ARTICLES

THE HAVOC DEATH WREAKS: CIVIL RIGHTS CHALLENGES TO CAPITAL PUNISHMENT

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INTRODUCTION

Following a *per curium* opinion that banned the imposition of capital punishment because it violated the Eighth Amendment, as made applicable to the states through the Fourteenth Amendment, United States Supreme Court Justice Thurgood Marshall offered a unique criticism of capital punishment.[1] Justice Marshall, an iconic civil rights litigator prior to his confirmation to the Court, stated, "[T]he death penalty wreaks havoc with our *entire* criminal justice system."[2] Similarly, sometime in the late 1950s, Associate Justice Robert H. Jackson reportedly said that capital punishment "completely bitches up the criminal law."[3] In essence, both Justices were asserting that the death penalty affects more than just the families of victims and the accused; rather, capital punishment infects the entire criminal justice system.[4] As this Article demonstrates, Justices Marshall and Jackson were right then and they are still right now.

The death penalty touches many more lives than just the individuals condemned to death row.[5] Throughout the process, numerous other people are involved, and some suffer injury as a result of their compulsory association with the "machinery of death."[6] Due to the justiciability doctrine of standing, however, these individuals have not received redress for the damage they suffer because of capital punishment.[7] This Article argues, to the contrary, that the

[1] Furman v. Georgia, 408 U.S. 238, 342–71 (1972) (Marshall, J., concurring).

[2] *Id.* at 364 (emphasis added). For additional reading on how Justice Marshall's life and background contributed to his fierce opposition to the death penalty, see Stephanie E. Grana, *Thurgood Marshall and the Fight for Life*, 20 S.U. L. REV. 1 (1993) (discussing Justice Marshall's life with a specific focus on Justice Marshall's disagreement with the death penalty).

[3] Michael D. Hintze, Note, *Attacking the Death Penalty: Toward a Renewed Strategy Twenty Years After* Furman, 24 COLUM. HUM. RTS. L. REV. 395, 431 (1993) (quoting MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT ON CAPITAL PUNISHMENT 22 (1973)).

[4] *See supra* notes 2–3, and accompanying text.

[5] For a sampling of individuals affected by the death penalty, see C. Crystal Enekwa, Note, *Capital Punishment and the Marshall Hypothesis: Reforming a Broken System of Punishment*, 80 TENN. L. REV. 411, 428–42 (2013).

[6] Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) ("From this day forward, I no longer shall tinker with the machinery of death."); *see also* Linda Greenhouse, *Death Penalty is Renounced by Blackmun*, N.Y. TIMES, Feb. 23, 1994, at A1 (noting Justice Blackmun's passionate and personal admonition of the death penalty in his *Callins* dissent).

[7] *See* Whitmore v. Arkansas, 495 U.S. 149, 151 (1990) (holding that a third party lacks standing to "challenge the validity of a death sentence imposed on a capital defendant who has elected to forgo his right to appeal to the State Supreme Court"). *Whitmore* specifically dealt with third-party standing to pursue the claims of a capital defendant. *Id.* This Article takes a slightly different approach by arguing that third parties who are connected to the death penalty and injured by its continued use have a right to pursue redress for their *own* injuries through civil rights litigation.

individuals who are affected negatively by the death penalty, beyond simply the convicted defendant themself, can satisfy the necessary elements of Article III standing, as well as other justiciability obstacles, and have legitimate claims that the death penalty is cruel and unusual *as applied to them*. This Article further maintains, specifically, that the families of capital defendants have claims based on the Thirteenth Amendment's prohibition on slavery in addition to Eighth Amendment grievances. If the people considered in this Article can surmount the justiciability hurdle, they present a unique challenge to the constitutionality of capital punishment and offer another vehicle through which death penalty opponents may challenge this age-old punitive practice.

Other scholars have considered the possibility of third-party challenges to the death penalty based on differing constitutional or statutory theories.[8] For instance, Adam M. Clark argues that capital punishment, and specifically death-qualifying juries, violate the rights of potential jurors.[9] Clark maintained that the right to serve on a jury is nearly, if not completely, as important as the right to vote.[10] When jurors are forced to either defy their own beliefs to serve on a capital jury or otherwise be stricken for cause based on opposition to the death penalty, this is tantamount to a deprivation of the right to serve on a jury.[11] Likewise, Rachel King has asserted that the family members of capital defendants have a substantive due process right to family that the government violates when carrying out the death penalty.[12] In King's analysis, the death penalty could not survive a substantive due process claim because capital punishment does not adequately serve any stated penological interest, except for possibly incapacitation, and the death penalty is not narrowly tailored to advance any penological interest that could not otherwise be served by life without parole.[13] Similarly, though not a constitutional argument, but a public policy one, Rachel King and Katherine Norgard have advocated for adding a mitigating

[8] *See* Adam M. Clark, *An Investigation of Death Qualification as a Violation of the Rights of Jurors*, 24 BUFF. PUB. INT. L.J. 1, 61–67 (2006); Rachel King, *No Due Process: How the Death Penalty Violates the Constitutional Rights of the Family Members of Death Row Prisoners*, 16 B.U. PUB. INT. L.J. 195, 201–17 (2007); Rachel King & Katherine Norgard, *What About Our Families? Using the Impact on Death Row Defendants' Family Members as a Mitigating Factor in Death Penalty Sentencing Hearings*, 26 FLA. ST. U. L. REV. 1119, 1142–53 (1999); Evan Tsen Lee & Ashutosh Bhagwat, *The* McCleskey *Puzzle: Remedying Prosecutorial Discrimination Against Black Victims in Capital Sentencing*, 1998 SUP. CT. REV. 145, 180–84, 185–91 (1998); Michael Mello, *Defunding Death*, 32 AM. CRIM. L. REV. 933, 995–1007 (1995).

[9] Clark, *supra* note 8, at 3, 61–67. A death-qualified jury is one in which potential jurors "who 'would not consider' the death penalty [may] be excluded at the *for cause* stage [of jury selection]." *Id.* at 7 (quoting Witherspoon v. Illinois, 391 U.S. 510, 515 n.9 (1968)).

[10] *Id*. at 3 (citing Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995)).

[11] *Id.* at 3.

[12] *See* King, *supra* note 8, at 201, 208.

[13] *Id.* at 249–50.

factor to state capital sentencing statutes based on the impact of a death sentence on the condemned's family.[14]

Making an equal protection argument, Evan Tsen Lee and Ashutosh Bhagwat considered the ability of a condemned capital defendant's family to allege constitutional violations.[15] The scholars, nevertheless, found that challenges to death sentences by families of the condemned are not presently options.[16]

Finally, though not a constitutional challenge but a statutory one, Professor Michael Mello has promoted the possibility of using Title VI of the Civil Rights Act of 1964 to challenge the discriminatory impact of the death penalty.[17] The main benefit of this approach, according to Mello, is that a successful Title VI action does not require a showing of discriminatory intent, as in an equal protection challenge, but only discriminatory effect.[18] As to standing, Mello noted that the most likely third party to be able to overcome the hurdles of third-party standing would be the families of victims, as well as capital defendants themselves.[19]

In slight contrast to these existing proposals, this Article adds to the scholarship by focusing on a broad range of affected individuals and two specific constitutional rights—one well-trodden ground and the other cutting edge. This Article identifies five categories of potential plaintiffs to constitutionally challenge the continued imposition of capital punishment as applied to them, not to death penalty defendants. These categories are: victims' families, capital defendants' families, judges, corrections officials, and governors. Moreover, this Article proposes two constitutional provisions to serve as the basis of these individuals' complaints: the Eighth and Thirteenth Amendments. The Eighth

[14] King & Norgard, *supra* note 8, at 1124–25 ("To balance the influence of victim impact statements, we propose the use of defendants' family impact statements during the sentencing phases of capital trials. Judges and juries in death penalty cases should be allowed to hear from the family members and friends of those on trial for their lives . . . . The system should realize that the innocent family members of the defendant are also victimized by the process and that the impact of their loved one's death sentence on their lives is significant.").

[15] Lee & Bhagwat, *supra* note 8, at 145; *see* U.S. CONST. amend. XIV ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws*." (emphasis added)).

[16] Lee & Bhagwat, *supra* note 8, at 184–86.

[17] Mello, *supra* note 8, at 975–1012; *see* the Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000d (2018) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

[18] Mello, *supra* note 8, at 972 ("The Justice Department regulations are typical and state that: 'A recipient . . . may not . . . utilize criteria or methods of administration which have the *effect* of subjecting individuals to discrimination because of race, color or national origin.'" (quoting 28 C.F.R. § 42.104(b)(2))).

[19] *Id.* at 1003–07.

Amendment to the United States Constitution prohibits the imposition of "cruel and unusual punishment,"[20] while the Thirteenth Amendment proscribes slavery.[21] Both of these provisions offer the possibility of ending capital punishment if the proper challenge is brought by an injured person from one of these five categories seeking a permanent injunction. A playbook for succeeding on these claims is articulated here, with a particular emphasis on overcoming the ominous obstacle of justiciability.

Importantly, this Article does not intend to try to diminish the severity or heinous character of the crimes for which juries have convicted and states have sentenced those to capital punishment. Nor does this Article endeavor to suggest that those who have received capital sentences did not engage in serious crimes deserving of the community's condemnation. This Article does, however, seek to more fully appreciate the breadth of the damage that stems from the death penalty's continued use in the United States and to contextualize capital punishment by highlighting the often-ignored voices of others involved in its implementation.

With that in mind, this Article proceeds in four parts. Part I illuminates the ill this Article seeks to remedy. Next, Part II offers the legal vehicles through which litigants may gain access to the courts to advance their claims. Then, Part III analyzes the difficult standing arguments that this Article raises. Finally, this Article concludes that third-parties to capital punishment have justiciable claims to challenge its continued practice.

I. THE SCOPE OF CAPITAL PUNISHMENT'S HAVOC

The death penalty does not solely affect the accused; nor does capital punishment only consist of an investigation, trial, and execution of a sentence.[22] Instead, the death penalty impacts the lives of numerous people as a capital case works its way from investigation through execution.[23] This Part, in varying degrees, surveys the effect the death penalty has on five categories of individuals, all of whom have cognizable claims for deprivations of their constitutional rights.[24]

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[20] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*" (emphasis added)).

[21] U.S. CONST. amend. XIII ("Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have the power to enforce this article by appropriate legislation.").

[22] For a rather comprehensive overview of the capital punishment process, see RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS (4th ed. 2012).

[23] *Id.*

[24] *See infra* Part I. Invariably, there are other categories of individuals who could potentially present colorable claims of constitutional violations based on the imposition of capital punishment. For the sake of brevity and efficiency of argument, however, this Article focuses on the five sets of persons described here.

A. *Victims' Families*

A core group of persons affected by the continued imposition of capital punishment is the families of the victims in death-penalty eligible crimes.[25] Undoubtedly, many of the families of victims of capital crimes support the imposition of the death penalty and are willing to testify to the loss they have suffered because of the actions of a person convicted of a capital crime and awaiting sentencing.[26] Other families, though, are not as enthusiastic in their desire for the ultimate punishment for the person accused or convicted of murdering their loved one.[27] Indeed, some family members of capital victims want and seek mercy for the person convicted of killing their relative.[28] It is

[25] For discussions of the role of victims' families in capital punishment, see Payne v. Tennessee, 501 U.S. 808, 827 (1991) ("A State may legitimately conclude that evidence about the victim and *about the impact of the murder on the victim's family* is relevant to the jury's decision as to whether or not the death penalty should be imposed." (emphasis added)); Joshua D. Greenberg, Comment, *Is* Payne *Defensible?: The Constitutionality of Admitting Victim-Impact Evidence at Capital Sentencing Hearings*, 75 IND. L.J. 1349, 1349 (2000) ("[C]ritics have alleged that by allowing the admission of victim-impact evidence at capital sentencing, *Payne* permits 'arbitrary and capricious' sentencing in violation of the Eighth Amendment."); Susan C. Hascall, *Shari'ah and Choice: What the United States Should Learn from Islamic Law About the Role of Victims' Families in Death Penalty Cases*, 44 J. MARSHALL L. REV. 1, 2 (2010) ("Redefining the scope of permissible victim impact testimony in state sentencing statutes to allow the victims to voice their opinions on the proper sentence to be imposed would demonstrate respect to those most personally affected by the grief and horror of murder—the family members of the victims."); David R. Karp & Jarrett B. Warshaw, *Their Day in Court: The Role of Murder Victims' Families in Capital Juror Decision Making*, *in* WOUNDS THAT DO NOT BIND: VICTIM-BASED PERSPECTIVES ON THE DEATH PENALTY 275, 294 (James R. Acker & David R. Karp, eds., 2006) ("Our findings suggest that [victim impact evidence] may be a valuable way to empower the families of murder victims, making their day in court free of the fear that this will bias jurors and thereby alter the course of justice."); Paige McThenia, *The Role of Forgiveness in Capital Murder Cases*, 12 CAP. DEF. J. 325, 326 (2000) ("[A] criminal wrong is prosecuted by a public attorney who represents the state rather than the victim. The criminal proceeding is brought to protect the public interest rather than to compensate the individual victim or the family of the victim.").

[26] *See supra* note 25 and accompanying text; *see also* Marilyn Peterson Armour & Mark S. Umbreit, *The Ultimate Penal Sanction and "Closure" for Survivors of Homicide Victims*, 91 MARQ. L. REV. 381, 402 (2007).

[27] *See* Charles F. Baird & Elizabeth E. McGinn, *Re-Victimizing the Victim: How Prosecutorial and Judicial Discretion Are Being Exercised to Silence Victims Who Oppose Capital Punishment*, 15 STAN. L. & POL'Y REV. 447, 465 (2004) ("[A] significant number of survivors oppose the death penalty on moral, social, or religious grounds, but not because of sympathy for the murderer.").

[28] *Id.* North Carolina District Court Judge Paige McThenia argued, while still a law student at Washington & Lee University, that forgiveness of death row inmates by victims' families should have a role to play in the criminal justice system, as it does in Islamic law. *See* McThenia, *supra* note 25, at 325–28. Judge McThenia noted that multiple family members of

these individuals, those family members who plead for compassion for the death row inmate, that this Article maintains have a cognizable claim against capital punishment.

The injury that these victims' families experience is demonstrable. For numerous reasons, these individuals oppose the imposition of capital punishment and are either ignored or, worse yet, silenced by the government, which has "traditionally possessed tremendous and unbridled discretion about who may give [a victim impact] statement."[29] For instance, the sister of murdered Virginia State Trooper Jerry Hines openly forgave Trooper Hines's murderer, Dennis Wayne Eaton.[30] Trooper Hines's sister, former nun Maria Hines, spoke of her pleas for compassion for Eaton, stating, "[K]illing is wrong, whether it's a case of one individual killing another or if it's a state killing one of its citizens . . . . I want other victims to know there is an alternative. That alternative is forgiveness and reconciliation."[31] Despite Ms. Hines's entreaties, the State of Virginia executed Dennis Wayne Eaton for Trooper Hines's murder on June 18, 1998.[32] Ms. Hines met with Eaton the day before his execution, and she attended a candlelight vigil outside of the prison during and after the performance of the sentence.[33] Of Eaton's execution, Ms. Hines stated that the state had committed an "act of retribution and revenge."[34] Ms. Hines concluded that "[d]epite [sic] the heinous acts that Dennis committed in 1989, the Eaton family can be proud of the person Dennis Eaton became while in prison, the same person who was executed tonight."[35]

Likewise, the United States Court of Appeals for the Tenth Circuit dealt with the issue of a victim's family asking the sentencer for mercy in the 1987 case of

victims have pursued mercy for capital defendants based on the crimes committed against the advocate's loved one. *Id.* at 327–28.

[29] Susan A. Bandes, *Victims, "Closure," and the Socio. of Emotion*, 72 LAW & CONTEMP. PROBS. 1, 15 (2009) ("[F]or example, prosecutors have on a number of occasions barred survivors who oppose the death penalty from testifying . . . . Even when prosecutors do not silence survivors, they may explicitly or implicitly communicate their own views about which emotions are appropriate to the occasion." (footnotes omitted)); *see* Baird & McGinn, *supra* note 27, at 465 ("Victims' family members opposing the death penalty typically receive very different treatment from those who support it. Prosecutors often refuse to offer, and judges refuse to admit, victim impact evidence that advocates 'mercy, kindness, or forgiveness towards defendants . . . .'" (footnote omitted) (quoting Elizabeth E. Joh, *Narrating Pain: The Problem with Victim Impact Statements*, 10 S. CAL. INTERDISC. L.J. 17, 28 (2000))).

[30] *See* McThenia, *supra* note 25, at 328.

[31] *Id.* (quoting Spencer S. Hsu, *Victim's Sister Urges Clemency; Plea to Spare Trooper's Killer Comes as Court Rejects Appeal*, WASH. POST, June 17, 1998, at B04).

[32] Spencer S. Hsu, *Trooper's Killer is Executed in V.A.*, WASH. POST, June 19, 1998, at D4.

[33] *Id.*

[34] *Id.*

[35] *Id.*

Robison v. Maynard.[36] At the sentencing stage of the bifurcated capital trial of Olan Randle Robison in Oklahoma, the defense intended to call a sister of one of Robison's victims to testify that she did not wish for Robison to receive the death penalty for his crimes.[37] In response, the government moved the trial court for an order directing witnesses at the sentencing phase "not to express any kind of opinion, to be asked any kind of question or express any kind of opinion as to whether or not they feel the death penalty should be imposed."[38] The trial judge granted the motion, noting that permitting the defense to present testimony from the victim's family that capital punishment should not be levied "'would be no more proper' than allowing the State to put on testimony that the penalty should be invoked."[39] The Tenth Circuit affirmed the trial court's decision while recognizing that:

> [A]llowing any person to opine whether the death penalty should be invoked would interfere with the jury's performance of its duty to exercise the conscience of the community. Because the offense was committed not against the victim but against the community[,] . . . only the community, speaking through the jury, has the right to determine what punishment should be administered.[40]

The Tenth Circuit concluded that "the jury must be provided with evidence that will lead it to a principled determination without any hint of arbitrariness . . . . [T]he testimony offered by the defense in this instance was calculated to incite arbitrary response, thus it was properly excluded."[41] Accordingly, the victim's sister was kept from testifying and informing the jury of her wish that they spare Robison's life.[42]

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[36] 829 F.2d 1501, 1504 (10th Cir. 1987); *see also* Robison v. Maynard, 943 F.2d 1216, 1216–17 (10th Cir. 1991) ("The issue presented here is whether *Payne* [*v. Tennessee*, 501 U.S. 808 (1991)] requires us to now reverse our previous holding that testimony from a victim's relative that she did not want the jury to impose the death penalty was improper mitigating evidence and inadmissible at the penalty phase hearing. We believe that it does not." (citation omitted)); Baird & McGinn, *supra* note 27, at 466.

[37] *See Robison*, 829 F.2d at 1504 ("Chief defense counsel [stated] that he was disposed to call 'relatives' of [the victims] who had 'expressed . . . a desire to ask the jury not to impose the death penalty in this case.'"); *see also id.* at 1504 n.4 ("During the course of the state postconviction hearing, defense counsel testified that he had discussed with Petitioner the possibility of 'putting on the one witness who was related to one of the victims.' At the same hearing, co-counsel testified: 'I believe that this particular witness, who was a sister of one of the victims, . . . certainly didn't want him to get the death penalty.'").

[38] *Id.* at 1504.

[39] *Id.*

[40] *Id.* at 1505.

[41] *Id.*

[42] *Id.* at 1504 n.5, 1505.

These two instances in no way represent the numerous times that survivors of victims of capital crimes have opposed death sentences.[43] At any rate, the families of victims are involuntary participants in the capital punishment arena. These individuals are not involved with the death penalty by their own actions or omissions; rather, it is the alleged *defendant*'s criminal actions and the state's decision to prosecute and seek a capital sentence that brings the relatives of a murder victim into contact with the death penalty.

Consequently, when victims' families speak out against capital punishment and have their voices silenced or ignored, they suffer a real injury. Now, based on the loss of life suffered by their loved one, these family members must carry the burden of knowing that another person will die. While death row inmates, if properly convicted by a jury, took the life of individuals close to the family member, that does not necessarily mean that the victim's relatives wish to live with the knowledge that the convicted person will die at the hands of the government.[44]

B. *Capital Defendants' Families*

Similarly, the families of capital defendants and death row inmates have potential causes of action for the damage they suffer because of the death penalty.[45] In a crucial study, two professors, Drs. Elizabeth Beck and Pamela Blume Leonard, joined by two capital defense attorneys, Brenda Sims Blackwell and Michael Mears, "interviewed the family members of nineteen capital defendants and studied the harm that occurs to families."[46] Through this research, the interviewers identified ten types of harm-triggering stimuli for capital defendants' family members: "the underlying offense, notification that the State is seeking the death penalty, institutional failure, their community, the media, the court, defense attorneys, visitation with their incarcerated family member, notice of execution, and the execution itself."[47]

Because of these triggering stimuli, of thirteen defendants' relatives who agreed to share their psychological diagnoses and symptoms, eleven revealed they had been clinically diagnosed with major depression and all thirteen admitted to symptoms consistent with post-traumatic stress disorder (PTSD).[48]

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[43] For a non-exhaustive list of other instances where victim's families have implored the sentencer, or the clemency-granting body, to save the defendant from execution, often to no avail, see Baird & McGinn, *supra* note 27, at 465–67; Bandes, *supra* note 29, at 15 & nn.78–79 & 81–83; McThenia, *supra* note 25, at 326–30.

[44] *See* Elizabeth Beck et al., *Seeking Sanctuary: Interviews with Family Members of Capital Defendants*, 88 CORNELL L. REV. 382, 393 (2003) ("For co-victims who do not support the death penalty, the capital trial process is especially traumatic.").

[45] *See id.* at 384 ("[T]he death penalty process harms, and indeed can victimize [defendant's] family members.").

[46] *Id.* at 386.

[47] *Id.* at 397.

[48] *Id.* at 406.

For many defendants' family members, the entire capital punishment experience is an "ongoing horror" and a "nightmare."[49] In total, the interviewers found that "offenders' family members experience depression, cognitive changes, chronic grief, and symptoms consistent with PTSD."[50]

Death row inmates' family members' own words illustrate the injuries they suffer.[51] Two sisters of Robert Glen Coe, a death row inmate who was executed by Tennessee in 2000, have memorialized their experiences with the death penalty.[52] Coe was convicted of the aggravated kidnapping, aggravated rape, and first degree murder of eight-year-old girl Cary Medlin.[53] As a child, Coe suffered physical and sexual abuse from his father, and as an adult, Coe was diagnosed with several mental disorders, including: dissociative identity disorder; generalized anxiety disorder; schizoaffective disorder; poly-substance abuse; learning disorder; reading disorder; and schizoid personality disorder with antisocial features.[54]

Coe's sisters chronicled their experiences as relatives of an accused, convicted, and executed capital defendant in an interview with Dr. Amy L.

[49] *See id.* at 410.

[50] *Id.* at 413.

[51] Middle Tennessee State University History Professor, Dr. Amy L. Sayward, wrote about her interview with the sisters of Robert Glen Coe, who was executed by the State of Tennessee in 2000. *See* Amy L. Sayward, *An Interview with the Sisters of Robert Glen Coe*, *in* TENNESSEE'S NEW ABOLITIONISTS: THE FIGHT TO END THE DEATH PENALTY IN THE VOLUNTEER STATE 251, 251–57 (Amy L. Sayward & Margaret Vandiver eds., 2010) [hereinafter TENNESSEE'S NEW ABOLITIONISTS].

[52] *Id.*

[53] State v. Coe, 655 S.W.2d 903, 905 (Tenn. 1983).

[54] Coe v. State, 17 S.W.3d 193, 202, 205 (Tenn. 2000). Shortly before Coe's execution, *The Jackson Sun* in West Tennessee reported that a deputy clerk for the Weakley County, Tennessee General Sessions Court, who witnessed Coe in court twenty years prior stated, "I never will forget that look he had, that smart-aleck grin and never showing a trace of remorse . . . If I would have got close enough, I'd of [sic] liked to smacked [sic] that look right off his face. But it don't matter now. It looks like he's finally going to get what he deserved all along." Todd Kleffman, *Portrait of A Killer*, JACKSON SUN (Mar. 19, 2000), http://orig.jacksonsun.com/fe/coe/portrait_of_a_killer.htm. The discussion of Coe's facial expressions is particularly interesting given his diagnosis of schizoid personality disorder with antisocial features. *See Coe*, 17 S.W.3d at 202. According to the Mayo Clinic, persons diagnosed with schizoid personality disorder "avoid social activities and consistently shy away from interaction with others. They also have a limited range of emotional expression." *Schizoid Personality Disorder*, MAYO CLINIC (Aug. 17, 2017), https://www.mayoclinic.org /diseases-conditions/schizoid-personality-disorder/symptoms-ca uses/syc-20354414. The Mayo Clinic adds, "If you have schizoid personality disorder, you may be seen as a loner or dismissive of others, and you may lack the desire or skill to form close personal relationships. Because you don't tend to show emotion, *you may appear as though you don't care about others or what's going on around you*." *Id.* (emphasis added).

Sayward.[55] Speaking about the lead-up to Coe's execution, his sister Bonnie DeShields recalled, "When they first set an execution date, that's when it really hit . . . . I was consumed by the newspaper articles, the news, anything I could get on it. That's all my life was focused on; *I did not have a life, because it was just tormenting to my mind*."[56] Discussing her relationship with the media related to her brother's trial and execution, Bonnie added, "[I]t was awful. Because a lot of the stuff they put in the papers just wasn't true, even about our family history."[57] Bonnie continued, "They put our names in there along with Robert's . . . . You'd go in a store or somewhere where they were talking about it, and it was awful—just being who we were and loving him and not believing they were going to execute him. It just hurt."[58] The sisters also remembered their feelings at seeing their brother bound and gagged at a competency hearing on television.[59] Bonnie recollected, "It was just horrible. He was treated worse than any kind of wild animal; and he did have a mental illness, and they knew that."[60] Meanwhile, sister Billie Jean Mayberry expressed, "It's just something that we won't ever forget . . . ."[61]

Speaking of the execution day and its aftermath, the sisters reflected that they were keenly aware that this was the last time they would ever see or touch their brother alive.[62] Bonnie said, "I do remember looking at him and thinking, 'It's the last time we're going to see him alive.' And I didn't want to take my eyes off him. I didn't want to leave him."[63] After the execution, Billie Jean recalled feeling "like a part of us had just died. It was hard knowing that when we came out of the prison there would be people there, shouting, yelling, proud it had happened. And they did."[64] Bonnie added, "When we were walking out, it was the most horrible pain, because our brother was gone."[65] Billie Jean surmised their experience: "[P]eople don't understand. It's not only Robert affected [by the death penalty] . . . ."[66] Billie Jean described the effect of Coe's execution on her and her family: "I remember one day I heard something on TV, and I just broke down crying and screaming, there at the house. [My] [k]ids should not have been around that."[67] Because of its emotional power, a short portion of a poem written by Billie Jean about her experience with the death penalty, her

[55] *See supra* note 51 and accompanying text.

[56] Sayward, *supra* note 51, at 252 (emphasis added).

[57] *Id.*

[58] *Id.* at 252–53.

[59] *Id.* at 253.

[60] *Id.*

[61] *Id.*

[62] *Id.* at 253–55.

[63] *Id.* at 254.

[64] *Id.* at 255.

[65] *Id.*

[66] *Id.*

[67] *Id.*

childhood relationship with her brother, and their shared trauma, entitled *The Wild Inside of Me*, is quoted here:

He had a lonely life, I know that is the truth
Locked up behind bars since the end of his youth
Never walking in the grass never playing in the park
Never staring at the stars all alone in the dark

I did what I could to ease the hurt and pain he felt inside
But they wouldn't let him alone until the day he died
And still today they talk like what they did was good
When they killed my loving brother that they never understood

When we were little he protected me from harm in many ways
But he paid for it with beatings that hurt him for days
He took my hand and led me to the woods where I would hide
From my drunken evil father full of hate and lust inside

We played together and were close in so many ways
I felt like we were twins all alone in the horrible place
The evils that were done, the wrongs that couldn't be right
He would try to protect me from them, he would always fight

Now I am in this world alone, they took him from me
So somehow I have to survive and live with the memory
Of a brother the whole world has learned to love to hate
With just me knowing I had a brother who was so great[68]

The research conducted by Dr. Beck and her co-authors, as well as Dr. Sayward's interview with Robert Glen Coe's sisters, makes evident that not only do the survivors of capital victims suffer serious trauma, so too do the families of capital defendants.[69] These injuries are personal, concrete, and palpable, as identified by Dr. Beck's team in their psychological symptom and diagnoses survey.[70] But for the government's continued pursuit and performance of capital sentences, it is more than reasonable to postulate that these individuals would

[68] *Id.* at 256–57.

[69] *See* Beck et al., *supra* note 44, at 393–95, 406, 410, 413; Sayward, *supra* note 51, at 251–57.

[70] *See* Beck et al., *supra* note 44, at 413.

not suffer these injuries. Accordingly, there is a direct connection between the death penalty's usage and damage to the families of those accused, convicted, sentenced, and executed for capital crimes.

C. *Death Penalty Judges*

The jurists involved with carrying out the death penalty, though certainly not uniform in their beliefs or objections, also have cognizable injuries for their role in the capital punishment system.[71] Apart from any moral qualms individual judges may have with the death penalty, some judges have paid a tangible price for their role in the capital punishment system.[72]

Though some jurists could theoretically claim emotional or moral injuries for having to sentence individuals to death or to affirm death sentences, the principal and provable injury for judges is through losses in retention elections based on capital punishment opinions.[73] Two particular jurists are of note for their judicial careers being cut short based largely on their votes or opinions in death

[71] *See* Brandice Canes-Wrone et al., *Judicial Selection and Death Penalty Decisions*, 108 AM. POL. SCI. REV. 23, 37 (2014) ("[T]he rise of expensive, policy-oriented judicial campaigns has created incentives for judges in the most low-information election environments to cater to majority sentiment on the salient campaign issue of the death penalty."). Some have argued that majoritarian pressure on the United States Supreme Court affects the Court's death penalty opinions despite the justices not standing for retention or general elections. *See* Corrina Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 77–78 (2007) ("[S]ociopolitical context . . . generally pushes the Justices' decisionmaking in a majoritarian direction. The strength of that push will vary from case to case, but the models discussed suggest that in the death penalty context, the influence of sociopolitical context is a strong one.").

[72] *See* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 760–61 (1995). For example, three justices on California's state supreme court lost their seats after Governor George Deukmejian publicly threatened to, and did, "oppose them in their retention elections unless they voted to uphold more death sentences." *Id.* ("In 1986, [California] Governor George Deukmejian publicly warned two justices of the state's supreme court that he would oppose them in their retention elections unless they voted to uphold more death sentences. He had already announced his opposition to Chief Justice Rose Bird because of her votes in capital cases. Apparently unsatisfied with the subsequent votes of the other two justices, the governor carried out his threat. He opposed the retention of all three justices and all lost their seats after a campaign dominated by the death penalty." (footnotes omitted)); *see also* Penny J. White, *Judicial Independence and Capital Punishment in Tennessee*, *in* TENNESSEE'S NEW ABOLITIONISTS, *supra* note 51, at 163, 163–85; Gerald F. Uelmen, *The Tragedy of Rose Bird*, 38 T. JEFFERSON L. REV. 143, 148–49 (2016) ("The issue that would define the campaign to remove Rose Bird would be her voting record on death penalty cases . . . . In the November election . . . Chief Justice Bird was rejected, winning approval of only 33.8% of the voters.").

[73] *See supra* note 72.

penalty cases: California Supreme Court Chief Justice Rose Bird in 1986 and Tennessee Supreme Court Associate Justice Penny J. White in 1996.[74]

Rose Bird was appointed as the twenty-fifth Chief Justice of the Supreme Court of California by Governor Jerry Brown in 1977.[75] Chief Justice Bird's tenure on the court was characterized by distrust and discord with many of her colleagues, and her judicial record particularly drew the ire of conservative gubernatorial candidate George Deukmejian in 1986.[76] In her nine years leading the court, Chief Justice Bird had heard and decided fifty-eight death penalty appeals.[77] In every single case of those fifty-eight, Chief Justice Bird voted to overturn the sentence of death.[78] The 1986 campaign against Chief Justice Bird, and two of her colleagues on the court, centered on the death penalty.[79] In fact, television campaign advertisements promulgated by Bird's opposers suggested that a vote against Bird amounted to a vote for capital punishment.[80] The voters reacted favorably to this argument, and Chief Justice Bird was soundly defeated in her retention election.[81] Indeed, Bird received the support of less than thirty-four percent of voters who participated in the election.[82] Though there were perhaps other factors at play, the question of the death penalty played a substantial role in prematurely ending Chief Justice Bird's judicial career.[83]

Similarly, questions about her support of capital punishment doomed the retention election of Tennessee Associate Supreme Court Justice Penny J. White in 1996.[84] Justice White was appointed to the court by Governor Ned McWherter in December 1994.[85] Unlike Chief Justice Bird, Justice White was very well liked by her colleagues and had considerable judicial experience prior to joining the state's high court.[86] In fact, Justice White had been chosen by her

[74] *See* Richard Carelli, *Judges Face Political Pressures*, CHARLESTON DAILY MAIL, Nov. 30, 1996, at 1A; Frank Clifford, *Voters Repudiate 3 of Court's Liberal Justices*, L.A. TIMES, Nov. 5, 1986, at B1; Tom Humphrey, *White Becomes 1st Appellate-Level Judge to Be Defeated in 'Yes-No' Vote*, KNOXVILLE NEWS SENTINEL, Aug. 2, 1996, at A1 [hereinafter *White Becomes 1st Appellate-Level Judge to Be Defeated*]; Tom Humphrey, *White Ouster Signals New Political Era*, KNOXVILLE NEWS SENTINEL, Aug. 4, 1996, at A1 [hereinafter *White Ouster Signals New Political Era*]; Bill Zimmerman, *The Campaign That Couldn't Win: When Rose Bird Ran Her Own Defeat: Bird*, L.A. TIMES, Nov. 9, 1986, at H1.

[75] Uelmen, *supra* note 72, at 144.

[76] *Id.* at 145–48.

[77] *Id.* at 148.

[78] *Id.*

[79] *Id.*

[80] *Id.* at 148–49.

[81] *Id.* at 149.

[82] *Id.*

[83] *Id.* at 148.

[84] *See supra* note 74.

[85] White, *supra* note 72, at 173.

[86] *Id.*; Uelmen, *supra* note 72, at 144, 148.

colleagues to become the State's first woman Chief Justice in 1997 after her retention, in accordance with Tennessee Supreme Court rules that require the justices themselves to select the chief justice.[87] Nevertheless, one opinion that Justice White simply joined during her time on the court led to a firestorm and a determined campaign by conservatives to remove her from the bench.[88] In that case, which involved the conviction of Richard Odom for the rape and murder of a seventy-eight-year-old woman in Memphis, Justice White joined two other justices in vacating Odom's sentence because, according to the court, the State had failed to prove the circumstances sufficient to establish that the crime was especially "heinous, atrocious, or cruel."[89]

Consequently, Tennessee's Republican Governor Don Sundquist and the Tennessee Conservative Union embarked on a concerted campaign to oust Justice White based on her decision to join the majority's opinion.[90] Ultimately, following a vitriolic campaign by Tennessee's Republican Party and the Tennessee Conservative Union, the voters of Tennessee voted to remove Justice White from the court based on her supposed views on the death penalty.[91]

The stories of the removals of Chief Justice Bird and Justice White, motivated in part by their opinions about capital punishment, demonstrate the havoc that the death penalty wreaks on the entire criminal justice system.[92] Both jurists' careers were cut short because of capital punishment.[93] Undoubtedly, Chief Justice Bird and Justice White served at the pleasure of the voters and were always subject to removal from office. However, but for the jurists' views on the death penalty, it is seemingly likely that both would have remained on the bench.[94] There is a strong argument that the continued use of capital punishment caused concrete harm to these judges and they, and others similarly situated, have colorable claims against the death penalty.

D. *Death Row and Execution Team Correctional Officers*

Those who work on death row and help carry out the sentence of death, even those correctional officers who strongly support the death penalty, can suffer

[87] *Id.*

[88] Humphrey, *White Becomes 1st Appellate-Level Judge to Be Defeated*, *supra* note 74, at A1.

[89] White, *supra* note 72, at 171–72.

[90] *Id.* at 174.

[91] *Id.* at 178.

[92] Furman v. Georgia, 408 U.S. 238, 364 (1972) (Marshall, J., concurring); *see* Uelmen, *supra* note 72, at 144; Humphrey, *White Becomes 1st Appellate-Level Judge to Be Defeated*, *supra* note 74, at A1.

[93] *See* Uelmen, *supra* note 72, at 144, 148; White, *supra* note 72, at 178.

[94] Both jurists were women in powerful positions during the late-twentieth century in the United States, and it is plausible, if not somewhat probable, that sexism played some role in their respective electoral rejections.

serious trauma.[95] These individuals, tasked with carrying out the state's solemn judgment against convicted death row inmates, often suffer mental and emotional trauma based on their participation in the "machinery of death."[96] Though there are many stories evidencing the pain capital punishment visits upon these individuals, three accounts articulated herein demonstrate their suffering.[97]

Lewis E. Lawes was the warden of Sing Sing Correctional Facility in the State of New York for twenty-one years where he supervised over 300 executions.[98] Lawes, nevertheless, was ardently opposed to capital punishment.[99] Quoting Marquis de Lafayette, Lawes once wrote that he would "ask for the abolition of the Penalty of Death until [he had] the infallibility of human judgment demonstrated to [him]."[100] Lawes believed that capital punishment served no legitimate penological interest.[101] Still, Lawes was tasked with carrying out the judgments issued by the State of New York, and he was true to his duty.[102] Doing so came at a price though.

Some executions Lawes supervised left him visibly physically ill.[103] Indeed, before one execution, the condemned requested a drink of liquor, which was strictly prohibited.[104] Lawes nonetheless sneaked the spirit to the condemned prisoner.[105] The inmate, acknowledging Lawes's nervousness and internal conflict, instead offered the drink to Lawes and said, "You need the shot more

[95] *See* Beck et al., *supra* note 44, at 394 ("Participants in the execution process, even those who indicate a strong belief in the death penalty, have expressed some discomfort, or even a great deal of anxiety, about their role in carrying out the death penalty.").

[96] *See* Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) ("From this day forward, I no longer shall tinker with the machinery of death."); Paula Mitchell, *The Weight of Capital Punishment on Jurors, Justices, Governors, & Executioners*, VERDICT (Oct. 25, 2013), https://verdict.justia.com/2013/10/25/weight-capital-punishment-jurors-justices-governors-executioners.

[97] *See*, *e.g.*, COYNE & ENTZEROTH, *supra* note 22, at 53 (describing execution team member Fred Allen's emotional breakdown caused by his role in tying down convicted death row inmates for their executions); Tammy Tate et al., *Voices from Within the Tennessee Department of Correction*, *in* TENNESSEE'S NEW ABOLITIONISTS, *supra* note 51, at 233, 233–35 (detailing death row's effect on correctional officers); Ralph Blumenthal, *A Man Who Knew About the Electric Chair*, N.Y. TIMES: CITY ROOM (Nov. 6, 2011, 5:02 PM), https://cityroom.blogs.nytimes.com/2011/11/06/a-man-who-knew-about-the-electric-chair/ (recounting former Sing Sing Prison Warden Lewis E. Lawes's opposition to the death penalty).

[98] Blumenthal, *supra* note 97.

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.*

than I do, warden."[106] This was characteristic of Lawes's disagreement with this part of his job.[107] Lawes stated of his job, "[W]hen you have steeled yourself, as I have, to supervise the death of a young and healthy man; when you try . . . to let routine rule while doing everything within the law to make the end as merciful as possible, it's heartbreaking to run against the raw of human suffering."[108]

Fred Allen, a member of the "tie-down team" for executions at the Texas State Penitentiary at Huntsville, otherwise known as the Walls Unit, suffered a mental breakdown from his role in the death penalty.[109] Allen participated in about 120 executions at the Walls Unit.[110] In 1998, following the execution of a woman convicted of murder who claimed to be a born-again Christian prior to her execution, Allen suffered an emotional breakdown that forced him to retire.[111] Describing the emotional distress, Allen later recalled:

> I was just working in the shop and all of a sudden something just triggered in me and I started shaking. And then I walked back into the house and my wife asked "What's the matter?" and I said "I don't feel good." And tears—uncontrollable tears—was [sic] coming out of my eyes. And she said "What's the matter?" And I said "I just thought about that execution that I did two days ago, and everybody else's that I was involved with." And what it was was something triggered within and it just—everybody—all of these executions all of a sudden all sprung forward.[112]

Three years after his retirement from the Walls Unit, Allen was still "haunted by the eyes of the men he helped strap to the gurney before their executions," noting, "[j]ust like taking slides in a film projector and having a button and just pushing a button and just watching, over and over: him, him, him . . . . You know, there was just so many of 'em."[113]

Like Allen and Lawes, Tammy Tate's experience as a correctional officer with the Tennessee Department of Correction (TDOC) during executions deeply affected her.[114] Specifically, Tate recalled her participation, though somewhat indirect, in the execution of Robert Glen Coe.[115] Tate remembered learning that

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[106] *Id.*

[107] *Id.*

[108] Mitchell, *supra* note 96 (citing DONALD A. CABANA, DEATH AT MIDNIGHT: THE CONFESSION OF AN EXECUTIONER (1998)).

[109] COYNE & ENTZEROTH, *supra* note 22, at 53; Howard Rosenberg, *The Deaths That Go Unseen*, L.A. TIMES, Oct. 11, 2000, at F1.

[110] COYNE & ENTZEROTH, *supra* note 22, at 53.

[111] *Id.*; Rosenberg, *supra* note 109, at F1.

[112] COYNE & ENTZEROTH, *supra* note 22, at 53.

[113] *Id.*; Rosenberg, *supra* note 109, at F1; *Witness to an Execution*, STORY CORPS, at 18:34, 19:14 (Oct. 20, 2000), https://storycorps.org/stories/witness-to-an-execution/.

[114] Tate et al., *supra* note 97, at 233–34.

[115] *Id.*

Coe would be placed on deathwatch, meaning that the State would soon execute Coe.[116] The day before the State moved Coe to deathwatch, Tate spoke with the condemned about his feelings on his impending demise.[117] Coe, according to Tate, was primarily worried about the toll his execution would take on his family.[118] To Tate, the experiences of death row correctional officers humanize the inmates whom the State and the community have demonized.[119]

On the night of Coe's execution, the TDOC assigned Tate to stand outside the prison and watch the protestors.[120] As soon as the prison announced that Coe's sentence had been fulfilled, Tate recalled feeling "stunned, confused, tired, and numb."[121] Tate remembered that a protestor walked up to her and called her a murderer.[122] Tate described, "I felt like I had been slapped in the face! I felt dirty and wanted to shower. Did wearing a TDOC uniform make me a part of this? I didn't want to be part of it!"[123]

Finally, Tate recalled her conversation with one of the correctional officers who participated directly in Coe's execution.[124] According to Tate, the officer

> was white as a sheet and looked ready to drop. He said that talking about it was one thing, but to actually watch someone be put to death was another. It was like waking from a dream and trying to figure if it really happened or not. He just knew he never wanted to see it again.[125]

The stories of Allen, Lawes, and Tate exemplify the human toll capital punishment takes on those tasked with fulfilling the State's judgment on death row prisoners.[126] Of course, some may argue that correctional officials sign up for this turmoil when they pursue employment at facilities that handle executions. That is certainly a fair criticism. However, no person's job should include the type of long term emotional and mental trauma that these officials experience. Also, a person's ability to earn a living in the occupation of their choosing should not be limited by the untenable choice of taking a job at a facility or turning down work in hopes of avoiding a later emotional breakdown. At any rate, the individuals who are forced as part of their employment to participate in executions that lead to serious and long term emotional and mental distress have suffered concrete and particularized injuries that are traceable to

[116] *Id.* at 234.
[117] *Id.*
[118] *Id.*
[119] *Id.* at 233.
[120] *Id.* at 234.
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *See supra* note 97 and accompanying text.

capital punishment and that can be redressed by the complete cessation of the death penalty.

E. *State Governors*

The final category of persons who suffer from their proximity to the death penalty is somewhat elite, but that does not diminish the injury they suffer at the hands of capital punishment. The elected governors of the respective states that continue to impose the death penalty can endure damage because of their role in capital punishment.[127] The stories of three governors in particular prove the havoc the death penalty wreaks on governors: Frank G. Clement of Tennessee, George Ryan of Illinois, and John Kitzhaber of Oregon.[128]

Tennessee Governor Frank G. Clement was a rising political star as he entered the Volunteer State's Governor's Office for a second time, his third term, after taking a constitutionally-mandated term away from the office.[129] During his first two terms as Governor of Tennessee, Clement had permitted the executions of many condemned prisoners.[130] In his second term, however, Clement's views started to change when he personally visited with all eight death row inmates scheduled to die during his term—six of whom were eventually executed.[131] It was this experience that forced Clement to reckon with his views on capital punishment.[132] Consequently, as he left office following his second term, Clement extolled the State's politicians to reconsider their continued support for the death penalty.[133]

As Clement reentered the Governor's Office for his third term, he expressed in his "State of the State Address" that he intended to seek the General Assembly's assent to ending capital punishment.[134] This was a deeply personal issue to Governor Clement at this point.[135] Clement's son remembered observing his father praying on his knees in his bedroom right before scheduled

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[127] *See, e.g.*, Sekou M. Franklin, *The New South's Abolitionist Governor: Frank G. Clement's Attempt to Abolish the Death Penalty in* TENNESSEE'S NEW ABOLITIONISTS, *supra* note 51, at 43, 43–58; Ken Armstrong & Steve Mills, *Ryan Suspends Death Penalty*, CHI. TRIB., Jan. 31, 2000, at C1; Jonathan Cooper, *Haunted by Regret, Oregon Governor Bans Death Penalty*, COMMON DREAMS (Nov. 23, 2011), https://www.commondreams.org/news/2011/11/23/haunted-regret-oregon-governor-bans-death-penalty; Mitchell, *supra* note 96; Tyler Whetstone, *A Phone Call Can Save Him: Tennessee Governors Recount Death Row Decisions*, KNOX NEWS (May 14, 2019, 11:00 PM), https://www.knoxnews.com/story/news/politics/2019/05/15/tennessee-governors-recall-death-penalty-decisions/1189187001/.

[128] *See supra* note 127.

[129] Franklin, *supra* note 127, at 43–44.

[130] *Id.* at 50–51.

[131] *Id.*

[132] *Id.* at 51.

[133] *Id.*

[134] *Id.*

[135] Whetstone, *supra* note 127.

executions in his previous two terms.[136] Governor Clement himself discussed the personal toll the death penalty took on him, telling the Tennessee House of Representatives in an impassioned speech, "You may think you know what it's like to sit there at your desk and know that all you've got to do is pick up a pen and that man won't die . . . ."[137] When the State's House of Representatives came up one vote short of repealing the State's death penalty, Governor Clement issued commutations for five death row inmates expected the be executed during his term.[138] Lamar Alexander, former United States Secretary of Education, United States Senator, and Governor of Tennessee, believes that Governor Clement's untimely death in 1969, just four years after Clement attempted and failed to repeal the death penalty, was caused in part by Clement's anguish from capital punishment.[139]

Similarly, the death penalty bothered former Illinois Governor George Ryan.[140] In 2000, Governor Ryan issued a moratorium on the State's use of capital punishment.[141] Though Ryan believed that the death penalty was a legitimate sentence, he nevertheless found "the ultimate decision whether someone is injected with a poison that's going to take their life," which rested on his shoulders, to be "very agonizing."[142] With that in mind, along with recent research that called into question the accuracy of some of Illinois' convictions for persons on death row, Ryan declared that capital punishment was a system "so fraught with error [that it] has come so close to the ultimate nightmare."[143] Accordingly, given his serious misgivings about a system which he believed to otherwise be legitimate, as well as the agonizing decision he faced when deciding whether to allow an execution, Ryan refused to permit the executions of any condemned prisoners during his moratorium.[144]

Finally, quite similar to Governor Clement, Oregon Governor John Kitzhaber issued a moratorium on the death penalty during his third term in office after having stepped away from the Governor's Office eight years earlier following two terms in that office.[145] Kitzhaber, an emergency room physician by private occupation, had previously permitted the execution of two people during his first

[136] *Id.*

[137] *House Kills Bill on Capital Punishment*, KNOXVILLE NEWS-SENTINEL, Mar. 18, 1965, at A-2.

[138] Franklin, *supra* note 127, at 55 ("Three of these inmates were scheduled for execution on 20 March, just two days after the second House vote; all five inmates were given the reduced sentence of ninety-nine years with the possibility of parole after forty-eight years.").

[139] Whetstone, *supra* note 127.

[140] Armstrong & Mills, *supra* note 127, at C1.

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] Cooper, *supra* note 127.

two terms in office.[146] However, Governor Kitzhaber later expressed in an emotional news conference that he had long regretted his decision to allow those executions to proceed, and he would no longer give his assent to carrying out death sentences.[147] With tears in his eyes, Kitzhaber recognized that he had spoken with some of the victims' families and those had been difficult conversations, but he added that he found the capital punishment system in Oregon to be "compromised and inequitable," and he could not continue to support it.[148]

These three governors' stories indicate how agonizing and difficult some states' executives find their role in the death penalty.[149] For some, like Governors Clement and Kitzhaber, their deep personal and moral convictions against capital punishment make the decision to sign death warrants or reprieves nearly impossible.[150] Moreover, even for those governors who support capital punishment in theory, such as Governor Ryan, the decision is still agonizing.[151]

Again, some may assert that if these individuals do not wish to bear this burden, they simply should not seek their state's high office. On one hand, it is true that those who become governors voluntarily seek the duties demanded of the offices in which they enter. On the other hand, though, it should not be that qualified and interested individuals who would otherwise make good governors should be deterred from seeking high office because of the awesome responsibilities that come along with the death penalty. Governor Clement, for instance, was deeply troubled by his role in the "machinery of death," and, according to those who knew him personally, never shook the pain of permitting executions in his first two terms.[152] The death penalty is simply too high a price to pay for causing tremendous heartache and suffering in those tasked with carrying out the State's ultimate sentence. Therefore, governors placed in this unenviable position have a concrete and particularized injury resulting from capital punishment as applied to them.

II. ACTIONS AVAILABLE TO INJURED PARTIES

The previous Part outlined those individuals, in addition to the defendants of capital crimes themselves, who have suffered and are suffering because of the death penalty's continued existence.[153] This Part analyzes some of the causes of action that may be viable for these injured parties to seek redress for the damage

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *See House Kills Bill on Capital Punishment*, *supra* note 137; Cooper, *supra* note 127.

[151] *See* Armstrong & Mills, *supra* note 127.

[152] Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting); *see House Kills Bill on Capital Punishment*, *supra* note 137; Whetstone, *supra* note 127.

[153] *See* discussion *supra* Part I.

capital punishment has done to them.[154] First, this Part considers, and ultimately rejects, the possibility of habeas corpus petitions by these categories of individuals acting as next friend to a capital defendant. Second, this Part advocates for the use of Section 1983 to pursue a permanent injunction based on the Eighth Amendment as the death penalty is applied to these third parties. Finally, this Part promotes the Thirteenth Amendment's prohibition on slavery as applied to capital defendants' families.

A. *Habeas Corpus Next Friend Claims*

One potential remedy for the injuries these third parties have suffered is filing petitions for writs of habeas corpus on behalf of the specific capital defendants with whom they are involved. For example, if a victim's family member disagrees with a death sentence, that relative could file a petition for a writ of habeas corpus on the defendant's behalf. However, this litigation strategy is doomed to fail. By its plain language, the federal habeas corpus statute only offers remedies to petitions filed by prisoners themselves or by another that is intended to benefit the prisoner in custody.[155] Specifically, the statute dictates:

> The writ of habeas corpus shall not extend *to a prisoner* unless—(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or (5) It is necessary to bring him into court to testify or for trial.[156]

In addition to the statute's plain language, the federal courts of the United States have made clear that the individual who will receive the benefits of the writ must be in custody.[157] Nevertheless, the statutory "next friend" doctrine permits

[154] For purposes of uniformity of analysis, this Article only considers remedies to be filed in federal courts. It is likely true that some of the individuals and claims discussed here could be viable in the respective state courts. However, that is outside the scope of this Article.

[155] 28 U.S.C. § 2242 (2018).

[156] 28 U.S.C. § 2241(c) (2018) (emphasis added).

[157] *See* Hajduk v. United States, 764 F.2d 795, 796 (11th Cir. 1985) ("A petition for a writ of habeas corpus may only be brought in the court having jurisdiction over the petitioner or *his place of incarceration*." (emphasis added)); Jackson v. Carlson, 707 F.2d 943, 946 (7th Cir. 1983) ("Although a habeas corpus proceeding challenges the *legality of the petitioner's custody*, the challenge can be mounted even if the petitioner is not seeking immediate release *from custody*." (emphasis added) (citations omitted)).

another person to file a petitioner for a writ of habeas corpus on a prisoner's behalf.[158] The right to pursue an inmate's claims as "next friend" are not automatic.[159] In fact, there are two prerequisites for a third party "next friend" to pursue a prisoner's remedies through habeas corpus.[160] First, the proposed next friend must establish that the prisoner in custody cannot pursue their own claims because of "inaccessibility, mental incompetence, or other disability," thus rendering the "real party in interest" unable to appear for the action.[161] Second, the proposed next friend must have a significant relationship to the real party and be working in the real party's best interests.[162] The United States Supreme Court has specifically declared, importantly, that a next friend does not have standing to attempt to appeal a convicted defendant's conviction and death sentence.[163]

Accordingly, the use of a habeas corpus petition by a third party is not a viable litigation strategy to redress an injury suffered by the third party for two reasons. First, the next friend doctrine does not encompass challenges to convictions and death sentences; the Supreme Court has explicitly considered and rejected standing in this context.[164] Second, the petition for the writ of habeas corpus must sound in the prisoner's rights and be for their benefit, and that is not the circumstance discussed here.[165] Instead, this Article advances the theory that the third parties have claims based on their own injuries caused by capital punishment, not the injuries to the capital defendants themselves. Thus, habeas petitions acting as next friend of a convicted capital defendant are not viable.

B. *Section 1983 Civil Rights Litigation Seeking a Permanent Injunction*

The Civil Rights Act of 1871, also known as the Ku Klux Klan Act or the Enforcement Act, codified a right of action for individuals deprived of a statutory or constitutional right by someone acting under color of state law.[166]

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[158] *See* 28 U.S.C. § 2242 (2018) ("Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended *or by someone acting in his behalf*." (emphasis added)).

[159] Whitmore v. Arkansas, 495 U.S. 149, 163 (1990).

[160] *Id.*

[161] *Id.*

[162] *Id.* at 163–64 (citation omitted).

[163] *Id.* at 164 ("Whitmore, of course, does not seek a writ of habeas corpus on behalf of Simmons. He desires to intervene in a state-court proceeding to appeal Simmons' conviction and death sentence. Under these circumstances, there is no federal statute authorizing the participation of 'next friends.'").

[164] *Id.*

[165] *See supra* note 158 and accompanying text.

[166] *See* 42 U.S.C. § 1983 (2018) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

This Section evaluates potential civil rights claims under Section 1983 for the classes of people identified in Part I based on two constitutional rights: the Eighth Amendment's prohibition on cruel and unusual punishments and the Thirteenth Amendment's proscription of slavery.[167]

1. Eighth Amendment Claims

The Eighth Amendment to the United States Constitution, adopted as part of the Bill of Rights, declares, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[168] Notably, the Eighth Amendment does not contain a clause or provision declaring that only prisoners or those convicted of crimes may not be subject to cruel and unusual punishments or qualifying the right at all; rather, the prohibition applies generally, assumedly, to all classes of persons.[169] This conclusion rests on the canon of construction of *expressio unius est exclusio alterius*, translated to mean "the express mention of one thing excludes anything else not mentioned," which supports the assertion that the Framers' decision not to declare convicted persons as the sole possessors of the right against cruel and unusual punishment indicates it should be read more broadly.[170] Likewise, the common legal definition of the term "punishment" offers insight into this question.[171] Professor Celia Rumann wrote:

> [D]efinitions reveal[] . . . that the word [punishment], as used in the common vernacular, encompasses two distinct sets of conduct: that which is inflicted in response to an offense and one that involves rough or severe

Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."); Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 484–85 (1982).

[167] *See* Eisenberg, *supra* note 166, at 484–85; U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); U.S. CONST. amend. XIII, §§ 1–2 ("Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have power to enforce this article by appropriate legislation.").

[168] U.S. CONST. amend. VIII.

[169] *See id.*

[170] *See* Stephen M. Durden, *Textualist Canons: Cabining Rules or Predilective Tools*, 33 CAMPBELL L. REV. 115, 130–31 (2010) (citations omitted); M.B.W. Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 U. PITT. L. REV. 373, 414–20 (1985). There is some considerable disagreement, scholarly and judiciary, about the application of this maxim of construction to constitutional interpretation. *See* Durden, *supra*, at 131–32. Some suggest that the canon does not apply to the constitution while others argue that it does in appropriate circumstances. *See id.* at 132. This Article argues that this canon applies to the Eighth Amendment because the language implies a general prohibition on cruel and unusual punishments.

[171] *See* Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661, 684 (2004).

> treatment, neither necessarily following judicial procedure. That the definition of punishment is broader than post-adjudication penalties was recognized in the statements of Justice Blackmun, in his concurrence in *Farmer v. Brennan.* Objecting to the "unduly narrow definition of punishment" adopted by the Court, Justice Blackmun referred to the common usage definition of punishment, noting that a "prisoner may experience punishment when he suffers 'severe, rough, or disastrous treatment.'"[172]

Consequently, the definition of the word "punishment," even without considering what the Court has interpreted the word to mean, suggests that it is broader than just penalties for crimes.[173]

Furthermore, the Supreme Court's Eighth Amendment jurisprudence indicates a willingness to consider untraditional "punishments" in an analysis under the Amendment.[174] The Court's analysis of the term "punishments" is also instructive for these potential claims against capital punishment by those who have not been charged, convicted, or sentenced for a crime but rather have only experienced injury because of their involvement with the death penalty.[175] Since the Founding, the Court has primarily interpreted the scope of the Eighth Amendment's "cruel and unusual punishments" clause to refer only to "the penalty imposed for the commission of a crime."[176] In the last half-decade, though, the Court has started to expand the Amendment's scope to include other types of "punishment."[177]

For instance, the Court held that "deliberate indifference by prison personnel to a prisoner's serious illness or injury constitutes cruel and unusual punishment."[178] Nevertheless, the Court has not yet extended the Eighth Amendment outside of the criminal context; indeed, the Court has only applied

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[172] *Id.* at 684–85 (footnotes omitted).

[173] *See id.*

[174] *See* Jeffrey D. Bukowski, Comment, *The Eighth Amendment and Original Intent: Applying the Prohibition Against Cruel and Unusual Punishments to Prison Deprivation Cases is Not Beyond the Bounds of History and Precedent*, 99 DICK. L. REV. 419, 429–30 (1995); Rumann, *supra* note 171, at 692 ("This discussion of the Court's interpretations of the meaning of 'punishment,' demonstrates that there is no clearly defined test for determining whether particular actions by the government are punishments or not. To answer this question, the Court seems to focus on two things. First, the Court considers the nature of the action involved to determine whether it is by its nature 'punishment.' Second, the Court considers the purposes behind the government's action to see if it is motivated by goals commonly associated with punishment." (footnotes omitted)).

[175] *See* Bukowski, *supra* note 174, at 429–30; Rumann, *supra* note 171, at 692.

[176] Bukowski, *supra* note 174, at 419 ("From the time the Eighth Amendment was ratified until today, 'punishment' has referred to the penalty imposed for the commission of a crime.").

[177] *Id.*

[178] *See id.* at 424–25 (citing Estelle v. Gamble, 429 U.S. 97, 97, 106 (1976)).

the proscription of cruel and unusual punishments to matters involved criminal sentences, method of execution, and prisoner treatment.[179] As an example, the Court has expressly rejected the application of the Eighth Amendment to corporal punishment in schools.[180] Even still, the expansion of the cruel and unusual punishments clause beyond just punishments pursuant to a sentence following a criminal conviction implies that the Court is at least open to considering "punishments" that might fall outside of the criminal justice context, such as the claims of the death penalty plaintiffs.

Thus, the text of the Eighth Amendment and Supreme Court jurisprudence expanding the Amendment's scope suggest that any person who can claim that they have been the subject of cruel and unusual punishment by the state's hand, regardless of whether they have actually been convicted or accused of any crime, should be shielded from such injury.[181] Therefore, all five death penalty plaintiffs should reasonably be permitted to pursue actions against government officials for deprivation of their Eighth Amendment right not to have cruel and unusual punishments inflicted upon them.

The final inquiry is whether the death penalty plaintiffs have any chance of succeeding in proving their injuries were inflicted through a cruel and unusual punishment. Professor Rumann acknowledges that "there is no greater clarity as to the exact parameters of the limitation placed on the term 'punishment' by the modifiers 'cruel and unusual,' than there is on what constitutes punishment."[182] The Supreme Court itself has recognized this concern, stating that "the exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court."[183] Yet, in an effort to define the clause's scope, the Court has declared that in analyzing such allegations, courts should look to the "evolving standards of decency that mark the progress of a maturing society."[184]

Because the Court has not had occasion to consider whether a punishment against third parties who are involved with capital punishment constitutes "cruel and unusual punishment," the death penalty plaintiffs must demonstrate how the damage they have suffered is violative of the "evolving standards of decency that mark the progress of a maturing society."[185] This Article does not pretend

[179] *See id.* at 423–30.

[180] Ingraham v. Wright, 430 U.S. 651, 665–66 (1977). The Court reasoned that, unlike prisoners, schoolchildren "[have] little need for the protection of the Eighth Amendment," because "[t]he openness of the public school and its supervision by the community afford significant safeguards against the kinds of abuses from which the Eighth Amendment protects the prisoner." *Id.* at 670.

[181] *See* Durden, *supra* note 170, at 131; Sinclair, *supra* note 170, at 414–20.

[182] Rumann, *supra* note 171, at 696.

[183] *Id.* (quoting Trop v. Dulles, 356 U.S. 86, 99 (1958)). Professor Rumann appreciated that *Trop* was decided in 1958, but she also noted that "the intervening years have done little to clarify the scope of these words." *Id.* at 696 n.279.

[184] *Id.* at 697 (quoting *Trop*, 356 U.S. at 101).

[185] *Id.*

to know every potential argument these plaintiffs may make, but at least in circumstances of emotional distress, the plaintiffs can argue that society has adequately evolved to recognize the importance of mental health.[186] Indeed, society has increasingly accepted that mental injury can be just as harmful as physical harm.[187] If, then, a practice of the state is routinely causing individuals who are neither accused nor convicted of a crime serious emotional or mental trauma, there is a valid argument to be made that such a practice is contrary to the "evolving standards of decency that mark the progress of a maturing society."[188]

Accordingly, the death penalty plaintiffs have legitimate claims, though by no means slam dunks, that their injuries, caused by their interactions with capital punishment, amount to deprivations of their rights to be free from cruel and unusual punishments. Lest there be any doubt, these claims will require jurists willing to consider creative constructions of the Eighth Amendment and the types of injuries proscribed by it. However, the difficulty in proving a valid cause of action to the right panel of judges should not dissuade the death penalty plaintiffs from pursuing their claims.

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[186] *See Survey: Americans Becoming More Open About Mental Health*, AM. PSYCH. ASS'N (May 1, 2019), https://www.apa.org/news/press/releases/2019/05/mental-health-survey.

[187] The United States Centers for Disease Control and Prevention emphasizes the importance of both mental and physical health: "Mental and physical health are equally important components of overall health. For example, depression, increases the risk for many types of physical health problems, particularly long-lasting conditions like diabetes, heart disease, and stroke. Similarly, the presence of chronic conditions can increase the risk for mental illness." *About Mental Health*, CTRS. FOR DISEASE CONTROL AND PREVENTION (June 28, 2021), https://www.cdc.gov/mentalhealth/learn/index.htm. *See* Sandro Galea, *Mental Health Should Matter as Much as Physical Health*, PSYCH. TODAY BLOG (Mar. 25, 2019), https://www.psychologytoday.com/us/blog/talking-about-health/201903/mental-health-should-matter-much-physical-health. The continued use of torts for infliction of emotional distress further evidence society's willingness to protect against mental trauma. *See* Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 42 (1982) ("Academics, rather than courts, were the prime movers in the development of the tort of intentional infliction of severe emotional distress by outrageous conduct; the modern tort was introduced in the pages of law reviews, and then refined and finally defined by the American Law Institute in its *Restatements*. Despite these origins, or perhaps because of them, the tort, while widely recognized, has not generated great scholarly interest. While this may reflect a sense that the issues raised by this tort have long been settled or lack contemporary relevance, the potential reach of the tort and its extraordinary lack of defined standards command closer scrutiny. The tort provides recovery to victims of socially reprehensible conduct, and leaves it to the judicial process to determine, on a case-by-case basis, what conduct should be so characterized." (footnotes omitted)).

[188] Rumann, *supra* note 171, at 697 (quoting *Trop*, 356 U.S. at 101).

2. Thirteenth Amendment Claims

The Thirteenth Amendment to the United States Constitution declares, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have power to enforce this article by appropriate legislation."[189] Though this language might at first blush appear somewhat narrow, there is considerable budding scholarship on expanding the use of the Thirteenth Amendment to end oppressive practices.[190] Scholars have primarily focused on the Supreme Court's opinion in the *Civil Rights Cases*, in which the Court declared that the Thirteenth Amendment prohibited not only the institution of slavery but also "all badges and incidents of slavery."[191]

The Supreme Court has largely been silent on what constitutes a "badge and incident of slavery," but scholars have identified two factors that help guide that inquiry.[192] According to Professor Michael A. Lawrence, the two factors are: "(1) group targeting in core cases involving those with African ancestry and a history of slavery or servitude; and (2) some degree of causal, genealogical, analogical, or functional connection between a particular injury and the law, practice, or experience of slavery or effective re-enslavement of Black Americans post-slavery."[193] There is scholarly disagreement about whether both factors must be met for a practice to qualify as a "badge and incident of slavery"; nevertheless, those challenged practices that can satisfy both factors likely would receive support as being considered "badges and incidents of slavery" by commentators.[194]

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[189] U.S. CONST. amend. XIII, §§ 1–2.

[190] *See, e.g.*, Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981 (2002); William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311 (2007); Michael A. Lawrence, *The Thirteenth Amendment as Basis for Racial Truth and Reconciliation*, 62 ARIZ. L. REV. 637 (2020). For a well-articulated compilation of the arguments advanced by scholars about the Thirteenth Amendment, see Alexander Tsesis, *Into the Light of Day: Relevance of the Thirteenth Amendment to Contemporary Law*, 112 COLUM. L. REV. 1447 (2012).

[191] Civil Rights Cases, 109 U.S. 3, 20 (1883).

[192] *See* Lawrence, *supra* note 190, at 660 ("With the Supreme Court's and lower courts' silence, it has been left to scholars to fill in the blanks on what constitutes Section 1 'badges and incidents of slavery.'").

[193] *Id.* at 662.

[194] *Id.*; *see also* James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426, 468 (2018) ("Some say that both elements are required, while others maintain that group targeting alone should suffice. It also seems that, in some cases, a nexus with slavery or involuntary servitude by itself suffices; no group targeting is necessary." (footnote omitted)).

Finally, scholars disagree about whether claims premised on the Thirteenth Amendment must be brought based on a statute passed pursuant to Section II of that Amendment, which grants Congress the power to pass legislation to enforce the Amendment's proscriptions, or if parties can challenge conduct under Section I of the Amendment.[195] Professor Baher Azmy has argued that the federal judiciary has long possessed the ability to craft equitable remedies for constitutional violations, and the federal courts have that same power to enforce Section I of the Thirteenth Amendment in direct actions.[196] Similarly, Professor William M. Carter, Jr. has maintained that the legislative history of the debate over the Thirteenth Amendment indicated that the drafters of the Amendment did not believe that the inclusion of a Congressional enforcement provision, codified as Section II of the Amendment, limited the judiciary's power to enforce Section I.[197]

With these principles in mind, at least one group of people from the set of five identified in Part I may have claims based on the Thirteenth Amendment: families of Black capital defendants.[198] These individuals can likely satisfy both factors that scholars have articulated as relevant to determining whether a practice is a badge and incident of slavery. First, statistics indicate that Black defendants are disproportionately sentenced to death as compared to white defendants accused of similar crimes.[199] Thus, the plaintiffs can demonstrate

[195] *See* Azmy, *supra* note 190, at 1049–50.

[196] *Id.* at 1050 ("Federal courts have long had the power to create equitable remedies for direct constitutional violations that have assumed structurally significant and certainly controversial forms." (footnote omitted)).

[197] *See* Carter, *supra* note 190, at 1344–46 ("The Amendment's advocates would have seen no need for a specific authorization for the judiciary in a proper case to enforce the Amendment's prohibition of the badges and incidents of slavery. Advocates assumed that such judicial power existed under commonly understood principles of judicial review.").

[198] *See* discussion *supra* Section I.B.

[199] *See* McCleskey v. Kemp, 481 U.S. 279, 291 n.7 (1987) (assuming the validity of a study demonstrating racial disparities in the State of Georgia's capital punishment system that disproportionately harmed Black defendants); Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 434 (1995) ("An analysis of twenty-eight studies by the U.S. General Accounting Office found a 'remarkably consistent' pattern of racial disparities in capital sentencing throughout the count[r]y." (quoting GEN. ACCT. OFF., DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (Feb. 1990)); Floyd D. Weatherspoon, *The Devastating Impact of the Justice System on the Status of African-American Males: An Overview Perspective*, 23 CAP. U. L. REV. 23, 46–47 (1994) ("More than 2500 [federal] prisoners are on death row, of which approximately 40% are African-American. Since the [federal] death penalty was reinstated in 1976, of the 232 executed, 91 or 39.22% have been African-Americans. African-Americans make up approximately 12% of the general population. Therefore, they are disproportionately overrepresented on death row and subsequently executed. Study after study has substantiated that race is a significant factor

that the state is attempting to take their loved one from them by targeting a group "involving those with African ancestry and a history of slavery or servitude."[200]

Second, these plaintiffs should be able to show "some degree of causal, genealogical, analogical, or functional connection between a particular injury and the law, practice, or experience of slavery or effective re-enslavement of Black Americans post-slavery."[201] They can do this by comparing capital punishment imposed against Black people at the hands of the government with state-sponsored or state-permitted lynching and other killings during slavery and as part of the "re-enslavement of Black Americans post-slavery."[202] Indeed, some scholars have already explicitly decried capital punishment in the United States today as "legal lynching."[203] This connection between lethal violence against enslaved people and capital punishment is confirmed by the scholarly discourse.

Professor John D. Bessler, relying partly on the work of Professor Phyllis Goldfarb, has noted, "America's death penalty . . . is closely 'intertwined' with issues of race, gender, and class. 'Our criminal justice system . . . was forged in America's racial cauldron and would not look as it does but for our racial history.'"[204] Professor Bessler continued, "At one time . . . slaves were hanged, gibbeted, or burned to death for rebelling against their masters, and [B]lack men—even boys—were sadistically lynched, whether for sexually assaulting whites or for other actions, even perceived slights."[205] Likewise, political scientist James W. Clarke, speaking to the "re-enslavement of Black Americans post-slavery" factor, declared:

> A new era of lynching began in [1868] when the Ku Klux Klan killed at least 291 [B]lack males, and left countless other men, women and children physically and psychologically maimed by brutal beatings and sexual mutilations. Over the next three years, at least 118 more [B]lacks were murdered by the Klan. No one is sure how many more [B]lacks died between 1872 to 1881, for records are incomplete, but there were probably many. The lynching epidemic symbolized racial injustice. It illustrates, as

in the decision to sentence a defendant to die, especially if the defendant is [B]lack and the victim is white." (footnotes omitted)).

[200] *See* Lawrence, *supra* note 190, at 662.

[201] *See id.*

[202] *See id.*

[203] Kathryn Kahler, *Courts Turn Their Backs on the Poor: Murder Defendants Often Assigned Inept Lawyers*, PLAIN DEALER, June 10, 1990, *reprinted in* COYNE & ENTZEROTH, *supra* note 22.

[204] John D. Bessler, *The Inequality of America's Death Penalty: A Crossroads for Capital Punishment at the Intersection of the Eighth and Fourteenth Amendments*, 73 WASH. & LEE L. REV. ONLINE 487, 494–95 (2017) (quoting Phyllis Goldfarb, *Matters of Strata: Race, Gender, and Class Structures in Capital Cases*, 73 WASH. & LEE L. REV. 1, 6, 14 (2016)).

[205] *Id.* (footnote omitted).

> well, the abuse of state authority and, for too long, federal indifference to it.[206]

Discussing the culture of lynching and violence against formerly enslaved Black people during and after Reconstruction, historian Terrence Finnegan wrote, "The dehumanizing nature of mob violence enabled white majorities to rationalize laws and norms that effectively denied [B]lacks the full rights of citizenship."[207] Finnegan continued, "Historians [have] attributed lynching to lax attitudes toward law, the *cult of southern honor*, the need to *reaffirm traditional hierarchical power relationships*, and white-black psychosexual tensions channeled into ritualized killings that *helped preserve the economic and social preeminence of southern white males*."[208] With these scholars' acknowledgment of the associations between state-sponsored, or at least state-permitted, lynching and mob violence designed to oppress formerly enslaved people, the families of Black capital defendants can draw a connection between capital punishment and the "re-enslavement of Black Americans post-slavery."[209] Therefore, relatives of Black capital defendants condemned to die at the hands of the state can satisfy both factors of what constitutes "badges and incidents of slavery."[210]

Consequently, this specific class of potential plaintiffs may bring Thirteenth Amendment claims in addition to their Eighth Amendment actions through Section 1983. Although the five categories of individuals identified as injured

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[206] James W. Clarke, *Without Fear or Shame: Lynching, Capital Punishment and the Subculture of Violence in the American South*, 28 BRIT. J. POL. SCI. 269, 271 (1998) (footnote omitted). For more on the history and dynamics of lynching and legal executions in Reconstruction and post-Reconstruction America, see MARGARET VANDIVER, *Legal and Extralegal Executions in the American South*, *in* LETHAL PUNISHMENTS: LYNCHING AND LEGAL EXECUTIONS IN THE SOUTH 8, 8–17 (2006). For a historical account of the Ku Klux Klan's "reign of terror" that largely focused on oppressing, and arguably re-enslaving, formerly enslaved persons, see ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 425–44 (1988).

[207] Terence Finnegan, *"Politics of Defiance": Uncovering the Causes and Consequences of Lynching and Communal Violence*, 101 J. AM. HIST. 850, 850 (2014). Anthropologist J. Anthony Paredes has stated of the United States' continued use of capital punishment:

> Lacking the knowledge, if not the means, to solve the unique problems of a society built on massive dislocation of native peoples, burdened with a legacy of African slavery so recent that the last of those born into slavery died within the living memory of the current 'Baby Boomer' generation, and inundated with successive tides of immigration from Europe, Asia, and Latin America, many Americans cling to the hope that by ritually executing an occasional murderer (from among thousands) order will be restored as surely as collectively sanctioned killing of a threatening deviant restored social harmony in the (imagined) tribal or frontier or agrarian or small town or old neighbourhood past.

J. Anthony Paredes, *Capital Punishment in the USA*, 9 ANTHROPOLOGY TODAY 16, 16 (1993).

[208] Finnegan, *supra* note 207, at 850 (emphasis added).

[209] *See* Lawrence, *supra* note 190, at 662.

[210] *See id.*

by the death penalty have civil rights claims, there are still multiple barriers to potential success in this litigation.

C. *Preliminary Non-Justiciability Barriers to Relief*

Along with the justiciability obstacles these plaintiffs will doubtlessly have to overcome to succeed on these claims, which are discussed in detail in Part III, there are a few other barriers to relief. Specifically, it is critical that these plaintiffs identify the correct defendant or defendants in these actions to avoid sovereign immunity.[211] Likewise, it is necessary to consider absolute and qualified immunity, because at least absolute immunity applies in limited circumstances to certain potential defendants who are governmental actors.[212] Finally, the United States Supreme Court has erected additional burdens for plaintiffs to satisfy to demonstrate sufficient cause for a court to award prospective injunctive relief.[213] Each possible concern is addressed here seriatim.

1. Choosing the Proper Defendant Based on Immunity Concerns

One potential pitfall of any civil rights action against a state for its perpetuation of capital punishment is Eleventh Amendment sovereign immunity.[214] The United States Supreme Court has held that the Eleventh Amendment prohibits direct suits by citizens against states.[215] However, the Court recognized an exception to this prohibition in *Ex parte Young*, permitting suits against state officials in their official capacities.[216] To comport with sovereign immunity, prospective equitable relief is the only remedy available

[211] *See infra* notes 214 and 216 and accompanying text.

[212] *See infra* notes 219–21 and accompanying text.

[213] *See infra* note 225 and accompanying text.

[214] U.S. CONST. amend. XI ("The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."); *see* John Randolph Prince, *Forgetting the Lyrics and Changing the Tune: The Eleventh Amendment and Textual Infidelity*, 104 DICK. L. REV. 1, 25 (1999).

[215] Hans v. Louisiana, 134 U.S. 1, 12 (1890) ("Any such power as that of authorizing the federal judiciary to entertain suits by individuals against the states had been expressly disclaimed, and even resented, by the great defenders of the constitution while it was on its trial before the American people.").

[216] *Ex parte* Young, 209 U.S. 123, 155–56 (1908) ("The various authorities we have referred to furnish ample justification for the assertion that individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.").

pursuant to these official capacity suits against state officials.[217] Accordingly, potential plaintiffs must bring their claims against a state official in their official capacity, not against the state government or state agency itself, and the only relief sought must be an injunction against future conduct.[218]

Another possible snare is absolute immunity.[219] Fortunately, with few exceptions, absolute immunity does not apply to suits for prospective injunctive relief, such as that sought here, but rather affects only suits for money damages.[220] Similarly, the doctrine of qualified immunity, which shields government actors from liability for suit and damages unless they violated a clearly established right, only protects against claims for money damages, not prospective injunctive relief.[221] Accordingly, neither qualified nor absolute immunity will bar suits or relief against officials other than judges and legislators in their official functions.[222]

To avoid triggering these immunities, as limited as they may be in this situation, it is important for the plaintiffs to bring their claims against a state official in their official capacity who is neither a judge nor a legislature and who has a connection to capital punishment. For instance, the state's attorney

[217] *Id.*; *see also* Ford Motor Co. v. Indiana, 323 U.S. 459, 464 (1945) ("[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants." (citations omitted)). Notably, there are some exceptions to the *Young* doctrine; however, none apply here. *See* Seminole Tribe of Fla v. Florida, 517 U.S. 44, 74–76 (1996). The only potentially relevant exception would be where a detailed remedial scheme already exists to enforce the constitutional rights at issue. *Id.* That does not apply here because there is no remedial scheme for individuals who are not capital defendants themselves to challenge the use of capital punishment by the states. *See id.*

[218] *See* cases cited *supra* notes 216–17 and accompanying text.

[219] *See* Erwin Chemerinsky, *Absolute Immunity: General Principles and Recent Developments*, 24 TOURO L. REV. 473, 473–76 (2008) (outlining the history and general principles of the absolute immunity doctrine).

[220] *Id.* at 476 ("[G]enerally, with few exceptions, absolute immunity claims are for money damages, not for injunctive relief. For example, judges, as a result of a 1996 federal law, generally have absolute immunity against suits *and injunctions*. Also, legislators have absolute immunity for injunctions for legislative functions. Otherwise, absolute immunity concerns damages, not injunctive relief." (emphasis added) (footnote omitted)).

[221] Alex Reinert, *Procedural Barriers to Civil Rights Litigation and the Illusory Promise of Equity*, 78 UMKC L. REV. 931, 936 (2010) ("Qualified immunity protects governmental officials *from damages relief only*, in those cases where a governmental official acted reasonably in light of clearly established law. Thus, in cases in which both damages and injunctive relief are sought by a plaintiff, there will be circumstances in which legal remedies will be barred but equitable remedies will be made available." (emphasis added)); *see also* Morse v. Frederick, 551 U.S. 393, 432–33 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part) (citing Wood v. Strickland, 420 U.S. 308, 314 n.6 (1975)) ("A 'qualified immunity' defense applies in respect to damages actions, but not to injunctive relief.").

[222] *See supra* notes 219–21 and accompanying text.

general, the commissioner or secretary of the department of corrections, or the warden of the prison at which death row is located could all be proper defendants. None of those individuals, sued in their official capacities for prospective injunctive relief only, would trigger sovereign, absolute, or qualified immunity.[223]

2. Additional Burdens to Receive Injunctive Relief

Unlike legal remedies available to civil rights plaintiffs, litigants must satisfy additional standards to be entitled to equitable relief, known in this context as injunctive relief.[224] The Supreme Court has outlined a four-factor test for permanent injunctions.[225] For a plaintiff to be entitled to a permanent injunction, they must show:

> (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.[226]

The death penalty plaintiffs can satisfy all four factors. First, because of their involvement with capital punishment, each of these five categories of defendants has suffered an irreparable injury.[227] For instance, victims' family members who oppose death sentences for those accused or even convicted of murdering their relative suffer the irreparable injury of feeling grief not only for the victim, but also for the condemned.[228] Second, legal remedies such as money damages cannot prevent or redress the harm capital punishment has caused or is causing the death penalty plaintiffs. Applying these factors in the context of the victim's family, for example, if a victim's relative brings a civil rights action to prevent executions, monetary damages instead cannot keep the condemned from being executed and would not prevent the plaintiff's grief.

Third, considering the balance of hardships between the plaintiffs and the defendant, which is the state through one of its officials, a permanent injunction is warranted. This is so because the state can accomplish nearly every penological interest served by the death penalty just as well through a sentence of life without the possibility of parole; thus, the hardship on the state is nominal, while the hardship on the plaintiffs is irreparable injury.[229] The final factor,

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[223] *See supra* discussion section II.C.1.

[224] *See* Reinert, *supra* note 221, at 934–35 (citing eBay, Inc. v. MercExchange, LLC, 547 U.S. 388, 391 (2006)).

[225] *eBay, Inc.*, 547 U.S. at 391.

[226] *Id.* (citing Weinberger v. Romero-Barcelo, 456 U.S. 305, 311–13 (1982)).

[227] *See* discussion *supra* Part I.

[228] *See* discussion *supra* Part I.A.

[229] Though states use a number of penological interests to justify capital punishment, only two hold water: retribution and deterrence. *See* Daniel R. Oldenkamp, Note, *Civil Rights in*

whether a permanent injunction would disserve the public interest, presents a closer question because of the sincere policy debates regarding capital punishment. Nevertheless, because the state can achieve the safety of the community and the punishment of crime through a sentence of life without the possibility of parole as well as it could through the death penalty, it is difficult to maintain that a permanent injunction on capital punishment would work a disservice to the public interest.[230] Therefore, though by no means easy arguments, the death penalty plaintiffs have valid claims that they are entitled to equitable relief in the form of a permanent injunction.

III. TIPTOEING THROUGH JUSTICIABILITY

Justiciability refers to the complex web of doctrine that courts use to determine whether the judiciary may constitutionally consider a case.[231] In federal courts, there are a number of justiciability doctrines that may prevent litigants from having their claims heard or decided on the merits.[232] Those theories include: standing, ripeness, mootness, the adversity requirement; and the political question doctrine.[233] Not all of these doctrines apply in the death penalty plaintiffs' cases. However, those that are pertinent are considered seriatim.

the Execution Chamber: Why Death Row Inmates' Section 1983 Claims Demand Reassessment of Legitimate Penological Objectives, 42 VAL. U. L. REV. 955, 969–70 (2008) ("Currently, courts accept penological objectives for the death penalty and the justifications for the punishment in its entirety, *especially retribution and deterrence*. This is because, under habeas corpus, death row prisoners' only post-conviction relief was an equitable stay of execution rather than an injunction against specific conditions of confinement. Since even one stay of execution would erode the states' retributive and deterrence justifications for death sentencing, courts have jealously guarded legislatures' penological interests by lending them massive deference in method-of-execution analysis." (emphasis added) (footnotes omitted)). There is disagreement as to whether the deterrent value of the death penalty exceeds that of a sentence of life without the possibility of parole. *Id.* at 972–73 ("In theory, deterrence dissuades people from committing crimes punishable by death by instilling fear of execution where otherwise stiff fines or life imprisonment would be the harshest punishments under law. This "intimidation" aspect of deterrence is intended to affect every segment of society, except for condemned criminals themselves, whom the state has manifestly chosen not to rehabilitate. Aside from its conceded inapplicability to death row inmates, capital punishment's effectiveness as a deterrent of others remains a *significant source of academic debate*." (emphasis added) (footnotes omitted)).

[230] *See* Oldenkamp, *supra* note 229, at 969–73.

[231] *See* Russell W. Galloway, Jr., *Basic Justiciability Analysis*, 30 SANTA CLARA L. REV. 911, 911–12 (1990); F. Andrew Hessick, *Cases, Controversies, and Diversity*, 109 NW. U. L. REV. 57, 62–63 (2015); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 76–77 (2007).

[232] *See* Hessick, *supra* note 231, at 62–63.

[233] *See id.*

A. *Article III Standing*

All cases brought in federal courts must satisfy the three elements of Article III standing.[234] These three elements are: injury in fact, traceability, and redressability.[235] Injury in fact means that the plaintiff must allege that they have suffered "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical."'"[236] The traceability prong demands that plaintiffs show "a causal connection between the injury and the conduct complained of."[237] Finally, the redressability requirement compels plaintiffs to prove that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision'" by the court.[238] The plaintiff bears the burden of establishing the elements of standing.[239] The death penalty plaintiffs can establish all three elements of Article III standing.[240]

The death penalty plaintiffs, as previously articulated, have suffered an injury in fact.[241] The relatives of the victims of capital crimes who do not agree with the capital sentence imposed in their family member's case, and who are prevented by the prosecution from sharing that belief to the sentencing authority, can suffer additional grief and even guilt for this interaction with the "machinery of death."[242] Similarly, the families of capital defendants suffer serious emotional injuries because of capital punishment, as Dr. Beck and her research team discovered through their research.[243] Likewise, correctional officers, such as Fred Allen, have suffered emotional breakdowns and felt guilt for their actions in carrying out death sentences, and some have even became physically ill, such as Warden Lewis Lawes.[244] Finally, judges and governors have suffered electoral consequences, like Chief Justice Bird and Justice White, or been haunted by their decision to permit executions, such as Governor Clement.[245] These are actual, concrete, and particularized injuries to these potential

[234] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

[235] *Id.*

[236] *Id.* at 560 (citations omitted).

[237] *Id.* (citing Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 41–42 (1976)).

[238] *Id.* at 561 (citing *Simon*, 426 U.S. at 38, 43).

[239] *Id.*

[240] *See* discussion *supra* Part II.

[241] *See supra* notes 44, 50, 70–72, 95, 97, 127 and accompanying text.

[242] Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) ("From this day forward, I no longer shall tinker with the machinery of death."); *see* Baird & McGinn, *supra* note 27, at 465–67; Bandes, *supra* note 29, at 15; Beck et al., *supra* note 44, at 393; McThenia, *supra* note 25, at 327–28.

[243] *See* Beck et al., *supra* note 44, at 397–413.

[244] *See* Blumenthal, *supra* note 97; COYNE & ENTZEROTH, *supra* note 22, at 31; Rosenberg, *supra* note 109, at F1.

[245] *See* Uelmen, *supra* note 72, at 148–49; Whetstone, *supra* note 127; White, *supra* note 72, at 178.

plaintiffs; they are neither hypothetical nor speculative.[246] Therefore, the death penalty plaintiffs can satisfy the injury in fact element of Article III standing.[247]

Furthermore, because the plaintiffs would not have been injured in the way that they are or were but for their involvement with capital punishment, their injuries are fairly traceable to the challenged conduct—namely, the continued use of the death penalty.[248] Thus, the death penalty plaintiffs can also fulfill the traceability element of Article III standing.[249]

A permanent injunction in the state where the specific plaintiff challenges capital punishment would redress the death penalty plaintiffs' injuries.[250] Though it could be argued that some of these injuries are for past conduct only, especially if the sentence of death has already been accomplished, that does not mean that the plaintiff will not suffer further injury from the continued use of capital punishment against others.[251] As Billie Jean Mayberry, Robert Glen Coe's sister recalled, she would see images and videos on television even after her brother's execution that caused her to cry and scream in her own home in front of her children.[252] The emotional trauma she suffered, as well as assuredly others who are similarly situated, is ongoing even after a death sentence has been carried out.[253]

Consequently, an order granting a permanent injunction proscribing the continued imposition of capital punishment in a state can redress the death penalty plaintiffs' harm. Importantly, the standard does not demand absolute certainty that a favorable decision to the plaintiff will redress the plaintiff's *entire* injury; moreover, the test only requires that a favorable order "likely" redress the wrong allegedly befallen the plaintiff.[254] So, it is likely that the death penalty plaintiffs' injury would be largely redressed by a permanent injunction prohibiting the continued imposition of the death penalty in the state in which the suit is brought.[255]

Therefore, the death penalty plaintiffs can establish all three elements of Article III standing for federal courts.[256] They have suffered actual, concrete, and particularized injuries;[257] that damage is fairly traceable to the challenged

[246] *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).

[247] *Id.*

[248] *See id.*; *see also* discussion *supra* Part I.

[249] *See Lujan*, 504 U.S. at 560.

[250] *See id.* at 561.

[251] *See* Sayward, *supra* note 51, at 255.

[252] *Id.*

[253] *See* Beck et al., *supra* note 44, at 397, 406, 410; Sayward, *supra* note 51, at 255.

[254] *Lujan*, 504 U.S. at 561 ("Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'").

[255] *See id.*

[256] *See* discussion *supra* section III.A.

[257] *See Lujan*, 504 U.S. at 560.

conduct, which is the continued use of capital punishment in certain states;[258] and an order granting a permanent injunction prohibiting the imposition of capital sentences and the fulfillment of current death sentences in those states is likely to redress significant aspects of these plaintiffs' injuries.[259] Accordingly, Article III standing is satisfied. The Court, however, has erected even further justiciability barriers for plaintiffs seeking redress for their injuries.

B. *Prudential Standing*

Beyond Article III standing, the Supreme Court has also added "prudential standing" requirements that may lead to a court dismissing a litigant's case before getting to the matter's merits.[260] Unlike Article III standing, prudential standing is not constitutionally mandatory, but rather it is a discretionary choice by the judiciary not to decide a specific case.[261] Moreover, while there is some disagreement on this point, it is generally understood that prudential standing is not jurisdictional, which means that a court need not always consider prudential standing before deciding a case unless it is raised by the litigants themselves.[262] There are currently two main doctrines of prudential standing that courts employ to dismiss a case as non-justiciable: (1) the proscription on asserting claims outside of the zone of interest of the relevant statute, where applicable;[263] and (2) the ban against alleging the claims of third parties.[264] Additionally, the Supreme Court has added a prudential standing requirement in civil rights cases that seek injunctive relief.[265]

1. Normal Prudential Standing Requirements

The zone of interest requirement demands that where a plaintiff alleges that a person or entity violated a statutory right that caused the plaintiff an injury, the interest asserted the plaintiff "must be 'arguably within the zone of interests to

[258] *See id.*

[259] *See supra* note 253; *Lujan*, 504 U.S. at 561.

[260] *See* Kylie Chiseul Kim, *The Case Against Prudential Standing: Examining the Courts' Use of Prudential Standing Before and After* Lexmark, 85 TENN. L. REV. 303, 305 (2017); Micah J. Revell, Comment, *Prudential Standing, The Zone of Interests, and the New Jurisprudence of Jurisdiction*, 63 EMORY L.J. 221, 223 (2013).

[261] *See* U.S. CONST. art. III, § 2; Kim, *supra* note 260, at 305.

[262] Revell, *supra* note 260, at 224.

[263] Kim, *supra* note 260, at 331.

[264] *Id.* at 337–38.

[265] *See* Linda E. Fisher, *Caging* Lyons*: The Availability of Injunctive Relief in Section 1983 Claims*, 18 LOY. U. CHI. L.J. 1085, 1085 (1987) ("In *City of Los Angeles v. Lyons*, the United States Supreme Court declared that, in most cases, a plaintiff seeking injunctive relief under Title 42 of the United States Code, Section 1983 . . . must allege that he or she will be subject again to the challenged conduct. Absent such allegations, the Court held that a plaintiff does not have standing to seek an injunction and thus, that aspect of the case is not justiciable." (footnote omitted)).

be protected by or regulated by the statute' that [the plaintiff] says was violated."[266] Because the death penalty plaintiffs' claims are based on the United States Constitution, not a statute, this prudential standing requirement is not applicable.[267] Prudential standing also demands that litigants assert their own rights rather than those of others.[268] Of course, if the death penalty plaintiffs were alleging capital punishment violates the Eighth and Thirteenth Amendment rights of the capital defendants and the condemned, this prudential standing doctrine would bar those claims.[269] However, because the death penalty plaintiffs claim violations of *their own rights*, and seek redress for *their own injuries*, this prudential standing barrier to suit is not implicated.

Accordingly, the traditional prudential standing limits are not affected by the death penalty plaintiffs' claims.[270] Neither Article III nor typical prudential standing standards, which are applied to all federal cases, serve as a barrier to these claims. Therefore, the only remaining potential hurdle is the special standing requirement imposed on civil rights litigants seeking equitable relief instead of monetary damages.[271]

2. *Lyons*' Future Harm Test

In *City of Los Angeles v. Lyons*, the Supreme Court declared that plaintiffs in civil rights cases seeking injunctive relief must allege that they are "likely to suffer future injury" because of the challenged conduct.[272] Specifically, a plaintiff must prove two elements: (1) "that [they] will have another encounter in the future with the defendant";[273] and (2) "that the defendant again will treat [them] in the same allegedly unconstitutional manner."[274] The underlying rationale for this high standard is that a civil rights plaintiff is entitled to damages for past harm, but is not entitled to a prospective injunction based solely on past action by the defendant or defendants.[275]

Applying the *Lyons* test to the death penalty plaintiffs' claims, it is apparent that all plaintiffs can satisfy the standard, but only in certain circumstances. The analysis rests entirely on the first prong of the Court's articulation of the test.

[266] Revell, *supra* note 260, at 226 (quoting Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 224 (2012)).

[267] The death penalty plaintiffs' claims are based on the Eighth and Thirteenth Amendments to the United States Constitution, as discussed in Part II.

[268] Kim, *supra* note 260, at 337–38.

[269] *See id.* at 338 ("Prudential standing's rule against asserting a third party right ordinarily applies when the purpose of the suit is to enforce the right of another.").

[270] *See* Revell, *supra* note 260, at 226; Kim, *supra* note 260, at 338 and accompanying text.

[271] *See* Fisher, *supra* note 265, at 1085.

[272] 461 U.S. 95, 105 (1983).

[273] Fisher, *supra* note 265, at 1092.

[274] *Id.*

[275] *Id.* at 1092–93.

Capital victims' and defendants' relatives in cases in which the execution in the case has already taken place, for instance, may not be able to prove that they will ever again encounter the warden of the state's death row or the state's attorney general in pursuing an execution in a capital punishment case. Thus, in that situation, those individuals will not be able to satisfy the dictates of *Lyons*. A potential argument to the contrary is that these relatives are going to be haunted by the death penalty, and any time it is referenced in the news media or by politicians that an execution is upcoming or has occurred, it will exacerbate these plaintiffs' injuries.[276] Of course, the response to this is that these plaintiffs' injuries may then be deemed "speculative" or "hypothetical."[277] Nevertheless, any relatives of capital victims or defendants in cases in which the sentence has not been fulfilled can satisfy the first element of the *Lyons* standard.

Similarly, correctional officials who no longer work on death row or as part of an execution team will not be able to satisfy *Lyons* because they cannot reasonably assert that they will come into contact with the defendant or defendants again.[278] The same is true for judges and governors who have already left office and are term-limited such that they cannot reclaim those offices in which they are faced with capital punishment decisions. However, if any of these potential plaintiffs are still employed in the positions that cause them harm or are otherwise eligible and likely to reclaim those jobs, they will likely be able to meet the *Lyons* burden.[279]

Finally, any plaintiff who fulfills the first prong of the *Lyons* test will easily satisfy the second prong. This is because if any plaintiff is going to come into contact with those carrying out the death penalty, it is axiomatic in states where capital punishment is authorized and a sentence of death has been levied, that the defendant will be committing the allegedly unconstitutional conduct. In other words, the defendants are authorized and directed to carry out the already-issued death sentences, and they will do so absent judicial or executive intervention; thus, the plaintiffs can show that the defendants intend to and will conduct the allegedly unlawful behavior again if the plaintiffs encounter the defendants in this scenario. Consequently, *Lyons* will prevent some potential death penalty plaintiffs from bringing their claims—primarily those whose contact with capital punishment has caused past injury but there is no prospect

[276] *See* Sayward, *supra* note 51, at 255.

[277] *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

[278] *See* Fisher, *supra* note 265, at 1092.

[279] One could be argue that any person who is eligible to run for governor, take a job on an execution team, or serve as a judge in a capital case could satisfy the *Lyons* standard. This misunderstands the holding in *Lyons*. Only those individuals who can reasonably be said to have a chance to come into contact with the defendants in the future will be able to succeed in these claims. Doubtlessly, it will be difficult for any plaintiff who is not presently employed in a position that requires death penalty decisions to make this claim.

of future involvement with the death penalty. Otherwise, the other plaintiffs can overcome the high burden established by the Court in *Lyons*.[280]

C. *Ripeness & Mootness*

The doctrine of justiciability also includes the theories of ripeness and mootness, which require that a case present an actual controversy that the court can decide rather than a future or past controversy.[281] A case is ripe if "an issue is sufficiently developed for decision."[282] The Supreme Court has offered the policy rationale for the ripeness doctrine, stating, "[I]t is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . ."[283] The Court has offered two factors for the ripeness inquiry, a reviewing court is "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[284] The first factor has typically focused on whether the case requires more factual development before judicial intervention and the likelihood that the harm challenged will actually occur.[285] Meanwhile, the second factor asks whether "the challenged conduct would have a sufficiently direct and immediate impact on the plaintiff."[286]

The death penalty plaintiffs can satisfy both elements of the ripeness doctrine. First, these plaintiffs are challenging a system of punishment that has been used in the United States almost continuously, since before the Founding; thus, the factual background on the practice of capital punishment is well established.[287] Second, in cases in which the plaintiffs are challenging capital punishment where either a relative is involved or the litigant is being asked to make a decision in a pending case or assist in an upcoming execution, the potential harm to the plaintiff absent a judicial ruling is tremendous. Therefore, it is difficult to maintain that the death penalty plaintiffs' claims would not be ripe.

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[280] *See* Fisher, *supra* note 265, at 1092.

[281] *Id.* at 1088 ("In addition to the requirement of standing, a case must be ripe, and must not have become moot, or extinguished, by the passage of time.").

[282] *Id.*

[283] Abbott Lab'ys v. Gardner, 387 U.S. 136, 148 (1967).

[284] *Id.* at 149.

[285] *Id.*; *see* Michael Aaron DelGaudio, Note, *From Ripe to Rotten: An Examination of the Continued Utility of the Ripeness Doctrine in Light of the Modern Standing Doctrine*, 50 GA. L. REV. 625, 647–48 (2016) ("[C]ourts throughout the last century have applied the ripeness doctrine in similar ways and have emphasized similar factors. The most prominent factors are the need for further factual development, [and] the likelihood that the conduct bringing about the harm will occur . . . .").

[286] *Abbott Lab'ys*, 387 U.S. at 149; DelGaudio, *supra* note 285, at 641.

[287] Paul Marcus, *Capital Punishment in the United States, and Beyond*, 31 MELB. U. L. REV. 837, 838 (2007) ("The death penalty has been a well-established . . . practice in the United States for almost 400 years. The first execution of a criminal in the American colonies occurred in Virginia in 1622." (footnote omitted)).

The justiciability doctrine of mootness demands that the court only decide matters where a ruling has the ability to make a difference.[288] In essence, as the Supreme Court has stated, mootness is "the doctrine of standing set in a time frame: [t]he requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence."[289] The death penalty plaintiffs generally will be able to avoid the mootness question except for two circumstances: the execution of the death row inmate to which the plaintiff has a connection or the leaving of employment by someone whose job requires them to be involved with capital punishment. In the first instance, it should be rare that the state executes an inmate whose sentence is indirectly in question based on a pending civil rights case.[290] Nevertheless, if the state did execute the person whose sentence indirectly serves as the underlying basis for the plaintiff's request for an injunction, the reviewing court would likely then find the claim to be moot.[291] Similarly, if a correctional officer, judge, or governor leaves their employment in those specific positions during the pendency of litigation, their claims would want for standing and would likely be declared moot. These two situations, as well as the death of the plaintiff, would render the cases moot; otherwise the cases should avoid a mootness challenge.

Even if one of these events occurred sufficient to trigger a claim of mootness, there is an exception to the mootness doctrine that would likely apply to permit the court to consider the case on its merits.[292] The exception permits courts to hear cases that are otherwise moot so long as the "controversy is 'capable of repetition, yet evading review.'"[293] To warrant the exercise of this exception, the plaintiff must show: "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again."[294] However, despite that the second requirement demands that the *same complaining party* be subject to harm based on the challenged conduct again in the future, the courts have applied this requirement loosely to hear cases on their merits even where some other party will be harmed by the challenged conduct in the future.[295] Thus, if one of the events previously identified triggers

[288] *See* Fisher, *supra* note 265, at 1087.

[289] *Id.* at 1088 (quoting U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980)).

[290] Indeed, one would think that the court with relevant jurisdiction would likely issue a stay of execution pending the dispensation with the litigation to prevent this issue from arising.

[291] This is subject to certain relevant mootness exceptions, which are explained later.

[292] *See* Matthew I. Hall, *The Partially Prudent Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562, 589–90 (2009).

[293] Herron for Cong. v. Fed. Election Comm'n, 903 F. Supp. 2d 9, 14 (D.D.C. 2012) (quoting Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 462 (2007)).

[294] *Id.*

[295] Hall, *supra* note 292, at 590 ("Although the 'requirement' that the same complaining party will be harmed by recurrence of the challenged action appears to a be a bright-line rule—

mootness in one of the death penalty plaintiffs' actions, the litigants will at least have an argument that their claims are "capable of repetition yet evading review" because the death penalty, absent a change in the law, will continue despite the cessation of their claim.[296]

D. *Political Question Doctrine*

The final justiciability doctrine that could apply to prevent a dispensation of the death penalty plaintiffs' claims on the merits is the political question doctrine.[297] In essence, the political question doctrine constrains the judiciary from deciding issues in cases that are otherwise better suited for the other two branches of government to determine.[298] The Supreme Court has identified six classes of cases that call for employment of the political question doctrine and require dismissal of a case before reaching its merits.[299] These six cases are those that involve:

> [A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[300]

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and has frequently been cited as such by courts declining to apply the 'capable of repetition, yet evading review' exception—courts have nonetheless frequently disregarded this so-called 'requirement' and held claims not to be moot despite the lack of any reasonable likelihood that the same complaining party would again be subject to the same action." (footnote omitted)).

[296] *Id.*

[297] *See generally* Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002) (describing reduction in use of the political question doctrine); Tara L. Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908 (2015) (arguing that the political question doctrine is not at odds with judicial supremacy but is part of the court's supremacy); Gwynne Skinner, *Misunderstood, Misconstrued, and Now Clearly Dead: The "Political Question Doctrine" as a Justiciability Doctrine*, 29 J.L. & POL. 427 (2014) (asserting that federal courts should consider cases involving political questions on their merits to determine the scope of power of the respective branches of government); Linda Sandstrom Simard, *Standing Alone: Do We Still Need the Political Question Doctrine?*, 100 DICK. L. REV. 303 (1996) (maintaining that the political question doctrine should be abolished because it is barely used by the courts, which rely on other theories of justiciability).

[298] Barkow, *supra* note 297, at 239.

[299] *Id.* at 264–65.

[300] Baker v. Carr, 369 U.S. 186, 217 (1962).

None of these doctrines apply in the capital punishment context because the Court has already delved, on innumerable occasions, into deciding the constitutionality of the death penalty. Indeed, on one occasion, the Court has even declared capital punishment, in its entirety, to violate the Eighth Amendment.[301] Consequently, there can be no valid claim, in the context of a civil rights case against capital punishment, that the death penalty's continued use is a political question reserved for the other branches of government. As Chief Justice John Marshall declared in *Marbury v. Madison*, "It is emphatically the province and duty of the judicial department to say what the law is."[302] Because the death penalty plaintiffs' claims revolve around the interpretation of the Eighth and Thirteenth Amendments as applied to their respective injuries, it is within the province of the judiciary, not the other branches of the government, to determine what those rights are and to provide redress if applicable.[303] Accordingly, the political question doctrine does not apply.

CONCLUSION

Overall, the plaintiffs identified here have suffered a real injury because of their involvement in capital punishment. None of these plaintiffs have been charged with, convicted of, or sentenced for a capital crime, but every single one of them has been harmed because of the death penalty's continued use. For those who wish to see capital punishment ended in the United States, this Article offers a unique litigation playbook to bring a civil rights claim that has not previously been tested. Unquestionably, succeeding in procuring a determination of these cases on the merits will be difficult; let there be no misapprehensions about that. The Supreme Court has erected numerous barriers through the doctrine of justiciability, qualified and absolute immunity, and the *Lyons* decision to make it harder for plaintiffs to succeed in these claims. Moreover, the Eleventh Amendment's grant of sovereign immunity to states creates a potential trap for plaintiffs who are not careful in choosing the correct defendant or defendants and the proper relief to seek. Regardless, this Article has demonstrated legitimate legal arguments to overcome those hurdles.

Assuredly, those who support the continued imposition of the death penalty will decry this litigation strategy as advocating for judicial activism and a misapplication of the relevant constitutional amendments and civil rights statutes. However, for those opposed to the death penalty, and especially those personally injured by it, this Article offers one tool in challenging the punishment's constitutionality. And perhaps litigation will not be necessary. Over the past few years, more states have voluntarily abolished their capital

[301] Furman v. Georgia, 408 U.S. 238, 239 (1972) (per curiam) ("The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.").

[302] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[303] *See id.*

punishment schemes.[304] This includes, most recently, the Commonwealth of Virginia, which was historically notorious for its use of the death penalty.[305] Moreover, the election of President Joseph R. Biden, Jr., who is openly opposed to capital punishment, offers hope to those seeking to close the federal government's death row.[306] At any rate, the great debate over the death penalty continues, and this Article aims to highlight voices often ignored in this discussion of who should have the right to have their day in court and consider whether the death penalty violates their rights as well as those who are condemned.

[304] *Several States Consider Repealing or Reforming Death Penalty Laws*, AM. BAR ASS'N (Mar. 10, 2020), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/spring/state-repeal-efforts-2020/; *States and Capital Punishment*, NAT'L CONF. OF STATE LEGISLATURES (Aug. 11, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx ("Capital punishment is currently authorized in 27 states, by the federal government and the U.S. military. In recent years, New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), New Hampshire (2019), Colorado (2020) and Virginia (2021) have legislatively abolished the death penalty, replacing it with a sentence of life imprisonment with no possibility for parole. The Nebraska Legislature also abolished capital punishment in 2015, but it was reinstated by a statewide vote in 2016. Additionally, courts in Washington and Delaware recently ruled that the states' capital punishment laws are unconstitutional.").

[305] Hailey Fuchs, *Virginia Becomes First Southern State to Abolish the Death Penalty*, N.Y. TIMES (Mar. 24, 2021), https://www.nytimes.com/2021/03/24/us/politics/virginia-death-penalty.html.

[306] Madeline Carlisle, *What Happens to the Federal Death Penalty in a Biden Administration?*, TIME (Jan. 25, 2021, 11:39 AM), https://time.com/5932811/death-penalty-abolition-joe-biden/ ("Joe Biden is the first president in U.S. history to openly campaign on abolishing the death penalty and win.").