputy-snatches-camera-threatens-arrest> (last visited Sept. 12, 2015).
66. *NAACP v. Button*, 371 U.S. 415, 433 (1963).



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Lisa Lindhorst

**ENDING THE UNCONSTITUTIONAL
TORTURE OF THREE-DRUG LETHAL
INJECTIONS: A REBUKE
OF *GLOSSIP V. GROSS***

I. Introduction

Oklahoma state officials escorted Clayton Lockett into the execution chamber and strapped him into the gurney.¹ The State scheduled what was supposed to be a quick and painless lethal injection for 6:00 PM. The executioners began by injecting Lockett with midazolam, a controversial and largely un-tested muscle relaxant,² followed by a drug to induce paralysis, and a final drug to induce cardiac arrest.³ Sixteen minutes later, after the execution staff should have pronounced Lockett dead, Lockett’s face contorted and body tensed. His head rose from the gurney and his feet kicked.⁴ Instead of the virtually instantaneous execution lethal injections are supposed to administer, Lockett suffered for forty minutes before finally dying of a heart attack.⁵ Lockett’s botched execution fueled a fierce Eighth Amendment debate over the constitutionality of Oklahoma’s three-drug lethal injection protocol.⁶

On June 25, 2014, in response to Lockett’s execution, Charles Warner⁷ and twenty other Oklahoma death row inmates sued Oklahoma state officials under 42 U.S.C. § 1983,⁸ challenging the state’s lethal injection procedures as a violation of the Eighth Amendment and seeking to stay their executions until a court ruled on the merits.⁹ Although the Supreme Court refused the stay,¹⁰ the Court granted certiorari on the constitutional issue. On June 29, 2015, in a fractured 5–4 decision, the majority declared Oklahoma’s three-drug lethal injection protocol constitutional over scathing dissenting opinions.¹¹ *Glossip v. Gross* marks the second time that the Supreme Court has upheld the constitutionality of the lethal injection, which has been a controversial execution method since its inception in 1977.¹² The Court first assessed the constitutionality of the lethal injection in its 2008 *Baze v. Reese* opinion, which ruled constitutional the particular three-drug lethal injection that states used at the time.¹³ The *Baze* Court also outlined an oft-cited Eighth Amendment test that declares a method of execution to be cruel and unusual punishment if it presents a “substantial” or “objectively intolerable” risk of “serious harm” compared to “known and available alternatives.”¹⁴

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The lethal injection drugs the *Baze* Court analyzed are no longer available, and the new, largely untested drug combinations that states, such as Oklahoma, experiment with today fall far short of the *Baze* constitutionality standard.¹⁵ This article argues that the *Gross* majority opinion erred in declaring Oklahoma's use of midazolam¹⁶ and the reckless manner in which prison officials administer three-drug lethal injections constitutional under the *Baze* test, and explains that a single-drug lethal injection is a viable, more consistent, and more humane alternative to the current torture regime. Given the current state of death penalty law, even anti-death penalty absolutists must recognize the importance of coupling their arguments for abolition with those urging smaller reforms that bring the law closer to that ultimate goal.

Part II surveys the controversy surrounding the lethal injection and the Supreme Court's Eighth Amendment method-of-execution decisions, and then introduces both the *Gross* majority opinion and Justice Breyer's scathing dissent, in which he questions the constitutionality of the death penalty altogether. Part III applies the *Baze* test to Oklahoma's three-drug lethal injection protocol and illustrates why, contrary to the *Gross* majority ruling, Oklahoma's current lethal injection protocol is unconstitutional. Lastly, Part IV examines the status of the abolitionist argument in light of Justice Breyer's dissent.

II. Background: criticism and jurisprudence concerning lethal injections

Although the procedures, doses, and drug types in lethal injection protocols vary considerably across states, lethal injection as a class is the primary execution method in every state that institutes the death penalty.¹⁷ Some states still permit alternative execution methods,¹⁸ but society and lawmakers consider the lethal injection the most humane execution method available.¹⁹ Though humane in theory, the history of botched lethal injections in practice demonstrates otherwise.²⁰ A study of all U.S. executions between 1890 and 2010 reveals that the rate of botched lethal injections alone more than doubles the rate of botched executions across all methods.²¹ The complications inherent in administering multi-drug lethal injections, paired with the largely untrained prison employees that administer these procedures and the frequent accidents that result, raise concern about the humaneness of this execution method. Section A describes the typical lethal injection procedure of administering three consecutive drugs and discusses the accidents that are symptomatic of this complicated procedure, especially when using the controversial drug, midazolam. Section B outlines Supreme Court jurisprudence in Eighth Amendment method-of-execution challenges, and Section C introduces the Court's most recent case on this issue, *Glossip v. Gross*.

A. Criticism and evolution of the lethal injection

Although execution by lethal injection is supposed to be quick and painless, many aspects of the complicated three-drug procedure can and do go wrong,

leaving the inmate in prolonged agony. Criticisms of this procedure center on the execution staff's ineptitude, which causes frequent mishap.²² Additional criticisms of three-drug lethal injections focus on the trend amongst states such as Oklahoma, to incorporate midazolam—a controversial and largely untested drug—into what is already a very risky and complicated execution procedure. This section first discusses the procedure that states use in typical three-drug lethal injections, then overviews criticisms of the lethal injection procedure, and finally introduces a single-drug lethal injection alternative many states are implementing.

1. Procedural criticisms of three-drug lethal injection protocols

To understand why three-drug lethal injections commonly go wrong, it is important to understand what the procedure entails. First, prison guards strap the inmate to a gurney and insert intravenous (I.V.) lines into one of the inmate's arms.²³ Then, the prison employees inject the inmate with a lethal quantity of three drugs: an anesthetic (traditionally sodium thiopental²⁴), followed by a muscle relaxant to paralyze the inmate (traditionally pancuronium bromide²⁵), and finally potassium chloride to induce cardiac arrest.²⁶ The first drug, if given in sufficient doses, protects the inmate from excruciating pain associated with the paralysis and cardiac arrest induced by the second two drugs.²⁷ If the execution staff administers the procedure correctly, the inmate should die within minutes of the first injection.²⁸

One common criticism of the three-drug lethal injection hinges on the ineptitude of the prison employees to administer such a complicated medical procedure.²⁹ The concern is that prison employees perform this procedure with minimal training and with no medical professionals in the death chamber to assist.³⁰ The most common accident in three-drug lethal injection procedures is the prison employees' failure to properly administer the anesthetic.³¹ The failure to administer the anesthetic can occur by improperly inserting the catheter into the inmate's vein or by using an ineffective dose of anesthetic.³² Determining the right dose is particularly challenging with condemned inmates because—due to a history of intravenous drug use, obesity, and other aspects of poor health—they are at particular risk of being immune to the anesthetic effects of the drugs.³³ With at-risk inmates such as these, it is especially important that the prison staff monitor the delivery and reaction to the anesthesia to ensure unconsciousness.³⁴ Prisons do not, however, permit anyone to monitor the inmate's sedation level before the next two painful drugs are administered.³⁵ Without sufficient anesthetic, the inmate will remain conscious as the second drug suffocates him by paralyzing his diaphragm, and the third drug—potassium chloride—“inflamm[e]s . . . [his] sensory nerve fibers, literally burning up [his] veins as it travels to [his] heart.”³⁶ An inmate in complete agony will still appear calm to witnesses due to the partial paralysis that prevents him from crying out.³⁷

The complications inherent in three-drug lethal injections, paired with the medical incompetence of the execution staff, results in frequent botched executions throughout the nation. In Oklahoma's execution of Lockett, the prison staff struggled to find a vein in his arm, so they tried to set an I.V. into his groin, which blew out one of his veins and caused blood to squirt on him.³⁸ In a Kentucky execution, an improperly trained prison guard faced similar struggles and decided to inject the lethal chemicals into the inmate's neck.³⁹ In Florida, the prison staff "pushed [the needles] all the way through the blood vessels into surrounding soft tissue," leaving chemical burns and causing severe pain.⁴⁰ In Texas, an inmate took forty minutes to die after the I.V. popped out of his vein and sprayed the lethal chemicals toward witnesses.⁴¹ In Missouri, the prison staff strapped the inmate so tightly to the gurney that the chemicals stopped circulating, and he was left convulsing.⁴² In Illinois, a kink in the I.V. tube prevented the drugs from reaching the inmate.⁴³ And, in another case, the drugs unexpectedly clogged the I.V. tube and prolonged the execution.⁴⁴ Anesthesiologists blamed the inexperienced prison officials, saying that an "I.V. 101" class would have prevented the error.⁴⁵ In Ohio, prison guards inserted needles into the inmate eighteen times in their pursuit of a usable vein, and at one point the inmate tried to help them locate a vein.⁴⁶ These are just a few of the countless accidents that occur during complicated three-drug lethal injection procedures.

2. Criticisms of the inclusion of midazolam in lethal injections

In addition to the complications inherent in three-drug lethal injection protocols, states such as Oklahoma add greater complication and risk by including a largely-untested drug called midazolam as an experimental anesthetic replacement. Before 2009, states across the nation uniformly administered a standard, well-tested, three-drug cocktail that included the powerful anesthetic, sodium thiopental.⁴⁷ Then, international and domestic laws that abolished capital punishment,⁴⁸ paired with the political resistance to aiding capital punishment, forced international pharmaceutical companies to stop selling sodium thiopental to the United States for use in lethal injections.⁴⁹ In 2009, the Food and Drug Administration (FDA) stopped licensing U.S. pharmaceutical companies to sell sodium thiopental for that purpose as well.⁵⁰ In order to continue killing inmates, capital punishment states were forced to come up with new lethal-injection cocktails.⁵¹ Without avenues for rigorously testing lethal drugs before use, however, the inmates effectively became lab rats.⁵² These untested drug combinations resulted in a slew of botched executions and subsequent Eighth Amendment challenges, which in turn led states to pass secrecy laws to avoid condemned inmates' attorneys finding out the ingredients, effectiveness, doses, and suppliers of these new chemicals.⁵³

One such anesthetic replacement drug that states throughout the country began to use is midazolam. Midazolam's anesthetic qualities, however, dif-

fer markedly from sodium thiopental, and therefore has a markedly different effect on inmates.⁵⁴ Sodium thiopental is a rapid-onset, short-acting barbiturate⁵⁵ that hospitals widely use as their general anesthetic because it causes unconsciousness within thirty to forty-five seconds.⁵⁶ Midazolam, on the other hand, is not an anesthetic. Rather, it causes muscle relaxation and memory loss by enhancing the effect of the neurotransmitter gamma-aminobutyric acid (GABA), allowing it to more easily attach to the GABA receptors.⁵⁷ Midazolam, like all benzodiazepines,⁵⁸ reaches a “ceiling effect” when there is no more GABA available to bind to GABA receptors.⁵⁹ This ceiling effect often occurs before midazolam saturates the person’s nerves to a level necessary to induce unconsciousness.⁶⁰ Arizona’s execution of Joseph Wood demonstrates midazolam’s ceiling effect, because despite the state’s administration of 750 mg of midazolam—*fifteen* times the normal dose—Wood still gasped and writhed for two hours before dying.⁶¹ Moreover, even if midazolam does cause some level of unconsciousness, it cannot induce a “coma-like” state of unconsciousness. Therefore, the inmate may be “jolted into consciousness” by stimulation such as the pain potassium chloride inflicts—which is the third drug in the three-drug lethal injection sequence.⁶² Thus, midazolam on its own cannot serve as a reliable anesthetic.

Several states, including Arizona, Florida, Ohio, and Oklahoma, incorporated the drug into their executions, despite warnings of the ineffectiveness of midazolam, and the results were disastrous.⁶³ Ohio was the first state to use midazolam in an execution, and the inmate gasped, writhed, and struggled for air for twenty-six minutes.⁶⁴ A priest who witnessed the execution described it as “ghastly” and “inhumane.”⁶⁵ Arizona also used midazolam in an execution, and the inmate gulped and snorted for ninety minutes before he died.⁶⁶ The enormity of these botched procedures led Ohio, Arizona, and Kentucky to categorically ban midazolam from all prospective lethal injections.⁶⁷ Oklahoma then used midazolam in Lockett’s execution, and he writhed in pain for forty minutes before suffering a heart attack.⁶⁸ Thus, although the inclusion of midazolam in lethal injections is relatively new, the immediate adverse results led to widespread controversy over the humaneness of the drug.

The sweeping criticisms of midazolam and three-drug lethal injections compelled several states to turn to a more simple, consistent, and error-proof method of lethal injection that involves only one drug. Single-drug executions are carried out with lethal doses of a single anesthetic or barbiturate,⁶⁹ much like doctor-assisted suicides and euthanasia.⁷⁰ Ohio was the first state to administer a one-drug execution in 2009, and the inmate died within ten minutes and showed no sign of suffering.⁷¹ Currently, eight states have formally adopted single-drug lethal injection protocols and six more plan to do so for future executions.⁷² Experts throughout the nation are starting to call for this alternative. Richard Dieter, the executive director of the Death Penalty

Information Center, explained that single-drug executions are “the wave of the future” and that “all . . . major death penalty states have been switching to a single drug.”⁷³ Additionally, the “Constitution Project”—a highly respected think tank composed of bipartisan legal experts—issued a 2014 Report specifically calling for a single-drug lethal injection.⁷⁴ The Constitution Project’s Report carries particular clout because it is endorsed by experts who both oppose and favor the death penalty, including former judges, police chiefs, attorneys general and governors who have signed execution warrants.⁷⁵ The trend throughout the nation toward single-drug lethal injections, paired with widespread societal outrage over contemporary three-drug lethal injections, casts significant doubt on the constitutionality of complicated and experimental multi-drug procedures.

B. Evolution of Eighth Amendment jurisprudence on method-of-execution challenges

The Eighth Amendment’s prohibition on cruel and unusual punishment limits state execution methods to those that do not inflict pain or suffering beyond what is reasonably necessary to induce death. The exact standards that the Eighth Amendment imposes have varied over time because the Amendment “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁷⁶ The Supreme Court’s first method-of-execution decision, *Wilkerson v. Utah*, upheld the constitutionality of the firing squad and instituted the principle that punishments are “cruel and unusual” if they involve pain beyond what is normally expected at death.⁷⁷ Eleven years later, the Court expounded the Eighth Amendment principle that execution methods must also guarantee a quick and painless death.⁷⁸ In so deciding, the Court explained that New York’s “application of electricity to the vital parts of the human body” would undoubtedly cause an instantaneous and painless death.⁷⁹ Half a century later, in *Louisiana ex rel. Francis v. Resweber*, the Court addressed whether a second imposition of electrocution, after an initial attempt failed, violated the Eighth Amendment.⁸⁰ The Court determined that the second electrocution attempt did not run afoul of the Eighth Amendment because the first failed attempt was an unforeseeable accident, and therefore, did not add an element of cruelty to the subsequent execution.⁸¹

time, but the opinion established an Eighth Amendment test to determine when an execution method would cross this constitutional line.⁸³ Under *Baze*, for an execution method to violate the Eighth Amendment, “a prisoner [must] establish that the state’s lethal injection protocol [1] creates a demonstrated risk of severe pain” and “[2] that the risk is substantial when compared to the known and available alternatives.”⁸⁴

The “risk of pain” prong of the test focuses on the amount of pain that the execution method could inflict upon the inmate and the risk of accidents during the administration of the execution. The *Baze* Court emphasized

that “[s]imply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of ‘objectively intolerable risk of harm’ that qualifies as cruel and unusual” under the Eighth Amendment.⁸⁵ However, repeated failure—as opposed to an isolated accident— would constitute an Eighth Amendment violation.⁸⁶ The *Baze* Court found Kentucky’s inclusion of sodium thiopental in its three-drug cocktail⁸⁷ eliminated any significant risk of pain because, if the prison employees properly administered the anesthetic, the prisoner would not feel the subsequent injection of drugs.⁸⁸

The Court further explained that “[a] state with a lethal injection protocol substantially similar to the protocol [upheld in *Baze*]” would not present an unconstitutional risk of pain.⁸⁹ The Court did, however, recognize that without a proper dose of sodium thiopental to render the prisoner unconscious, there would be a “constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and of pain from potassium chloride.”⁹⁰ Thus, to meet the first prong of the *Baze* test, the inmate must either prove that the drug combination itself presents a substantial risk of pain, or that there is substantial risk of accident during the procedure that would cause pain.⁹¹

The “viable alternative” prong of the *Baze* test includes a comparison to other, equally effective methods of execution the state could implement that would substantially lower the risk of pain.⁹² In *Baze*, the Court rejected the petitioner’s argument that a single-barbiturate injection was a viable alternative because such a method had “not been adopted [or tried] by any State.”⁹³ The Court explained that “Kentucky’s continued use of the three-drug protocol cannot be viewed as posing an ‘objectively intolerable risk’ when petitioners have proffered no study showing that the one-drug method is an equally effective manner of imposing a death sentence.”⁹⁴ The drastic change in the availability of lethal injection drugs and consequent slew of botched executions since *Baze*, however, paved the way for the re-assessment of the constitutionality of three-drug lethal injections in *Glossip v. Gross*.⁹⁵

C. *Glossip v. Gross*: Constitutional challenge to Oklahoma’s three-drug lethal injection

Despite the clear agony and torture Oklahoma subjected inmate Clayton Lockett to during his April 29, 2014 execution, in *Glossip v. Gross* the United States Supreme Court upheld the constitutionality of Oklahoma’s three-drug lethal injection protocol. The three-drug lethal injection Oklahoma used on Clayton Lockett⁹⁶ caused him to strain on the gurney in what seemed to be extreme pain and exclaim “something is wrong” and the “drugs aren’t working.”⁹⁷ The initial drug, midazolam, failed to induce Lockett into a “coma-like state,” and he lay in agony for forty minutes until finally suffering a heart attack.⁹⁸ The White House released a statement that the execution “fell short of humane standards.”⁹⁹

Dozens of condemned Oklahoma inmates sued the state, citing Oklahoma's use of midazolam as a replacement for sodium thiopental as an Eighth Amendment violation.¹⁰⁰ The United States Supreme Court granted certiorari to determine whether it is constitutional for a state to perform a three-drug lethal injection that includes midazolam, even though there is great risk it will cause the condemned inmate significant pain.¹⁰¹ Oklahoma defended its lethal injection protocol by arguing that there was no viable alternative, and that the constitutional concerns that may have existed during Lockett's execution no longer exist now because the state substantially increased the dose of midazolam to ensure complete unconsciousness.¹⁰² The state also cited Florida's execution of ten inmates with a protocol that incorporates midazolam "without serious incident" as reason to support the constitutionality of midazolam.¹⁰³

The majority opinion in *Gross* applied the *Baze v. Rees* test to Oklahoma's lethal injection protocol and concluded that it did not violate the Eighth Amendment. First, the majority held that the condemned inmates failed to prove a single-drug lethal injection was a viable alternative, which the court deemed a *prerequisite* for declaring the state's existing method unconstitutional.¹⁰⁴ This finding rested largely on Oklahoma officials' cursory claim that they could not procure drugs for a single-drug lethal injection.¹⁰⁵ To the contrary, drugs for single-drug lethal injections appear to be widely available.¹⁰⁶ For example, in the short time since the petitioners filed for certiorari in this case, three other states carried out six single-drug executions using pentobarbital.¹⁰⁷ According to Fordham Professor Deborah Denno—a known expert in the field of lethal injections—any compounding pharmacy can make pentobarbital, and "[y]ou could build a pharmacy in your prison."¹⁰⁸ Texas officials purchased their pentobarbital from a nearby compounding pharmacy.¹⁰⁹ Oklahoma failed to address why pentobarbital is readily available to states throughout the nation but not to Oklahoma.

Second, the court held that the condemned inmates failed to prove a substantial risk of significant pain in future Oklahoma lethal injections because the state allegedly addressed the errors that caused Lockett's painful and prolonged execution.¹¹⁰ Based on these findings, the court affirmed the Tenth Circuit's decision. Two Justices, however, wrote scathing dissents and highlighted the shortcomings in the majority's analysis. Justice Sotomayor went as far as to describe Oklahoma's execution method as a "chemical equivalent of being burned at the stake."¹¹¹

Perhaps the most noteworthy dissent came from Justice Breyer, whose 41-page opinion explains why he believes "the death penalty, in and of itself, now likely constitutes a legally prohibited 'cruel and unusual punishment[.]'"¹¹² Breyer argues that for the death penalty to be constitutional it must have "safeguards sufficient to ensure that the penalty would be applied reliably and not arbitrarily."¹¹³ Yet, Breyer cites the astonishingly high number of

exonerated death row inmates as proof of the unreliability and error-prone nature of capital punishment, and cites the increasingly rare and arbitrary imposition of the death penalty as proof that the punishment is “unusual.”¹¹⁴ In a particularly illuminating statement, Breyer explains, “[f]rom a defendant’s perspective, to receive that sentence, and certainly to find it implemented, is the equivalent of being struck by lightning. How then can we reconcile the death penalty with the demands of a Constitution that first and foremost insists upon a rule of law?”¹¹⁵

Breyer further supports his argument through an evaluation of the “dehumanizing” effect of spending years on death row leading up to execution on condemned inmates. He discusses the torture inherent in solitary confinement paired with a looming yet uncertain death date,¹¹⁶ and adds that, “[g]iven the negative effects of confinement and uncertainty, it is not surprising that many inmates volunteer to be executed...”¹¹⁷ The inherent delay on death row, according to Breyer, also “undermines the death penalty’s penological rationale, perhaps irreparably so.”¹¹⁸ Breyer explains that *this* Court itself has noted that “if the death penalty does not fulfill the goals of deterrence or retribution, ‘it is nothing more than the purposeless and needless imposition of pain and suffering and hence an unconstitutional punishment.’”¹¹⁹ Finally, Breyer ends his opinion with: “I believe it highly likely that the death penalty violates the Eighth Amendment. At the very least, the Court should call for full briefing on the basic question.”

The potential call to action imbedded in Breyer’s dissent, paired with the scathing criticism of the majority’s analysis that plague both dissenting opinions, indicates that the debate over the constitutionality of the lethal injection in America is far from over.

III. Analysis

The *Glossip v. Gross* concurring and dissenting opinions simultaneously repress the opportunity to challenge modern day lethal injection protocols under the Eighth Amendment, and open the door to broader litigation and debate over the constitutionality of capital punishment in general. This section explains how the majority misapplied the *Baze v. Reese* test to erroneously declare Oklahoma’s three-drug lethal injection that incorporates midazolam constitutional, examines the effect a contrary ruling would have on the nation, and briefly analyzes the call to action signaled by Justice Breyer’s dissent. .

A. Why Oklahoma’s three-drug cocktail is unconstitutional and a call for the adoption of a single-drug lethal injection

The *Gross* majority opinion misapplied the *Baze* test and erroneously declared Oklahoma’s three-drug lethal injection protocol constitutional. The three-drug lethal injection Oklahoma used to execute Lockett¹²⁰ violates the Eighth Amendment under *Baze* because the use of midazolam paired

with the clumsy and inconsistent administration of the injections creates a substantial risk of pain, and a significantly safer alternative is now readily available. Short of abolishing the death penalty altogether, as Breyer suggests, a more constitutionally sound result in *Gross* would have been a reversal of the Tenth Circuit's ruling, and a mandate that Oklahoma adopt an alternative execution method that eliminates the substantial risk of repeating Lockett's excruciating experience.

1. Oklahoma's lethal injection is an Eighth Amendment violation under *Baze v. Reese*

In *Baze*, the Supreme Court conceded that without appropriate anesthesia, the second and third drugs in a three-drug lethal injection would cause "constitutionally unacceptable" pain.¹²¹ Thus, the determination of whether Oklahoma's lethal injection protocol is "cruel and unusual" under *Baze* rests entirely on the reliability and effectiveness of the first drug—the anesthetic—to protect against the pain the last two drugs cause. Oklahoma's particular drug combination is unconstitutional under *Baze* because (a) it produces a substantial risk of a prolonged and painful death, and (b) there is a viable alternative that substantially reduces the risk of pain.

a. Oklahoma's current three-drug protocol produces a substantial risk of pain

Contrary to the *Gross* majority's assertions, the petitioners in *Gross* met the first *Baze* factor because Oklahoma's three-drug lethal injection protocol that includes midazolam presents a "substantial risk" of serious pain. Although the *Baze* opinion explained that any lethal injection protocol substantially similar to the protocol the Court upheld in *Baze* would not create a risk that meets this standard,¹²² Oklahoma's lethal injection protocol starkly diverges from the protocol in *Baze*. First, three-drug lethal injections, as a whole, are significantly less predictable today than they were when the Court decided *Baze* due to the unavailability of sodium thiopental and consequent state experimentation with new drugs.¹²³ Second, the inclusion of midazolam in place of sodium thiopental further differentiates Oklahoma's lethal-injection protocol from the protocol the *Baze* Court analyzed.

The significant increase in the number of accidents associated with insufficiently trained prison employees administering complicated three-drug lethal injections since the 2009 *Baze* opinion is enough to meet the "substantial risk of pain" prong of the test. The slew of botched three-drug lethal injections over the last several years reveals that prison employees have questionable competence to administer these complicated medical procedures.¹²⁴ Although the *Baze* Court rejected the argument that "an unforeseeable accident" could render the entire lethal-injection protocol "cruel and unusual,"¹²⁵ at the time the Court rendered that decision the rate of botched lethal injections was far lower than it is today, thus making such untoward incidents entirely foresee-

able.¹²⁶ The shortage of sodium thiopental since *Baze* led states to reduce their anesthetic doses, be secretive and experimental about their drug combinations, and to seek drugs from unknown suppliers, all greatly increasing complications and the risk of accident.¹²⁷ Moreover, what the Court deemed constitutional in 2008 may certainly be unconstitutional in 2015, because the Eighth Amendment “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.”¹²⁸ The national awareness and outrage over the inhumaneness of three-drug lethal injections has increased significantly since *Baze*, and this indicates a change in societal standards of decency.¹²⁹

In addition to the risk of severe pain associated with contemporary three-drug lethal injections in general, an isolated look at three-drug lethal injections that include midazolam illustrates an even higher risk of pain that was not present in the cocktail the *Baze* court analyzed.¹³⁰ The *Baze* Court acknowledged that without the proper dose of sodium thiopental, Kentucky’s lethal injection protocol would have presented an unconstitutional risk of pain and suffocation from the administration of the subsequent drugs.¹³¹ The use of midazolam in lieu of sodium thiopental raises the very risk against which the *Baze* court cautioned. Specifically, midazolam’s anesthetic qualities are far inferior to sodium thiopental due to the ceiling effect that prevents midazolam from inducing a coma-like unconsciousness, and the likely reversal of midazolam’s sedative effects when mixed with stimuli like potassium chloride—the final drug in the three-drug protocol.¹³² Although in *Gross* Oklahoma officials argued the state’s increase in the dosage of midazolam from 100mg to 500mg since Lockett’s execution makes it a more reliable anesthetic,¹³³ midazolam’s ceiling effect renders this dosage increase completely ineffective.¹³⁴ Arizona’s execution of Joseph Wood demonstrates this point perfectly, as the state used 750 mg of midazolam—250 mg more than Oklahoma requires—yet Mr. Wood still gasped and struggled to breathe for hours, because, even in substantial doses, midazolam cannot reliably induce a comatose state.¹³⁵

The *Gross* majority failed to address the slew of botched executions across the nation that confirm the ineffectiveness of midazolam as an anesthetic by applying the *Baze* test to declare Oklahoma’s three-drug lethal injection constitutional.¹³⁶ Although Oklahoma cited Florida’s use of midazolam in ten executions “without significant incident” as proof of the drug’s success, all this citation proves, as reiterated in Sotomayor’s dissent, is that Florida’s properly-administered paralytic successfully masked the painful results of using midazolam.¹³⁷ In Lockett’s execution the prison guards did not administer the paralytic properly, which caused viewers to witness his slow asphyxiation.¹³⁸ If prison employees administer the paralytic properly, the pain is no less—the viewers simply do not see the pain beneath the inmate’s paralyzed exterior. The paralyzed inmate still fully experiences the suffocation and

the agonizing sensation as the potassium chloride literally burns through the veins.¹³⁹ The substantial risk of accidents in contemporary three-drug lethal injections in general, compounded with the ineffectiveness of midazolam as a sedative, was certainly sufficient for the petitioners in *Gross* to meet the first *Baze* factor, and the Court erred in finding otherwise.

b. One-drug lethal injection protocols present a viable alternative

Contrary to the majority's finding in *Gross*, the petitioners also met the second *Baze* factor because a single-drug lethal injection is a feasible alternative method of execution that "significantly reduces a substantial risk of severe pain."¹⁴⁰ Although the *Baze* Court rejected the one-drug lethal injection as a viable alternative in 2008, the grounds for that rejection no longer exist.¹⁴¹ Specifically, in 2008, no state had yet used the one-drug protocol, therefore, the petitioner in *Baze* was unable to effectively argue that it was as reliable as the three-drug protocol.¹⁴² Moreover, because other states had yet to try the one-drug method in 2008, it was not a "widely available alternative."¹⁴³ Today, however, single-drug lethal injections are irrefutably viable alternatives because eight states—Arizona, Georgia, Idaho, Missouri, Ohio, South Dakota, Texas, and Washington—have each adopted the single-drug lethal injection method.¹⁴⁴

The *Gross* majority's rejection of the viability of a single-drug alternative is therefore baseless. The majority erroneously placed the burden on the petitioners to *prove* the viability of this single-drug alternative, rather than challenging Oklahoma's cursory claim against such viability.¹⁴⁵ Although Oklahoma complained that it could not obtain one of the drugs¹⁴⁶ states commonly use for single-drug lethal injections, well-respected scholars in the field reject that claim as well.¹⁴⁷ Additionally, evidence shows that pentobarbital is certainly not the only feasible drug for single-drug lethal injections. For example, in California the state allows inmates to choose from four possible barbiturates for the single-drug lethal injection: pentobarbital, thiopental, amobarbital, or secobarbital.¹⁴⁸ Similarly, Oregon's terminally ill patients that undergo doctor-assisted suicide have a choice between either second or nembutal, both of which cause a quick, painless, and certain death.¹⁴⁹

Moreover, from a resource standpoint, using a one-drug rather than three-drug protocol will not impose significant fiscal hardship on the states, considering that single-drug injections involve fewer drugs, less machinery, and far less medical expertise to administer.¹⁵⁰ The single-drug lethal injection is also just as—if not more—reliable at inducing death, as has been documented by veterinarians that use single-drug methods to euthanize animals, doctors that perform single-drug doctor-assisted suicides of terminally ill patients, and states that already use one-drug lethal injections.¹⁵¹

Contrary to the *Gross* majority's conclusions, one-drug lethal injections also present a substantially reduced risk of pain compared to three-drug

lethal injections due to the near elimination of opportunity for accidents. First, administering one drug is much simpler than three, which addresses the significant concern of an incompetent execution staff.¹⁵² Second, the one-drug method eliminates the risk of subjecting the inmate to suffocation and immense pain because the one-drug method does not involve a paralytic agent or potassium chloride.¹⁵³ Thus, because of the substantial risk of pain as well as the availability of a viable alternative that significantly reduces the risk of pain, the three-drug lethal injection Oklahoma used to execute Lockett is cruel and unusual punishment under the *Baze* test. The majority's application of the *Baze* test in *Gross* was therefore incorrect.

2. Implications of a Supreme Court decision that three-drug lethal injections like Oklahoma's are unconstitutional

If, through the inevitable slew of botched lethal injection certiorari petitions in the future, the Supreme Court were to reverse its holding in *Gross*, it would result in significant benefits and only a few practical challenges. A positive implication of a Supreme Court determination that lethal injections like Oklahoma's are unconstitutional would be upholding the integrity of the Eighth Amendment. To date, the Supreme Court has sided with the state in every method-of-execution case it has heard.¹⁵⁴ This trend will continue to degrade the public legitimacy of the Eighth Amendment's protections unless the Court establishes clear boundaries on the amount of pain state-sanctioned executions may inflict upon inmates. Eighth Amendment boundary setting is particularly important now, when there is widespread scientific evidence that contemporary three-drug lethal injections are paralyzing inmates before subjecting them to "the chemical equivalent of being burned at the stake."¹⁵⁵ Witnesses in the execution chambers are habitually sickened by the sight of these botched executions, and have spoken out about their disgust at witnessing torture.¹⁵⁶ Thus, a reversal of the *Gross* holding in a future Supreme Court decision is necessary to ensure that no more death-row inmates or witnesses suffer this fate.

Furthermore, although a reversal of the *Gross* holding in the future would solely be a ruling against the particular state in that case, the implications of the decision would protect the constitutional rights of condemned inmates throughout the nation. The fear of being found in violation of the Eighth Amendment in the future would drive states to better train their execution staff, put more care and research into the selection of drug combinations and dosages, and put more safeguards in place in case a drug does not work. Additionally, a determination that a single-drug lethal injection is a constitutional alternative will steer the nation towards a more consistent and easily administrable alternative that will likely produce far less controversy and litigation.

A reversal of the *Gross* holding would naturally also give rise to a few concerns. One concern may be that the fear of declaring a specific combination of

lethal injection drugs unconstitutional could derail the current state of capital punishment throughout the nation, force states to clamor for a new method or combination of drugs or revert to the older methods of the gas chamber or electric chair.¹⁵⁷ This concern, however, would become moot if the Court simultaneously declares the single-drug lethal injection constitutional, because states that use the lethal injection already have the machinery, execution staff, and drugs in place to immediately adopt this change.¹⁵⁸

Another related concern, and one Oklahoma raised in *Gross*, is that many states that use single-drug lethal injection protocols use a lethal dose of sodium thiopental, which is largely unavailable today because the Food and Drug Administration and international laws prohibit the sale of the drug to American prisons.¹⁵⁹ Single-drug lethal injections, however, can and have been successfully administered with other more-widely available drugs such as pentobarbital, amobarbital, secobarbital, and nembutal.¹⁶⁰

Lastly, critics of a reversal of *Gross* might fear such a reversal would provide condemned inmates with a strong legal backing in their Eighth Amendment fight against any execution method states choose to adopt. It is true that inmates could cite the new favorable precedent to argue that a multitude of accidents related to a particular execution method, or widespread scientific evidence of pain associated with that method renders the method unconstitutional. However, because the long list of brutally-botched lethal injections and evidence of pain is so widespread today,¹⁶¹ if another method of execution ever invokes a similar level of widespread outrage, then reliance on this precedent may well be necessary to garner another judicial victory. Thus, although practical challenges may result from a reversal in *Gross* in the future, the integrity of the Eighth Amendment depends on such a ruling.

B. The abolitionist argument in light of Justice Breyer's *Glossip v. Gross* dissent

According to Justice Breyer in his *Gross* dissent, the integrity of the Eighth Amendment may depend on declaring the nation's use of capital punishment as a whole unconstitutional. In his 41-page opinion, Breyer indicates that the increasing complications inherent in keeping the nation's lethal injection regime within the bounds of the Eighth Amendment has reached such a height that the time is ripe to consider the broader constitutional analysis of the death penalty in its entirety.¹⁶² There is no denying that an increasing number of people throughout the nation are beginning to share Breyer's position.¹⁶³ An October Gallup poll indicates that national support for capital punishment is at its lowest in decades, showing a consistent decline since the 1990s.¹⁶⁴ However, the unwavering support capital punishment enjoys in a select few states means that if *national* abolishment is the answer, it must come from the Supreme Court.

The Supreme Court is seemingly split down the middle when it comes to the constitutionality of capital punishment. On one side, it is fairly clear that Justices Alito, Thomas and Roberts will never vote to abolish the death penalty.¹⁶⁵ On the other side, Justice Breyer, Ginsburg, Kagan and Sotomayor will almost certainly vote to abolish the death penalty if the issue appears before the Court.¹⁶⁶ Justice Kennedy provides the key swing vote on the issue. Justice Breyer's dissent seems to indicate that he believes Justice Kennedy will side with the abolitionists if now faced with the question. Such an outcome seems logical considering Justice Kennedy wrote both majority opinions striking down the death penalty for juveniles and child rapists; and, this term, he included in an opinion a wholly unsolicited invitation to challenge the constitutionality of solitary confinement.¹⁶⁷ Justice Kennedy also expressed his disdain for solitary confinement in a March 2015 Congressional hearing, explaining that isolation in American prisons "literally drives men mad."¹⁶⁸ Perhaps these humanitarian impulses extend to ending capital punishment altogether?

Justice Breyer's opinion raises the critical issue of timing. Breyer's invitation may be a signal that the small window in which the abolitionist movement could succeed is currently open. However, history has shown that if the abolitionists prematurely launch the issue to the Supreme Court, it can result in severe backlash, as was true after the Court's *Georgia v. Furman* decision.¹⁶⁹ Breyer's decision now presents the abolitionists with the dilemma of continuing to whittle away at the margins of the issue or fighting for complete abolition. But waiting any longer to bring the broader question to the Court could mean a lost opportunity. After all, this specific Supreme Court makeup and public disdain for capital punishment may not present itself synchronously again for a long time. This may be the time for action.

C. Conclusion

The death penalty in America has come under unusually sharp and much-deserved scrutiny due to the frequent accidents and visibly torturous pain lethal injections inflict upon condemned inmates.

The majority in *Gross* unfortunately continued the Court's unwavering legacy of refusing to deem an execution method unconstitutional.

When the Court next has the opportunity to rule on an Eighth Amendment challenge to three-drug lethal injections, the Court should reverse its holding in *Gross* and determine that the torture states inflict upon their condemned inmates in the guise of a seemingly humane three-drug lethal injection can no longer stand under the Eighth Amendment. And perhaps, as Justice Breyer signals in his dissenting opinion, the time is ripe for the Court to reassess the constitutionality of capital punishment in the United States in its entirety.

NOTES

1. Katie Fretland, *Clayton Lockett writhed and groaned. After 43 minutes, he was declared dead*, GUARDIAN (April 30, 2014), <http://www.theguardian.com/world/2014/apr/30/clayton-lockett-oklahoma-execution-witness>.
2. *Id.* Midazolam is supposed to render the condemned inmates unconscious before the lethal drugs enter their system, however the drug is not FDA approved, and has caused several botched executions. See *infra* Section II.A.2.
3. *Id.*
4. *Id.*
5. *Id.*
6. See *infra* Section II.B.
7. Charles Warner is an Oklahoma inmate scheduled for execution two hours after Lockett, but whose execution was stayed. Fretland, *supra* note 1.
8. 42 U.S.C. § 1983 permits any person within U.S. jurisdiction to file suit against anyone who, acting under color of the color of state law, causes them to be deprived of a right, privilege, or immunity secured by federal law.
9. See *Warner v. Gross*, No. 14-cv-00665, 2014 WL 7671680 (W.D. Okla. Dec. 22, 2014).
10. See *Warner v. Gross*, 135 S.Ct. 824 (2015).
11. The case dealing exclusively with the injunction was titled *Warner v. Gross*. However, the grant of certiorari on the constitutional issue uses the name of another inmate, Richard E. Glossip. See *Glossip v. Gross*, No. 14–7955, 576 U.S. ____, 135 S. Ct. 1197 (2015), *reported sub nom. Warner v. Gross*, 135 S. Ct. 1173 (2015).
12. *Baze v. Reese*, 553 U.S. 35 (2008).
13. See *id.*
14. *Id.* at 50, 61 (plurality opinion) (internal quotation marks omitted).
15. See *infra* Section II.A.
16. See *supra* text accompanying note 2.
17. Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L.J. 1331, 1334 (2014) [hereinafter Denno, *Lethal Injection Chaos*]. In many states, lethal injection is the *only* method of execution, but some states have alternative methods as well. See *Authorized Methods*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/methods-execution> (last visited Dec 22, 2015). Eight states also permit electrocution (Alabama, Arkansas, Florida, Kentucky, Oklahoma, South Carolina, Tennessee, and Virginia). *Id.* Though Tennessee *only* permits electrocution if lethal injection drugs are unavailable. *Id.* Five states permit the gas chamber (Arizona, California, Missouri, Wyoming, and Oklahoma). *Id.* Though Oklahoma *only* permits the gas chamber if lethal injection drugs are unavailable or if courts strike down the lethal injection. *Id.* Three states permit hanging (Delaware, New Hampshire, and Washington). *Id.* Two states permit the firing squad (Utah and Oklahoma). *Id.* Though Oklahoma *only* permits firing squad if courts declare both lethal injection and electrocution unconstitutional. *Id.* Utah used to allow *only* firing squad if an inmate *chose* it prior to its elimination in 2004; however, as of March 23, 2015, the state is authorized to use the firing squad if lethal injection drugs are unavailable. *Id.*
18. See *supra* text accompanying note 17.
19. See Roberta M. Harding, *The Gallows to the Gurney: Analyzing the (Un)Constitutionality of the Methods of Execution*, 6 B.U. PUB. INT. L.J. 153, 163, 153 (1996); Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 129, tbl. 1 (2002) [hereinafter Denno, *The Troubling Paradox*]; Brenton Schick, *Lethal Injection, Cruel And Unusual? Establishing A Demonstrated Risk Of Severe Pain: Morales V. Cate*, 623 F.3d 828 (9th Cir. 2010), 38 W. ST. U. L. REV. 173, 176 (2008).
20. *The Most Botched Executions*, DAILY BEAST (April 30, 2014), <http://www.thedailybeast.com/articles/2014/04/30/lethal-injection-leads-to-the-most-botched-executions.html>.

21. *Id.*; Tierney-Sneed, *Can the Death Penalty Survive Lethal Injection?*, U.S. NEWS (Aug 7, 2014), <http://www.usnews.com/news/articles/2014/08/07/can-the-death-penalty-survive-lethal-injection>.
22. See *supra* Section II.A.1.
23. See Denno, *The Troubling Paradox*, *supra* note 19, at 146.
24. The FDA now prohibits pharmaceutical companies from selling this drug to prisons. See *infra* Section II.A.2.
25. The paralytic stops the inmate's breathing by paralyzing the diaphragm and lungs.
26. Michael A. Cokley, *Whatever Happened To That Old Saying "Thou Shall Not Kill?": A Plea for the Abolition of the Death Penalty*, 2 LOY. J. PUB. INT. L 67, 93 (2001); See Denno, *The Troubling Paradox*, *supra* note 19, at 146.
27. *Baze v. Reese*, 553 U.S. 35, 49 (2008) (Alito, J., concurring).
28. See *State by State Lethal Injection*, DEATH PENALTY INFO. CTR. <http://www.deathpenaltyinfo.org/state-lethal-injection> (last visited Mar. 8, 2015).
29. See Erik Eckholm, *Panel Urges One-Drug Lethal Injections*. N.Y. TIMES (May 7, 2014), http://www.nytimes.com/2014/05/07/us/panel-urges-one-drug-lethal-injections.html?_r=0. Execution team members often do not know the nature or properties of the drugs they are injecting into inmates, nor the risks associated with the procedure. See *Morales v. Tilton*, 465 F.Supp.2d 972, 979 (N.D. Cal. 2006).
30. See Eckholm, *supra* note 29.
31. See *Brown v. Beck*, No. 5:06CT3018 H, 2006 WL 3914717, at *7 (E.D.N.C. Apr. 7, 2006); Denno, *Lethal Injection Chaos*, *supra* note 17, at 1334; *Murderer Executed After a Leaky Lethal Injection*, N.Y. TIMES, Dec. 14, 1988, at A29. See Amanda C. Pustilnik, *Pain As Fact And Heuristic: How Pain Neuroimaging Illuminates Moral Dimensions Of Law*, 97 CORNELL L. REV. 801, 837 (2012); HUMAN RIGHTS WATCH, *SO LONG AS THEY DIE: LETHAL INJECTIONS IN THE UNITED STATES 21* (2006), available at <http://hrw.org/reports/2006/us0406/us0406web.pdf> [hereinafter HUMAN RIGHTS WATCH REPORT].
32. See *ASA Standards for Basic Anesthesia Monitoring*, AMERICAN SOCIETY OF ANESTHESIOLOGISTS (revised Oct. 25, 2005), <http://www.asahq.org/publicationsAndServices/Standards/02.pdf> (retrieved December 22, 2015); *2000 Report of the AVMA Panel on Euthanasia*.
33. See *ASA Standards*, *supra* note 32, at 7-8.
34. See *id.*
35. *Id.* Standard medical (and even veterinary) procedures require a hands-on determination of the patient's level of anesthesia before the initiation of painful procedures. *Id.* at 15.
36. See *Beck*, 2006 WL 3914717, at *7; Denno, *Lethal Injection Chaos*, *supra* note 17, at 1334; *Murderer Executed After a Leaky Lethal Injection*, *supra* note 31; Pustilnik, *supra* note 31, at 837; HUMAN RIGHTS WATCH REPORT, *supra* note 31, at 21.
37. HUMAN RIGHTS WATCH REPORT, *supra* note 31, at 21.
38. *Id.*; Katie Fretland, *Scene at Botched Oklahoma Execution of Clayton Lockett Was 'A Bloody Mess'*, THE GUARDIAN (Dec. 13, 2014), <http://www.theguardian.com/world/2014/dec/13/botched-oklahoma-execution-clayton-lockett-bloody-mess> [hereinafter Fretland, *Scene At Botched Oklahoma*].
39. Deborah W. Denno, *Death Bed*, 124 TRIQUARTERLY 141, 162 (2006) (discussing *Baze*).
40. Ed Pilkington & Alan Yuhas, *Lethal Injections: A Brief History of Botched US Executions*, GUARDIAN (Apr. 30, 2014), <http://www.theguardian.com/world/2014/apr/30/oklahoma-execution-history-botched-execution> (citing the Associated Press).
41. See *Drawn-out Execution Dismays Texas Inmates*, DALLAS MORNING NEWS, Dec. 15, 1988, at 29A.
42. Tim O'Neil, *Too-Tight Strap Hampered Execution*, ST. LOUIS POST-DISPATCH, May 5, 1995, at B1; Jim Slater, *Execution Procedure Questioned*, KANSAS CITY STAR, May 4, 1995, at C8.

43. See *Niles Group Questions Execution Procedure*, UNITED PRESS INT'L, Nov. 8, 1992 (LEXIS/NEXUS file).
44. See Scott Fornek and Alex Rodriguez, *Gacy Lawyers Blast Method: Lethal Injections Under Fire After Equipment Malfunction*, CHICAGO SUN-TIMES, May 11, 1994, at 5; Rich Chapman, *Witnesses Describe Killer's 'Macabre' Final Few Minutes*, CHICAGO SUN-TIMES, May 11, 1994, at 5.
45. Rob Karwath & Susan Kuczka, *Gacy Execution Delay Blamed on Clogged I.V. Tube*, CHICAGO TRIB., May 11, 1994, at 1 (Metro Lake Section).
46. See *State v. Broom*, No. 96747, 2012 WL 504504, at *1 (Ohio Ct. App. Feb. 16, 2012); Pilkington & Yuhas, *supra* note 40.
47. See Denno, *When Legislatures Delegate Death*, *supra* note 19 at 146 tbl. 11.
48. The International Covenant on Civil and Political Rights (ICCPR) does not outright prohibit the death penalty, but a number of less widely adopted treaties do. For example, the Second Optional Protocol to the International Covenant on Civil and Political Rights; the Protocol to the American Convention on Human Rights to Abolish the Death Penalty; Protocol Six to the European Convention for the Protection of Human Rights and Fundamental Freedoms; Protocol Thirteen to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Other treaties strictly limit the death penalty, including: the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States; the American Convention on Human Rights; and the Arab Charter on Human Rights. See *The Death Penalty under International Law: A Background Paper to the IBAHRI Resolution on the Abolition of the Death Penalty*, INT'L BAR ASSOC. (May 2008), http://www.ibanet.org/Human_Rights_Institute/About_the_HRI/HRI_Activities/death_penalty_resolution.aspx (follow "The Death Penalty Under International Law (Deathpenalty_Paper.pdf)" hyperlink)
49. *Id.*; See Molly Redden, *New Lethal Injections Could Cause Extreme Pain, Make Deaths "Drag On" for Hours*, MOTHER JONES (Nov. 7, 2013, 7:00 AM), <http://www.motherjones.com/politics/2013/11/ohio-lethal-injection-cocktail-execution-drugs>.
50. *In Lethal Injection Case, High Court has a Chance to Take a Bold Step*, L.A. TIMES (Jan. 26, 2015, 5:38 PM), <http://www.latimes.com/opinion/editorials/la-ed-death-penalty-supreme-court-oklahoma-drugs-20150127-story.html>. In 2011, the last U.S. supplier, a company called Hospira, stopped making sodium thiopental. *Id.*
51. See Redden, *supra* note 49.
52. *Id.*
53. For example, Arkansas, Georgia, South Dakota, Texas and Tennessee have all passed laws to keep their execution recipes secret. See Paul Lewis, *Report Urges One-Drug Lethal Injection to Avoid Botched US Executions*, THE GUARDIAN (May 7, 2014, 11:41 AM), <http://www.theguardian.com/world/2014/may/07/oklahoma-lethal-injection-execution-drugs-constitution-animals>; see also Denise Grady, *Three-Drug Protocol Persists for Lethal Injections, Despite Ease of Using One*, N.Y. TIMES (May 1, 2014), <http://www.nytimes.com/2014/05/02/science/three-drug-protocol-persists-for-lethal-injections-despite-ease-of-using-one.html>.
54. See Matt Pearce et al., *Arizona Killer Takes 2 Hours to Die, Fueling Lethal-Injection Debate*, L.A. TIMES (July 23, 2014, 11:17 PM), <http://www.latimes.com/nation/nationnow/la-na-nn-arizona-execution-20140723-story.html>; Lewis, *supra* note 53.
55. Central nervous system depressants that produce a spectrum of effects, from mild sedation to total anesthesia.
56. Bill Perkins, *How Does Anesthesia Work?*, SCIENTIFIC AMERICAN (Feb. 7, 2005), <http://www.scientificamerican.com/article/how-does-anesthesia-work/>.
57. See generally, *Midazolam*, U.S. NATIONAL LIBRARY OF MEDICINE, <http://livertox.nlm.nih.gov/Midazolam.htm> (last visited April 5, 2015).
58. Drug that causes sedation, sleep, muscle relaxation, hypnosis, and decreased anxiety by enhancing the effect of the GABA at the GABA receptor. See *id.*

59. *Id.*
60. As explained by anesthesiologist Dr. Lubarsky during his expert testimony in Warner v. Gross, 135 S. Ct. 824 (2015) (Sotomayor, J., dissenting).
61. See Fernanda Santos, *Executed Arizona Inmate Got 15 Times Standard Dose, Lawyers Say*, N.Y. TIMES (Aug. 1, 2014) <http://www.nytimes.com/2014/08/02/us/executed-arizona-man-given-15-times-standard-dose-lawyers-say.html>.
62. See J.G. Reves et al., *Midazolam: Pharmacology and Uses*, 62 ANESTHESIOLOGY 310, 318 (1985). See also, Warner, 135 S. Ct. at 824 (Sotomayor, J., dissenting) (citing expert testimony of anesthesiologist Dr. Lubarsky).
63. Louisiana, Kentucky, Alabama and Virginia also made future plans to incorporate midazolam, but have not yet done so. See *State by State Lethal Injection*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/state-lethal-injection> (last visited Feb 27, 2015).
64. Erica Goode, *After a Prolonged Execution in Ohio, Questions over 'Cruel and Unusual'*, N.Y. TIMES, Jan. 17, 2014; Pilkington & Yuhas, *supra* note 40.
65. *Id.*
66. Pilkington & Yuhas, *supra* note 40.
67. See Pearce et al., *supra* note 54.
68. See Mark Berman, *Ohio Drops Controversial Lethal Injection Drug, Postpones Upcoming Execution*, WASH. POST (Jan 9, 2015), <http://www.washingtonpost.com/news/post-nation/wp/2015/01/09/ohio-drops-controversial-lethal-injection-drug-postpones-upcoming-execution/>; Alan Johnson, *ACLU Seeks Execution Records; Inmate Suffocated, Doctor Says*, COLUMBUS DISPATCH, June 1, 2007, at B5; Pilkington & Yuhas, *supra* note 40; Brett Barrouquere, *Kentucky Drops 2-Drug Executions, Reworking Method*, ASSOCIATED PRESS (Nov. 14, 2014, 7:00 AM), available at http://www.denverpost.com/ci_26937217/kentucky-drops-2-drug-executionsreworking-method.
69. Fretland, *supra* note 1.
70. Central nervous system depressants that produce a spectrum of effects, from mild sedation to total anesthesia.
71. Oregon's Death with Dignity Act permits terminally ill patients to take large doses of one of two barbiturates that puts them in a coma within about five minutes, and induces a painless death within half an hour later. See OREGON DEPARTMENT OF HUMAN SERVICES, 2009 SUMMARY OF OREGON'S DEATH WITH DIGNITY ACT, www.oregon.gov/DHS/ph/pas/docs/year12.pdf (last visited March 3, 2015); Eckholm, *supra* note 29; Lewis, *supra* note 53.
72. Ariane De Vogue & Dennis Powell, *Ohio Killer Executed in First Use of Single-Drug Lethal Injection*, ABC NEWS (Dec. 8, 2009), <http://abcnews.go.com/Politics/lethal-injection-ohio-perform-execution-single-drug/story?id=9277599>. See Adam Liptak & Adam B. Ellick, *Judge Orders Ohio to Alter Its Method of Execution*, N.Y. TIMES, June 11, 2008, <http://www.nytimes.com/2008/06/11/us/11death.html>.
73. The eight states that have used the single-drug method are Arizona, Georgia, Idaho, Missouri, Ohio, South Dakota, Texas, and Washington. The six states that have announced plans to use it are Arkansas, California, Kentucky, Louisiana, North Carolina, and Tennessee. See Denno, *Lethal Injection Chaos*, *supra* note 17, at 1359-60 charts 3 & 4; *State by State Lethal Injection*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/state-lethal-injection> (last visited Feb 27, 2015). California has formally proposed the one-drug method, which must first be subject to a public hearing before the state's final adoption of it. Christopher Cadelago & Sam Stanton, *Will California Begin Executions Again Under New Method?*, THE SACRAMENTO BEE (Nov. 6, 2015, 10:08 AM), <http://www.sacbee.com/news/politics-government/capitol-alert/article43441407.html>.
74. Laura Vozzella, *Virginia Opts For One-Drug Lethal Injection Protocol*, WASH. POST (July 27, 2012), https://www.washingtonpost.com/local/dc-politics/virginia-opts-for-one-drug-lethal-injection-protocol/2012/07/27/gJQA8jxiEX_story.html.
75. See The Constitution Project Death Penalty Committee, *Irreversible Error: Recom-*

mended Reforms for Preventing and Correcting Errors in the Administration of Capital Punishment, THE CONSTITUTION PROJECT (2014), www.constitutionproject.org; see also Eckholm, *supra* note 29.

75. Lewis, *supra* note 53.
76. *Trop v. Dulles*, 356 U.S. 86, 100 (1958).
77. 99 U.S. 130, 135-36 (1879). Wilkerson declined to be strapped down before his execution by firing squad. After a sheriff gave the command to fire, Wilkerson moved enough that the bullets struck his arm and torso but not his heart. Wilkerson took 27 minutes to bleed to death. See Gilbert King, *Cruel and Unusual History*, N.Y. TIMES (April 23, 2008), http://www.nytimes.com/2008/04/23/opinion/23king.html?_r=0.
78. *In re Kemmler*, 136 U.S. 436 (1890); Harding, *supra* note 19, at 162.
79. See *Kemmler*, 136 U.S. at 443.
80. 329 U.S. 459 (1947).
81. *Id.*
82. See 553 U.S. 35 (2008).
83. See generally *id.*
84. *Id.* at 61; *A New Test For Evaluating Eighth Amendment Challenges To Lethal Injections*, 120 HARV. L. REV. 1301, 1301 (2007).
85. *Baze*, 553 U.S. at 50.
86. *Id.* at 49 (citing *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 470-71 (1947) (Frankfurter, J., concurring)).
87. See *supra* Section II.A (discussing the three-drug combination that, since 2009, is no longer available).
88. *Baze*, 553 U.S. at 50.
89. *Id.* at 61.
90. *Id.* at 53, 55.
91. See generally *id.*
92. “A condemned prisoner cannot successfully challenge a State’s method of execution merely by showing a slightly or marginally safer alternative.” *Id.* at 51 (Alito, J., concurring).
93. *Id.* at 41 (plurality opinion).
94. *Id.* at 53, 57.
95. See *supra* Section II.A.2.
96. For more on the crimes Lockett committed and the details of his execution, see Jaime Fuller, *Why Were The Two Inmates In Oklahoma On Death Row In The First Place?*, WASH. POST (April 30, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/04/30/why-were-the-two-inmates-in-oklahoma-on-death-row-in-the-first-place/>.
97. *Warner v. Gross*, 135 S. Ct. 824 (2015) (Sotomayor, J., dissenting); Fretland, *Scene At Botched Oklahoma*, *supra* note 38.
98. *Warner*, 135 S. Ct. at 824.
99. Lewis, *supra* note 53.
100. See *Warner v. Gross*, 2014 WL 7671680 (W.D. Okla. 2014) (aff’d 776 F.3d 721 (10th Cir. 2015)).
101. See *id.*
102. See Brief for Respondent at 7, *Glossip v. Gross*, 135 S. Ct. 1197 (2015) (No. 14-7955).
103. See *id.*
104. See *Glossip v. Gross*, 576 U.S. ___, 14 (2015).
105. See *id.*; see also *Execution List 2015*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executionlist-2015> (last visited Dec. 22, 2015).
106. See *supra* text accompanying note 72.

107. Missouri, Texas, and Georgia. *See Execution List 2015*, *supra* note 105. Moreover, Georgia, Mississippi, Missouri, and Texas have all used or plan to use pentobarbital from compounding pharmacies. *See* Wendy N. Davis, *Compound Sentence: States Keep Mum On Where Lethal Injection Drugs Are Made*, 100-MAR A.B.A. J. 15 (2014); Grady, *supra* note 53.
108. Maura Dolan, *California Now Under Pressure to Propose Lethal Injection Method*, L.A. TIMES (June 29, 2015, 7:26 PM), <http://www.latimes.com/local/california/la-me-lethal-injection-calif-20150630-story.html>.
109. Associated Press, *Texas: State Bought Execution Drugs From a Compounding Pharmacy*, N.Y. TIMES (Oct. 3, 2013), http://www.nytimes.com/2013/10/03/us/texas-state-bought-execution-drugs-from-a-compounding-pharmacy.html?_r=0.
110. *See Gross*, 576 U.S. at 16-17. *See also infra* Section III.A.1.a (discussing why the state's alleged resolution of the issue is inadequate).
111. *Id.* at 2 (Sotomayor J., dissenting).
112. *Id.* at 2 (Breyer, J., dissenting).
113. *Id.* at 1.
114. *See id.* at 17. In a noteworthy reposte to Justice Scalia, Breyer cites the exoneration of Henry Lee McCollum, commonly referred to as "Scalia's favorite murderer." *Id.* at 30.
115. *See id.* at 9.
116. *Id.* at 20-21.
117. *Id.* at 22.
118. *Id.* at 23.
119. *Id.* at 28 (citing *Atkins*, 536 U. S., at 319 (quoting *Enmund v. Florida*, 458 U. S. 782, 798 (1982) (internal quotation marks omitted))).
120. Oklahoma still permits three-drug lethal injections in future executions. *See supra* Section II.C (introducing *Glossip v. Gross*).
121. *See Baze v. Reese*, 553 U.S. 35, 113-14 (Ginsburg, J., dissenting).
122. *Id.* at 61.
123. *See supra* Section II.A.2.
124. *See supra* Section II.A.1.
125. *Baze*, 553 U.S. at 49 (citing *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 470-71 (1947) (Frankfurter, J., concurring)). *See supra* Section II.B.1 (detailing the *Baze* opinion).
126. *See Tierney-Sneed*, *supra* note 21; Sarat et al., *supra* note 20.
127. *See supra* Section II.A.1.
128. *See Trop v. Dulles*, 356 U.S. 86, 100 (1958).
129. *See supra* Section II.A (citing the plethora of botched executions and subsequent societal outcry over lethal injections since 2009).
130. *See supra* Section II.A.2 (discussing the botched executions in states throughout the nation that have used midazolam in their lethal injections).
131. *See Baze*, 553 U.S. at 53, 55; *see also supra* Section II.A.
132. *See supra* Section II.A.2 (discussing why midazolam is an unreliable anesthetic).
133. *See supra* Section II.B.2 (discussing Oklahoma's arguments in *Glossip v. Gross*).
134. *See supra* Section II.A.2.
135. *See* Fernanda Santos, *Executed Arizona Inmate Got 15 Times Standard Dose, Lawyers Say*, N.Y. TIMES, Aug. 2, 2014, at A11.
136. *See supra* Section II.A.2 (discussing botched lethal injections due to inclusion of midazolam).
137. *See* Brief for Respondent, *supra* note 102, at 7. *See also* *Glossip v. Gross*, 576 U.S. ___, 20-21 (Sotomayor J., dissenting) ("because the protocol involves the administration of a powerful paralytic, it is as Drs. Sasich and Lubarsky explained, impossible to tell whether the condemned inmate in fact remained unconscious").

138. *See supra* Section I.
139. *See supra* Section II.A.2.
140. *See Baze*, 553 U.S. at 51; *see also supra* Section II.B.1.
141. *See Baze*, 553 U.S. at 41 (plurality opinion); *see also supra* Section II.B.1.
142. *See id.*
143. *See id.*
144. *See supra* Section II.A.3; Denno, *Lethal Injection Chaos*, *supra* note 17, at 1359-60 charts 3 & 4; *State by State Lethal Injection*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/state-lethal-injection> (last visited Dec. 22, 2015).
145. *See Gross*, 576 U.S. at 29 (Sotomayor J., dissenting) (criticizing the majority's imposition of the burden of proof on the condemned inmates.).
146. The single drug the state claims to be unable to obtain is Pentobarbital.
147. *See supra* text accompanying note 107 (citing Fordham Professor Deborah Denno's statement that any compounding pharmacy can make pentobarbital and that "[y]ou could build a pharmacy in your prison.").
148. Cadelago & Stanton, *supra* note 72.
149. Daniel Engber, *How Does Assisted Suicide Work?*, SLATE (Oct. 6, 2015, 6:20 PM), http://www.slate.com/articles/news_and_politics/explainer/2005/10/how_does_assisted_suicide_work.html.
150. Currently three-drug lethal injections contain a lethal dose of all three drugs; thus states are simply subtracting the latter two drugs, not changing or adding to the first drug. *See supra* Section II.A.2.
151. *See supra* Section II.A.3; Stefan Anitei, *Lethal Injection Means a Slow and Painful Death*, SOFTPEDIA (Apr. 24, 2007, 1:38 PM), <http://news.softpedia.com/news/Lethal-Injection-Means-a-Slow-and-Lethal-Death-53087.shtml>.
152. *See* Denno, *Lethal Injection Chaos*, *supra* note 17, at 1357; News Desk, *Death Penalty: States Transition to One-Drug Executions*, PBS NEWSHOUR (July 19, 2012, 6:56 PM), <http://www.pbs.org/newshour/rundown/death-penalty-states-transition-to-one-drug-executions/>.
153. *See supra* Section II.A.
154. *See* *Wilkerson v. Utah*, 99 U.S. 130 (1879); *In re Kemmler*, 136 U.S. 436 (1890); *Baze v. Reese*, 553 U.S. 35 (2008); *Glossip v. Gross*, 576 U.S. ___ (2015).
155. *Gross*, 576 U.S. at 28 (Sotomayor J., dissenting). *See also supra* Section II.A.
156. *See supra* Section II.A.
157. *See supra* text accompanying note 17 (listing states that would revert to older execution methods if a court declares lethal injection unconstitutional).
158. Or can procure such drugs with reasonable efforts. *See supra* Section III.A.2.
159. *See id.*
160. *See id.*
161. *See generally id.*
162. *See supra* Section II.C. (summarizing Breyer's dissent in *Gross*).
163. *See* Matt Ford, *How a Victory for the Death Penalty May Hasten Its End*, THE ATLANTIC (July 23, 2015), <http://www.theatlantic.com/politics/archive/2015/07/death-penalty-kennedy/399419/>.
164. *See National Polls and Studies*, DEATH PENALTY INFO. CTR., <http://deathpenaltyinfo.org/national-polls-and-studies> (last visited Dec. 12, 2015); Evan Mandery, *An Invitation to End the Death Penalty*, SLATE (Nov. 12, 2015), http://www.slate.com/articles/news_and_politics/jurisprudence/2015/11/the_supreme_court_should_end_the_death_penalty_now.html.
165. *See* Mandery, *supra* note 164; *see also* Ford, *supra* note 163.
166. *See* Mandery, *supra* note 164.

167. *See* Davis v. Ayala, 135 S. Ct. 2187 (2015) (Kennedy, J., concurring); Kennedy v. Louisiana, 554 U.S. 407 (2008) (striking down the death penalty for the crime of raping a child); Roper v. Simmons, 543 U.S. 551(2005) (striking down the death penalty for juveniles).
168. *See* The Editorial Board, *Justice Kennedy's Plea to Congress*, N.Y. TIMES (Apr. 4, 2015), <http://www.nytimes.com/2015/04/05/opinion/sunday/justice-kennedys-plea-to-congress.html>.
169. The Supreme Court's 1972 decision, *Furman v. Georgia*, ruled that the death penalty at that time was unconstitutional. 408 U.S. 238 (1972). Following a massive backlash, however, the Supreme Court changed direction four years later in *Gregg v. Georgia*, which set the abolitionist movement back decades. 428 U.S. 153 (1976). *See* Mandery, *supra* note 164.



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Alan W. Clarke

BOOK REVIEW: *JUST MERCY*

Bryan Stevenson, *Just Mercy: A Story of Justice and Redemption*, New York, Spiegel & Grau, an imprint of Random House, 2014, 336pp. Paperback 2015

Your Honor ... It was far too easy to convict this wrongly accused man for murder and send him to death row for something he didn't do and much too hard to win his freedom after proving his innocence. We have serious problems and important work that must be done ..."

—Bryan Stevenson, in Walter McMillan's case.¹

It is no longer reasonably debatable that our inefficient, expensive, broken, racist, criminal justice bureaucracy wrongfully condemns and executes the wholly innocent. That in itself marks an astonishing reordering of opinion since the 1980s when nearly 8 people in 10 supported the death penalty² and a gubernatorial candidate in Alabama ran for office vowing to “fry them until their eyeballs pop out.”³ Riddled with race and class biases, the U.S. prison-industrial complex also ruins the lives of millions more—mostly poor, despised and discriminated—against minorities, generating the second highest imprisonment rate in the world, second only to the Seychelles⁴ and by far the largest total prison population of any nation on earth, roundly beating the far more populous China for this dubious distinction.⁵

Since 1973 courts have been forced, over vigorous and sometimes vicious opposition from prosecutors and police, to free 156 patently innocent victims of America's experiment with capital punishment.⁶ While we can never know precisely how many innocent people have been killed by the state, scholars identify 13 who were executed despite probable innocence. In the case of Carlos DeLuna, evidence that Texas killed—perhaps “judicially murdered” would be a better phrase—an innocent man approaches certainty.⁷ Beyond capital punishment, and in our name, the carceral complex deploys a variety of formally neutral, seemingly facilitative and supposedly disinterested, but in practice racist and classist, mechanisms to ensure quick, inexpensive, but fallible convictions with cruelly long imprisonment for those without money or resources. *Justitia* may wear a blindfold but she unerringly detects race and class.

Enter into this Stygian morass a very bright, determined, idealistic, nearly broke, and at first splendidly naïve, Harvard trained lawyer, Bryan Stevenson.

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Just Mercy shines the clearest spotlight yet on our Jim Crow-style judicial pipeline to prison or death. What did he do? His conversation with civil rights icon Rosa Parks summarizes his project nicely:

Ms. Parks turned to me sweetly and asked, ‘now, Bryan tell me who you are and what you’re doing.’ ...

‘Yes, ma’am. Well, I have a law project called the Equal Justice Initiative, and we’re trying to help people on death row. We’re trying to stop the death penalty actually. We’re trying to do something about prison conditions and excessive punishment. We want to free people who’ve been wrongfully convicted. We want to end unfair sentences in criminal cases and stop racial bias in criminal justice. We’re trying to help the poor and do something about indigent defense and the fact that people don’t get the legal help they need. We’re trying to help children in adult jails and prisons. We’re trying to do something about poverty and the hopelessness that dominates poor communities. We want to see more diversity in decision-making roles in the justice system. We’re trying to educate people to confront abuse of power by police and prosecutors ...’

Ms. Parks leaned back, smiling. ‘Ooooh, honey, all that’s going to make you tired, tired, tired.’⁸

Walter McMillian’s wrongful conviction predicated on perjured testimony, and a law enforcement cover-up, arguably constitutes Bryan Stevenson’s most celebrated case. It exposed nearly everything wrong with our criminal injustice system—starting with a racist Alabama judge with the improbably appropriate name, Robert E. Lee Key, Jr.—a man who, unlike his namesake, never stopped fighting the civil war. Key’s racism reeked from his first telephone conversation with Stevenson, “This is Judge Key, and you don’t want to have anything to do with this McMillian case. No one really understands how depraved this situation truly is, including me, but I know it’s ugly. These men might even be Dixie Mafia.”⁹

And, what was McMillian’s sin? A married, successful black man, he outraged the white community by dating a white woman.

Mr. McMillian, ... did not have a history of violence, but he was well known in town for something else. Mr. McMillian, ... was dating a white woman. ... And one of his sons had married a white woman. Roots of suspicion.¹⁰

McMillian was arrested, tried, convicted and sentenced to death in Monroeville, Alabama, the natal county of favorite daughter Harper Lee. Her 1960 classic *To Kill a Mockingbird* eerily foreshadows this case. The film version of Lee’s novel was shot in Monroeville and Gregory Peck, as defense lawyer Atticus Finch, argued his fictional case in the old county courthouse. Brock Peters played the part of Tom Robinson, a black man wrongly charged with and convicted of raping a white woman. Adding to the irony, the community proudly stages a yearly production of the story with the *Mockingbird Players*.¹¹ The book, the film, the annually staged play, and a museum commemorat-

ing the trial, are the town's main tourist attractions thus intertwining self-congratulatory civic vainglory with racism and dollops of rancid hypocrisy.¹²

For Walter McMillian, as for the fictional Tom Robinson, Monroeville seethed with racism. "The intense rage of the arresting officers and the racist taunts and threats from uniformed police officers who did not know him were shocking."¹³ McMillian's arresting officer unleashed such a torrent of invective that all Walter heard was "[n]igger this,' 'nigger that,' followed by insults and threats of lynching."¹⁴

That law enforcement somehow housed him on death row even before he was tried, much less convicted, speaks volumes about the cozy relationship between police, prosecutor and judge. Stevenson and the reader are left perplexed. How did they manage to put a presumptively innocent man onto death row before trial, verdict, sentence, or even the ordinary prison processes?¹⁵

One can only imagine McMillian's horror at his precipitate and confused change in circumstances, one day innocent and free, and then in a bewildering instant transformed into an innocent man on death row. Sinking into deep despair,¹⁶

[h]is body reacted to the shock of the situation. A lifelong smoker, Walter tried to smoke to calm his nerves, but at Holman [the prison housing Alabama's death row] he found the experience of smoking nauseating and quit immediately. For days he couldn't taste anything he ate. He couldn't orient or calm himself. When he woke each morning, he would feel normal for a few minutes and then sink into terror upon remembering where he was. Prison officials had shaved his head and all the hair from his face. Looking into a mirror he didn't recognize himself.¹⁷

This is no ordinary case of the wrongful conviction of a black man on death row (the fact that such cases remain all too ordinary is a penetrating indictment of our criminal justice system). It was not even a typical case of wrongful conviction resisted at every level notwithstanding clear evidence of actual innocence, although this too occurs often enough as defensive prosecutors invent ever-nuttier hypotheses of guilt thus compounding their initial error. Far worse than mere incompetence tinged with racism, this capital case exposed the downright framing of an innocent black man, using perjured testimony, for having the audacity to date a white woman.

It is also a tale of perseverance. One follows in awe as Stevenson overcomes one obstacle after another in his improbable untangling of the web of deceit thrown up by law enforcement officers, the prosecutor and judge. Indeed, this is the part that any death penalty post-conviction lawyer will appreciate. Few lawyers harbor the talent, intellect and diligence to, with meager resources, untangle such a deceitful web as the one that ensnared Walter McMillian. This leads to a regrettable conclusion. He was lucky in two respects. First, he had one of the most effective and caring lawyers imaginable. How many

others languish in our prisons who, if they have a lawyer at all, have one who isn't up to such a daunting task?. Second, he had the good fortune, if good fortune it can be called, to draw a foolish judge, who over-rode the jury's recommendation and sentenced him to death, thus inviting more attention to his case. "If the jury's sentence of life in prison without parole had been left in place, Mr. McMillian might have been another forgotten black inmate in an Alabama prison."¹⁸

While working on multiple death row cases, Bryan Stevenson somehow found time to tackle the even more widespread problem of children as young as thirteen or fourteen years old increasingly sentenced in adult courts to life without the possibility of parole. In 2010, as a result of Stevenson's advocacy, the Supreme Court invalidated "Life imprisonment without parole sentences imposed on children convicted of non-homicide crimes" holding such to be "cruel and unusual punishment and constitutionally impermissible."¹⁹ Then in 2012, also as a result of his efforts, the Supreme Court held that, even in cases of homicide, life without the possibility of parole is unconstitutional.²⁰ These two cases likely had a broader impact in the numbers of people affected than any other case he had handled.

For most lawyers, these achievements alone would mark a successful career in social justice advocacy. Stevenson, always pressed for time, nonetheless also turned his attention to wrongfully convicted "bad moms" whose children were stillborn, or suffered an unexplained death, or who were "criminally prosecuted and sent to prison for decades if there was any evidence that they had used drugs at any point during the pregnancy."²¹

In the process, he exposed an incompetent forensic pathologist "with a history of prematurely and incorrectly declaring deaths to be homicides without adequate supporting evidence."²² His work also helped start a movement to assist the "thousands of women—particularly poor women in difficult circumstances—whose children die unexpectedly" countering the wrongful "criminalization . . . and the persecution of poor women whose children die."²³ In one case, the "discredited pathologist left Alabama but continues to serve as a practicing medical examiner in Texas."²⁴

Stevenson has not only fought racism; he has experienced it. Late one night, exhausted from a hectic day, and while sitting for a few minutes in his car outside his apartment, listening to Sly and the Family Stone on the radio, a police SWAT team accosted him. Systematically humiliated and illegally searched before a growing crowd, he could hear people "talking about all the burglaries in the neighborhood. . . . There was a particularly vocal older white woman who loudly demanded that I be questioned about items she was missing."²⁵

“Ask him about my radio and my vacuum cleaner!’ Another lady asked about her cat who had been absent for three days.”²⁶ Repeated complaints to the Atlanta Police Department’s administrative review process yielded the consistent response that the police had done no wrong. With a crushing caseload, and like so many young black men who have been harassed and stopped and illegally searched, Stevenson eventually dropped the matter. However, unlike those similarly situated young black men, Stevenson did get one last minor victory. *Just Mercy* exposes all the racism, bigotry and sheer incompetence of Atlanta’s police. It also reveals a callous administrative indifference all the way up the chain of command. *Just Mercy* shines a penetrating light on entrenched racism in our police and judicial systems. Given Ferguson, Black Lives Matter, and a host of recent incidents, this exposure of indecent, systemic failure is essential reading.

Conclusion

On September 11, 2013, after struggling for years with disabilities and dementia, Walter McMillan died. At his funeral Bryan Stevenson told the congregation at Limestone Faulk A.M.E. Zion Church:

Walter made me understand why we have to reform a system of criminal justice that continues to treat people better if they are rich and guilty than if they are poor and innocent Walter’s case taught me that fear and anger are a threat to justice; they can infect a community, a state, or a nation and make us blind, irrational, and dangerous. . . . mass imprisonment has littered the national landscape with carceral monuments of reckless and excessive punishment and ravaged communities with our hopeless willingness to condemn and discard the most vulnerable among us Walter’s case had taught me that the death penalty is not about whether people deserve to die for the crimes they commit, the real question of capital punishment in this country is, *Do we deserve to kill?*²⁷

Archbishop Desmond Tutu calls Bryan Stevenson “America’s young Nelson Mandela.” Indeed.

NOTES

1. BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION*, (2014) at 225.
2. <http://deathpenaltyinfo.org/national-polls-and-studies>
3. Alan W. Clarke, *Procedural Labyrinths and the Injustice of Death: A Critique of Death Penalty Habeas Corpus (Part Two)*, 30 U. RICH. L. REV. 303, 355 (1996).
4. World Prison Brief, Institute for Criminal Policy Research, *available at* http://www.prisonestudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All
5. *Id.* http://www.prisonestudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All
6. Death Penalty Information Center, *Innocence and the Death Penalty* (April 18, 2016) <http://www.deathpenaltyinfo.org/innocence-and-death-penalty>.
7. Robert Weisburg, *Executing Justice: Anatomy of a Wrongful Execution* by James Liebman & the Columbia DeLuna Project, 93 TEX. L. REV. 1179 (2014).

8. STEVENSON, *supra* note 1 at 293.
9. *Id.*
10. Peter Applebome, *Alabama Releases Man Held on Death Row for Six Years*, N.Y. TIMES, Mar. 3, 1993, available at <http://www.nytimes.com/1993/03/03/us/alabama-releases-man-held-on-death-row-for-six-years.html>.
11. Jennifer Crossley Howard & Serge F. Kovalski, 'Mockingbird' Reopens in Alabama, 11. Jennifer Crossley Howard & Serge F. Kovalski, 'Mockingbird' Reopens in Alabama, and Drama Plays Out, N.Y. TIMES, April 17, 2016, http://www.nytimes.com/2016/04/18/books/a-mockingbird-reopens-in-alabama-and-drama-plays-out.html?_r=0.
12. Peter Applebome, *supra* note 10, writes,

Mr. McMillian's case, which was given national attention last fall on the CBS News program "60 Minutes," played out in Monroeville, Ala., best known as the home of the Harper Lee, whose "To Kill a Mockingbird," told a painful story of race and justice in the small-town Jim Crow South. To many of his defenders, Mr. McMillian's conviction for the killing seemed like an updated version of the book, in which a black man was accused of raping a white woman."
13. STEVENSON, *supra* note 1, at 55.
14. *Id.* at 50.
15. Stevenson writes, "It's unclear how Tate was able to persuade Holman's warden to house two pretrial detainees on death row, although Tate knew people at the prison from his days as a probation officer." *Id.* at 53.
16. *Id.*
17. *Id.* at 55–56.
18. *Id.*
19. STEVENSON, *supra* note 1, at 295.
20. *Miller v. Alabama*, 567 U.S. ____ ; 132 S. Ct. 2455 (2012) held that life imprisonment for juveniles without the possibility of parole was unconstitutional. Bryan Stevenson argued the case for the juveniles. STEVENSON, *supra* note 1, at 295-96.
21. STEVENSON, *supra* note 1, at 234.
22. *Id.* at 230.
23. *Id.* at 233.
24. *Id.*
25. *Id.* at 41.
26. *Id.*



this lowest point. Capital punishment in the United States is the quintessential act of domination and abasement.

There is no ethically or empirically plausible justification for the death penalty save one, retribution, the belief that some acts are so objectionable that justice requires that the actor be killed. Every other rationale—that it deters crime is the most often cited—has been exploded by sociological research so thoroughly and so frequently that they can no longer be taken seriously.¹ The retribution rationale, too, has no empirical or utilitarian support behind it. Its adherents can't point to statistics or criminological outcomes while making their case. The retribution rationale is instead based on a shared feeling that certain acts merit death. The feeling death penalty advocates share is the impulse to vengeance, and this impulse is just a slight adrenaline surge away from sadism.

“Ending the Unconstitutional Torture of Three-Drug Lethal Injections: A Rebuke of *Glossip v. Gross*” by Lisa Lindhorst explores a case that involves a practice that crosses the threshold from vengeance to outright sadism. The Supreme Court heard *Gross* in the wake of a series of botched executions, including the especially gruesome killings of Clayton Lockett in Oklahoma and Joseph Wood in Arizona, in which the condemned suffered horrific pain for protracted periods of time. This pain was the result of the use of the demonstrably ineffective anesthetic, midazolam, which has come to replace the more reliable pentobarbital as the state's painkiller of choice during lethal injections. One of the reasons for the switch to midazolam is that Lundbeck, the Danish company that owns pentobarbital, recently decided it would no longer sell its product to the United States due to its opposition to the death penalty. Shortly thereafter the European Union banned companies from exporting drugs that are used for implementing capital punishment. The horrific facts of the botched midazolam executions notwithstanding, the five-justice majority in *Gross* allowed Oklahoma to continue using the drug, prompting Justice Sotomayor to include in her dissent an admonishment that this ruling may result in inmates feeling “the chemical equivalent of being burned at the stake.” In this feature Lindhorst exposes the flaws in the majority's reasoning and assesses the possibility that Justice Breyer's dissent in *Gross*, which seems to invite a constitutional challenge to the death penalty in all its forms, might possibly lead to the abolition of the capital punishment once and for all.

With his review of Bryan Stevenson's *Just Mercy*, author and human rights attorney Alan W. Clarke explains the value of the most recent literary masterpiece exposing the moral confusion, inherent unfairness, and cruelty of capital punishment.

—Nathan Goetting, *Editor-in-Chief*

1. See ALAN W. CLARKE & LAURELYN WHITT, *THE BITTER FRUIT OF AMERICAN JUSTICE* 75-96, (2007) for an example of scholarship exploding popular myths justifying capital punishment in the United States.

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