NOTES

"Waiting on Death": Nathan Dunlap and the Cruel Effect of Uncertainty

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INTRODUCTION

When the sun fell behind Colorado's iconic mountains on November 4, 2014, the political fates of two men hung in the balance. In one corner sat Democrat John Hickenlooper, a geologist turned brewmaster turned Governor of Colorado who had been elected in 2010 thanks to a fractured Republican party.[1] His opponent in that election had been Dan Maes—a candidate perhaps best known for insisting that Denver's bike-sharing program was not, as it seemed on the surface, an effort to promote cycling and environmentalism, but instead a program "dictated" to the City of Denver by the United Nations.[2] After Maes's campaign imploded, Hickenlooper's chief challenger was immigration firebrand Tom Tancredo, whose stated interest in bombing Mecca[3] and impeaching President Obama[4] hardly made him a threat to the quirky, but affable, Hickenlooper.[5] This favorable political environment allowed Hickenlooper to buck the 2010 Tea Party movement and win by a whopping fifteen points,[6] but it also gave rise to a sense that his victory was due more to circumstance than political acumen.[7]

A victory in the 2014 election would put an end to the whisper campaign that his "aw-shucksy" persona could not withstand a real electoral challenge and would invigorate the growing speculation that he could become a candidate for national office in 2016 and beyond.[8] In the other corner stood Republican Bob

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1. *See generally* Maximillian Potter, *The Happy Shrewdness of John W. Hickenlooper*, 5280: DENVER'S MILE HIGH MAG. (Aug. 2012), http://www.5280.com/2012/07/the-happy-shrewdness-of-john-w-hickenlooper [https://perma.cc/ZMB4-SHRE] (detailing Hickenlooper's unique background as the owner of a local microbrewery and his unlikely career in politics).

2. *See* Christopher N. Osher, *Bike Agenda Spins Cities Toward U.N. Control, Maes Warns*, DENVER POST (Aug. 3, 2010, 6:55 PM), http://www.denverpost.com/2010/08/03/bike-agenda-spins-cities-toward-u-n-control-maes-warns [https://perma.cc/WDF3-D3PZ] ("At first, I thought, 'Gosh, public transportation, what's wrong with that, and what's wrong with people parking their cars and riding their bikes? And what's wrong with incentives for green cars?' But if you do your homework and research, you realize [the International Council for Local Environmental Initiatives] is part of a greater strategy to rein in American cities under a United Nations treaty . . . ." (quoting Maes)).

3. Lauren Kornreich, *Tancredo: Threaten To Bomb Muslim Holy Sites in Retaliation*, CNN: POL. TICKER (Aug. 4, 2007, 2:08 PM), http://politicalticker.blogs.cnn.com/2007/08/04/tancredo-bomb-muslim-holy-sites-first [https://perma.cc/FJM3-8U65].

4. Erin Dooley & Scott Wilson, *Meet the Impeachment Crowd: 6 Republicans Who Want Obama Out*, ABC NEWS (July 10, 2014, 2:45 PM), http://abcnews.go.com/Politics/meet-impeachment-crowd-republicans-obama/story?id=24494476 [https://perma.cc/B3UL-CDB7].

5. Hickenlooper would eventually win over 50% of the vote. John Moore, *Buck, Bennet Close as Hick Wins Easily*, DENVER POST, Nov. 3, 2010, at A1.

6. Hickenlooper won 51% of the vote, with Tancredo garnering 36% and Dan Maes, the Republican, earning a meager 11%. *Election 2010 Results, Colorado*, N.Y. TIMES, https://www.nytimes.com/elections/2010/results/colorado.html [https://perma.cc/A5ZW-FWH8].

7. *See* Ryan Lizza, *The Middleman: Colorado's Governor Finds Himself Leading His State to the Left*, NEW YORKER (May 13, 2013), http://www.newyorker.com/magazine/2013/05/13/the-middleman-2 [https://perma.cc/TTP4-58TA] ("Hickenlooper's 'quirky personality is one that many voters have found endearing,' Ryan Call, the chairman of the state G.O.P., told me. 'He's also been lucky. He's never had to run a tough race and has never had to take many political shots from tough opponents.'").

8. *See id.* ("Soon after Hickenlooper became governor, local reporters wondered whether he might run for President in 2016.").

Beauprez, a former congressman whose previous bid for Governor had been swept away by the Democratic wave of 2006.[9] After losing by seventeen points,[10] Beauprez entered the political wilderness, emerging in 2014 to seek a renewed political future and redemption from the Colorado electorate.[11]

As the two candidates watched the returns from their respective headquarters in Denver, a third man sat a little over one hundred miles away. Like the two politicians, Offender No. 89148's fate also hung in the balance that evening. Unlike them, the fate that hung for him was literal, not political. As the results trickled in, one politician presumably dreamt of legitimacy, the other of redemption. Nathan Dunlap, Offender No. 89148, dreamt only of certainty.

Convicted of four counts of first-degree murder in 1996, Dunlap had spent the previous eighteen years on death row.[12] In 2013, his appeals exhausted, Dunlap petitioned Governor Hickenlooper for executive clemency.[13] As advocates across the ideological spectrum advocated for granting or denying the petition, Hickenlooper found a third avenue: granting Dunlap a temporary reprieve and thrusting him onto the front pages and into the upcoming gubernatorial election.[14]

When Beauprez indicated that, if elected, his administration would rescind the reprieve,[15] the 2014 election suddenly presented a simple choice: if Hickenlooper were elected, Dunlap would live; if Beauprez were elected, Dunlap would die. Whether Dunlap would live or die was in the hands of the voters.

Although subjecting Dunlap's life to the uncertainty of a political referendum is undoubtedly cruel, his story is only one egregious case of the uncertainty that befalls death row inmates. As Justice Stephen Breyer has noted—most recently in dissent in *Glossip v. Gross*—the modern death penalty is administered so arbitrarily, and after such interminable delays, that the ensuing uncertainty

9. *See* Ivan Moreno, *Bob Beauprez Wins Colorado Governor GOP Primary*, PUEBLO CHIEFTAIN (June 24, 2014), https://web.archive.org/web/20140729035416/http://www.chieftain.com/news/politics/2673963-120/beauprez-primary-tancredo-republican [https://perma.cc/D8AZ-RM4P].

10. *Id.*

11. *See* Ivan Moreno, *Guv's Race a Dead Heat as Voters Hold Ballots*, DURANGO HERALD (Oct. 17, 2014, 1:24 PM), https://durangoherald.com/articles/80550 [https://perma.cc/3VBZ-DY57] ("For Beauprez, a buffalo rancher who grew up working on his father's dairy farm, this is a chance at redemption after a humiliating 17-point defeat when he ran for governor in 2006.").

12. *See* Natasha Gardner & Patrick Doyle, *The Politics of Killing*, 5280: DENVER'S MILE HIGH MAG. (Dec. 2008), http://www.5280.com/2010/08/the-politics-of-killing [https://perma.cc/2NBS-VS7K].

13. *See* Colo. Exec. Order No. D 2013-006 (May 22, 2013), https://www.colorado.gov/governor/sites/default/files/d_2013-006_death_sentence_reprieve.pdf [https://perma.cc/FB28-C6MF].

14. *See id.*; *Nathan Dunlap Granted "Temporary Reprieve" by Governor*, DENVER POST (May 22, 2013, 6:20 AM), http://www.denverpost.com/2013/05/22/nathan-dunlap-granted-temporary-reprieve-by-governor [https://perma.cc/U76R-MH7H].

15. *See* Joey Bunch, *Three GOP Candidates for Governor Say "War on Women" Is Democratic Hot Air*, DENVER POST: THE SPOT (May 20, 2014, 10:15 PM), http://blogs.denverpost.com/thespot/2014/05/20/three-gop-candidates-governor-say-war-women-democratic-hot-air/109128 [https://perma.cc/G3T4-THFZ].

likely violates the Eighth Amendment's ban on cruel and unusual punishment.[16] One reason this argument has thus far proven unsuccessful is the approach of the Court's originalists, who believe the original meaning of the Eighth Amendment only precludes punishments imposed with cruel intent.[17] Because the uncertainty discussed in Breyer's dissent in *Glossip* was unintentional, the two originalists on the Court at the time dismissed this argument out of hand, forcing advocates to convince at least five of the remaining seven Justices of the wisdom of the cruelty of uncertainty.[18]

Recent research has called the current originalist approach into question, potentially creating an avenue to put the votes of the Court's originalists back in play for Eighth Amendment claims based on uncertainty and interminable delays. In a recent article, John Stinneford persuasively argues that the original meaning of the Eighth Amendment targets cruel effects, not cruel intentions. Read in combination with a previous article exploring the original meaning of "unusual,"[19] Stinneford's contention is that the original meaning of the Cruel and Unusual Punishments Clause was to outlaw punishments with "unjustly harsh" effects compared to "longstanding prior punishment practice."[20] At least arguably, then, Stinneford's research creates a new opportunity for argument at the Supreme Court about the cruel effects of uncertainty.

This Note uses an originalist lens to view Nathan Dunlap's story as a particularly egregious example of the cruelty inherent in our capital punishment scheme. It acknowledges that much of the cruel uncertainty surrounding the death penalty may be due to constitutional and legal safeguards imposed to ensure the state does not execute an innocent person, yet it considers whether the modern death penalty violates the original meaning of the Eighth Amendment as interpreted by Stinneford. Finally, this Note argues that we may have to choose between this quest for perfection in the administration of capital punishment and avoiding the imposition of cruel and unusual uncertainty.

Part I of this Note discusses the original meaning of the Eighth Amendment, ending with Stinneford's recent originalist reinterpretation of the Cruel and Unusual Punishments Clause. Part II explores the history of uncertainty and delay claims at the Supreme Court, discussing both the reasons for uncertainty and delay and the cruelty that uncertainty imposes. Part III tells the story of Nathan Dunlap, exploring the particularly cruel uncertainty to which he was subjected as a result of Governor Hickenlooper's reprieve. Finally, this Note

16. *See* U.S. CONST. amend. VIII; Glossip v. Gross, 135 S. Ct. 2726, 2767–70 (2015) (Breyer, J., dissenting).

17. *See, e.g.*, Baze v. Rees, 553 U.S. 35, 94, 102 (2008) (Thomas, J., concurring).

18. This Note operates under the assumption that Justice Antonin Scalia's replacement, Justice Neil Gorsuch, will adhere to Justice Scalia's originalist approach. To date, Justices Thomas and Scalia have been the most ardent originalists regarding the Eighth Amendment, rejecting all claims that do not involve cruel intentions. *See Glossip*, 135 S. Ct. at 2750 n.1 (Thomas, J., dissenting).

19. *See* John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1766–1825 (2008).

20. John F. Stinneford, *The Original Meaning of "Cruel,"* 105 GEO. L.J. 441, 464 (2017).

concludes with a discussion of the implications of Dunlap's example for modern capital punishment.

I. THE ORIGINAL MEANING OF THE EIGHTH AMENDMENT

Regardless of one's preferred approach to constitutional interpretation and construction, it is undeniable that the last thirty years have seen an explosion in the importance of the original meaning of the Constitution. For much of the twentieth century, the original meaning of the Constitution was considered largely irrelevant to Supreme Court jurisprudence.[21] The phrase "original meaning" first appeared in a dissent in a Supreme Court opinion in 1966.[22] It did not appear in a majority opinion for another eleven years.[23] The term "originalist" was not used in an opinion of the Court until 2005.[24] From 1974 to 1983, only 9% of the Supreme Court's constitutional decisions cited originalist materials, but by 2008 that percentage had doubled.[25] Although the Supreme Court may have lost one of its most vocal proponents of originalism with the death of Justice Antonin Scalia,[26] at least five members of the current Court have joined opinions adhering to various levels of originalism,[27] and originalism is so central to Justice Neil Gorsuch's judicial philosophy that his recent confirmation hearings featured testimony on the philosophical and legal underpinnings of

21. *See* Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 12, 14–32 (Grand Huscroft & Bradley W. Miller eds., 2011) (detailing the evolution of originalism at the Supreme Court and in the academy).

22. *Id.* at 14 (citing Harper v. Va. Bd. of Elections, 383 U.S. 663, 671 (1966) (Black, J., dissenting)).

23. *Id.* (citing Ingraham v. Wright, 430 U.S. 651, 670 n.39 (1977)).

24. *Id.* at 15 (citing Roper v. Simmons, 543 U.S. 551, 626 (2005) (Scalia, J., dissenting)).

25. *See* Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL'Y 217, 226 & fig.6 (2010).

26. *See, e.g.*, *Originalism: A Primer on Scalia's Constitutional Philosophy*, NPR (Feb. 14, 2016, 5:41 PM), http://www.npr.org/2016/02/14/466744465/originalism-a-primer-on-scalias-constitutional-philosophy [https://perma.cc/M93P-PY3N] (interviewing legal affairs correspondent Nina Totenberg, who called Justice Scalia the "main proponent" of originalism on the Supreme Court). Scalia once famously referred to himself as a "faint-hearted originalist" in response to an expectation that he would be unable to stomach some of the particularly unpalatable ends of originalism, such as upholding public flogging as a punishment. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989). He later repudiated that characterization. Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), http://nymag.com/news/features/antonin-scalia-2013-10 [https://perma.cc/8K3T-E5GH].

27. *See, e.g.*, NLRB v. Noel Canning, 134 S. Ct. 2550, 2565 (2014) (Breyer, J.) (noting that "the Framers likely did intend the [Recess Appointments] Clause to apply to a new circumstance"); Bond v. United States, 134 S. Ct. 2077, 2103 (2014) (Thomas, J., joined by Alito and Scalia, J.J., concurring) (urging the Court to "address the scope of the Treaty Power as it was originally understood"); NFIB v. Sebelius, 567 U.S. 519, 554 (2012) (plurality opinion) (Roberts, C.J.) (explaining that allowing the government to compel citizens to act "is not the country the Framers of our Constitution envisioned"); Citizens United v. FEC, 558 U.S. 310, 353–54 (2010) (Kennedy, J.) (exploring the original meaning of the First Amendment).

originalism.[28]

Whether the original meaning of a constitutional provision must always control is beyond the scope of this Note. However, to ignore original meaning is to reduce the available votes at the Supreme Court for a given position. Regardless of its normative or positive justifications, originalism[29] is a tool of constitutional interpretation that cannot be overlooked, especially by defense attorneys and death penalty abolitionists frustrated with the Supreme Court's inconsistent and open-textured Eighth Amendment jurisprudence.

A. ORIGINALIST TREATMENT OF THE EIGHTH AMENDMENT

In recent years, two Supreme Court Justices have taken explicitly originalist approaches to the interpretation of the Eighth Amendment: Justices Clarence Thomas and Antonin Scalia.[30] Under each of their approaches, the original meaning of the Eighth Amendment's ban on cruel and unusual punishment forecloses only "*intentional* infliction of gratuitous pain."[31] Under this standard, the focus is on the punisher, not the punished, and the question is whether the punishment was adopted "to add elements of terror, pain, or disgrace to the death penalty."[32]

Justice Thomas has used this approach to reject the "arbitrariness" standard that has characterized the Court's death penalty jurisprudence since the 1970s.[33] In 1972, in *Furman v. Georgia*, the Supreme Court held that the death penalty, as currently administered, was unconstitutional under the Eighth Amendment.[34] Among the jumble of opinions issued in that case, the following emerged: "The high service rendered by the 'cruel and unusual' punishment clause of the

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28. *See Nomination of the Honorable Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary (Day 2)*, 115th Cong. 63–64 (2017) (statement of Lawrence B. Solum, Carmack Waterhouse Professor of Law, Georgetown University Law Center).

29. "Originalism" is an umbrella term covering various tributaries that have branched off from the basic theory. *See* Solum, *supra* note 21, at 32–38 (describing the "originalist family of theories"). Where this Note refers to "originalism," it refers to "Public Meaning Originalism," which holds that "the communicative content of the constitutional text is fixed at the time of origin by the conventional semantic meaning of the words and phrases in the context that was shared by the drafters, ratifiers, and citizens." Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 459 (2013). This is the predominant branch of originalism today, originally encouraged by then-Judge Scalia in 1986. *See* Solum, *supra* note 21, at 22–23 & n.51.

30. *See, e.g.*, Glossip v. Gross, 135 S. Ct. 2726, 2747, 2749–50 (2015) (Scalia, J., joined by Thomas, J., concurring).

31. Baze v. Rees, 553 U.S. 35, 102 (2008) (Thomas, J., concurring) (emphasis added). Although only Justice Scalia joined Justice Thomas's opinion, the plurality opinion authored by Chief Justice Roberts and joined by Justices Alito and Kennedy implicitly adopts this cruel intent reading as well. *See id.* at 48, 50–51 (plurality opinion) (noting that "[w]hat each of the forbidden punishments had in common was the deliberate infliction of pain for the sake of pain").

32. *Id.* at 107 (Thomas, J., concurring).

33. *See* Gregg v. Georgia, 428 U.S. 153, 188 (1976) (plurality opinion) (holding that "sentencing procedures that create[] a substantial risk" that the death penalty will be "inflicted in an arbitrary and capricious manner" are unconstitutional).

34. 408 U.S. 238, 239–40 (1972) (per curiam).

Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary . . . ."[35] When the death penalty was reinstated in 1976, in *Gregg v. Georgia*, the arbitrariness standard survived[36] and has served as the Court's guiding light when confronted with the death penalty ever since.

In adopting a cruel intent reading of the Eighth Amendment, Justice Thomas implicitly rejects an inquiry focused on arbitrary application. His opinions discuss punishment practices at the Founding, finding that the critical distinction was between punishments "designed to inflict pain and suffering beyond that necessary to cause death" and those that harbored no such designs.[37] In his cruel intent reading, it was against this backdrop that the Eighth Amendment was adopted, with the express purpose of preventing Congress from "imposing torturous punishments."[38]

It is relatively unchallenged, at least from an originalist perspective, that this ban on tortuous punishments did not extend to the death penalty. For starters, the Bill of Rights explicitly contemplates the death penalty[39] and, at the Founding, the death penalty was the "standard punishment for a wide range of serious crimes."[40] If the Framers had intended to make the death penalty unconstitutional, such a change would have been dramatic and would have elicited much discussion. Instead, the death penalty received relatively little attention during the debate over the Bill of Rights.[41]

Current originalist death penalty jurisprudence can thus be captured by three prongs: (1) the death penalty itself does not necessarily violate the Eighth Amendment, (2) there is no support for the arbitrariness standard imposed by *Furman* and *Gregg*, and (3) a punishment only violates the Eighth Amendment if it is "deliberately designed to inflict pain."[42] Recent Supreme Court advocacy has tended either to ignore originalist arguments in pursuit of the seven nonoriginalist Justices or to operate within these boundaries.[43]

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35. *Id.* at 256 (Douglas, J., concurring).

36. *See Gregg*, 428 U.S. at 188 (plurality opinion).

37. *Baze*, 553 U.S. at 96 (Thomas, J., concurring).

38. *Id.* at 97. Justice Thomas's discussion of the historical backdrop for the Eighth Amendment, which spans several pages in *Baze*, contains details outside the scope of this Note, but is worth consideration. *See id.* at 94–99.

39. *See* U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .")

40. STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 23 (2002).

41. *See Baze*, 553 U.S. at 97 (Thomas, J., concurring) (stating that "the Eighth Amendment was not the subject of extensive discussion during the debates on the Bill of Rights").

42. *Id.* at 94.

43. *See, e.g.*, Brief for Respondents at 40–55, Glossip v. Gross, 135 S. Ct. 2726 (2015) (No. 14-7955), 2015 WL 1619433 (arguing that Oklahoma's method of execution "does not expose [p]etitioners to 'a substantial risk of severe pain'"); Brief for Petitioner at 4, Hall v. Florida, 134 S. Ct. 1986 (2014) (No. 12-10882), 2013 WL 6673693 (arguing that Florida's "bright-line rule" for establishing which defendants were too mentally ill to execute was "clinically arbitrary").

B. A NEW INTERPRETATION OF THE ORIGINAL MEANING

If this originalist approach seems unnecessarily cabined, that is because it developed in direct response to the dominant line of Eighth Amendment jurisprudence, which explicitly rejects an originalist approach. In *Trop v. Dulles*, the Court adopted a view of the Eighth Amendment that is anathema to Justices Thomas and Scalia's constitutional originalism—that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[44] This "evolving standards" approach means that whether a punishment is excessive "is judged not by the standards that prevailed . . . when the Bill of Rights was adopted, but rather by those that currently prevail."[45] The Court has employed this standard to reverse course in its more recent death penalty cases, finding punishments it previously labeled unobjectionable as unconstitutional.[46]

This approach is not without justification. The word "cruel"—open-textured as it is—may have been added to the Amendment expressly to allow for this malleable interpretation.[47] Regardless, the effect of the evolving standards approach is that a practice once acceptable under the Eighth Amendment could later be found to violate the same text. For strident originalists, this cannot be.[48] The ensuing tension has only widened the gulf between originalists and nonoriginalists when it comes to the Eighth Amendment[49] and has left advocates to choose between arguments aimed at one bloc or the other.

John Stinneford argues that both sides are flawed. He criticizes the evolving standards test as presenting "deep practical and theoretical problems" because it makes the rights of criminal defendants dependent upon either the unmoored

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44. 356 U.S. 86, 101 (1958) (plurality opinion).

45. Atkins v. Virginia, 536 U.S. 304, 311 (2002).

46. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 574–75 (2005) (holding execution of juvenile offenders unconstitutional sixteen years after holding otherwise in Stanford v. Kentucky, 492 U.S. 361, 380 (1989)); *Atkins*, 536 U.S. at 321 (holding execution of mentally disabled individuals unconstitutional thirteen years after holding otherwise in Penry v. Lynaugh, 492 U.S. 302, 340 (1989) (plurality opinion)). For a helpful analysis of the "evolving standards of decency" principle, see generally Brian W. Varland, *Marking the Progress of a Maturing Society: Reconsidering the Constitutionality of Death Penalty Application in Light of Evolving Standards of Decency*, 28 HAMLINE L. REV. 311 (2005).

47. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 13–14 (1980).

48. That the meaning of a constitutional text is fixed at the time it is ratified—the Fixation Thesis—is one of the two core ideas of originalist theory. *See* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015). Whether the evolving standards of decency test violates the Fixation Thesis is a more complicated topic than it is made to seem in this Note. An adherent to the Fixation Thesis could conceivably agree that "cruel" was chosen explicitly for its adaptability, and that the communicative content of the phrase—what is "fixed" under the Fixation Thesis—is actually that the Amendment is meant to evolve as society evolves. For the purposes of this Note, however, I adopt a stricter interpretation of the Fixation Thesis than an originalist who takes this position would, predominantly because the originalists on the Supreme Court have done so up to this point. *See, e.g.*, Baze v. Rees, 553 U.S. 35, 104 (2008) (Thomas, J., concurring) (criticizing the use of the evolving standards of decency principle as applied to "cruel" punishments).

49. *See* Stinneford, *supra* note 19, at 1743.

sentiments of individual judges or public opinion.[50] His critique of the originalist test is twofold: first, it almost entirely ignores the word "unusual" in the Cruel and Unusual Punishments Clause;[51] second, the logical ends of the originalist argument are so absurd to modern society that even originalists would not adhere to their demands.[52] This exact problem forced Justice Scalia to once label himself a "faint-hearted originalist": because the Framers would not have considered public flogging to violate the Eighth Amendment, Justice Scalia remarked that he would be forced to uphold a similar law if passed today.[53] Having indicated a potential unwillingness to do so, Justice Scalia, according to Stinneford, "abandoned any pretext that his approach to the Cruel and Unusual Punishments Clause is more principled than the evolving standards of decency approach."[54]

In response, Stinneford engages the originalists on their own turf. He first presents historical evidence that the original meaning of "unusual" was "contrary to long usage,"[55] leaving a punishment "unusual" if it is "contrary to our longstanding traditions."[56] This reading provides an objectivity that the evolving standards test lacks, while simultaneously allowing for the possibility that society can evolve beyond certain objectionable punishments like public flogging. Furthermore, it addresses the most troubling flaw of the evolving standards test: should public opinion become inflamed against a subset of criminals, these standards could evolve regressively.[57]

To determine whether a given punishment is cruel, the current originalist jurisprudence focuses on the intent of the punisher.[58] By contrast, Stinneford presents compelling evidence that this intent-centric approach is incorrect. He

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50. *Id.* at 1751–54.

51. *Id.* at 1757–58. Stinneford also critiques nonoriginalists for the same defect. *See id.* at 1743 (stating that "both [nonoriginalist and originalist] approaches essentially read the word 'unusual' out" of the Eight Amendment).

52. *Id.* at 1765.

53. *See* Scalia, *supra* note 26, at 864.

54. Stinneford, *supra* note 19, at 1766.

55. *See id.* at 1767–71 (cataloging the historical support for defining "unusual" as "contrary to long usage").

56. *Id.* at 1815.

57. For example, imagine that in response to a highly publicized series of child pornography cases, California passes a law mandating that all offenders convicted of distributing child pornography will be chemically blinded. The bill would be the first of its kind. Furthermore, assume surveys show broad support for the punishment amongst the public, juries did not hesitate to impose the punishment, and the legislation passed with supermajorities in both chambers of the California legislature. Under the evolving standards test, invalidating the bill would require the Supreme Court to reject all "objective indicia" of society's standards. *See* Roper v. Simmons, 543 U.S. 551, 564 (2005) ("The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question."). Under Stinneford's test, however, the bill—assuming it was cruel—could be dismissed as contrary to longstanding punishment practices. *See* Stinneford, *supra* note 19, at 1754–55 (discussing the recent adoption of chemical castration laws for sex offenders).

58. *See, e.g.*, Baze v. Rees, 553 U.S. 35, 94–96 (2007) (Thomas, J., concurring) ("[I]n my view, a method of execution violates the Eighth Amendment only if it is deliberately designed to inflict pain . . . .").

argues that the original meaning of "cruel" focused not on the intent of the punisher but on the effect of the punishment.[59] In compiling many persuasive historical sources, perhaps Stinneford's strongest evidence comes from Blackstone, who uses "cruel," "severe," and "sanguinary" interchangeably without reference to the intent of the punisher.[60] Furthermore, the only mention of "cruel" during the congressional debate over the Eighth Amendment supports a "cruel effects" reading of the clause.[61] Stinneford's persuasive historical case demonstrates that if the originalists on the Court intend to remain faithful to the original meaning, they must jettison the idea that cruel intent is necessary to trigger the Eighth Amendment.

Taken together, Stinneford's research presents a reasonable and more readily administrable interpretation of the Eighth Amendment: "The linguistic and historical evidence demonstrates that a punishment is cruel and unusual within the original meaning of the Cruel and Unusual Punishments Clause if its effects are unjustly harsh in light of longstanding prior punishment practice."[62]

C. THE STINNEFORD TEST AND IMPLICATIONS FOR THE DEATH PENALTY

Stinneford's test has several implications for modern death penalty jurisprudence. Not only does it impose objectivity on the previously subjective evolving standards of decency test that led judicial conservatives to adopt the cruel intent reading of the Amendment in the first place,[63] it also provides a mechanism for addressing "accidental" cruelty, which would otherwise go ignored by a cruel intent reading.

A vexing aspect of Eighth Amendment jurisprudence is that punishment often results in pain and suffering that is neither intended nor authorized.[64] Consider a minor criminal unknowingly housed with members of a gang he had previously betrayed. The pain this offender is likely to suffer far exceeds the intended punishment, yet no government official intended such excessive punishment to occur. Does this accidental scenario support an Eighth Amendment claim?

Under the current doctrine, the Supreme Court has used "wantonness" to determine when an unintended harm of a legitimate punishment becomes part of the punishment itself.[65] When government officials are "aware of the risk of severe harm entailed by some government action and deliberately choose to perform the action anyway,"[66] the officials' actions are said to constitute

59. Stinneford, *supra* note 20, at 467.
60. *Id.* at 477 (citing 5 WILLIAM BLACKSTONE, COMMENTARIES *17–18).
61. *Id.* at 480.
62. *Id.* at 464.
63. *See id.* at 494.
64. *See, e.g.*, Glossip v. Gross, 135 S. Ct. 2726, 2782 (2015) (Sotomayor, J., dissenting) (detailing the unintentional suffering experienced by Clayton Lockett during his execution).
65. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 103–06 (1976).
66. Stinneford, *supra* note 20, at 499.

"unnecessary and wanton infliction of pain."[67] This wantonness can be satisfied not only if the officials act maliciously or sadistically but also if the officials display deliberate indifference to a risk of harm.[68]

As Stinneford notes, this standard becomes difficult to enforce the more disparate our criminal justice system becomes.[69] With modern prisons resembling highly compartmentalized bureaucracies, and responsibility for prisoners being spread among larger and larger groups of government officials, the objective risk of enhanced punishment can remain stable despite an increased likelihood that "no person in the system may have actual awareness of an unjustifiable risk of harm."[70]

The wantonness standard, when combined with this compartmentalization, means defendants exposed to a substantial risk of pain and suffering have fewer avenues for recourse for vindicating their constitutional rights. It is even likely that the Supreme Court's jurisprudence has accelerated this compartmentalization, giving states and prison systems a powerful incentive to place no single official "in charge" of managing a defendant's risk.[71] This is especially true in the capital punishment context, where this compartmentalization is not an accident but a conscious decision to disaggregate responsibility so no single official will feel responsible for carrying out the execution.[72] Even safeguards put in place to protect the constitutional rights of defendants may enhance the risk of harm.[73]

In any punishment, the question is whether unintended harm that accompanies the punishment should be included in assessing the constitutionality of the punishment. To impose a capital sentence on a modern shoplifter would unquestionably run afoul of the Eighth Amendment.[74] Yet if that same shoplifter—despite displaying a healthy disposition—were to suffer a heart attack brought on in part by the conditions of prison, it would be a stretch to apply the Eighth Amendment to such disparate harm. In both cases the suffering experienced by the offender is the same, but the applicability of the Eighth Amendment must necessarily recognize critical distinctions between the two scenarios. The Stinneford test would alleviate much of the modern difficulty in assessing this relationship. By focusing on the effect of the punishment rather than the intent

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67. *Estelle*, 429 U.S. at 104 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion)).

68. Stinneford, *supra* note 20, at 457.

69. *Id.* at 499.

70. *Id.*

71. *See* Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 892 (2009) (noting that current jurisprudence "holds officers liable only for those risks they happen to notice—and thereby creates incentives for officers *not* to notice").

72. *See* STEPHEN TROMBLEY, THE EXECUTION PROTOCOL: INSIDE AMERICA'S CAPITAL PUNISHMENT INDUSTRY 106 (1992).

73. *See* discussion *infra* Section II.D.

74. *See* Solem v. Helm, 463 U.S. 277, 288 (1983) (detailing the Supreme Court's "principle of proportionality," which holds that the Eighth Amendment invalidates "grossly disproportionate" punishments).

of the punisher and comparing that effect to longstanding practices, a workable and objective test emerges. If a punishment—particularly in the capital context—poses a risk of unjustified pain and suffering that exceeds the risk posed by traditional punishments, that punishment is unconstitutional.[75] The manner in which the modern death penalty is carried out approaches this standard.

II. UNCERTAIN DELAYS

In discussing his test's application to the death penalty, Stinneford stops short of assessing its implications for two critical areas of death penalty jurisprudence: (1) uncertainty and (2) delay. This Note argues that Stinneford's research reveals that the uncertain and delayed nature of the modern death penalty likely violates the Eighth Amendment.

In 1976, when the Supreme Court revived the death penalty in *Gregg v. Georgia* four years after invalidating it in *Furman*, it did so under the theory that capital punishment may serve two principle purposes: retribution and deterrence.[76] In the forty years since *Gregg*, the Court has consistently reiterated that capital punishment's penological rationale "rests almost exclusively upon a belief in its tendency to deter and upon its ability to satisfy a community's interest in retribution."[77] Any adjustments to the capital punishment protocol—adjustments to the longstanding practices, in Stinneford's terminology—must maintain a reasonable relationship to these purposes.

Whether the death penalty actually deters capital crimes is a fraught topic far beyond the scope of this Note. It is enough to say that recent Supreme Court death penalty opinions have devolved into a "battle of the studies," with the conservatives offering data that show a clear deterrent effect[78] and the liberals countering with their own salvos drawing the opposite conclusion.[79] The theoretical nature of retributivism makes inquiry into that arena even less conclusive. To determine whether a punishment is sufficiently retributive is to inquire into the psyches of victims, families, and society at large. It, too, devolves into sniping that often seems, to this author, to be driven more by desired outcome than scientific certainty.

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75. *See* Stinneford, *supra* note 20, at 501–02.

76. *See* Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion).

77. Glossip v. Gross, 135 S. Ct. 2726, 2767 (2015) (Breyer, J., dissenting). Although incapacitation and rehabilitation are also valid penological rationales, they are both inapplicable to capital punishment. Rehabilitation, on its face, cannot be a legitimate goal of capital punishment, and life in prison without the possibility of parole would accomplish the same incapacitation as the death penalty. *See* Ring v. Arizona, 536 U.S. 584, 614–15 (2002) (Breyer, J., concurring).

78. *See, e.g.*, *Glossip*, 135 S. Ct. at 2748–49 (Scalia, J., concurring) (citing Paul R. Zimmerman, *State Executions, Deterrence, and the Incidence of Murder*, 7 J. APPLIED ECON. 163, 166 (2004) for the proposition that "it is estimated that each state execution deters approximately fourteen murders per year on average").

79. *See, e.g.*, *id.* at 2768 (Breyer, J., dissenting) (citing NAT'L RESEARCH COUNCIL, DETERRENCE AND THE DEATH PENALTY 2 (Daniel S. Nagin & John V. Pepper eds., 2012) for its review of thirty years of empirical evidence to conclude that the death penalty was "insufficient to establish a deterrent effect").

Regardless, when a method of punishment loses its connection to these rationales, deterrence and retribution, the suffering it inflicts becomes "gratuitous" and violates the Eighth Amendment.[80] Over the last four decades, many have argued that aspects of the death penalty have lost this critical connection.[81] One such argument is that the inordinate time spent on death row—and the uncertainty of waiting for execution—severs the connection between deterrence, retribution, and the ultimate penalty.[82] Because these delays and uncertainty are not intentional byproducts of the punishment imposed, they have been ignored by the Court's originalists. In addition to its implications for objectivity and accidental cruelty, the cruel effects reading of the Eighth Amendment has the potential to revive judicial consideration of these effects.

This Part proceeds as follows. First it introduces the concept of a *Lackey* claim: the claim that long waits on death row may violate the Cruel and Unusual Punishments Clause. Then, it explores how one court adjusted that framework to focus on systemic delays rather than a single inmate's pain and suffering. Finally, it explores whether the uncertainty imposed by these delays is a cruel effect for Eighth Amendment purposes.

A. HISTORY OF THE *LACKEY* CLAIM

In 1995, Justice Stevens, writing only for himself[83] in response to a denial of certiorari in *Lackey v. Texas*, addressed whether the goals of retribution and deterrence are achieved where prisoners spend extended periods of time on death row prior to execution.[84] Justice Stevens noted that the prisoner in *Lackey* had sat on death row for seventeen years by the time his petition for certiorari reached the Supreme Court.[85] Justice Stevens invoked the "novel," but "not without foundation," claim that when a prisoner has spent seventeen years on death row the principal social purposes of the death penalty are no longer served.[86]

Justice Stevens's memorandum relies on a late-nineteenth-century Supreme Court opinion discussing the penal effect of uncertainty. *In re Medley* is a state habeas case in which the defendant alleged a series of violations of the Ex Post Facto Clause because he was sentenced under a law passed after the crime was committed.[87] The *Medley* Court traced the history of the Ex Post Facto Clause

80. *See Gregg*, 428 U.S. at 182–83 (plurality opinion); *see also* Kennedy v. Louisiana, 554 U.S. 407, 441 (2008) ("*Gregg* instructs that capital punishment is excessive when it . . . does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes.").

81. *See, e.g.*, *Glossip*, 135 S. Ct. at 2766–69 (Breyer, J., dissenting).

82. *Id.* at 2769.

83. Justice Breyer agreed with Justice Stevens, but only to the extent that "the issue is an important undecided one." *See* Lackey v. Texas, 514 U.S. 1045, 1047 (1995) (Stevens, J., respecting denial of certiorari).

84. *See id.* at 1045–46.

85. *Id.*

86. *Id.* at 1045.

87. 134 U.S. 160, 162–63 (1890).

as applicable to the states,[88] finding that when a law "inflicts a greater punishment than the law annexed to the crime at the time it was committed," imposing the new punishment violates the clause.[89] At issue was whether any punishment could be added to the death penalty such that its imposition could be fairly considered to violate the Ex Post Facto Clause.[90]

The Court held that it could. Among other provisions, the new statute imposed a period of solitary confinement on prisoners waiting for execution.[91] The Court found that this was an additional punishment "of the most important and painful character" and that its imposition violated the Ex Post Facto Clause.[92]

But solitary confinement was not the only additional punishment the new statute imposed. Also at issue was a section forbidding the warden or any other person from communicating the date and time of a prisoner's execution to the prisoner.[93] This, too, the Court held, violated the Ex Post Facto Clause by imposing a greater punishment than death:

> Nor can we withhold our conviction of the proposition that when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it, which may exist for the period of four weeks, as to the precise time when his execution shall take place . . . . [The] secrecy must be accompanied by an immense mental anxiety amounting to a great increase of the offender's punishment.[94]

In *Lackey*, this recognition that uncertainty adds to a punishment—even one as "final" as death—led Justice Stevens to consider whether the uncertainty of a prolonged period on death row was in and of itself sufficient punishment to satisfy the retributive justification for the death penalty.[95] He also doubted that actual execution after such a long time on death row added any deterrent effect to the original punishment.[96] Having made these observations, Justice Stevens ultimately questioned whether the imposition of a death penalty that furthers neither retribution nor deterrence "would then be the pointless and needless extinction of life with only marginal contributions to any discernable social or public purposes."[97] If so, he questioned whether "a penalty with such negligible

88. U.S. CONST. art. I, § 10, cl. 1.
89. *Medley*, 134 U.S. at 171.
90. *Id.* at 170–72.
91. *Id.* at 167.
92. *Id.* at 171.
93. *Medley*, 134 U.S. at 171–72.
94. *Id.* at 172.
95. Lackey v. Texas, 514 U.S. 1045, 1045–47 (1995) (Stevens, J., respecting denial of certiorari).
96. *Id*. at 1046.
97. *Id.* (quoting Furman v. Georgia, 408 U.S. 238, 312 (1972) (White, J., concurring)).

returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment."[98]

Justice Stevens's memorandum—although explicitly calling for lower courts to address the issue themselves before the Supreme Court speaks on the issue[99]—created the concept of a *Lackey* claim: "A prisoner's assertion that incarceration on death row for a protracted period is cruel and unusual punishment."[100] Although *Lackey* claims have become common enough to enter the lexicon, they have been almost universally rejected by lower courts.[101] Nonetheless, some members of the Supreme Court have attempted to reinvigorate the claim in memoranda in response to denials of certiorari.[102] Their efforts have been met with equal strength from Justices who find baffling the premise that "a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed."[103] These include the originalist Justices, whose adherence to the cruel intent reading of the Eighth Amendment provides no avenue for consideration of arguably cruel treatment imposed only by the "system" rather than a specific individual. So far, the latter perspective has prevailed at the Supreme Court—certiorari has never been granted on a *Lackey* claim[104]—and in Congress.[105]

B. *JONES* AND THE MODERN *LACKEY* CLAIM

In 2014, a court in the Central District of California became the first—and, so far, only—federal court to grant relief under a theory similar to that advanced in *Lackey*.[106] Whereas Justice Stevens's memorandum in *Lackey* focused primarily on the delay itself, the California court instead focused on the mental implications of that delay. According to the court, the systemic delays in the California capital sentencing scheme had made an inmate's execution "so unlikely that the

98. *Id.* (quoting *Furman*, 408 U.S. at 312 (White, J., concurring)).

99. *Id.* at 1045.

100. Lackey *Claim*, BLACK'S LAW DICTIONARY (10th ed. 2014).

101. *See* Angela April Sun, *"Killing Time" in the Valley of the Shadow of Death: Why Systematic Preexecution Delays on Death Row Are Cruel and Unusual*, 113 COLUM. L. REV. 1585, 1593 (2013).

102. *See* Thompson v. McNeil, 556 U.S. 1114, 1115 (2009) (Stevens, J., respecting denial of certiorari) (cataloging his and Justice Breyer's efforts to consider whether "substantially delayed executions" violate the Eighth Amendment). In *Thompson*, the defendant's case arrived at the Supreme Court thirty-two years after he was first sentenced to death. *Id.*

103. Knight v. Florida, 528 U.S. 990, 990 (1999) (Thomas, J., concurring in denial of certiorari).

104. *See* Kara Sharkey, Comment, *Delay in Considering the Constitutionality of Inordinate Delay: The Death Row Phenomenon and the Eighth Amendment*, 161 U. PA. L. REV. 861, 864 (2013).

105. In 1996, Congress included a section in the Antiterrorism and Effective Death Penalty Act implicitly designed to limit *Lackey* claims. *See* 28 U.S.C. § 2244(b)(2) (2012) (confining successive habeas applicants to certain narrow enumerated circumstances); *see also* Sharkey, *supra* note 104, at 882 (explaining how the years of delay required for a ripe *Lackey* claim means that it will usually arise in a second habeas petition).

106. Jones v. Chappell, 31 F. Supp. 3d 1050, 1053 (C.D. Cal. 2014), *rev'd sub nom.* Jones v. Davis, 806 F.3d 538 (9th Cir. 2015). *Jones v. Chappell* did not find that the death penalty was patently unconstitutional; it only found that the penalty was being administered in an unconstitutional manner in California. *See id.*

death sentence carefully and deliberately imposed by the jury has been quietly transformed into one no rational jury or legislature could ever impose: *life in prison, with the remote possibility of death*."[107] This, the court said, harkening back to *Medley*, left California inmates awaiting their execution on death row "with complete uncertainty as to when, or even whether, it will ever come."[108] It was this uncertainty that proved dispositive to the court: "Allowing this system to continue to threaten Mr. Jones with the slight possibility of death, almost a generation after he was first sentenced, violates the Eighth Amendment's prohibition against cruel and unusual punishment."[109]

Jones was later overruled at the Ninth Circuit, which leaned on a procedural requirement in an apparent effort to avoid ruling on the merits of the decision below.[110] The district court decision therefore serves as a useful map for the types of delay-related arguments that could resonate throughout the judiciary. Notably, the district court did not grant relief on a straight *Lackey* claim.[111] Whereas a *Lackey* claim focuses on the cruelness of the delays specific to individual prisoners, the district court in *Jones* relied not on individual delays but on the delays endemic to California's capital punishment system.[112] That these delays were systemic meant a sentence of death in California was actually a sentence of "life imprisonment with the remote possibility of death."[113] This, according to the court, violates the anti-arbitrariness dictate of *Furman*[114] and deprives the sentence of its deterrent or retributive effect.[115]

As to deterrence, the law generally recognizes that a penalty's deterrent effect is determined by the certainty of its imposition.[116] Noting that only thirteen of the nine hundred individuals sentenced to death in California between 1978 and 2014 were executed, the *Jones* district court observed that the unlikelihood of the penalty ever being imposed undermined whatever deterrent effect it could be considered to have.[117] "Under such a system," the court said, "the death penalty is about as effective a deterrent to capital crime as the possibility of a lightning strike is to going outside in the rain."[118]

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107. *Id.*

108. *Id.*

109. *Id.*

110. *See* Jones v. Davis, 806 F.3d 538, 541 (9th Cir. 2015) (holding that petitioner's claim asked the court to apply a novel constitutional rule of procedure and therefore was barred by *Teague v. Lane*, 489 U.S. 288 (1989)).

111. *See id.* at 554 (Watford, J., concurring) (noting that "the claim on which the district court granted relief rests on . . . a different legal theory").

112. *See Jones*, 31 F. Supp. 3d at 1066 n.19 (distinguishing *Lackey* claims as focusing on the individual's delay instead of "system-wide dysfunction in the post-conviction review process").

113. *Id.* at 1062.

114. *See* 408 U.S. 238, 256–57 (1972) (Douglas, J., concurring).

115. *See Jones*, 31 F. Supp. 3d at 1063–65.

116. *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 989 (1991) (plurality opinion) (stating that deterrent effect depends upon a penalty's certainty).

117. *Jones*, 31 F. Supp. 3d at 1064.

118. *Id.*

This same defect also cripples the state interest in retribution. Even conservatives at the Supreme Court have recognized that a "delay in the enforcement of capital punishment frustrates the purpose of retribution."[119] The more attenuated and arbitrary the punishment becomes, the looser its retributive relationship because only a few of those whom society, as represented by a jury of peers, considers to be "deserving" of death will actually be killed. Arbitrariness—a synonym for uncertainty in this context[120]—necessarily prevents the offenders, the victims' families, the juries that impose the sentence, and society at large from realizing the retributive effect of the death sentence.

Because the systemic delays in California's capital punishment scheme robbed the death sentence of both its deterrent and its retributive effects, the district court in *Jones* found the death penalty, as administered in California, unconstitutional and, in doing so, provided an avenue for future claims.[121] Perhaps the argument is not that the delay itself is unconstitutional, but that the uncertainty provided by that delay is unconstitutional. Uncertainty (1) robs the punishment of its deterrent effect, (2) undermines the state's interest in retribution, and (3) imposes a significant, additional punishment on the offender.[122] The first two of these assertions follow logically from observation and experience. Whether uncertainty does, in fact, contain the cruel effect necessary to constitute excessive punishment is less obvious.

C. THE CRUEL EFFECT OF UNCERTAINTY

In 1890, the Supreme Court recognized the terror imposed by uncertainty as to an impending execution.[123] Noting the "immense mental anxiety" it creates, the Court held this uncertainty to be "a great increase of the offender's punishment."[124] In the ensuing century, the Court's theory has been borne out by observation. Interviews with death row inmates provide sufficient evidence that the uncertainty of execution imposes a mental suffering beyond basic incarceration. This additional suffering, analyzed through the lens of Stinneford's cruel effects standard,[125] provides an originalist argument against the modern death penalty.

One academic describes the capital offenders with whom he has interacted as "suffer[ing] an existence rather than a way of life—they are the living dead until the execution team can 'get them dead,' to paraphrase one prison warden. That such an existence brings psychological devastation in its wake hardly requires

119. Coleman v. Balkcom, 451 U.S. 949, 960 (1981) (Rehnquist, J., respecting denial of certiorari).

120. Arbitrariness and uncertainty are synonyms in that the uncertainty of execution makes it arbitrary which offenders sentenced to death are actually executed.

121. *See Jones*, 31 F. Supp. 3d at 1053.

122. *See id.* (describing the system as one that "continue[s] to threaten Mr. Jones with the slight possibility of death").

123. *In re* Medley, 134 U.S. 160, 170–72 (1890).

124. *Id.* at 172.

125. *See* Stinneford, *supra* note 20, at 446–47.

elaboration."[126] Furthermore, that devastation is clearly enhanced by the delays and accompanying uncertainty. Describing the "uncertainty that characterizes their condition," one death row inmate said: "It's just like you are in the middle of a vise, and one part of the vise is pulling you this way and one of them is pulling you the other way. And the vise is sharp."[127] Another described his thought process as follows: "They could come and get me at any time. There's no future . . . . [T]hey could pass a law tomorrow and burn everybody, you know. They could come in and start electrocuting."[128]

The number of inmates who drop their appeals and thereby "volunteer" for execution provides further evidence of this destruction. From 1976 to 2012, roughly 12% of executions in the United States were of inmates who had voluntarily dropped their appeals.[129] Some research has shown that as many as one in ten condemned inmates make this choice.[130] In his *Glossip* dissent, Justice Breyer considered this act of volunteering as a way to end the uncertainty that eventually torments condemned offenders.[131] His observation was in the tradition of Justice Frankfurter, who noted in 1950 that "the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon."[132]

Although the psychological effect of uncertainty on death row has not been studied in great detail, much has been written about the effect of uncertainty on terminally ill patients.[133] This research shows that terminal patients "whose lives have been extended through medical developments may struggle with the uncertainty of death, even when seemingly given new life."[134] It is not a great leap to assume that death row offenders—some of whom come face-to-face with the pre-execution rituals multiple times[135]—would experience these same effects. As one death row offender said after learning about a last-minute commutation of his sentence:

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126. ROBERT JOHNSON, DEATH WORK: A STUDY OF THE MODERN EXECUTION PROCESS 93 (2d ed. 2006).

127. ROBERT JOHNSON, CONDEMNED TO DIE: LIFE UNDER SENTENCE OF DEATH 80–81 (1981).

128. *Id.*

129. JOHN D. BESSLER, CRUEL AND UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS' EIGHTH AMENDMENT 225 (2012).

130. *See* Robert Johnson et al., *Life Under Sentence of Death: Some Research Agendas*, *in* THE FUTURE OF AMERICA'S DEATH PENALTY: AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH 469, 470 (Charles S. Lanier et al. eds., 2009).

131. Glossip v. Gross, 135 S. Ct. 2726, 2766 (2015) (Breyer, J., dissenting) ("[G]iven the negative effects of confinement and uncertainty, it is not surprising that many inmates volunteer to be executed, abandoning further appeals.").

132. Solesbee v. Balkcom, 339 U.S. 9, 14 (1950) (Frankfurter, J., dissenting).

133. *See* Amy Smith, *Not "Waiving" But Drowning: The Anatomy of Death Row Syndrome and Volunteering for Execution*, 17 B.U. PUB. INT. L.J. 237, 251–52 n.93 (2008) (compiling sources on terminally ill patients).

134. *Id.*

135. *See, e.g.*, *Glossip*, 135 S. Ct. at 2766 (Breyer, J., dissenting) ("On fourteen separate occasions since Mr. Suárez Medina's death sentence was imposed, he has been informed of the time, date, and manner of his death. At least eleven times, he has been asked to describe the disposal of his bodily remains." (quoting Petition for Writ of Certiorari at 35–36, Suárez Medina v. Texas, 536 U.S. 979 (2002) (No. 02-5752))).

> For nine long months I'd been rehearsing my death, dying a little every day, dying a little more every night, while just up the hall from my cell they were killing men, thirteen of them. I knew my role as victim too well, knew it by heart, couldn't back down now. "I don't want clemency," I heard myself saying.[136]

Another added:

> That's the hurting part. Waiting on death. The real cruel and mean things what they done in here is keep you locked up waiting on death. Waiting on death. Every day go around, it come in your mind: "When all of this going to be over with?" That's how they really punish you.[137]

One inmate admitted:

> If they were to come to my cell and tell me I was going to be executed tomorrow, I would feel relieved, in a way. The waiting would be over. I would know what to expect. To me, the dying part is easy; it's the waiting and not knowing that's hard . . . . I have reached the point where I no longer really care . . . . They're killing me a little bit each day.[138]

Finally, Willie Turner, the "Dean of Virginia's Death Row," put it as follows:

> It's the unending, uninterrupted immersion in death that wears on you so much . . . . It's the boring routine of claustrophobic confinement, punctuated by eye-opening dates with death that you helplessly hope will be averted. It's watching yourself die over the years in the eyes of family and friends, who, with every lost appeal, add to the emotional scar tissue that protects them . . . . I've spent over 5000 days on death row. Not a single waking hour of any of those days has gone by without me thinking about my date with the executioner . . . . All that thinking about it [execution] is like a little dying, even if you're on the best death row on earth.[139]

Together, these narratives show that the uncertainty imposed by a capital punishment system fraught with delays and uncertainty adds a substantial punishment to that imposed by the jury. In *Bell v. Wolfish*, the Supreme Court implied that the conditions of confinement experienced on death row rarely rise to torture because they are not properly considered as part of the "punishment"

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136. JOHNSON, *supra* note 126, at 198.

137. *Id.* at 197.

138. *Id.* at 197–98 (alterations in original).

139. Robert Johnson & Harmony Davies, *Life Under Sentence of Death: Historical and Contemporary Perspectives*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 661, 681–82 (James R. Acker et al. eds., 3d ed. 2014).

imposed by the state.[140] This holding, however, is predicated on the improper intent reading of the Eighth Amendment.[141] Once we understand the original meaning of the Eighth Amendment to properly be focused on *effect*—not *intent*, per Stinneford's test—the clear psychological suffering of these inmates becomes relevant to their punishment.

D. REASONS FOR UNCERTAINTY AND DELAYS

A common refrain in response to *Lackey* claims is that any delay, and its accompanying uncertainty, in the execution of a death sentence is of the prisoner's own making.[142] This argument follows logically. How can a prisoner, after filing multiple state appeals followed by subsequent federal habeas appeals, then complain that his execution has been unconstitutionally delayed?

The answer lies in the unique finality of a death sentence. This distinction was recognized in *Furman*, when Justice Stewart remarked that the death penalty differs "from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability."[143] When the Supreme Court reinstated the death penalty in *Gregg*, the plurality was careful to affirm this sentiment, noting that the death penalty is "unique in its severity and irrevocability."[144] Based on this observation, it articulated a standard that survives today: "When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed."[145]

Regardless of constitutional questions, morality and consistency require that every protection be afforded to capital defendants. Lengthy delays are the result of procedures designed to ensure increased accuracy in the imposition of the death penalty compared to other forms of punishment.[146] "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two."[147] And this finality brings with it a corresponding impetus for accuracy. Among punishments, it is the death penalty alone that is entirely irreversible. A man sentenced to life in prison who is later exonerated

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140. *See* 441 U.S. 520, 538 (1979).

141. *See* JOHNSON, *supra* note 126, at 197 ("The holding in *Wolfish* would seem to indicate that death row confinement, whether or not it meets independent criteria defining torture, may nevertheless be considered a reasonable restriction if it is imposed without expressly punitive intent."); *see also supra* Section I.B (discussing the alternative cruel effect reading of the Eighth Amendment).

142. *See, e.g.*, Knight v. Florida, 528 U.S. 990, 992 (1999) (Thomas, J., concurring in denial of certiorari) ("It is incongruous to arm capital defendants with an arsenal of 'constitutional' claims with which they may delay their executions, and simultaneously to complain when executions are inevitably delayed."); Turner v. Jabe, 58 F.3d 924, 933 (4th Cir. 1995) (Luttig, J., concurring) ("It is a mockery of our system of justice . . . for a convicted murderer, who, through his own interminable efforts of delay and systemic abuse has secured the almost-indefinite postponement of his sentence, to then claim that the almost-indefinite postponement renders his sentence unconstitutional.").

143. Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).

144. Gregg v. Georgia, 428 U.S. 153, 187 (1976) (plurality opinion).

145. *Id.*

146. *See* Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion).

147. *Id.* at 305.

by DNA evidence can be released.[148] A man sentenced to life in prison on the basis of eyewitnesses who later recant and a confession that is later determined to have been coerced can be set free.[149] A man sentenced to life in prison for a murder that family members and acquaintances of another man later say the second man committed can be liberated.[150]

A man sentenced to death has no such recourse. As a result, the legal system must extend to its breaking point to ensure the conviction for a capital sentence is correct. If, as the old aphorism goes, it is better one hundred guilty men go free than one innocent man be convicted,[151] that ratio must swell in capital cases. This is why the death penalty system contains so many points of review. "These procedural necessities take time to implement,"[152] forcing a Sophie's choice between the procedures necessary to ensure reliability and interminable delays and uncertainty. If those delays and uncertainty are unconstitutional, then legislators and judges may be forced to decide between the procedures designed to ensure reliability and unconstitutional delays. Whether they qualify as unconstitutional delays, therefore, becomes the critical question.

III. NATHAN DUNLAP'S CRUEL UNCERTAINTY

It was roughly ten o'clock at night on December 14, 1993, when Nathan Dunlap walked out of the restroom in which he had been hiding and shot five workers, killing four, at the Chuck E. Cheese's from which he had recently been fired.[153] At his trial, prosecutors painted the nineteen-year-old Dunlap as a "superpredator," detailing his history of run-ins with the law, including five separate misdemeanor arrests in 1993 alone.[154] They offered evidence from friends, enemies, and jailhouse snitches, the *coup de grâce* coming when the prosecution called Dunlap's mother to the stand, anticipating that when she invoked the Fifth Amendment—which she did—the jury would be left with the

148. *Cf.* Dave Mann, *DNA Tests Undermine Evidence in Texas Execution*, TEX. OBSERVER (Nov. 11, 2010, 7:57 PM), https://www.texasobserver.org/texas-observer-exclusive-dna-tests-undermine-evidence-in-texas-execution [https://perma.cc/WK3S-AGP3] (telling the story of Claude Jones, who was convicted of murder on the basis of a strand of hair found at the crime scene, and after he was executed, DNA testing proved the hair was not his).

149. *Cf.* Steve Mills, *Questions of Innocence*, CHI. TRIBUNE (Dec. 18, 2000), http://www.chicagotribune.com/news/chi-001218deathp-story.html [https://perma.cc/Z634-PRE2] (telling the story of Leo Jones, who was convicted and executed based on the testimony of witnesses who later recanted and a confession that the prosecuting officer later bragged about using force to obtain).

150. *Cf.* Maurice Possley & Steve Mills, *Did One Man Die for Another Man's Crime?*, CHI. TRIBUNE (June 27, 2006), http://articles.chicagotribune.com/2006-06-27/news/0606270137_1_gas-station-stabbed-killing [https://perma.cc/YZ23-GS78] (telling the story of Carlos De Luna, who was executed for allegedly committing a murder that the family of a man named Carlos Hernandez claimed Hernandez committed after De Luna was executed).

151. *See* Letter from Benjamin Franklin to Benjamin Vaughan (Mar. 14, 1785), *in* 9 THE WRITINGS OF BENJAMIN FRANKLIN, 1783–1788, 291, 293 (Albert H. Smyth ed., 1906).

152. Glossip v. Gross, 135 S. Ct. 2726, 2764 (2015) (Breyer, J., dissenting).

153. People v. Dunlap, 975 P.2d 723, 733–34 (Colo. 1999).

154. Gardner & Doyle, *supra* note 12.

impression that even Dunlap's mother could not offer a word in defense of her son.[155]

When the prosecution rested, so did the case. Offered the opportunity to call witnesses, the defense did not call a single person, leaving the prosecution's narrative—not just of the events that occurred on December 14 but also of Mr. Dunlap as a "superpredator"—unchallenged. It took the jury only three-and-a-half hours to unanimously convict.[156] It is not uncommon in capital cases for the defense to save the bulk of its presentation for the sentencing phase of the bifurcated trial.[157] This strategy was not employed for Dunlap. During the sentencing phase, although the defense presented evidence that Dunlap had experienced significant physical abuse as a child, it did not call a single expert to assign meaning to that abuse.[158] During closing statements, Dunlap's attorney practically participated in his prosecution. "How can anyone be so cold," he asked, in reference to his client's actions. "I still don't know . . . . If you choose to kill my client under the facts of this case, I will respect your decision and you will hear not one word of criticism of you from me."[159]

Both of Dunlap's attorneys had previously succeeded in earning life imprisonments for defendants charged with capital crimes,[160] but their performance in Dunlap's case was perplexing. As Dunlap watched the prosecution parade family member after family member of his victims to the stand, something inside him snapped. "Kill me right now," he cried, "sobbing uncontrollably."[161] "I have [had] enough of this motherfucking shit. You can take me to the motherfucking little chair and do what the fuck you want."[162] On May 17, 1996, Dunlap was sentenced to death.[163]

As Nathan Dunlap's case worked its way through the appellate system, it became clearer and clearer that he suffered from some form of mental illness. In a trial full of questionable decisions from the defense attorneys, perhaps most baffling was their disinterest in pursuing evidence of Dunlap's mental illness. In 1994, while awaiting trial, Dunlap's behavior was apparently so bizarre that a judge ordered him to be moved from the local jail to the Colorado Mental Health Institute at Pueblo.[164] Alongside the "superpredator" image that had

155. *Id.*

156. *Id.*

157. *See, e.g.*, Richard A. Serrano, *Defense's Goal in Boston Marathon Bombing Trial: Save Dzhokhar Tsarnaev's Life*, L.A. TIMES (Mar. 19, 2015, 6:32 PM), http://www.latimes.com/nation/la-na-boston-bomb-defense-20150320-story.html [https://perma.cc/XAH9-QVTP].

158. Gardner & Doyle, *supra* note 12.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* (alteration in original).

163. People v. Dunlap, 975 P.2d 723, 735 (Colo. 1999).

164. Petition for Executive Clemency for Nathan Dunlap at 11 (May 6, 2013), https://localtvkwgn.files.wordpress.com/2013/05/final_clemency_petition.pdf [https://perma.cc/2GYJ-XXE2].

been presented at trial, a competing narrative began to emerge, remaining to be explored.

In this narrative, Dunlap was born into a family with a history of mental illness.[165] His mother, already dealing with her own mental health issues, molested her sons and once attempted to kill Dunlap's brother because she believed he was "possessed by the Devil."[166] Dunlap's adopted father, Jerry, believed Dunlap's mother's mental illness was somehow Dunlap's fault, so Jerry beat Dunlap regularly, culminating in a particularly intense assault when Dunlap was fifteen after he discovered Jerry sexually abusing his sister, Adinea.[167] According to one reporter's characterization of Adinea's testimony, it was at this point that "Jerry's abuse of [Dunlap] took on a vengeful intensity."[168] Not only did this abuse seem to desensitize Dunlap to violence, it may have contributed to—even catalyzed—the onset of his mental illness.[169]

By 2006, ten years after Dunlap was sentenced to death and thirteen years after he was first incarcerated in state institutions, the state's medical professionals were in agreement: Dunlap suffers from bipolar disorder.[170] They began treating Dunlap, and the changes to his behavior in prison were "striking."[171] According to Dunlap's petition for clemency:

> From 1996 to 2006, Mr. Dunlap's behavior in prison was characterized by cycles of bizarre, agitated, destructive, and delusional behavior and frequent disciplinary problems. [Department of Corrections] records show that he experienced extended psychotic manic episodes in 1997 and 2000, and also experienced periods of deep depression, including a suicide attempt in 2002. Since 2006, however, Mr. Dunlap has not had a single disciplinary write-up. He has remained medication-compliant and has had no manic or depressive episodes.[172]

By the time Dunlap had exhausted his appeals, the "superpredator" narrative had an equally compelling rival: that of a young man who was sick, not twisted, and utterly desensitized to the violence that had marked his life since birth. In *Ford v. Wainwright*, the Supreme Court held that the execution of the mentally ill violates the Eighth Amendment,[173] yet as many as half of death row inmates

165. *Id.* at 5.
166. *Id.* at 6.
167. *Id.* at 8–9; Gardner & Doyle, *supra* note 12.
168. Gardner & Doyle, *supra* note 12.
169. Childhood physical abuse has been shown to catalyze the onset of bipolar disorder. *See* L. Daruy-Filho et al., *Childhood Maltreatment and Clinical Outcomes of Bipolar Disorder*, 124 ACTA PSYCHIATRICA SCANDINAVICA 427, 427 (2011).
170. Petition for Executive Clemency for Nathan Dunlap, *supra* note 164, at 13.
171. *Id.*
172. *Id.* at 13–14.
173. 477 U.S. 399, 409–10 (1986).

suffer from some form of mental illness.[174] Once convicted, even the state's reassessment of a prisoner's mental health can be insufficient to fall under the protective awning of *Ford*.[175] For good reason, the state is protective of the legitimacy of the jury's decision, even in Dunlap's case where multiple jurors indicated that if they had known about Dunlap's mental illness, they may not have voted to sentence him to death.[176]

On February 19, 2013, the United States Supreme Court denied Dunlap's petition for a writ of certiorari,[177] and Dunlap's execution date was set for the week of August 18, 2013. Dunlap's last recourse lay with Governor John Hickenlooper. Like the majority of states,[178] Colorado's Constitution affords the governor the power to "grant reprieves, commutations and pardons" of convicted criminals.[179] On May 6, 2013, Dunlap and his attorneys filed a "Petition for Executive Clemency" with Governor Hickenlooper.[180]

Colorado has maintained the death penalty as a potential punishment for murder in the first degree since 1979.[181] In the ensuing thirty-five years, Colorado sought the death penalty in one hundred and twenty-four cases, twelve of which resulted in a sentence of death.[182] Of those twelve offenders, only one has been executed as of 2017: Gary Davis in 1997.[183] Three others, including Dunlap, remain on death row.[184] In 2013, noting the infrequency with which executions are carried out, a group of Democrats in the Colorado Senate introduced a bill to repeal the death penalty, but the effort failed in the Colorado

174. *See* Robert J. Smith, Sophie Cull & Zoë Robinson, *The Failure of Mitigation?*, 65 HASTINGS L.J. 1221, 1245 (2014).

175. *See generally* Rachelle Deckert Dick, Note, Ford v. Wainwright*: Warning—Sanity on Death Row May Be Hazardous to Your Health*, 47 LA. L. REV. 1351 (1987).

176. *See* Petition for Executive Clemency for Nathan Dunlap, *supra* note 164, at 14–15 (summarizing the affidavits of three jurors who indicate that evidence of Dunlap's mental illness may have led them to vote for life in prison instead of the death penalty).

177. Dunlap v. Clements, 568 U.S. 1164, 1164 (2013).

178. *See* Kathleen (Cookie) Ridolfi & Seth Gordon, *Gubernatorial Clemency Powers: Justice or Mercy?*, 24 CRIM. JUST. 26, 31 (2009) (cataloguing the different procedures for clemency in every state).

179. COLO. CONST. art. IV, § 7.

180. Petition for Executive Clemency for Nathan Dunlap, *supra* note 164, at 22.

181. John Ingold, *A History of the Death Penalty in Colorado*, DENVER POST: THE RAP SHEET (Mar. 23, 2012, 11:00 AM), http://blogs.denverpost.com/crime/2012/03/23/history-death-penalty-colorado/3921 [https://perma.cc/ZU9V-CS4K].

182. *See* Justin F. Marceau & Hollis A. Whitson, *The Cost of Colorado's Death Penalty*, 3 U. DENVER CRIM. L. REV. 145, 155 & n.44 (2013). In addition to the 123 cases cited by Marceau and Whitson, the state also sought the death penalty in the trial of James Holmes, convicted of first degree murder for the deaths of twelve people at a movie theatre in Aurora, Colorado in 2012. Holmes was sentenced by the jury to life in prison without the possibility of parole. *See* Kirk Mitchell, *DA Brauchler Defends Decision to Seek Death Penalty Against Holmes*, DENVER POST (Aug. 7, 2015, 2:54 PM), http://www.denverpost.com/2015/08/07/da-brauchler-defends-decision-to-seek-death-penalty-against-holmes [https://perma.cc/3XTW-C33C].

183. *See* Marceau & Whitson, *supra* note 182, at 155.

184. *See Colorado*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/colorado-1 [https://perma.cc/8NWK-NX5Z].

Senate Judiciary Committee.[185] In joining the Republican members voting against the repeal, one Democratic legislator personally opposed to the death penalty explained that her vote was influenced by Governor Hickenlooper's indication that he would veto the legislation.[186]

That Hickenlooper would oppose abolition was unsurprising to anyone who had followed his 2010 race for governor. In that election, he repeatedly voiced his support for the death penalty,[187] yet after taking office his public statements began to waver.[188] This culminated in a debate over the repeal legislation where Hickenlooper's own office admitted that he had "conflicting feelings about the death penalty" and that those feelings are "still unresolved."[189] Less than two months later, Dunlap's petition forced a resolution.

In considering the petition, Hickenlooper did his due diligence. He spoke with the families of Dunlap's victims, civil rights activists, and death penalty abolitionist groups.[190] He met with prosecutors, law enforcement officers, members of the clergy, and defense attorneys.[191] As the question gripped the Colorado political and legal class, it seemed clear the saga would end in with one of two outcomes: either Hickenlooper would deny the petition and allow the execution to proceed or he would commute Dunlap's sentence to life in prison without the possibility of parole.

Hickenlooper did neither. Instead, he leaned on the oft-ignored part of the executive pardon power: the power to grant reprieves.[192] In all respects, the four-page Executive Order—in which Hickenlooper repeatedly refers to Dunlap only by his Department of Corrections offender number—appears to be a full

185. *See Colorado Lawmakers Vote to Keep Death Penalty*, DENVER POST (Mar. 25, 2013, 8:04 PM), http://www.denverpost.com/2013/03/25/colorado-lawmakers-vote-to-keep-death-penalty [https://perma.cc/8WFC-LUX8].

186. *See id.*

187. *See* Jesse Paul & Joey Bunch, *Colorado's Pro-Death Penalty Voters Could Make Hickenlooper Pay*, DENVER POST (Aug. 30, 2014, 8:13 AM), http://www.denverpost.com/2014/08/30/colorados-pro-death-penalty-voters-could-make-hickenlooper-pay [https://perma.cc/4CC7-PEEW].

188. *See* Andrew Cohen, *Time's Up: Colorado's Governor Needs to Pick a Death-Penalty Position*, ATLANTIC (May 21, 2013), https://www.theatlantic.com/national/archive/2013/05/times-up-colorados-governor-needs-to-pick-a-death-penalty-position/276016 [https://perma.cc/JZ99-JZBQ] ("Gov. Hickenlooper isn't easy to pin down on death . . . . 'I wrestle with this,' he told the Associated Press in December, 'right now, on a pretty much daily basis in a position where we have a couple of death row inmates that are going to come up and I haven't come to a conclusion.'").

189. Lynn Bartels & Kurtis Lee, *Hickenlooper Hints at Veto of Lawmakers' Death-Penalty Repeal Bill*, DENVER POST (Mar. 20, 2013, 11:29 AM), http://www.denverpost.com/2013/03/20/hickenlooper-hints-at-veto-of-lawmakers-death-penalty-repeal-bill [https://perma.cc/6289-5EYN].

190. *See* Karen Augé, *Nathan Dunlap Granted "Temporary Reprieve" by Governor*, DENVER POST (May 22, 2013, 6:20 AM), http://www.denverpost.com/2013/05/22/nathan-dunlap-granted-temporary-reprieve-by-governor [https://perma.cc/U76R-MH7H].

191. Press Release, Office of Governor John Hickenlooper, Gov. Hickenlooper Grants Temporary Reprieve of Death Sentence (May 22, 2013), https://www.colorado.gov/governor/news/gov-hickenlooper-grants-temporary-reprieve-death-sentence [https://perma.cc/2TU5-THT4].

192. COLO. CONST. art. IV, § 7.

commutation.[193] It discusses the arbitrariness of the death penalty—comparing Dunlap's actions to similar offenses for which the offenders were not sentenced to death—and Colorado's limited history of executions.[194] It mentions that eighteen states have repealed their death penalty statutes and notes that seven others, including Colorado, have not executed an offender in over a decade.[195] It notes that two-thirds of countries around the world have abolished the death penalty and that "[m]ost major religions" do not support it either.[196] It cites Justice Blackmun's famous proclamation that "[t]he death penalty experiment has failed."[197]

But rather than commute Dunlap's sentence, Governor Hickenlooper's Executive Order only grants a "temporary reprieve," exacerbating the uncertainty of the average death sentence into an even more indeterminate condemnation. According to Hickenlooper, this decision reflected his sense that the question is not about Dunlap himself but rather the "question whether we as a state should be taking lives."[198] In a press conference announcing the Order, Hickenlooper declared it "highly unlikely" that he would reconsider his decision.[199] This created an odd situation: Dunlap would remain on death row but would not be executed as long as Hickenlooper held office. His execution could, of course, be reinstated by a subsequent administration.

To call Hickenlooper's temporary reprieve out of the ordinary would not do justice to the irregularity of the decision.[200] Although some governors have announced a moratorium on the use of the death penalty during their administrations,[201] Dunlap's temporary reprieve was a scalpel aimed at a single offender rather than the cleaver of a statewide moratorium.

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193. *See* Colo. Exec. Order No. D 2013-006 (May 22, 2013), https://www.colorado.gov/governor/sites/default/files/d_2013-006_death_sentence_reprieve.pdf [https://perma.cc/FB28-C6MF].

194. *See id.*

195. *Id.* at 3.

196. *Id.*

197. *Id.*

198. *Id.*

199. *See* Augé, *supra* note 190.

200. A glance at the historical record makes clear that this was not what the Founders contemplated when they enabled the executive to grant reprieves. The pardon power was the subject of relatively little debate at the Constitutional Convention, implying that it was intended to mirror the clemency powers enjoyed by the English King. *See* Schick v. Reed, 419 U.S. 256, 260–61 (1974). According to Blackstone, a reprieve power was given to the Crown for two reasons: (1) as a way for the King to offer an offender sufficient time to apply for either a conditional or absolute pardon; and (2) to stay the imposition of a punishment while a woman was pregnant or if the offender displays signs of insanity. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES, *394–96. However, if "neither pregnancy, insanity, non-identity, nor other plea will avail to avoid the judgment and stay the execution consequent thereupon, the last and surest resort is in the king's most gracious *pardon*." *Id.* at *396. Blackstone—and therefore the Founders—saw the reprieve as a resting point on the road to a pardon if more information or a change in circumstance was necessary prior to making the ultimate decision.

201. *See, e.g.*, Helen Jung, *Gov. John Kitzhaber Stops Executions in Oregon, Calls System "Compromised and Inequitable,"* OREGONIAN (Nov. 22, 2011, 2:00 PM), http://www.oregonlive.com/pacific-northwest-news/index.ssf/2011/11/gov_john_kitzhaber_stops_all_e.html [https://perma.cc/ACF2-HDEK]. The situation in Oregon is the closest analog to Hickenlooper's decision. There, the governor's hand was also forced by the imminent execution of an offender, and the governor chose to grant a

IV. LEAVING LIFE OR DEATH TO THE POLITICAL PROCESS

The response to Governor Hickenlooper's decision was swift and predictable. Advocates on the right attacked the Governor for not allowing justice to take its course.[202] Abolitionists encouraged—and continue to encourage—a full commutation instead.[203] A public opinion poll showed that 67% of Coloradans disagreed with Hickenlooper's handling of the issue.[204]

Furthermore, Hickenlooper's "third way" ensured that the death penalty in general, and the fate of Nathan Dunlap in particular, would become an issue in the 2014 gubernatorial election. Immediately after the decision, several rumored Republican candidates for governor expressed disappointment, with one calling it a "no-brainer" that Dunlap should be executed;[205] taking to the steps of the capital mere feet from where Hickenlooper had announced the reprieve, he called Hickenlooper Dunlap's "guardian angel" and decried what he called "inaction," "shrugging," and "not justice."[206]

At a Republican primary debate in May 2014, eventual Republican nominee Bob Beauprez confirmed his stance, announcing, to raucous applause, that if he were elected governor, "Nathan Dunlap will be executed."[207] In August, Hickenlooper vaguely suggested that he would consider full clemency for Dunlap during the lame-duck portion of his administration if he were to lose.[208] Beauprez quickly launched an advertisement calling such a decision "one final injustice" and reiterating that if elected, he would "carry out justice for the victims."[209] As election day approached, numerous national and local media outlets focused on the impact of the Dunlap decision—and therefore Dunlap's fate—on the election.[210] Although a September poll showed that only 18% of

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reprieve. *Id.* Unlike Hickenlooper, however, Oregon Governor John Kitzhaber extended the reprieve to all members of Oregon's death row and encouraged legislators to repeal Oregon's death penalty. *Id.*

202. *See* Augé, *supra* note 190.

203. *See* Editorial, *Hickenlooper Should Commute Nathan Dunlap's Sentence and Lead on Death Penalty Debate*, DENVER POST (Apr. 28, 2017, 3:00 PM), http://www.denverpost.com/2017/04/28/hickenlooper-should-commute-nathan-dunlaps-sentence-and-lead-on-death-penalty-debate [https://perma.cc/QJS7-QDXX].

204. Kimberley A. Strassel, *Hickenlooper's Death Penalty Problem*, WALL ST. J. (Oct. 22, 2014, 12:03 PM), http://www.wsj.com/articles/political-diary-hickenloopers-death-penalty-problem-1413993816 [https://perma.cc/PRN2-Y6D2].

205. Augé, *supra* note 190.

206. *Id.*

207. Bunch, *supra* note 15.

208. *See* Eli Stokols, *Beauprez Hits Hickenlooper on Dunlap Decision After Clemency Comment*, FOX 31 DENVER (Aug. 25, 2014, 4:32 PM), http://kdvr.com/2014/08/25/beauprez-hits-hickenlooper-on-dunlap-decision-after-clemency-comment [https://perma.cc/PAB3-MNBX].

209. *See* Bob Beauprez, *John Hickenlooper's Injustice*, YOUTUBE (Aug. 25, 2014), https://www.youtube.com/watch?v=pfv6ra5ZTD0&feature=youtu.be [https://perma.cc/H3GG-ZMAW].

210. *See, e.g.*, Mark Z. Barabak, *Colorado Governor Says No Regrets in Death Penalty Case*, L.A. TIMES (Nov. 3, 2014, 7:00 AM), http://www.latimes.com/nation/politics/politicsnow/la-pn-hickenlooper-defends-colorado-death-penatly-case-20141102-story.html [https://perma.cc/AYU6-QGTR]; Tessa Cheek, *Hickenlooper Campaign Allows Beauprez To Be Formidable Foe*, COLO. INDEP. (Nov. 4, 2014), http://www.coloradoindependent.com/150096/hickenlooper-campaign-allows-beauprez-to-be-formidable-

Colorado voters considered the death penalty to be a "major factor" in their vote, it also showed that 63% supported the death penalty.[211] Strategic investments from outside conservative groups quickly followed the release of the poll[212] in an attempt to ensure the issue stayed in the forefront of Colorado voters' minds. Whereas the average resident of death row is uncertain as to the time of their death, the effect of Dunlap's uncertainty was exacerbated by the public nature of whether he would live or die. His uncertainty was not the result of an appeal or a delay but rather a result of public debate and discussion surrounding the 2014 election.

The rest is history. With the race neck-and-neck as results poured in on Tuesday, November 3, 2014, both candidates and their teams watched closely, desperate for any indication of which way the election would tilt.[213] As the night wore on, it appeared Beauprez—at this point hanging onto a slim lead—would prevail.[214] But early Wednesday morning, the liberal enclave of Boulder County revised its vote totals, propelling Hickenlooper into a lead he would not relinquish.[215] When the ballots were counted—over two million in all—Hickenlooper bested Beauprez by a mere 68,238 votes.[216]

Those votes—less than 2% of Colorado's voting-aged population[217]—changed the fortunes of three men. They meant that Hickenlooper would return to the Governor's mansion, where his name would be floated as a potential candidate for vice president in 2016[218] and later as an early contender for the

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foe [https://perma.cc/3TXQ-ZABA]; Strassel, *supra* note 204; Danny Vinik, *Colorado's Governor's Race Could Come Down to the Death Penalty*, NEW REPUBLIC (Oct. 31, 2014), https://newrepublic.com/article/120063/colorado-governor-john-hickenlooper-may-lose-over-death-penalty-issue [https://perma.cc/8T6Y-VAKP].

211. *See* Jon Murray, *Poll: Death Penalty Not Major Factor for Colorado Voters*, DENVER POST (Sept. 11, 2014, 9:51 AM), http://www.denverpost.com/2014/09/11/poll-death-penalty-not-major-factor-for-colorado-voters [https://perma.cc/ZU3J-9R58]. Of those 18%, they split nearly three-to-one in Beauprez's favor. *Id.*

212. *See* Vinik, *supra* note 210.

213. *See* Colorado Public Radio Staff, *Beauprez Concedes Colo. Governor's Race to John Hickenlooper*, COLO. PUB. RADIO (Nov. 5, 2014, 4:10 PM), http://www.cpr.org/news/story/beauprez-concedes-colo-governors-race-john-hickenlooper [https://perma.cc/VQV3-TQBR].

214. *Id.*

215. *See* Joey Bunch & John Frank, *Hickenlooper Defeats Beauprez for Colorado Governor*, DENVER POST (Nov. 4, 2014, 7:40 AM), http://www.denverpost.com/2014/11/04/hickenlooper-defeats-beauprez-for-colorado-governor [https://perma.cc/NHZ4-L72Z] (detailing the saga of waiting for Boulder's vote total and the eventual outcome).

216. *See* ELECTIONS DIV., OFFICE OF THE SEC'Y OF STATE, STATE OF COLO., 2014 ABSTRACT OF VOTES CAST 106, https://www.sos.state.co.us/pubs/elections/Results/Abstract/pdf/2000-2099/2014AbstractBook.pdf [https://perma.cc/KWY5-SLYA].

217. *See* U.S. CENSUS BUREAU, ELECTRONIC PROFILE: COLO. (2016), https://www.census.gov/content/dam/Census/library/visualizations/2016/comm/cb16-tps19_graphic_voting_colorado.jpg [https://perma.cc/TP3C-WTDF].

218. *See* Amie Parnes, *Clinton's Top Five Vice Presidential Picks*, HILL (May 14, 2016, 5:28 PM), http://thehill.com/blogs/ballot-box/presidential-races/279879-hillary-clintons-top-five-vice-presidential-picks [https://perma.cc/NY89-B3FF].

2020 presidential nomination.[219] They meant that Beauprez would fade back into the political wilderness, returning to his buffalo ranch and away from the political spotlight.[220] And they meant Nathan Dunlap would live.

At first glance, it may seem tempting to label the decision to grant a temporary reprieve to Mr. Dunlap to be itself "cruel and unusual." After all, it imposed great uncertainty on the offender and left his fate in the hands of the 2014 gubernatorial electorate. Such an argument would undoubtedly fail. Although it may seem distasteful to leave such questions in the hands of the body politic, this is the effect of the Pardon Power, which has been almost unanimously adopted by the states.[221] As a matter of first principles, an executive may grant a pardon or a reprieve for any purpose (short of cases of impeachment).[222] In such situation, the only recourse for those aggrieved by a decision to pardon or reprieve is the political process. In this way, when someone unhappy with a use—or lack thereof—of the pardon power seeks recourse through the political process, that action is not only constitutional but was explicitly contemplated by the Founders.[223]

In granting Nathan Dunlap a temporary reprieve, there is no indication Governor Hickenlooper acted with cruel intent. All evidence points to a man deeply troubled by the death penalty and deeply concerned about whether his state should participate in "the machinery of death."[224] But his actions imposed

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219. *See* Chris Cillizza, *The Race for the 2020 Democratic Presidential Nomination Is Now Open*, WASH. POST (Nov. 27, 2016), https://www.washingtonpost.com/politics/the-race-for-the-2020-democratic-presidential-nomination-is-now-open/2016/11/27/5f4ba3c6-b4ad-11e6-9fa1-ff5eb54db157_story.html [https://perma.cc/29TB-FFFD] (listing Hickenlooper as one of six candidates who "might" run for President in 2020).

220. *See Bob Beauprez Joins Board of Directors*, STEAMBOAT INST. (Jan. 29, 2015), http://www.steamboatinstitute.org/update/bob-beauprez-joins-steamboat-institute-board-of-directors [https://perma.cc/5TQG-32AA] (noting that in 2015, after the election, Beauprez was the operator of a buffalo ranch in Northern Colorado).

221. *See Characteristics of Pardon Authorities*, RESTORATION OF RTS. PROJECT (Aug. 2017), http://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities/ [https://perma.cc/LNG9-YZQZ].

222. THE FEDERALIST NO. 74 (Alexander Hamilton) ("Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed."); 4 BLACKSTONE, *supra* note 200, at *398 ("[T]he king may pardon all offences merely against the crown or the public . . . .").

223. In defending the decision to vest the Pardon Power solely in the Executive, Alexander Hamilton noted the degree to which public opinion may play a role in the decision: "The reflection that the fate of a fellow-creature depended on his sole fiat, would naturally inspire scrupulousness and caution; the dread of being accused of weakness or connivance, would beget equal circumspection, though of a different kind." THE FEDERALIST NO. 74 (Alexander Hamilton). The earliest example of the Pardon Power being litigated through the political process was in conjunction with the Alien and Sedition Acts in the late-eighteenth century. *See* Nancy Murray & Sarah Wunsch, *Civil Liberties in Times of Crisis: Lessons from History*, MASS. L. REV. 72, 73–74 (2002). Thomas Jefferson explicitly campaigned on a promise to overturn the Alien and Sedition Acts and pardon those that had been sentenced under them. *See id.* at 74. This recourse to the political process was seen as not only unobjectionable, but the only proper way to challenge misuse of the pardon power. *See id.*

224. *See* Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., respecting denial of certiorari) ("From this day forward, I no longer shall tinker with the machinery of death.").

a cruel uncertainty that left Nathan Dunlap to ponder his life or death while voters cheered for lethal injection, ran advertisements calling for his execution, and eventually cast ballots in his name. His ultimate punishment was "unjustly harsh in light of longstanding prior punishment practice."[225]

CONCLUSION

Imagine a death-qualified jury, properly empaneled, instructed, and empowered, voting to abdicate its responsibility to a statewide referendum. Rather than decide whether the offender would be sentenced to death, it allows the state's voters—none of whom heard testimony or weighed aggravating and mitigating factors—to decide whether the penalty should be imposed. Would we accept this outcome?

Now imagine an inmate condemned to administrative segregation, spending twenty-three hours of every day alone in a small cell. Imagine the feeling of crippling uncertainty that accompanies the knowledge that beyond the walls that confine you people are casting ballots for governor, some driven by policies, others by politics, and others still by a sense that you should live or die. Imagine sitting alone, not knowing whether your reprieve would continue for a month or years. Imagine waiting as the election drags through the day and night, and as county clerks count ballots eventually realizing that your fate hangs in the balance of just 68,238 voters—less than 2% of Colorado's voting-age population.[226] Would this effect not be cruel? Is it not unusual?

In the case of Nathan Dunlap, it is unlikely any individual acted unjustly. The executive power to grant clemency and reprieves has been called a "fail safe" in our criminal justice system and "the historic remedy for preventing miscarriages of justice."[227] An outright rejection of that power because it can lead to cruel uncertainty would deprive countless defendants of a critical check on the judiciary and legislative over-criminalization.[228]

Furthermore, Nathan Dunlap's story is only one egregious case of the uncertainty that befalls nearly every capital offender. Whereas Dunlap's uncertainty may seem more visceral—being lodged in the hands of direct democracy—its cruelty compared to the uncertainty of the other two residents of Colorado's death row is one of degree, not kind. In Colorado, as in most states, a sentence of death is more aptly described as "*life in prison, with the remote possibility of death*."[229]

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225. *See* Stinneford, *supra* note 20, at 497.

226. *See supra* note 217 and accompanying text.

227. Harbison v. Bell, 556 U.S. 180, 192 (2009) (quoting Herrera v. Collins, 506 U.S. 390, 411–12, 415 (1993)).

228. *See generally* JEFFREY CROUCH, THE PRESIDENTIAL PARDON POWER 14 (2009) (discussing the pardon power as a check on the judiciary and over-criminalization).

229. Jones v. Chappell, 31 F. Supp. 3d 1050, 1053 (C.D. Cal. 2014) *rev'd sub nom.* Jones v. Davis, 806 F.3d 538 (9th Cir. 2015).

This sentence advances neither penological rationale for the death penalty: deterrence and retribution. For a utilitarian, the death penalty must necessarily offer some additional deterrence beyond what is offered by life in prison without the possibility of parole.[230] In reinstating the death penalty in 1976, the *Gregg* plurality took note of the myriad studies showing both that the death penalty did have a deterrent effect and that it did not.[231] It decided, however, that there are some "murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act."[232] The point, at its base, is that there are some criminals willing to risk life in prison to commit a crime, but not execution. The existing research demonstrates that to most criminals, the likelihood of being caught factors more into their calculation of whether to commit the crime than does the punishment they will suffer if caught[233]—does the *Gregg* assumption still hold when the possibility of death, regardless of the sentence, is so miniscule?

Consider the statistical reality. Colorado has charged one hundred and twenty-four individuals with a capital crime since 1979.[234] Only twelve of those individuals have been sentenced to death and only one has been executed, whereas three others remain on death row.[235] The remaining eight who had been sentenced to death either had their sentences commuted to life in prison due to procedural or constitutional deficiencies in their prosecution or died in prison.[236] Imagine a Colorado resident approached in a murder-for-hire scheme. Imagine further that he is not deterred by life in prison but is by execution—in other words, he is the individual imagined by *Gregg*.[237] Imagine further that after committing the crime the state actually seeks the death sentence in its prosecution (far from a certain outcome, given that Colorado prosecutors have sought the death penalty in fewer than one hundred thirty cases since 1979). At this point, our individual has only a 9.68% chance of being sentenced to death, and if sentenced, an 8.3% chance of actually being executed. The end result is a 0.8% chance that this individual will be executed.[238] Is this actually a deterrent? It is difficult to imagine an individual willing to spend his life in prison who is

230. *See* Samuel J.M. Donnelly, *Capital Punishment: A Critique of the Political and Philosophical Thought Supporting the Justices' Positions*, 24 ST. MARY'S L.J. 1, 24 (1992) ("In the absence of a reasonable demonstration that capital punishment would have a greater deterrent effect than life imprisonment, Utilitarians would oppose the death penalty.").

231. *See* Gregg v. Georgia, 428 U.S. 153, 184–86 (1976) (plurality opinion).

232. *Id.* at 186.

233. *See, e.g.*, Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 213 (2013); *see also* United States v. Sandoval-Enrique, 171 F. Supp. 3d 1190, 1206–07 (D.N.M. 2016) (collecting studies).

234. *See supra* note 182 and accompanying text.

235. *See supra* notes 181–83 and accompanying text.

236. *See supra* note 183 and accompanying text.

237. *See* Gregg v. Georgia, 428 U.S. 153, 185–86 (1976) (plurality opinion) (imagining a murder-for-hire offender who is more deterred by the death penalty than by life in prison).

238. Only twelve of one hundred twenty-four cases in which Colorado prosecutors sought the death penalty have resulted in a sentence of death (9.68%). Of those twelve, only one has been executed

not willing to subject himself to a 1% chance of execution in exchange for commanding a higher price in the murder-for-hire scheme.[239]

Nor does a sentence of life in prison with the remote possibility of death further a retributive rationale. In 2007, the Supreme Court described the retributive function of the death penalty as follows:

> [I]t might be said that capital punishment is imposed because it has the potential to make the offender recognize at last the gravity of his crime and to allow the community as a whole, including the surviving family and friends of the victim, to affirm its own judgment that the culpability of the prisoner is so serious that the ultimate penalty must be sought and imposed.[240]

This formulation has two components: one offender-focused and one community-focused. It is dubious that life in prison with the possibility of death "make[s] the offender recognize at last the gravity of his crime."[241] Death row inmates are executed, on average, nearly eighteen years after they are initially sentenced to death.[242] This would seemingly offer plenty of opportunities for inmates to recognize the gravity of their crime. If not during the pendency of their execution, then certainly when inmates are asked multiple times to make accommodations for the posthumous disposal of their remains.[243] Furthermore, the arbitrariness with which some prisoners are actually executed and others are not greatly reduces the punishment's communicative retribution. An offender cannot be expected to see the gravity of his crime in his execution when the majority of other, perhaps more grievous, capital offenders go unexecuted.

As for the community, it has changed over the course of eighteen years. "Feelings of outrage may have subsided . . . . And sometimes repentance and even forgiveness can restore meaning to lives once ruined."[244] While this is speculative, one must also consider the pain imposed on surviving family and

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(8.33%). That means that of the one hundred twenty-four individuals charged with capital murder, only one has been executed (0.8%). *See supra* notes 181–83 and accompanying text.

239. *See* Glossip v. Gross, 135 S. Ct. 2726, 2768–69 (2015) (Breyer, J., dissenting).

240. Panetti v. Quarterman, 551 U.S. 930, 958–59 (2007) (holding that courts should consider whether the offender's mental state is such that he can be aware of his punishment in deciding whether to uphold execution).

241. *Id.*

242. For the twenty inmates executed in 2016, the average wait was 18.55 years. *See Execution List 2016*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/execution-list-2016 [https://perma.cc/P3MJ-ZF5A]. In 2015, the average wait was just under seventeen years. *See Execution List 2015*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/execution-list-2015 [https://perma.cc/J9QF-PZLV]. In 2014, it was 17.58 years. *See Execution List 2014*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/execution-list-2014 [https://perma.cc/2K4F-9M8G].

243. *See supra* note 135; *see also* Bill Rankin, *Warren Lee Hill Granted Stay of Execution*, ATLANTA J.-CONST. (Feb. 20, 2013, 7:21 AM), http://www.ajc.com/news/local/warren-lee-hill-granted-stay-execution/9X6mxRDWAS6yAGT9zRXH9O [https://perma.cc/UZC7-4MUZ] (noting that when Warren Lee Hill was granted a stay of execution, he was so close to being executed that he had already been given the sedative to prepare for his lethal injection).

244. *Glossip*, 135 S. Ct. at 2769 (Breyer, J., dissenting).

friends by an eighteen-year wait for closure. Two days before leaving office in 2003, Illinois Governor George Ryan commuted the death sentences of all one hundred sixty-seven of Illinois's death row inmates. His decision was based, in no small part, on his conviction that it was cruel and unusual to force victims' friends and families to wait nearly two decades for closure.[245] The moral sense of the community may be best served by a prompt execution, but this sense would seem to decline with each passing year as the community's connection to the crime weakens and the value of closure to friends and family grows.

On the night of November 3, 2016, Nathan Dunlap faced the cruel uncertainty of having his fate decided by the whims of Colorado's electorate. Although this electoral referendum is viscerally painful to imagine, it is only an exacerbation of the uncertainty faced by all death row inmates. One hundred and thirty years ago, the Supreme Court recognized the cruelty of this uncertainty.[246] They were correct. Yet in the intervening century, layer after layer of appellate review has been added, so as to diminish the possibility of executing an innocent person. Although these layers have undoubtedly accomplished their purpose, they also have the effect of imposing uncertainty that is "unjustly harsh in light of longstanding prior punishment practice."[247]

Perhaps the originalists on the Court will ignore Stinneford's research, but his formulation at least creates an audience for these claims. Where previous defenders arguing the uncertainty of the modern death penalty were forced to cobble together five votes from a panel of seven, Stinneford has at least arguably opened an avenue through which all nine Justices may be targeted. As this Note demonstrates, the uncertainty imposed by the modern death penalty scheme adds unacceptably cruel effects, raising anew questions of whether it can be constitutionally administered. The death penalty is undoubtedly constitutional as an original matter, but that does not mean the death penalty as currently administered is devoid of originalist constitutional infirmities.

245. *See* AUSTIN SARAT, MERCY ON TRIAL: WHAT IT MEANS TO STOP AN EXECUTION 130 (2005).
246. *See In re* Medley, 134 U.S. 160, 172 (1890).
247. *See* Stinneford, *supra* note 20, at 497.