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Comments: The Crime, the Case, the Killer Cocktail: Why Maryland's Capital Punishment Procedure Constitutes Cruel and Unusual Punishment

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THE CRIME, THE CASE, THE KILLER COCKTAIL: WHY MARYLAND'S CAPITAL PUNISHMENT PROCEDURE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT

I. INTRODUCTION

“[D]eath is different”¹ It is this principle that establishes the death penalty as one of the most controversial topics in legal history, even when implemented only for the most heinous criminal acts.² In fact, “[n]o aspect of modern penal law is subjected to more efforts to influence public attitudes or to more intense litigation than the death penalty.”³ Over its long history, capital punishment has changed in many ways as a result of this litigation and continues to spark controversy at the very mention of its existence.⁴

This Comment will address the newest controversy in capital litigation: The possibility of undue pain and suffering caused to a defendant executed by lethal injection. Central to this emerging issue is a Supreme Court case, *Hill v. McDonough*,⁵ and a Maryland case, *Evans v. State*.⁶ *Hill* became the foundation for capital challenges based on the unconstitutionality of the method of execution.⁷ Although the court has yet to render a decision in *Evans*, this case could forever affect Maryland’s capital punishment structure, and potentially abolish the death penalty in Maryland.

As no decision on a controversial issue of law can be reached without a firm grasp of the history of that issue, this Comment will begin with an examination of the history of capital punishment both

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1. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).
 2. See THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES v (Hugo Adam Bedau ed., 1997).
 3. J. Richard Broughton, *The Second Death of Capital Punishment*, 58 FLA. L. REV. 639, 640 (2006).
 4. See FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA xiv–xvi (1986).
 5. 126 S. Ct. 2096 (2006).
 6. As of January 4, 2008, an opinion has not been rendered in *Evans*. Mr. Evans’s suit was filed in the U.S. District Court in Baltimore City under Chief Judge Benson Legg.
 7. Gail Gibson & Jennifer McMenamin, *Death Row Appeals Backed; Justices Allow More Challenges to Lethal Injection and New Claims of Innocence*, BALT. SUN, June 13, 2006, at 1A.

in this country,⁸ and in Maryland.⁹ This examination will include a commentary on the history of challenges to the capital punishment structure and the landmark cases that shaped the death penalty in this country.¹⁰ It will also address lethal injection, the specific method of execution currently used in a majority of states, and how a defendant dies by this form of capital punishment.¹¹ This method has come under significant fire of late based on the potential for botched or failed executions,¹² as well as the ban on physician-assisted executions.¹³

Having established the process by which the death penalty reached its current status, this Comment will then discuss and analyze¹⁴ the main question facing capital punishment in Maryland: Does Maryland's capital punishment procedure constitute cruel and unusual punishment?¹⁵ This Comment will then address the aforementioned landmark case, *Hill v. McDonough*,¹⁶ the U.S. Supreme Court case that opened the door for constitutional challenges to the death penalty based on the cruel and unusual nature of a state's method of execution.¹⁷ This Comment also reviews *Evans v. State*,¹⁸ the Maryland case that could change the face of capital punishment in this state and potentially outlaw the death penalty under state law.¹⁹

Finally, this Comment will address the likely future of capital punishment in this country.²⁰ Based on the analysis of four main constitutional concerns facing Maryland's death penalty system, this Comment also proposes solutions for the problems facing capital punishment in Maryland.²¹ This Comment calls for change. It seeks abolition of Maryland's death penalty based on the cruel and unusual nature of its capital punishment structure or a long-term moratorium

8. See *infra* Part II.A.

9. See *infra* Part II.B.

10. See *infra* Part II.A.

11. See *infra* Part II.B.3.

12. Jennifer McMenamin, *Evans Suit Leads to Changes; Lethal Injections Modified After Action Filed, Execution Official Testifies*, BALT. SUN, Sept. 22, 2006, at 5B.

13. See *infra* Part II.B.3.b.

14. See *infra* Part II.B.4.

15. See *infra* Part II.B.4.

16. 126 S. Ct. 2096 (2006).

17. See *infra* Part II.B.4.a.i.

18. See *supra* note 6.

19. See *infra* Part II.B.4.a.ii.

20. See *infra* Part III.

21. See *infra* Part IV.

on executions until a fair, consistent, and reliable method and process for executions can be established.²²

II. THE HISTORY OF CAPITAL PUNISHMENT

A. *Capital Punishment in the United States*

1. An Early History

The death penalty has been consistently used as a form of punishment in this country since the early colonial period.²³ Since this country's first execution in 1608,²⁴ more than 15,000 individuals have been executed²⁵—not only for murder, but also for lesser crimes, such as rape or counterfeiting.²⁶ “Through most of the nation's history, the proposition that authorities had the legal and moral right to take the lives of those who committed serious crimes was taken for granted by the bulk of the citizenry.”²⁷

Although opposition to the death penalty was visible beginning after the Revolutionary War,²⁸ it was not until the mid-1960s that the death penalty came under considerable fire.²⁹ Prior to that time, courts heard two types of capital cases: appeals from prisoners based on violations of their constitutional rights before or during their respective trials³⁰ and appeals based on certain barbaric methods of

22. *See infra* Part IV.

23. HERBERT H. HAINES, *AGAINST CAPITAL PUNISHMENT: THE ANTI-DEATH PENALTY MOVEMENT IN AMERICA, 1972–1994* 7 (1996).

24. In 1608, Captain George Kendall was the first person to be executed in what would become the United States. *Id.*

25. According to the Death Penalty Information Center [hereinafter DPIC], available online at <http://www.deathpenaltyinfo.org>, 15,585 people were executed between the first execution in 1608 and December 13, 2006. *See* DPIC, Searchable Database of Executions, <http://www.deathpenaltyinfo.org/executions.php> (last visited Mar. 12, 2007); DPIC, Executions in the United States, 1608–1976, By State, <http://www.deathpenaltyinfo.org/article.php?scid=8&did=1110> (last visited Mar. 12, 2007). These figures are compiled from a historical record known as the Espy file. DPIC, Executions in the United States, 1608–1976, By State, *supra*. This information is admittedly incomplete, however, as at least one individual researcher has determined that additional executions occurred during this time period and were not recorded in the Espy file. *Id.*

26. HAINES, *supra* note 23, at 7.

27. *Id.*

28. *Id.*

29. *See id.* at 23–26.

30. *Id.* at 24.

execution³¹ being cruel and unusual forms of punishment.³² It was not until a pair of law review articles was published in 1961 that a formidable assault against the death penalty was initiated.³³

The first article, authored by Gerald Gottlieb, asserted that executions may “on a sufficient factual showing, be found violative of the Eighth Amendment, since death . . . may . . . with good reason be alleged to be ‘cruel and unusual’ punishment and within the reach of the Eighth Amendment”³⁴ Later that year, Walter Oberer published a second article that called into question what he considered a “procedural flaw” in capital cases.³⁵ Oberer challenged procedures where jurors with moral oppositions to the death penalty were excluded from capital juries.³⁶ This trend could potentially establish juries “inclined toward guilty verdicts.”³⁷

The assault on the death penalty continued in the United States Supreme Court, where Justice Arthur Goldberg stated, in a dissenting opinion in *Rudolph v. Alabama*,³⁸ that the Court would possibly be open to hearing arguments against the constitutionality of the death penalty, such as those proposed by Gottlieb and Oberer.³⁹ The Goldberg dissent, which questioned whether “the imposition of the death penalty . . . violate[s] ‘evolving standards of decency that mark the progress of [our] maturing society,’ or ‘standards of decency

31. *Id.* The “mechanical aspects” of executions challenged during this time included burning at the stake, breaking on the wheel, and second electrocutions after a botched first attempt. *Id.*; see also *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 460–61 (1947).

32. HAINES, *supra* note 23, at 24.

33. *Id.* at 26.

34. CAPITAL PUNISHMENT IN THE UNITED STATES: A DOCUMENTARY HISTORY 121 (Bryan Vila & Cynthia Morris eds., 1997) [hereinafter DOCUMENTARY HISTORY] (quoting Gerald Gottlieb, *Testing the Death Penalty*, 34 S. CAL. L. REV. 268, 270 (1961)); see also HAINES, *supra* note 23, at 26.

35. HAINES, *supra* note 23, at 26; see also Walter E. Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?*, 39 TEX. L. REV. 545, 547–48 (1961).

36. HAINES, *supra* note 23, at 26; see also Oberer, *supra* note 35, at 547–48. Oberer argues that the common prosecutor practice of “death qualification,” the act of excluding jurors who state during voir dire examination that they have a moral opposition to the death penalty, “stack[s] the deck against the defendant’s claim that he was not guilty.” HAINES, *supra* note 23, at 26.

37. HAINES, *supra* note 23, at 26; see also Oberer, *supra* note 35, at 545.

38. 375 U.S. 889, 889–91 (1963) (Goldberg, J., dissenting).

39. *Id.*; see also HAINES, *supra* note 23, at 26.

more or less universally” acknowledged,⁴⁰ served as a signal that a change was on the horizon.⁴¹

Fueled by Goldberg’s dissent in *Rudolph*, the NAACP Legal Defense and Educational Fund, Inc. (LDF), one of the primary groups engaged in the national abolitionist movement at that time,⁴² initiated a two-pronged attack on the death penalty.⁴³ First, the LDF brought to light the racial discrimination present in death sentencing.⁴⁴ African-American defendants were much more likely to be convicted if their victims were white.⁴⁵ The second prong of the attack focused on certain trial procedures in capital cases.⁴⁶ The LDF primarily attacked: “(1) the exclusion of [jurors morally opposed to the death penalty]; (2) the simultaneous determination of guilt and sentence in a single trial; and (3) the lack of precise standards to guide juries in deciding whether to condemn a defendant to death.”⁴⁷ The Supreme Court heard arguments on the abolitionists’ procedural claims in 1971. In *McGautha v. California*,⁴⁸ the Court rejected these arguments and upheld, as constitutional, both the lack of guidelines for jury deliberations and unitary trials where guilt and sentence were decided in the same proceeding.⁴⁹ Although the arguments failed, shortly thereafter, the abolitionist movement gained a monumental decision in *Furman v. Georgia*.⁵⁰

Two months after its decisions in *McGautha*, the Court announced that, in *Furman*, it would examine whether the then-current administration of the death penalty constituted cruel and unusual punishment.⁵¹

40. *Rudolph*, 375 U.S. at 890 (1963) (Goldberg, J., dissenting) (footnotes omitted).

41. HAINES, *supra* note 23, at 27.

42. *Id.* at 15.

43. *Id.* at 27.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 28.

48. 402 U.S. 183 (1971).

49. *Id.* at 221. This case arose from two separate cases, *People v. McGautha*, 452 P.2d 650 (Cal. 1969), and *State v. Crampton*, 248 N.E.2d 614 (Ohio 1969). See *McGautha v. California*, 402 U.S. at 185.

50. 408 U.S. 238 (1972) (Douglas, J., concurring).

51. Four death penalty cases were originally consolidated in *Furman*. Besides *Furman*, the other cases included in the decision were *Jackson v. Georgia*, 171 S.E.2d 501 (Ga. 1969), and *Branch v. Texas*, 447 S.W.2d 932 (Tex. 1969). *Aikens v. California*, 406 U.S. 813 (1972), one of the original cases consolidated in *Furman*, was

2. *Furman v. Georgia*

In *Furman*, two defendants were sentenced to the death penalty after being convicted of rape.⁵² A third defendant was convicted of murder and likewise, sentenced to death.⁵³ The Supreme Court granted certiorari in each case to specifically address the question of “whether the imposition and execution of the death penalty constitute cruel and unusual punishment within the meaning of the Eighth Amendment as applied to the states by the Fourteenth” Amendment.⁵⁴

Historically, the Court’s decisions established that the sentence of death “is not cruel, unless the manner of execution can be said to be inhuman and barbarous.”⁵⁵ The Court also reiterated what had been established previously: the perception of what constitutes cruel and unusual punishment may change “as public opinion becomes enlightened by a humane justice.”⁵⁶ The Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”⁵⁷

Under these premises, the Court examined the state of the death penalty based on the current perceptions of moral justice,⁵⁸ and decided that a method of punishment could be perceived as cruel and unusual if it discriminated against certain individuals or if such a punishment was imposed under a procedure that could be affected by personal prejudice.⁵⁹ Based on studies done throughout the country that suggested that the death penalty was imposed more often on African-American defendants, the Court suggested that the death penalty was imposed in a discriminatory fashion.⁶⁰ The Court further found that legislatures, in enacting death penalty statutes, had failed to adequately define capital crimes or to establish a set of guidelines for juries such that an equitable decision could be reached in regards to the ultimate penalty.⁶¹ The Court stated that, although the death

dismissed when the California Supreme Court declared the death penalty unconstitutional in early 1972. DOCUMENTARY HISTORY, *supra* note 34, at 140.

52. *Furman*, 408 U.S. at 240 (Douglas, J., concurring).

53. *Id.*

54. *Id.*

55. *Id.* at 241 (citing *In re Kemmler*, 136 U.S. 436, 447 (1890)) (arguing hanging constituted an inhuman and barbarous method of execution and that death by electrocution did not).

56. *Id.* at 241–42 (Douglas, J., concurring).

57. *Id.* at 242 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

58. *Id.* at 241–42 (Douglas, J., concurring).

59. *Id.* at 242–45.

60. *Id.* at 249.

61. *Id.*

penalty itself is not cruel and unusual punishment, “the vice . . . [is] in the process by which it is inflicted.”⁶² In other words, “the death penalty, like lightning, will strike some, but not others, in a way that defies rational explanation.”⁶³ In sum, Justice Douglas stated, quoting Warden Lewis E. Lawes of Sing Sing Prison, that “no punishment could be invented with so many inherent defects” as the death penalty.⁶⁴ In so finding, Justice Douglas cited the unequal imposition of the death penalty to the rich and the poor—it is “the powerless . . . who are executed”—to support his decision.⁶⁵ Four other justices—Brennan, Stewart, White, and Marshall—joined Douglas in holding that the death penalty was “cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”⁶⁶

With that decision, the *Furman* Court officially outlawed capital punishment in the United States under the then-current method of administration.⁶⁷ The death sentences of more than six hundred death row inmates were immediately commuted to life imprisonment.⁶⁸ The decision of the Supreme Court, however, was far from wholly conclusive.⁶⁹ In fact, the Court did not find that capital punishment, in and of itself, was unconstitutional.⁷⁰ The decision allowed states to implement the death penalty under procedures that were not considered cruel or unusual punishment.⁷¹ In September 1973, just a year after the *Furman* decision, California reinstated the death penalty under a new statute, although no inmates were actually executed there until 1992.⁷²

62. *Id.* at 247–48.

63. *State v. Rhines*, 548 N.W.2d 415, 462 (S.D. 1996) (Amundson, J., dissenting).

64. *Furman*, 408 U.S. at 251 (Douglas, J., concurring).

65. *Id.*

66. *Id.* at 239–40 (per curiam).

67. DOCUMENTARY HISTORY, *supra* note 34, at 141.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 141 n.1. The long drought between reinstatement of the death penalty and the first execution in California under the new statute is likely due to the long appeals process mandatory in capital cases. *California Revives the Death Penalty*, TIME, Apr. 27, 1992, at 15. The presence of several liberal judges on California’s Supreme Court also contributed to the delay. When those judges were removed from office, the door was opened for executions to resume. Associated Press, *Bird Produces Negative Image in Campaign, Pollster Finds*, L.A. TIMES, May 23, 1986, at 36.

Following *Furman*, public support of the death penalty grew to some of its highest levels since the mid-1950s.⁷³ In fact, approximately two-thirds of the country supported the reinstatement of capital punishment.⁷⁴ A majority of states began implementing new capital punishment structures,⁷⁵ and in 1976, the U.S. Supreme Court reexamined the use of the death penalty in *Gregg v. Georgia*⁷⁶ and *Woodson v. North Carolina*.⁷⁷ Supreme Court Justice John Paul Stevens, having taken the bench in 1975 to replace Justice William Douglas, appeared to be the swing vote that would determine the future of the death penalty.⁷⁸ Before *Gregg*, Justice Stevens had never issued a ruling on the death penalty, therefore his decision was unpredictable.⁷⁹

3. *Gregg v. Georgia* and *Woodson v. North Carolina*

Both *Gregg* and *Woodson* arose out of the states' efforts to reinstitute the death penalty under a statute that would pass constitutional muster.⁸⁰ In *Gregg*, which was the lead decision of cases⁸¹ from three states—Georgia, Florida, and Texas—the Supreme Court examined “guided discretion statutes.”⁸² *Woodson* became the lead case of two cases⁸³ that challenged state laws which required mandatory death sentences for certain crimes.

In *Gregg*, the defendant was convicted of armed robbery and murder and was sentenced to death under Georgia's new, post-

73. DOCUMENTARY HISTORY, *supra* note 34, at 160.

74. *Id.*

75. *Id.* at 148.

76. 428 U.S. 153 (1976).

77. 428 U.S. 280 (1976).

78. HAINES, *supra* note 23, at 52.

79. *Id.*

80. DOCUMENTARY HISTORY, *supra* note 34, at 161–62.

81. *Gregg*, 428 U.S. 153, *Proffitt v. Florida*, 428 U.S. 242 (1976), and *Jurek v. Texas*, 428 U.S. 262 (1976), were reviewed at the same time, as those three states had adopted similar statutes which alleviated the procedural concerns that led to the decision in *Furman*. Each of these statutes created bifurcated trials, where guilt and sentencing were tried in different proceedings. Mandatory appellate review of all death sentences was also included. Finally, the statutes included factors to consider in the jury decision, designed to help juries adequately weigh the crime with aggravating and mitigating factors. DOCUMENTARY HISTORY, *supra* note 34, at 161–62.

82. DOCUMENTARY HISTORY, *supra* note 34, at 161.

83. *Woodson v. South Carolina*, 428 U.S. 280 (1976), was decided alongside *Roberts v. Louisiana*, 431 U.S. 633 (1977), as both states had enacted statutes that required the death penalty for certain crimes. DOCUMENTARY HISTORY, *supra* note 34, at 161.

Furman, death penalty statute.⁸⁴ The trial was held in two phases—guilt and penalty.⁸⁵ During the guilt phase, the trial judge submitted the case to the jury under both felony-murder and nonfelony-murder charges.⁸⁶ The robbery charges were submitted to the jury under armed robbery and robbery by intimidation, a lesser crime.⁸⁷ Despite being instructed on the issue of self-defense, the jury found the defendant guilty on two counts of armed robbery and two counts of murder.⁸⁸ During the penalty phase, the judge instructed the jury that they could recommend either capital punishment or life in prison for each count.⁸⁹ The judge also presented, in accordance with the new statute, several aggravating and mitigating factors which could influence the jury's decision.⁹⁰ After deliberation, the jury recommended the death penalty on all four counts.⁹¹

On appeal, the Supreme Court took the case to decide whether Georgia's new death penalty statute constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.⁹² Having previously stated that the death penalty is not, in and of itself, cruel and unusual,⁹³ the Court based its decision on the implementation of bifurcated trials, the increase in jury guidance for capital trials, and the availability of prompt appellate review of capital sentences.⁹⁴ Because the statute provided sufficient protection against potential ignorance, misunderstanding, or bias by the jury and a checks and balances system in appellate courts, the Court held that the death penalty, as applied by the Georgia statute was neither cruel, nor unusual punishment.⁹⁵ The Court also rejected the petitioner's primary argument that societal views of decency forbid capital punishment, pointing to the legislative response to *Furman* and a general national support for the death penalty.⁹⁶ By a 7-2 vote, the death penalty returned to the United States.⁹⁷

84. *Gregg*, 428 U.S. at 158.

85. *Id.*

86. *Id.* at 160.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 161.

91. *Id.*

92. *Id.* at 162.

93. *See id.* at 177-78.

94. *Id.* at 196-207.

95. *Id.* at 207.

96. *Id.* at 179.

97. HAINES, *supra* note 23, at 52.

In *Woodson v. North Carolina*,⁹⁸ the two defendants, James Woodson and Luby Waxton, and two others, committed the armed robbery of a convenience store.⁹⁹ The store clerk was killed during the robbery, and an innocent bystander was severely injured.¹⁰⁰ Throughout the trial, Woodson maintained his innocence on the murder charges.¹⁰¹ The facts of the case suggested that Woodson's involvement in the robbery consisted of driving the getaway car and some preparatory tasks.¹⁰² After a guilty verdict was returned by the jury, both defendants were sentenced under North Carolina's death penalty statute, which made the death penalty mandatory for all first-degree murder convictions.¹⁰³ The Supreme Court of North Carolina affirmed the convictions and sentences on appeal, and the U.S. Supreme Court granted certiorari to determine whether mandatory death sentences were constitutional under the Eighth and Fourteenth Amendments.¹⁰⁴

The Court reasoned that a mandatory imposition of the death penalty was unconstitutional because it "depart[ed] markedly from contemporary standards respecting the imposition of the punishment of death and thus [could not] be applied consistently . . . 'within the limits of civilized standards.'"¹⁰⁵ Furthermore, the Court found that the statute failed to establish "unbridled jury discretion" as required by *Furman v. Georgia* or "particularized consideration" by the jury of mitigating factors, such as the character and record of the accused.¹⁰⁶ Having found the North Carolina statute to be a violation of both the Eighth and Fourteenth Amendments, the Court set aside the mandatory death sentence statute.¹⁰⁷

4. Post-*Gregg* Modifications to Capital Punishment

The Court's decisions in *Gregg* and *Woodson* prompted intense scrutiny of the death penalty. Over time, the Supreme Court has tightened and loosened the restraints on capital sentencing, eventually resulting in the death penalty as it stands today. The significant

98. 428 U.S. 280 (1976).

99. *Id.* at 282-83.

100. *Id.* at 283.

101. *Id.* at 284.

102. *Id.* at 283.

103. N.C. GEN. STAT. §§ 14-17 (1969) (repealed 1976); *see also Woodson*, 428 U.S. at 284.

104. *Woodson*, 428 U.S. at 284-85.

105. *Id.* at 301 (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)).

106. *Id.* at 302-03.

107. *Id.* at 305.

Supreme Court decisions that have shaped today's capital punishment scheme include outlawing the death penalty for "lesser crimes" such as rape¹⁰⁸ and the expansion of the admissibility of character evidence of the accused.¹⁰⁹ These decisions increased a defendant's due process rights, therefore strengthening a defendant's ability to protect him or herself from a capital conviction.¹¹⁰ The reinstatement of the death penalty reawakened the abolitionist movement in the United States, and beginning in the mid-1980s, the Supreme Court was deluged with capital challenges for various reasons.¹¹¹

The abolitionist movement, post-*Gregg*, resulted in significant structural changes to the way capital punishment was carried out in this country. Abolitionists successfully narrowed the scope of the death penalty over time through Supreme Court decisions that prevented the execution of insane defendants,¹¹² minors under the age of sixteen,¹¹³ and the profoundly mentally retarded.¹¹⁴

The controversy surrounding capital punishment continued both inside the Supreme Court and outside in the general public. In *Callins v. Collins*,¹¹⁵ the struggle culminated in Justice Harry Blackmun abandoning the decision-making process altogether.¹¹⁶ In a landmark dissenting opinion, Justice Blackmun stated:

From this day forward, I no longer shall tinker with the machinery of death. . . . I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. . . . The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a

108. *Coker v. Georgia*, 433 U.S. 584 (1977).

109. *Roberts v. Louisiana*, 431 U.S. 633 (1977); *see also Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 602 (1978).

110. DOCUMENTARY HISTORY, *supra* note 34, at 195.

111. HAINES, *supra* note 23, at 73–79.

112. *Ford v. Wainwright*, 477 U.S. 399 (1986).

113. *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988), first established that defendants who committed their crimes before they reached the age of sixteen could not be executed. In *Stanford v. Kentucky*, 492 U.S. 361, 377 (1989), *abrogated by Roper v. Simmons*, 543 U.S. 551 (2005), the Court held that the death penalty could be imposed on defendants who committed crimes at the age of sixteen or seventeen.

114. *Penry v. Lynaugh*, 492 U.S. 302 (1989), *abrogated by Atkins v. Virginia*, 536 U.S. 384 (2002). *Penry* states that the execution of mentally retarded individuals is not categorically prohibited, but that the mental retardation must be adequately described as a mitigating factor. DOCUMENTARY HISTORY, *supra* note 34, at 241.

115. 510 U.S. 1141 (1994).

116. *Id.* at 1145–46 (Blackmun, J., dissenting).

system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.¹¹⁷

B. *Capital Punishment in Maryland*

After the Supreme Court ruling in *Furman v. Georgia*, the Court of Appeals of Maryland deemed capital punishment unconstitutional except in those circumstances where the death penalty is mandatory.¹¹⁸ The Maryland legislature, in response to the Court of Appeals of Maryland's decision, established a mandatory death sentence for some, specifically-defined first-degree murders.¹¹⁹ After the Supreme Court announced its decision in *Woodson v. North Carolina*,¹²⁰ the Court of Appeals of Maryland ruled mandatory death sentences unconstitutional.¹²¹ As a result, the legislature revised Maryland's capital punishment statute by constructing a law intended to conform to the laws established by the Supreme Court.¹²² The new statute established bifurcated trials, mandatory appellate review, and the weighing of aggravating and mitigating circumstances in each capital trial.¹²³

In 1994, Maryland's death penalty statute was amended to state that lethal injection shall be the method of execution for all defendants sentenced to the death penalty after March 25, 1994.¹²⁴ Prior to this date, inmates had been executed in the gas chamber. Those inmates condemned prior to March 25, 1994, had the choice of execution by lethal gas or by lethal injection.¹²⁵ Lethal injection would be utilized for all defendants sentenced after the amendment, as is the prevalent method throughout the rest of the country.¹²⁶

117. *Id.*

118. *Bartholomey v. State*, 267 Md. 175, 184, 297 A.2d 696, 701 (1972).

119. MD. ANN. CODE art. 27, § 413 (1976) (repealed 1978); *see also* Roann Nichols, Tichnell v. State—*Maryland's Death Penalty: The Need for Reform*, 42 MD. L. REV. 875, 877 (1983).

120. 428 U.S. 280 (1976).

121. *Blackwell v. State*, 278 Md. 466, 473, 365 A.2d 545, 549 (1976), *cert. denied*, 431 U.S. 918 (1977); *see also* Nichols, *supra* note 119, at 877.

122. Nichols, *supra* note 119, at 877.

123. MD. ANN. CODE art. 27, §§ 413–414 (1978) (repealed 2002).

124. MD. ANN. CODE art. 27, § 627 (1994) (repealed 2002); *see also* MD. CODE ANN., CRIM. LAW § 2-303(l) (LexisNexis 2002 & Supp. 2007).

125. *See* DPIC, *Methods of Execution*, <http://www.deathpenaltyinfo.org/article.php?scid=8&did=245> (last visited Mar. 12, 2007).

126. Casey Lynne Ewart, *Use of the Drug Pavulon in Lethal Injections: Cruel and Unusual?*, 14 WM. & MARY BILL RTS. J. 1159, 1159 (2006).

In 2000, an Illinois death penalty case sparked national debate over the death penalty, and the controversy extended to Maryland.¹²⁷ In 2002, then-Governor Parris N. Glendening, troubled that all nine Maryland death row inmates were of African-American descent, ordered all executions be halted for one year pending public and legislative review of a University of Maryland study (to be released later that year) on the effect of race on the capital punishment system in the United States.¹²⁸ The study thoroughly examined “suggestions . . . that the imposition of the death penalty in Maryland [was] influenced by factors such as race and the particular legal jurisdiction where the homicide occurred.”¹²⁹ The study provided empirical data suggesting that African-American defendants were significantly more likely to be given the death penalty than Caucasian defendants who committed the same crimes.¹³⁰ Likewise, the death penalty is implemented in cases where African-American defendants kill Caucasian victims more often than any other racial relationship.¹³¹ The study further suggested that legal jurisdiction plays a part in the imposition of the sentence of death.¹³² The study showed that a prosecutor’s decision to charge a death-eligible homicide as a capital offense is significantly different in different jurisdictions of Maryland.¹³³ Based on those results, “clearly the jurisdiction where the homicide occurs matters and matters a great deal.”¹³⁴

Less than a year later, despite the information released in the study, newly-elected governor Robert Ehrlich ended the moratorium, and executions resumed in the state without modification of the death penalty statute or procedure.¹³⁵

127. See David Nitkin & Dennis O’Brien, *Elsewhere, Questions About Death Penalty*, BALT. SUN, May 10, 2002, at 17A.

128. Dennis O’Brien & David Nitkin, *Glendening Halts Executions*, BALT. SUN, May 10, 2002, at 1A.

129. RAYMOND PATERNOSTER & ROBERT BRAME, AN EMPIRICAL ANALYSIS OF MARYLAND’S DEATH SENTENCING SYSTEM WITH RESPECT TO THE INFLUENCE OF RACE AND LEGAL JURISDICTION: FINAL REPORT 1 (2003), <http://www.newsdesk.umd.edu/pdf/finalrep.pdf> [hereinafter EMPIRICAL ANALYSIS].

130. *Id.* at 21, 43 fig.2.

131. *Id.* at 22–23, 45 fig.4.

132. *Id.* at 28–31.

133. *Id.* at 29–30.

134. *Id.* at 31.

135. Stephanie Hanes & Sarah Koenig, *Md. Judge Agrees to Execution of Oken*, BALT. SUN, Jan. 22, 2003, at 1A.

Shortly after the study was released, Maryland's Attorney General, J. Joseph Curran, called for an end to capital punishment in Maryland, citing the possibility of the wrongful execution of an innocent defendant.¹³⁶ Governor Ehrlich, however, promised to veto any bill seeking a moratorium or the abolition of Maryland's death penalty.¹³⁷ Ehrlich's threats were unnecessary, however, as bills to abolish the death penalty and to extend Glendening's moratorium both failed on the state senate floor.¹³⁸

The debate over the death penalty reached a head on December 19, 2006, when the Court of Appeals of Maryland halted all executions in the state, "ruling that procedures for putting prisoners to death were never submitted for the public review required by law."¹³⁹ The court made this decision in *Evans v. State*,¹⁴⁰ where Vernon Lee Evans, Jr., along with two other plaintiffs, filed a motion to vacate their respective death sentences based on the state's violation of the Administrative Procedure Act (APA).¹⁴¹ The Court found that the protocol dictating the manner in which lethal injection is carried out in Maryland was a "regulation" under the Maryland APA.¹⁴² Because the protocol was not submitted for public and legislative review, it was a violation of the APA, and therefore "ineffective."¹⁴³ The decision merely postpones executions in the state until the legislature can review the issue, and either "submit the execution protocols to the scrutiny of a joint legislative committee and schedule a public hearing on the issue" or, although unlikely, "exempt the execution procedures from that review process."¹⁴⁴

As it currently stands, Maryland's death penalty exists under the 2002 version of the Maryland Code Annotated.¹⁴⁵ On February 21, 2007, both the Maryland Senate and the House of Delegates

136. Sarah Koenig, *Attorney General Calls for Abolition of Md. Death Penalty; Curran Says Threat of Executing Innocent People Is Too Great*, BALT. SUN, Jan. 31, 2003, at 6B.

137. *Id.*

138. See Stephanie Desmon, *Death Penalty Freeze Rejected*, BALT. SUN, Mar. 19, 2003, at 1B.

139. Jennifer McMenamain, *Md. Executions Halted; State Court Finds Procedures Established Improperly*, BALT. SUN, Dec. 20, 2006, at 1A.

140. 396 Md. 256, 914 A.2d 25 (2006).

141. *Id.* at 271, 914 A.2d at 33-34.

142. *Id.* at 346, 914 A.2d at 78. The Maryland APA requires public and legislative review for those procedures deemed "regulations." McMenamain, *supra* note 139.

143. *Evans*, 396 Md. at 349-50, 914 A.2d at 80-81; see also McMenamain, *supra* note 139.

144. McMenamain, *supra* note 139.

145. MD. CODE ANN., CRIM. LAW § 2-303 (LexisNexis 2002 & Supp. 2007).

considered testimony from current Governor Martin O'Malley and several prominent pro- and anti-death penalty groups on a bill to repeal the death penalty permanently.¹⁴⁶ Although the bill failed at committee,¹⁴⁷ the controversy remains, and the death penalty continues to stand on "shaky ground."¹⁴⁸ When a new abolition bill inevitably comes before the Maryland General Assembly in the future, the legislature will have to examine the current capital punishment structure, which includes three main areas of controversy: the crime, the case, and the killer cocktail.

1. The Crime

As stated previously, in Maryland, the only crimes punishable by death are those that fall within the category of first-degree murder.¹⁴⁹ This trend is consistent with a majority of the country's current practices.¹⁵⁰ Some states, however, continue to implement the death penalty for crimes not resulting in death, but that trend is an

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146. Jennifer Skalka, *O'Malley Lobbies for Repeal*, BALT. SUN, Feb. 22, 2007, at 1A.
147. Jean Marbella, *Capital Punishment Holds Shaky Ground*, BALT. SUN, Mar. 16, 2007, at 1B.
148. *Id.*
149. MD. CODE ANN., CRIM. LAW § 2-201(b)(1) (LexisNexis 2002). In Maryland, a murder is in the first degree if it is:
- (1) a deliberate, premeditated, and willful killing;
 - (2) committed by lying in wait;
 - (3) committed by poison; or
 - (4) committed in the perpetration of or an attempt to perpetrate:
 - (i) arson in the first degree;
 - (ii) burning a barn, stable, tobacco house, warehouse, or other outbuilding . . .;
 - (iii) burglary in the first, second, or third degree;
 - (iv) carjacking or armed carjacking;
 - (v) escape in the first degree from a State correctional facility or a local correctional facility;
 - (vi) kidnapping . . .;
 - (vii) mayhem;
 - (viii) rape;
 - (ix) robbery . . .;
 - (x) sexual offense in the first or second degree;
 - (xi) sodomy; or
 - (xii) a violation of [the Criminal Article] concerning destructive devices.
- Id.* § 2-201(a).
150. See DPIC, Crimes Punishable by the Death Penalty, <http://www.deathpenaltyinfo.org/article.php?did=144&scid=10> (last visited Mar. 12, 2007).

exception to current capital punishment standards.¹⁵¹ For a murder to qualify as first-degree murder in Maryland, a murder must be “a deliberate, premeditated, and willful killing, . . . committed by lying in wait, . . . committed by poison, . . . or [a murder] committed in the perpetration of or an attempt to perpetrate” certain crimes.¹⁵²

2. The Case

If a defendant is charged with a first-degree murder in Maryland, and the state chooses to seek the death penalty, certain criteria must be met before a death sentence can be imposed.¹⁵³ First, the defendant must be a principal in the first degree,¹⁵⁴ or, in the case of the murder of a law enforcement officer, a principal in the second degree¹⁵⁵ who meets certain aggravating factors.¹⁵⁶ In addition, at least thirty days before trial, the state must give the defendant notice both of its intention to seek the death penalty and of the aggravating circumstances upon which the state will rely.¹⁵⁷

If a defendant is convicted of first-degree murder, and if the state gave sufficient notice to the defendant that the death penalty would be sought, a separate sentencing trial must be held to “determine whether the defendant shall be sentenced to death.”¹⁵⁸ This

151. Of the thirty-seven states which currently implement the death penalty, eleven have extended the scope of capital offenses to lesser crimes than first degree murder. In some states, crimes such as treason (Arkansas, California, Colorado, Georgia and Louisiana), trainwrecking (California), perjury causing execution (California) or death (Idaho), drug trafficking (Florida), sexual battery (Florida) or sexual assault (Montana), felony murder (Florida), aircraft hijacking (Georgia and Mississippi), aggravated kidnapping (Idaho, Kentucky and South Dakota), and aggravated rape of a minor (Louisiana) are punishable by death. *See id.*

152. CRIM. LAW § 2-201(a). The State may seek the death penalty for a defendant who commits a murder in the perpetration of (or attempt to perpetrate) first degree arson, the burning of a building (not a dwelling) which contains cattle, horses, grain, hay, tobacco or goods, burglary, carjacking, prison escape, kidnapping, mayhem, rape, robbery, first degree sexual offense, sodomy, or certain explosive-device crimes. *Id.* § 2-201(a)(4).

153. *See id.* § 2-202.

154. A principal in the first degree is “the perpetrator of a crime.” BLACK’S LAW DICTIONARY 1001 (Abr. 8th ed. 2005).

155. A principal in the second degree is “one who helped the perpetrator at the time of the crime.” *Id.*

156. CRIM. LAW § 2-202(a)(2)(ii). For the state to seek the death penalty against a principal in the second degree of a murder of a law enforcement officer, the defendant must “[have] willfully, deliberately, and with premeditation intended the death of the law enforcement officer; . . . [have been] a major participant in the murder; and [have been] actually present at the time and place of the murder.” *Id.*

157. *Id.* § 2-202(a)(1).

158. *Id.* § 2-303(b).

sentencing hearing must be held before a jury—either the same jury that convicted the defendant or a jury specifically empanelled for the purposes of the proceeding.¹⁵⁹ A defendant may, conversely, waive his jury rights for the sentencing proceeding.¹⁶⁰

To condemn a defendant to death, the court or jury must determine whether any of the statutory aggravating¹⁶¹ or mitigating¹⁶² factors exist. If the jury does not find that any aggravating circumstances exist, a death sentence cannot be imposed.¹⁶³ If one or more aggravating circumstances exist, the jury will then determine whether any mitigating circumstances preclude imposition of a death sentence.¹⁶⁴ After weighing the aggravating and mitigating circumstances, the jury will recommend a sentence for the defendant. A death sentence may only be imposed by a unanimous jury.¹⁶⁵ Should a jury decide the evidence does not warrant a death sentence, or if the state has failed to meet the procedural requirements of the statute, a sentence of life imprisonment, without the possibility of parole, is imposed.¹⁶⁶ If a jury returns a death sentence for a defendant, both the conviction and the sentence will be appealed to the Court of Appeals of Maryland automatically¹⁶⁷ in order to “ensure[] the integrity of capital justice.”¹⁶⁸ Defendants may petition for a writ of certiorari from the U.S. Supreme Court to seek further appellate review.

159. *Id.* § 2-303(c). A new jury will only be empanelled if:

- (i) the defendant was convicted based on a guilty plea;
- (ii) the defendant was convicted after a trial by a court sitting without a jury;
- (iii) the court, for good cause, discharged the jury that convicted the defendant; or
- (iv) a court of competent jurisdiction remanded the case for resentencing following a review of the original sentence of death.

Id. § 2-303(c)(2).

160. *See id.* § 2-303(c)(3).

161. *See id.* § 2-303(g).

162. *See id.* § 2-303(h).

163. *See id.* § 2-303(g)(2).

164. *See id.* § 2-303(h)(2). If the combination of aggravating circumstances is outweighed by the combination of mitigating circumstances, a death sentence may not be imposed. *See id.* § 2-303(i)(1)–(2).

165. *Id.* § 2-303(i)(3).

166. *See id.* § 2-303(j).

167. MD. R. 8-306(c)(1).

168. *Metheny v. State*, 359 Md. 576, 597, 755 A.2d 1088, 1100 (2000).

3. The Killer Cocktail

a. Procedure

Maryland's current method of execution, like a majority of states, is by lethal injection.¹⁶⁹ It was originally thought that lethal injection was the most humane way of ending a condemned inmate's life.¹⁷⁰ The medical certainty that extreme pain was felt by prisoners when executed by electrocution or the gas chamber was alleviated by the system that closely resembled a "medical procedure."¹⁷¹ Such a trend followed a historical pattern. "[New] methods of execution have become popular because they are seen as more humane than any of the other available alternatives; those methods are often replaced, however, after the public realizes that they are not as humane as they seem."¹⁷²

Execution by lethal injection involves an intravenous dose of three separate chemicals in succession,¹⁷³ each believed to be individually fatal in the proper doses.¹⁷⁴ Although the chemicals used may differ from state to state, generally, the lethal injection regimen will include an anesthetic, a paralytic, and a drug that stops the heart.¹⁷⁵ In Maryland, the three drugs used during the lethal injection process are sodium pentothal, pancuronium bromide (also known as Pavulon), and potassium chloride.¹⁷⁶

i. Drug #1 – sodium pentothal

Sodium pentothal, or a similar anesthetic, is the first drug used in the lethal injection process.¹⁷⁷ Sodium pentothal is "a short-acting barbiturate that is ordinarily used . . . in . . . anesthesia to render a surgical patient unconscious for mere minutes."¹⁷⁸ The charge against the use of this drug is that, because of the short-acting nature

169. See CRIM. LAW § 2-303(l); see also DPIC, *Methods of Execution*, *supra* note 125.

170. See Greta Proctor, Comment, *Reevaluating Capital Punishment: The Fallacy of a Foolproof System, the Focus on Reform, and the International Factor*, 42 GONZ. L. REV. 211, 217 n.34 (2006–2007).

171. Ewart, *supra* note 126, at 1166.

172. *Id.* at 1191.

173. *Evans v. State*, 396 Md. 256, 337–38, 914 A.2d 25, 73 (2006).

174. *Id.* at 338, 914 A.2d at 73.

175. See Ewart, *supra* note 126, at 1168–69, 1175.

176. *Evans*, 396 Md. at 337–38, 914 A.2d at 73.

177. See *id.* at 338, 914 A.2d at 73.

178. David R. Dow et al., *The Extraordinary Execution of Billy Vickers, The Banality of Death, and the Demise of Post-Conviction Review*, 13 WM. & MARY BILL RTS. J. 521, 543 (2004).

of the chemical, the drug may not sedate the defendant for the entire execution.¹⁷⁹

ii. Drug #2 – pancuronium bromide

Pancuronium bromide, sometimes referred to as Pavulon, is a paralytic drug used during some surgeries to paralyze the body and, in most states, during the lethal injection process.¹⁸⁰ If a significant dosage is injected, the drug can paralyze the lungs and diaphragm, thereby stopping a person's breathing.¹⁸¹ The use of Pavulon during the lethal injection process is intended to paralyze the body so that the defendant stops breathing to the point of clinical death before the third drug is injected to stop the heart.¹⁸²

Many challenges to capital punishment have arisen out of the use of Pavulon in the execution cocktail.¹⁸³ These challenges are based on allegations that the combination of the drug with some other substances, including some sodium-based sedatives (such as sodium pentothal), causes respiratory arrest before a loss of consciousness.¹⁸⁴ The possible result of such an occurrence would be that the defendant feels significant pain while paralyzed.¹⁸⁵ In other words, the defendant could feel intense pain but appear calm, "masking any potential problems with the execution."¹⁸⁶

iii. Drug #3 – potassium chloride

Potassium chloride is the third drug utilized in the execution process.¹⁸⁷ The drug is used to stop the heart and complete the execution.¹⁸⁸ A saline fluid is then passed through the defendant's veins for ten seconds.¹⁸⁹ When an electrocardiogram (EKG) monitor shows there is no heart activity, a physician pronounces the defendant dead, and the execution is complete.¹⁹⁰

179. *Id.* at 544.

180. *See* Ewart, *supra* note 126, at 1183.

181. *Id.*

182. *Id.*

183. *Id.* at 1184.

184. *Id.*

185. *See id.* at 1184–86.

186. *Id.* at 1189.

187. *Evans v. State*, 396 Md. 256, 337–38, 914 A.2d 25, 73 (2006).

188. *Id.* at 338, 914 A.2d at 73.

189. *Id.* at 338, 914 A.2d at 73–74.

190. *Id.* at 338, 914 A.2d at 74.

b. *The doctor's conflict*

Physicians have been witnessing executions since the first execution by electrocution occurred in 1890.¹⁹¹ Since 1982, however, with the dawn of the lethal injection era, the moral and ethical implications of medical participation in executions have created significant controversy.¹⁹² The controversy surrounds the Hypocratic Oath, taken by all doctors: "First, do no harm."¹⁹³ Assisting in an execution is a direct violation of this central tenet of physician care.¹⁹⁴ As an American Medical Association (AMA) executive vice president has stated, "When the healing hand becomes the hand inflicting the wound, the world is turned inside out."¹⁹⁵

The ramifications of keeping doctors out of the execution chamber can be equally troubling, however. In 1984, a "mishandled execution" caused an inmate to suffer for ten minutes after the injection, allegedly because no physician was present to administer the drugs correctly.¹⁹⁶ Arguments by proponents of physician supervision involve the Eighth Amendment ban on cruel and unusual punishment.¹⁹⁷ Under their argument, the presence of medical professionals is necessary to ensure that the execution procedures do not risk violation of the Eighth Amendment by allowing unqualified professionals to assist in the execution process.¹⁹⁸

A majority of states either require or permit the presence of a physician during executions.¹⁹⁹ Although the extent of requisite participation varies by state, generally, physicians are required to attend the execution only to pronounce death.²⁰⁰ In Maryland, nursing assistants, paramedics, correctional officers, and prison officials complete the injection procedure.²⁰¹ A physician is present for the sole purpose of pronouncing death.²⁰² Medical experts have testified that Maryland's procedure for lethal injection places the

191. DOCUMENTARY HISTORY, *supra* note 34, at 283.

192. *Id.*

193. *Id.* at 284.

194. *See id.*

195. *Id.* (quoting AMA executive vice president James Todd, M.D.)

196. Christopher J. Levy, Comment, *Conflict of Duty: Capital Punishment Regulations and AMA Medical Ethics*, 26 J. LEGAL MED. 261, 262 (2005).

197. *Id.*

198. *Id.*

199. *Id.* at 264.

200. *Id.* at 265.

201. Jennifer McMenamin, *Lethal Practice: In Maryland and Across the Nation, the Role of Physicians in Executions has Become an Issue Among Medical Professionals and the Courts*, BALT. SUN, Oct. 22, 2006, at 1C.

202. *Id.*

execution in the hands of “unqualified and poorly trained” individuals, some of whom “[do not] even comprehend their individual responsibilities.”²⁰³ If nothing else, such opinions by medical experts raise the question of whether Maryland’s current method of capital punishment could result in cruel and unusual punishment for an inmate in the execution chamber.

4. The Question

a. *Does Maryland’s capital punishment procedure constitute cruel and unusual punishment?*

The Eighth Amendment of the U.S. Constitution bans the infliction of cruel and unusual punishments.²⁰⁴ Although the Constitution does not establish boundaries for what constitutes cruel and unusual punishment, the Supreme Court has set guidelines against which punishments, such as the death penalty, can be scrutinized.²⁰⁵

The Supreme Court has stated that to successfully challenge a punishment accepted at common law, a defendant must show that it violates current standards of decency in the community.²⁰⁶ The defendant must present evidence that shows a national consensus against the punishment, not the absence of a national consensus supporting it.²⁰⁷ The Court has often applied its general rule in death penalty cases, most notably in *Furman v. Georgia*²⁰⁸ and *Gregg v. Georgia*.²⁰⁹ Eventually, the Court sculpted a standard test in *Gregg*.²¹⁰

The Court established in *Gregg* that a punishment is cruel and unusual if it “involve[s] the unnecessary and wanton infliction of pain.”²¹¹ A punishment may also be considered cruel and unusual if it “is grossly out of proportion to the severity of the crime.”²¹² In other words, for a punishment to be deemed constitutional, it cannot meet either of the two prongs of *Gregg*.²¹³ Recently, several states’

203. *Id.*

204. U.S. CONST. amend. VIII.

205. *See supra* notes 108–17 and accompanying text.

206. 35 GEO. L.J. ANN. REV. CRIM. PROC. 749 n.2303 (2006).

207. *Id.*

208. *See supra* notes 52–66 and accompanying text.

209. *See supra* notes 84–97 and accompanying text.

210. 428 U.S. 153 (1976).

211. *Id.* at 173 (quoting *Furman v. Georgia*, 408 U.S. 238, 392–93 (1972)).

212. *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)).

213. *Id.*

capital punishment structures have been challenged under this rule.²¹⁴ One such case was *Hill v. McDonough*,²¹⁵ where a defendant challenged the method of his execution on Eighth Amendment grounds.²¹⁶ The Court's landmark decision in *Hill* opened the door for challenges to the lethal injection practice throughout the country.

i. *Hill v. McDonough*

In 1982, Clarence Hill, along with an accomplice, robbed a bank at gunpoint.²¹⁷ The police arrived at the scene of the crime during the robbery and apprehended Hill's accomplice, Cliff Jackson.²¹⁸ In the confusion surrounding the crime scene, Hill was able to approach, from behind, two police officers who were handcuffing Jackson.²¹⁹ Hill shot both officers—killing one and wounding the other.²²⁰ Hill engaged in a shoot-out with the other officers, and suffered several gunshot wounds before being arrested.²²¹ Hill was charged with first-degree murder, among other charges, and was convicted and sentenced to death under Florida's death penalty statute.²²² On appeal, the Supreme Court of Florida vacated Hill's death sentence due to errors in the jury selection process and remanded the case for a new sentencing hearing.²²³ On remand, a new jury sentenced Hill to death again.²²⁴ This time, on appeal, the Supreme Court of Florida affirmed the trial court ruling, and Hill was transferred to death row.²²⁵

On appeal, Hill challenged his death sentence on several fronts, including an unsuccessful habeas corpus petition.²²⁶ In Hill's last

214. Jennifer McMenamin, *Ohio Execution Is Evans Suit Focus*, BALT. SUN, Sept. 23, 2006, at 3B.

215. 126 S. Ct. 2096 (2006).

216. *Id.* at 2100.

217. *Hill v. Florida*, 477 So. 2d 553, 554 (Fla. 1985).

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Hill v. Florida*, 513 So. 2d 176, 177 (Fla. 1987).

225. *Id.* at 179.

226. *Hill v. Florida*, 485 U.S. 993 (1988). Hill petitioned the U.S. Supreme Court for a writ of certiorari after his second death sentence. *Id.* The petition was denied. *Id.* Hill then filed for habeas corpus relief, but was again denied by the Supreme Court of Florida. *Hill v. Dugger*, 556 So. 2d 1385 (Fla. 1990). His appeal was reopened in 1994 after another habeas corpus petition was filed in federal court, and partially granted. Hill filed a petition to reopen his appeal to have the Florida Supreme Court review the issues presented at the habeas corpus proceeding, but any error was found

effort to stay his execution, just four days prior to the date for which his execution was scheduled,²²⁷ he filed an action in federal district court, under the federal civil rights statute.²²⁸ Under this statute, Hill claimed that the method by which he was to be executed violated the Eighth Amendment protection against cruel and unusual punishments.²²⁹ Hill argued that the three drugs used in lethal injection procedures could cause severe pain: first, that the anesthetic used was insufficient to render the administration of the second and third drugs painless;²³⁰ and, second, “that he could remain conscious and suffer severe pain as [the second drug] paralyzed his lungs and body [while the third drug] caused muscle cramping and a fatal heart attack.”²³¹ The district court dismissed the action, claiming that Hill had filed a “successive” habeas corpus appeal, which is prohibited by federal law.²³² The Eleventh Circuit Court of Appeals affirmed the trial court’s decision,²³³ but the Supreme Court granted certiorari to decide whether Hill’s final appeal constituted a successive habeas corpus claim or a separate action under § 1983.²³⁴ Finding Hill’s appeal valid, the Court remanded the case for a decision in the U.S. district court.²³⁵ The Supreme Court, however, refused to comment on the merits of Hill’s arguments.²³⁶

Hill’s claim failed in the U.S. district court.²³⁷ The court found Hill’s claim that the lethal injection process posed a risk of excruciating, unnecessary pain was meritless based on a full

to be harmless, and Hill remained on death row. *See generally* Hill v. Florida, 643 So. 2d 1071 (Fla. 1994). Hill appealed this decision to the U.S. Supreme Court, but again, that Court denied certiorari. Hill v. Florida, 516 U.S. 872 (1995).

227. Hill v. McDonough, 126 S. Ct. 2096, 2100 (2006).

228. 42 U.S.C. § 1983 (1994). Section 1983 states:

Every person who, under color of any statute, . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

229. *McDonough*, 126 S. Ct. at 2097.

230. *Id.* at 2100.

231. *Id.*

232. *Id.* at 2097.

233. *In re Hill*, 437 F.3d 1080 (11th Cir. 2006).

234. *McDonough*, 126 S. Ct. at 2097–98.

235. *Id.* at 2104.

236. *Id.*

237. *See generally* Hill v. McDonough, Slip Copy, No. 4:06-CV-032-SPM, 2006 WL 2556938 (N.D. Fla. Sept. 1, 2006).

evidentiary hearing.²³⁸ Hill was executed in Florida's death chamber on September 20, 2006, by lethal injection.²³⁹ Although in the end, Hill's arguments failed to save his life, his case opened the door for other defendants to challenge lethal injection in other parts of the country. One such case, the case of Vernon Lee Evans, Jr., has developed in Maryland.

ii. *Evans v. State*

In 1983, Evans entered into an agreement with Anthony Grandison whereby Evans would be paid \$9,000 to perform a "contract killing" of two witnesses who were scheduled to testify against Grandison in a narcotics case in federal court.²⁴⁰ After murdering two individuals, one of whom was a witness and one an innocent bystander, Evans was arrested and initially charged with witness tampering and violations of the victims' civil rights.²⁴¹ Shortly thereafter, both Evans and Grandison were charged with two counts of first-degree murder, and one count each of conspiracy to commit murder and use of a handgun in the commission of a felony.²⁴² Evans was sentenced to life in prison, plus an additional ten years on the witness tampering and civil rights charges, then moved the federal court to dismiss his murder indictment, arguing double jeopardy.²⁴³ The trial court denied the motion, and Evans was sentenced to death on the first-degree murder charges.²⁴⁴ The Court of Appeals of Maryland affirmed the trial court decision, and Evans appealed to the U.S. Supreme Court, but the Court denied Evans' petition for certiorari.²⁴⁵

Evans filed suit for post-conviction relief, and the circuit court vacated the death sentence.²⁴⁶ The case was removed to the Circuit Court of Maryland for Baltimore County, and Evans was again sentenced to death.²⁴⁷ Again, Evans appealed to the Court of Appeals of Maryland, but that court affirmed the lower court's

238. *Id.* at *4; *see also* *Sims v. Florida*, 754 So. 2d 657, 668 (Fla. 2000) (addressing contentions that current execution procedures provide inadequate protection from pain).

239. DPIC, Searchable Database of Executions, <http://dcathpenaltyinfo.org/executions.php> (last visited March 12, 2007).

240. *Evans v. State*, 304 Md. 487, 494, 499 A.2d 1261, 1265 (1985).

241. *Id.* at 495, 499 A.2d at 1265.

242. *Id.*

243. *Id.*

244. *Id.* at 494-95, 499 A.2d 1264-65.

245. *Evans v. Maryland*, 478 U.S. 1010 (1986).

246. *Evans v. State*, 333 Md. 660, 667, 637 A.2d 117, 120 (1994).

247. *Id.*

decision.²⁴⁸ Evans appealed to the Supreme Court, but certiorari was denied yet again.²⁴⁹ Thereafter, Evans sought post-conviction relief several times in federal court, but the court denied each of his petitions.²⁵⁰

After the Supreme Court rendered its decision in *Hill*, Evans filed an action under 42 U.S.C. § 1983, which mirrored Hill's claims.²⁵¹ In his suit, Evans alleges that Maryland's lethal injection procedure, which is significantly similar to the challenged procedure from Florida (and other states who utilize lethal injection), poses a risk of causing excessive pain to Evans, and therefore, violates the Eighth Amendment's ban on cruel and unusual punishment.²⁵²

The district court has not yet rendered a decision in Evans's § 1983 action, although the analysis will likely resemble that which was set forth in *Gregg v. Georgia*:²⁵³ whether the punishment "involves the unnecessary and wanton infliction of pain"²⁵⁴ and whether the punishment is "grossly out of proportion to the severity of the crime."²⁵⁵

b. Does Maryland's method of execution involve the unnecessary and wanton infliction of pain?

Maryland's method of lethal injection will be considered cruel and unusual if it involves the unnecessary and wanton infliction of pain²⁵⁶ or the "risk of unnecessary pain, violence, and mutilation."²⁵⁷ The arguments asserting Maryland's lethal injection practice is violative of the Eighth Amendment include: (a) the claim that the sedative used to anesthetize the condemned inmate wears off prior to death, therefore subjecting the inmate to severe pain during the

248. *Id.* at 666, 637 A.2d at 120.

249. *Evans v. Maryland*, 513 U.S. 833 (1994).

250. Evans filed a habeas corpus petition in 1999, which was denied by the federal court. *Evans v. Smith*, 54 F. Supp. 2d 503 (D. Md. 1999). The Fourth Circuit Court of Appeals affirmed this decision, *Evans v. Smith*, 220 F.3d 306 (4th Cir. 2000), and the Supreme Court denied certiorari, 532 U.S. 925 (2001). In 2004, Evans's post-conviction relief petition was reviewed, but again, denied. *Evans v. State*, 389 Md. 456, 886 A.2d 562 (2005).

251. Gibson & McMenemy, *supra* note 7.

252. *Id.*

253. *See supra* notes 210–213 and accompanying text.

254. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (quoting *Furman v. Georgia*, 408 U.S. 238, 392–93 (1972)).

255. *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)).

256. *Id.* (quoting *Furman*, 408 U.S. at 392–93).

257. *Glass v. Louisiana*, 471 U.S. 1080, 1086 (1985) (Brennan, J., dissenting).

execution;²⁵⁸ (b) witness accounts of inmates suffering through excruciating executions over an extended period of time;²⁵⁹ (c) mistakes by the injection team which could botch an execution and cause unnecessary pain to the inmate;²⁶⁰ and, (d) the assertion that the drug Pavulon, used in Maryland's execution practice, has been banned from use on animals because of the severe pain it inflicts.²⁶¹

Although the original intent of the lethal injection process was to "cause death rapidly and without pain,"²⁶² contemporary thought, however, acknowledges the fact that not all executions by lethal injection are painless.²⁶³ In fact, "it's harder to execute someone painlessly than would seem likely."²⁶⁴

- i. The sedative used to anesthetize the condemned inmate wears off prior to death

The latest trend in arguments made in opposition of Maryland's death penalty practice is that the sedative wears off prior to the prisoner's death.²⁶⁵ The problem with this argument is based on the uncertainty of the inmate's physical condition resulting from the combination of drugs used in the execution.²⁶⁶ Because Pavulon is used to paralyze the body, it is difficult to discern the physical state of the inmate, who is unable to move or register pain due to the paralytic.²⁶⁷ The inmate's body remains calm, although he or she has full sensory perception as the lethal drugs pump into his or her body, stopping the heart.²⁶⁸ It is commonly held by medical professionals that were the sedative to wear off prior to death, the inmate would feel excruciating pain as the final drug was injected.²⁶⁹ In such

258. Ewart, *supra* note 126, at 1159.

259. See, e.g., McMenamin, *supra* note 214.

260. Jennifer McMenamin, *Uncertainty on Execution Team*, BALT. SUN, Sept. 21, 2006, at 1B.

261. Ewart, *supra* note 126, at 1184.

262. *Id.* at 1167.

263. *Id.*

264. *Id.* (quoting *American Morning: Last-Minute Energy Funding: P.R. Ploy?; California Execution Delayed Due to Ethical Dilemma* (CNN television broadcast Feb. 21, 2006)).

265. *Id.* at 1159.

266. *Id.* at 1159-60.

267. *Id.*

268. *Id.* at 1159, 1167.

269. Brief of Drs. Kevin Concannon, Dennis Geiser & Glenn Pettifer, Amici Curiae Supporting Petitioner, *Hill v. McDonough*, 126 S. Ct. 2096 (2006), 2006 WL 542180.

circumstances, the pain felt by the inmate would likely amount to a level considered unnecessary and wanton by society's standards.

- ii. Witness accounts show that inmates sometimes suffer through excruciating executions over an extended period of time

Arguments are also made against the lethal injection process based on eye-witness accounts of executions.²⁷⁰ Dorian Hall, a social worker in Ohio's public defender's office, witnessed the lethal injection of Joseph Lewis Clark in 2006.²⁷¹ Her testimony is at the root of Vernon Lee Evans's challenge to Maryland's lethal injection process.²⁷² Hall testified that after the three drugs were injected into Clark, his legs moved, he raised his head, and he told the execution team that the process was not working.²⁷³ The execution team then pulled a curtain in order to shield witnesses from viewing the process once it was clear the first execution attempt had failed.²⁷⁴ Hall then testified that, although the curtain prevented her from seeing the execution, she heard Clark issue "loud, intense guttural moans and groans, as if [he] was in agony."²⁷⁵ The execution took a total of ninety minutes, far beyond the intended duration of an execution.²⁷⁶ This testimony serves as a first-hand account of the possible unnecessary and wanton pain suffered by condemned inmates during their execution.²⁷⁷

- iii. Mistakes by the injection team can cause botched executions which lead to unnecessary pain for the inmate

The most controversial argument in lethal injection litigation involves the use of Pavulon creating a risk of excruciating pain for the inmate if the injection cocktail is not perfectly administered.²⁷⁸ The risk of a botched injection, and therefore a high risk of potential pain for the inmate, increases if the execution is administered by poorly trained individuals.²⁷⁹ This issue has been brought to the

270. McMEnamin, *supra* note 214.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. See Patricia Roy, *Not So Shocking: The Death of the Electric Chair in Georgia at the Hands of the Georgia Supreme Court in Dawson v. State*, 53 MERCER L. REV. 1695, 1703 (2002).

279. See McMEnamin, *supra* note 260.

district court in Maryland through Evans's suit.²⁸⁰ During trial, members of Maryland's execution team testified about their understanding of their roles during an execution.²⁸¹ One corrections officer on the execution team, whose only medical training is limited to basic first-aid courses offered to prison guards, testified that his main responsibility is to regulate the flow of the intravenous (IV) lines during the injection.²⁸² This officer also testified that he was unaware of several critical procedures in the injection process, the failure of any of which could cause a botched execution.²⁸³ A second execution team member, who actually administers the injections, testified that he had no experience with IV medications prior to joining Maryland's execution team.²⁸⁴ After the testimony was presented, doctors, testifying as experts, stated that knowledge and understanding of the "lethal injection procedure . . . [was] lacking among execution team members."²⁸⁵ Such inexperience on the execution team presents a great risk that the initial anesthetic could fail, "leaving [a condemned prisoner] conscious when the heart-stopping chemical enters his system—but paralyzed and unable to signal his distress."²⁸⁶

Evans's execution poses an even higher risk of pain, given Evans's almost-daily injection of heroine over decades of drug addiction during his life.²⁸⁷ The state of Evans's veins calls for a more precise injection made through a central vein in Evans's chest, rather than the standard injection through a vein in the arm.²⁸⁸ Such a procedure would need to be performed by a trained medical professional to ensure success.²⁸⁹ As medical professionals are unable to perform executions under the Hypocratic Oath,²⁹⁰ the risk of a botched

280. *Id.*

281. *Id.*

282. *Id.*

283. *See id.* The officer specifically testified that he

[D]id not know what it means to run an IV line at a slow drip, that he would not be able to tell whether the saline solution was flowing too quickly and that he did not know whether an IV line can "go bad" if fluids are injected too quickly.

Id.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *See id.*

289. *Id.*

290. Levy, *supra* note 196, at 261–62.

execution, 'causing unnecessary and wanton pain during Evans's execution, is considerable.²⁹¹

iv. Pavulon has been banned from use on animals because of the severe pain it inflicts

In 2000, a panel of veterinarians created by the American Veterinary Medical Association stated, in a report on animal euthanasia, that the use of Pavulon, either by itself or in combination with certain anesthetics, can "cause respiratory arrest before loss of consciousness, so the animal may perceive pain and distress after it is immobilized."²⁹² Furthermore, veterinarians have testified that the use of Pavulon could cause a patient to be "aware of the need to breathe, the inability to do so and the terrifying experience of suffocation."²⁹³ The fact that the use of Pavulon has been outlawed against animals has not affected the lethal injection process, as it is still used in most states today.²⁹⁴

Based on the evidence, there is a strong basis to argue that Maryland's death penalty system is in violation of the Eighth Amendment due to the risk of unnecessary and wanton pain the procedure could cause.²⁹⁵ Maryland continues to utilize Pavulon, a drug proven to cause excruciating pain for animals, in its execution cocktail.²⁹⁶ Even if Pavulon could be administered painlessly, as long as Maryland employs unqualified and poorly trained individuals on its execution team, the very real threat of a botched execution will be a paramount risk.²⁹⁷ Even if administered correctly, the sedative used to anesthetize an inmate could wear off, causing an inmate extreme pain without the ability to alert their agony to the execution team.²⁹⁸ Finally, witness testimony has provided that the same execution procedure (including the exact drug cocktail used in Maryland) has caused extreme pain to inmates in the past.²⁹⁹ The evidence suggests that Maryland's death penalty procedure carries a heavy risk of causing unnecessary and wanton pain to an inmate,

291. Gibson & McMenamin, *supra* note 7.

292. Ewart, *supra* note 126, at 1184.

293. Brief of Drs. Kevin Concannon, Dennis Geiser & Glenn Pettifer, Amici Curiae Supporting Petitioner, *supra* note 269, at *15.

294. Ewart, *supra* note 126, at 1184.

295. See Levy, *supra* note 196; *cf. supra* notes 265–294 and accompanying text.

296. See *supra* notes 292–294 and accompanying text.

297. See *supra* notes 278–291 and accompanying text.

298. See *supra* notes 265–269 and accompanying text.

299. See *supra* notes 270–277 and accompanying text.

even when performed correctly; this risk is violative of the Eighth Amendment ban on cruel and unusual punishments.

c. *Is Maryland's method of execution disproportionate to the severity of the crime?*

The second prong of the *Gregg* test, whether a punishment is disproportionate to the severity of the crime, can be difficult to analyze.³⁰⁰ Each crime-punishment relationship must be evaluated on a case-by-case basis given that such an analysis is so fact-specific.³⁰¹ As the Court's model for evaluating punishments only requires that one of the two prongs of the *Gregg* test be met to deem a punishment unconstitutional, Maryland's capital punishment structure must still be considered unconstitutional because the lethal injection process presents a risk (or actuality) of unnecessary or wanton infliction of pain.³⁰² Given the picture painted by the totality of the evidence, a considerable risk of severe pain to a condemned inmate exists, and therefore, under the protections of the Eighth Amendment, the death penalty should be outlawed in Maryland until such time that a painless, less risky procedure can be perfected.

III. THE FUTURE OF CAPITAL PUNISHMENT

As dictated by the Court of Appeals of Maryland, the death penalty is on hiatus in the state pending legislative and possible public review of the system.³⁰³ Although this moratorium is a power move by the judicial branch to correct the wrongs of the Maryland death penalty system, it falls short of the goal, expressed by Justice Blackmun in *Callins v. Collins*:³⁰⁴ To create a system that "deliver[s] the fair, consistent, and reliable sentence[] of death required by the Constitution."³⁰⁵

A. *Can Maryland Supply a Fair, Consistent and Reliable Sentence of Death?*

The fact remains that Maryland's death penalty system is not a fair, consistent, and reliable punishment. Studies done by the University of Maryland provide evidence that defendants who kill whites are

300. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

301. Cf. Derek S. Bentsen, Note, *Beyond Statutory Elements: The Substantive Effects of the Right to a Jury Trial on Constitutionally Significant Facts*, 90 VA. L. REV. 645, 674-75 (2004).

302. Cf. *supra* notes 265-294 and accompanying text.

303. McMenamin, *supra* note 139.

304. 510 U.S. 1141, 1143-46 (1994) (Blackmun, J., dissenting).

305. See *id.* at 1146.

more likely to receive a death sentence than killers of non-whites.³⁰⁶ The jurisdiction in which the crime was committed is also a factor.³⁰⁷ More defendants are charged with and convicted of capital crimes in Baltimore County than in any other county in Maryland despite the fact that other counties have higher rates of “death-eligible” cases.³⁰⁸ In recent years, Maryland’s death penalty cases have been driven more by politics than by the reality of the crimes committed.³⁰⁹ As it stands, the Maryland system presents the possibility of human error resulting in a wrongful execution.³¹⁰ At a press conference in 2003, then-Attorney General J. Joseph Curran called for an end to Maryland’s death penalty, citing “an intolerable risk of killing an innocent person” and two cases where Maryland inmates were exonerated from capital convictions through DNA evidence.³¹¹ In that press conference, Curran also called for a revision of Maryland’s death penalty statute.³¹² Other state officials have called the Maryland death penalty system “a mess.”³¹³ Despite these calls for change, there has been no significant revision made to the death penalty statute since that date.³¹⁴ In fact, prominent anti-death penalty advocates have charged that “[a]ll three branches of government in Maryland are refusing to deal with” the problems presented by the study.³¹⁵

Throughout the United States, the problem persists. A majority of states utilize the same lethal injection procedures, but few states have implemented changes, despite growing pressure from the nation’s

306. Hanes & Koenig, *supra* note 135.

307. *Md. Attorney General to Call for End to Executions; Curran to Outline Stance at News Conference Today*, BALT. SUN, Jan. 30, 2003, at 4B.

308. EMPIRICAL ANALYSIS, *supra* note 129, at fig.9. Baltimore County prosecutors seek the death penalty almost three times as much as prosecutors in neighboring Baltimore City, despite having only a quarter of Baltimore City’s death eligible cases. *Id.* at fig.5. Courts in Baltimore County have also returned death sentences almost four times as much as those in Baltimore City. *Id.*

309. Hanes & Koenig, *supra* note 135.

310. Koenig, *supra* note 136.

311. *Id.*

312. *Id.*

313. Ivan Penn, *Sniper Trial Renews Death Penalty Talk; Legislators Are Vowing Push to Clarify, Improve Maryland’s Statutes; ‘It Should Have Been Tried Here’: Decision to Prosecute in Va. Angers Lawmakers, Points to Ambiguities*, BALT. SUN, Oct. 14, 2003, at 1B.

314. Jennifer McMenamin, *As Execution Clock Winds Down, the Racial Debate Lingers*, BALT. SUN, Dec. 4, 2005, at 1A.

315. *See id.*

court system.³¹⁶ In fact, one of Maryland's own administrative judges has called the current system "'legally ineffective' because [it was] not created with public input."³¹⁷ The moratorium implemented by the Court of Appeals of Maryland is a start, but it fails to prompt the necessary changes that could lessen the risk of excruciating pain for executed prisoners.³¹⁸

IV. CONCLUSION

"Amnesty International defines torture as an extreme physical and mental assault on a person who has been rendered defenseless."³¹⁹ It is this torture which the U.S. Constitution aims to prevent. As dictated by *Furman v. Georgia*³²⁰ and *Gregg v. Georgia*,³²¹ the Constitution prevents cruel and unusual punishments which involve the unnecessary and wanton infliction of pain. As laid out previously, Maryland's method of execution creates the extreme risk of such pain, and is therefore unconstitutional.

Recent challenges to the death penalty argue that the anesthetic used in a majority of executions can wear off prior to death. Eyewitness accounts provide evidence that often, executions have not been completed painlessly, even when procedures are presumably completed in conformance with protocol. The lack of experience and training of Maryland's execution team produces a risk of botched executions. Finally, the drug cocktail is so powerful that it has been banned for use on animals due to the intense pain it inflicts. Each of these four concerns present a significant risk of excruciating pain for the inmate. The culmination of this evidence leads to one conclusion: In its present state, Maryland's capital punishment procedure is no more than the kind of torture condemned by Amnesty International and other human rights groups across the globe, and the kind forbidden by the U.S. Constitution.

The debate over the whether to abolish capital punishment in Maryland will come to fruition as dictated by the moratorium implemented by the Court of Appeals of Maryland. Because such a

316. Gail Gibson, *Lethal Injection Lacks Protocols; Executions Halted for Courts' Questions*, BALT. SUN, July 8, 2006, at 1A.

317. *Id.*

318. Andrew A. Green & Justin Fenton, *On Eve of Session, Democrats Vow End to Confrontation; Death Penalty, Health Care Reform Seen as Key Issues; Lawmakers Start Today; General Assembly*, BALT. SUN, Jan. 10, 2007, at 1B.

319. HELEN PREJEAN, *DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES* 105 (1994).

320. 408 U.S. 238, 313-14 (1972).

321. 428 U.S. 153, 173 (1976).

controversial issue must be decided based on the current state of public opinion, as dictated by *Gregg v. Georgia*³²² and by Maryland's Administrative Procedure Act, capital punishment in Maryland remains in limbo. If a majority of the public returns a general favoritism for capital punishment, a long-term, open-ended moratorium should be implemented until such time that the legislature approves a bill establishing a fair, consistent, and reliable sentence of death approved by the public. Should the public return a general disfavor for capital punishment, Maryland should take a leadership role in this country and outlaw capital punishment, securing the protections of the Eighth Amendment for condemned prisoners in Maryland.

Matthew E. Feinberg

322. *Id.* at 173.