ESSAY

RECORDING THE PAIN OF OTHERS: LETHAL INJECTION'S VISIBILITY PROBLEM

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> *In a particularly revealing moment in the testimony, Dr. Baskin was questioned about his refusal to euthanize rabbits for experiments by injecting them with air bubbles . . . . Dr. Baskin conceded that he did not run an objective test to determine whether the injected rabbit was experiencing pain (i.e., the "tail flick test"). Rather, in response to counsel's question, "How do you know it was a painful death?", Dr. Baskin responded "You had to be there," and explained that seeing the animal and hearing the sounds it made was enough to convince him that the manner of death was painful.*
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> – Fierro v. Gomez, 865 F. Supp. 1387, 1404 (N.D. Cal. 1994).

INTRODUCTION

In July 2011, Georgia executed Andrew DeYoung for murdering his parents and sister. Pursuant to a motion to preserve evidence brought by counsel for Gregory Walker, another man on Georgia's death row, DeYoung's execution produced the only existing video of a lethal injection in the United States, which remains under seal in a Georgia courthouse.[1] This effort to record an execution runs against the historical trend of making executions

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1 Motion to Compel Response to Allow Preservation of Critical Evidence of the Execution of Andrew DeYoung, Walker v. Humphrey, No. 08-V-1088 (Ga. Super. Ct. July 19, 2011) (on file with author). Only one other execution has been recorded (Robert Alton Harris in California), pursuant to a class action challenging lethal gas; ultimately, the judge in the class action did not view the video, which was destroyed in 1994. Associated Press, *Videotape of a California Execution is Destroyed*, N.Y. TIMES, Feb. 13, 1994, at 35; Email from Brian Kammer, Exec. Dir., Ga. Research Ctr., to Author (Sept. 24, 2018).

less visible by bringing them inside prison walls and limiting eyewitnesses.[2] Unlike similar cases, the successful motion to preserve DeYoung's execution and autopsy on video did not litigate the public's right to *see* executions; it instead argued that visual evidence of a botched execution was necessary to support another condemned man's Eighth Amendment claim.

This Essay evaluates this strategy's assumption that video representation is less mediated and thus more effective and accurate *as evidence* than traditional eyewitness and expert testimony. This evaluation proceeds by examining the rhetorical strategies used in death penalty abolition litigation and judicial opinions that have, in turn, upheld and struck down methods of capital punishment. Part I examines lethal injection's "invisibility problem" and argues that this problem stems from secrecy surrounding state execution protocols and the overwhelming metaphor of healing that lethal injection's "weapons" project. Part II explores a potential solution to this problem—creating visual records of lethal injections—using the litigation surrounding DeYoung's execution as an example.

My goal is not just to compare the visual and narrative rhetoric present in Eighth Amendment arguments. Rather, I aim to better understand what does and does not work and to then theorize ways to make abolition arguments more persuasive to judges. My first introduction to habeas litigation was during a college internship at the Georgia Appellate Resource Center, the nonprofit that represented DeYoung and fought to record his execution. I was told that the strategy behind habeas litigation was to fight every aspect of every execution until the "toolbox" of available methods was so tiny and burdensome that pursuing capital punishment would no longer be worth it. This strategy has been partially successful. For example, *Roper v. Simmons* and *Atkins v. Virginia* both significantly reduced the "box" of people eligible for capital punishment.[3] In the 2018 Supreme Court term, two similar cases were on the docket. One, *Bucklew v. Precythe,* asked whether a condemned individual's physical characteristics make lethal injection cruel and unusual.[4] The other, *Madison v. Alabama*, challenged a state's plan to execute a man with severe dementia who could not remember the crime he committed.[5] While the Court soundly rejected the relevance of a condemned

2 *See generally, e.g.*, JOHN BESSLER, DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA (1997) (tracing the history of executions, from public hangings in colonial times to modern-day private executions); WENDY LESSER, PICTURES AT AN EXECUTION (1993) (exploring a federal court's decision not to televise Robert Alton's execution).

3 *See generally* Roper v. Simmons, 543 U.S. 551 (2005) (holding that imposing capital punishment for crimes committed before the age of eighteen is unconstitutional); Atkins v. Virginia, 536 U.S 304 (2002) (holding that executing people with intellectual disabilities is unconstitutional).

4 *See generally* Bucklew v. Precythe, 139 S. Ct. 1112 (2019).

5 *See generally* Madison v. Alabama, 138 S. Ct. 718 (2019).

individual's physical condition in *Bucklew*, the *Madison* decision indicated that the Eighth Amendment may prohibit executing a prisoner suffering from dementia.[6]

I worry, though, that this strategy may be insufficient, particularly in the context of lethal injection challenges—first, because of humanity's endless capacity to innovate cruelty, and second, because of the circular proclamation in *Baze v. Rees* (echoed in *Glossip v. Gross*[7] and *Bucklew*) that "capital punishment is constitutional" so "there must be a means of carrying it out."[8] To that end, Part III proposes that, if total abolition is the broader goal of Eighth Amendment challenges, visual advocacy is a necessary supplement to traditional expert and eyewitness evidence. I argue that visual evidence of potential Eighth Amendment violations transforms judges from neutral evaluators into witnesses and has the potential to interrupt the infinite deferral to the next, more "humane" execution method.

I. LETHAL INJECTION'S INVISIBILITY PROBLEM

Despite being the most literally, intentionally violent action the government regularly takes, execution exists primarily in the public imagination. Hugo Bedau notes that the "relative privacy of executions . . . means that the average American literally does not know what is being done when the government, in his name and presumably on his behalf, executes a criminal."[9] Few executions get significant media attention, and they take place secretly at night. Moreover, empirical justifications for capital punishment have been largely discredited.[10] Commenting on the lack of correlation between capital punishment and low murder rates, legal scholar Robert Weisburg notes that "there's no particular *reason* to feel any more in control or any more secure about the public safety because of the death penalty" and concludes that executions are "entirely symbolic."[11]

As many scholars have noted, the transition from raucous hangings in the public square to quiet, midnight lethal injections reflects our own "evolving

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6 *Madison*, 138 S. Ct. at 722; *Bucklew*, 139 S. Ct. at 1119.

7 135 S. Ct. 2726 (2015).

8 Baze v. Rees, 553 U.S. 35, 47 (2008) (citations omitted). The *Baze* majority also noted that, "This Court has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment." *Id.* at 48.

9 Austin Sarat, *Killing Me Softly: Capital Punishment and the Technologies for Taking Life*, *in* PAIN, DEATH, AND THE LAW 43, 50-51 (Austin Sarat ed., 2004) (quoting HUGO BEDAU, THE DEATH PENALTY IN AMERICA 13 (3d ed. 1982)).

10 *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 354 (1972) (Marshall, J., concurring) ("In light of the massive amount of evidence before us, I see no alternative but to conclude that capital punishment cannot be justified on the basis of its deterrent effect.").

11 LESSER, *supra* note 2, at 45-46.

standards of decency" as much as concern for the condemned.[12] Indeed, Judge Alex Kozinski once noted that if limiting pain were truly the aim of cruel and unusual inquiries, the "guillotine is probably best but seems inconsistent with our national ethos."[13] Moreover, in *Fierro v. Gomez*, the district court reiterated that the Eighth Amendment "protect[s] the dignity of society itself from the barbarity of exacting mindless vengeance."[14] Thus, modern execution symbolizes both state power and restraint over the violent criminal body.

Lethal injection serves this purpose admirably. Austin Sarat argues that by "masking physical pain and allowing the citizens to imagine that state killing is painless," lethal injection appears to come from a place of empathy for the condemned, but "works primarily to differentiate state killing from murder and to hierarchize the relationship between the state and those whose lives it takes."[15] Thus, the United States justice system and the state governments that implement lethal injection are not primarily invested in making execution painless, but in making any pain invisible.

A. *"Respectable" Witnesses and One-Way Mirrors*

Trying to achieve "humane" state killing has driven executions to a tightly controlled, private space. Initially, so-called "midnight assassination" laws were championed by abolitionists horrified by public delight surrounding hangings.[16] Many states contemporaneously passed "gag laws" requiring the time and place of executions to be kept secret and witnesses strictly limited to a certain number of "reputable citizens" chosen by the warden.[17] These laws did not just literally remove executions from public view; they also severely restricted the public's access to information. For example, New York's law threatened criminal penalties against any newspaper that published details beyond the fact that the execution took place.[18]

Modern executions are routinely carried out in ways that protect their implementing bureaucracies by literally shielding them from view, including

12 *See generally, e.g.,* BESSLER, *supra* note 2; LESSER, *supra* note 2; Dane A. Drobny, *Death TV: Media Access to Executions Under the First Amendment*, 70 WASH. U. L.Q. 1179, 1204 (1992) ("Although the press has a constitutional right to gather information, this right does not extend into the execution chamber."). The phrase "evolving standards of decency," repeated ad nauseum in capital punishment cases, comes from Trop v. Dulles, 356 U.S. 86, 101 (1958).

13 Wood v. Ryan, 759 F.3d 1076, 1103 (9th Cir. 2014) (Kozinski, J., dissenting).

14 865 F. Supp. 1387, 1409 (N.D. Cal. 1994) (quoting Ford v. Wainwright, 477 U.S. 399, 410 (1986)).

15 Sarat, *supra* note 9, at 47-48.

16 BESSLER, *supra* note 2, at 44-46, 98. Bessler points to Minnesota's midnight assassination law, which required executions to take place "before the hour of sunrise," as pivotal in this trend. *Id*.

17 *Id*. at 47-63 (discussing gag laws in New York, Colorado, Virginia, and Minnesota).

18 *Id*. at 50-51.

one-way windows,[19] turned-off microphones,[20] covering prisoners' bodies with sheets and taping down their hands, and lowering the viewing blinds when something goes wrong.[21] Many states, including Georgia, have also passed lethal injection secrecy laws that prevent the public (including those on death row and their counsel) from accessing information about lethal injection protocols under the guise of confidentiality.[22] By making lethal injection less visible, these statutes and their implementing bureaucracies make lethal injection particularly vulnerable to imaginative interpretation by the public and the courts.

B. *Lethal Injection as Metaphor and Medicine*

Various execution methods have been struck down by judges drawing analogies to more violent ways of dying. Of course, most legal opinions are generated via reasoning by analogy to precedent. What operates here is, perhaps, more precisely called reasoning by *metaphor*. Metaphors are powerful and sticky. The way we talk about things (e.g., the notion of time as money) "pre-suppose[s] a metaphor we are hardly ever conscious of," which in turn shapes the way we act.[23] Metaphors also operate as a "vehicle for keeping open the possibilities of moving from one way of conceiving reality to another [and] adapting to changing circumstances"—the perfect figurative tool to propel a jurisprudence based on evolving standards.[24]

The power of metaphors is on full display in judicial opinions about execution methods. For example, *Fierro v. Gomez*, which struck down California's lethal gas protocol, is full of figurative language: cyanide's "cytochrome oxidase effect" is analogous to drowning or strangulation, like "the pain accompanying intense physical activity or a heart attack," and its effects include "arch[ing] backwards like a bridge," and a "sardonic smile, in

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19 The *Baze* court described Kentucky's execution facilities as including "a control room separated by a one-way window." Baze v. Rees, 553 U.S. 35, 45 (2008).

20 Memorandum in Support of Petitioner's Motion to Compel Respondent to Allow Preservation of Critical Evidence of the Execution of Andrew DeYoung at 17, Walker v. Humphrey, No. 08-V-1088 (Ga. Super. Ct. July 19, 2011) (on file with author) [hereinafter DeYoung Memo].

21 Brief for Petitioners at 19 & n.21, Glossip v. Gross, 135 S. Ct. 2726 (2015) (No. 14-7955) ("Witnesses were not fully able to observe Lockett's pain before the blinds were lowered, however, because Oklahoma had taped Lockett's hands into fixed positions and concealed his body under sheets, masking signs of distress.").

22 GA. CODE ANN. § 42-5-36(d) (West, Westlaw through 2019 Gen. Assembly Sess.) (classifying identifying information of individuals involved with an execution as a "confidential state secret"); Respondent's Brief in Opposition to Petitioner's Motion to Compel Response to Allow Videotaping of an Execution and Interference with the Legally Mandated Autopsy Proceeding at 30-31, *Walker*, No. 08-V-1088 (Ga. Super. Ct. July 19, 2011) (on file with author) [hereinafter AG Brief].

23 GEORGE LAKOFF & MARK JOHNSEN, THE METAPHORS WE LIVE BY 5 (2003).

24 LAWRENCE ROSEN, LAW AS CULTURE 132 (2006).

which the lip muscles are pulled tightly away from the teeth."[25] Analogies to physically destructive conditions flow easily from electrocution, which "fries" or "cooks" flesh.[26] And, of course, figurative language is totally unnecessary to demonstrate why the guillotine, hanging, or stoning are disturbing or destructive—indeed, that was the point of public executions employing those methods.[27]

The closest analogy to lethal injection, by contrast, is one of remedy and healing: putting patients "under" in a precise, scientific, technologically advanced way to prevent them from feeling pain during a medical procedure ordinarily meant to heal the body. Compared to electrocution, lethal injection "pales as a symbol" of capital punishment; "the imagery of the lethal injection gurney and injection apparatus hardly appears at all on the web."[28] This is so, Professor Mona Lynch argues, because "[l]ethal injection so completely denies the violence of state killing that the act itself becomes abstract and devoid of any social meaning."[29]

Lynch's assertion that lethal injection carries no social meaning is not quite accurate. The gurney and the needle have social meaning, but that meaning is nonviolent. In *The Body in Pain*, Elaine Scarry writes of the weapon as the central symbol of pain. She argues that "as a perceptual fact, [the weapon] can lift pain and its attributes out of the body and make them visible."[30] Pain, then, "almost cannot be apprehended without [the image of the weapon]."[31] It is difficult to conceptualize an intravenous drip as a weapon: in the medical context, the needle is a nourishing, palliative tool. The drugs themselves are also subject to multiple readings; sodium thiopental, pentobarbital, and midazolam are all healing in the right doses. Lethal injection is merely a matter of degree. In comparison, there is no degree at which a bullet going into your body, or hanging by the neck from a rope, or ingesting cyanide has analgesic or palliative properties.[32]

As a symbol, lethal injection separates cause from effect and confuses even further the "deeply problematic character of [the language of the weapon]" as

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25 865 F. Supp. 1387, 1396 (N.D. Cal. 1994).

26 *See, e.g.*, Dawson v. State, 554 S.E.2d 137, 144 (Ga. 2001) (invalidating "death by electrocution, with its specter of excruciating pain and its certainty of cooked brains and blistered bodies").

27 MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 32-69 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (describing at length the purpose of "the spectacle of the scaffold").

28 Mona Lynch, *On-line Executions: The Symbolic Use of the Electric Chair in Cyberspace*, POL. & LEGAL ANTHROPOLOGY REV., Nov. 2000, at 1, 7-8.

29 *Id*. at 13.

30 ELAINE SCARRY, THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD 16 (1987).

31 *Id*.

32 Although lethal gas is also technically "invisible," the imagery and symbolism of "the gas chamber" is part of its visibility. I speculate that Auschwitz and the Holocaust loom large in any imagining of "the gas chamber," which casts a specter of torture, experimentation, and disturbing abuse of state power on any execution using that method.

an expression of pain.[33] In the Eighth Amendment context, expression of pain is literally vital. Fundamentally, then, the legal movement to abolish lethal injection has a visibility problem. After centuries of "progressing" to more humane methods, we have now arrived by analogy to a method that appears, by design, to be kind and gentle.

In *Glossip v. Gross*, petitioners sought certiorari on the theory that "[p]otassium chloride feels like liquid fire as it courses through the veins" and that "the Framers placed off limits such means of execution as burning a prisoner."[34] Therefore, they argued, "[f]rom the perspective of causing intolerable pain and suffering, injecting a prisoner with liquid fire is just as unconstitutional as lighting him afire."[35] While it might be too early to call lethal injection resistant to Eighth Amendment claims based on the method's risk of pain, typical reasoning by analogy to more physically destructive forms of killing has not yet been successful.

The Supreme Court ultimately rejected *Glossip's* metaphorical arguments because these effects occur only if the condemned is conscious, which would mean that something went wrong.[36]

Lethal injection supposedly reflects a consensus that "the 'science of the present day' has provided a less painful, less barbarous means for taking the life of condemned prisoners," and judges seem compelled by the quasi-medical apparatus that lethal injection projects.[37] The *Glossip* court emphasized that the Oklahoma protocol featured numerous quasi-medical "safeguards," including establishing two intravenous access sites and monitoring the offender's consciousness throughout the procedure.[38] Similarly, *Baze* details the medical trappings of Kentucky executions: the exact dosage of pharmaceuticals, the phlebotomist and EMT who "perform the venipunctures necessary for the catheters," and the electrocardiogram that confirms death.[39] Despite the overwhelming medical imagery that the lethal

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33 SCARRY, *supra* note 30, at 17. Moreover, the intravenous lines used in lethal injection are quite long and stretch from a separate control room into the execution chamber, which literally separates the condemned from the state actors. *See, e.g.*, Baze v. Rees, 553 U.S. 35, 45 (2008) ("The execution team administers the drug remotely from the control room through five feet of IV tubing.").

34 Brief for Petitioners, *supra* note 21, at 2.

35 *Id*.

36 Glossip v. Gross, 135 S. Ct. 2741-46 (2015).

37 Dawson v. State, 554 S.E.2d 137, 144 (Ga. 2001). In *Fierro*, the judge insisted that when evaluating execution methods, courts should look for "objective evidence of pain," but seemed most disturbed by the lack of technological sophistication in California's lethal gas protocol. Fierro v. Gomez, 865 F. Supp. 1387, 1391-92 (N.D. Cal. 1994). The image described was the slow poisoning of the potentially conscious condemned through a crude apparatus, designed without scientific consultation, that included a bedpan, cheesecloth bag holding cyanide crystals, and sulfuric acid mixture—reminiscent of a sadistic high school science experiment. *Id.*

38 *Glossip*, 135 S. Ct. at 2742.

39 *Baze*, 553 U.S at 45.

injection ritual produces, the execution itself is nothing more than an elaborate performance of a medical procedure. In many states, doctors are not allowed to participate in executions at all.[40] Their presence, if required, is to confirm that death has occurred or to be available for resuscitation in the case of an eleventh-hour stay.[41]

Botched executions most dramatically interrupt the medical performance put on by the state and thus offer advocates an opportunity to rebut the medical imagery that states generate to visually play down the risks inherent in their lethal injection protocols. The death penalty is, in essence, a ritual—following essentially the same narrative arc in every case, from the verdict, to the last meal, to the condemned's last words. Lethal injections are frequently botched, which "signal[s] a break in the ritualization and routinization of state killing" and "turn[s] the organized, state-controlled ritual into torture."[42] Indeed, despite its technologically sophisticated appearance, lethal injection fails at a higher rate than any other method.[43]

Of course, proving that an execution has been botched is difficult, and eyewitness accounts and expert reports have not proved to be sufficiently compelling to courts, in part because of the "sharply divided" and "contested" accounts of lethal injections.[44] The *Glossip* petitioners explicitly reference lethal injection's invisibility problem: "By preventing movement, the paralytic masks a prisoner's suffering if he returns to consciousness . . . . [A] prisoner's suffering . . . may be discernible only in an execution where the administration of the paralytic was interrupted."[45] DeYoung's expert anesthesiologist noted that the muscle relaxant in Georgia's three-drug protocol "is not intended to contribute to the actual death; its purpose is to limit unattractive body movements during the process."[46] Moreover, the doctors contracted by the

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40 *See* Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 47, 59 (discussing "grossly inadequate" lethal injections protocols); *see also, e.g.*, *Baze*, 553 U.S. at 46 ("By statute, . . . the physician is prohibited from participating in the 'conduct of an execution,' except to certify the cause of death." (citing KY. REV. STAT. ANN. § 431.220(3) (West, Westlaw though 2019 Reg. Sess.))).

41 *See, e.g.*, *Baze*, 553 U.S. at 46 (describing a Kentucky statute limiting a physician's participation in an execution to certifying the cause of death).

42 AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA'S DEATH PENALTY 5 (2014).

43 Report by Professor Jeffrey Fagan, Ph.D. on Execution Methods in the United States at 3, 9, Maha El Gizouli v. Secretary of State for the Home Department [2018] EWHC (60) (Admin) (Eng.) (No. CO/3449/2018) (describing estimates that "overall, three percent of all executions failed from 1890–2010, and that lethal injection failed at a higher rate than any other execution method employed since that time: 7.12 percent").

44 Order Denying Certificate of Immediate Review Under O.C.G.A. § 5-6-34(B) at 2, Walker v. Humphrey, No. 08-V-1088 (Ga. Super. Ct. July 19, 2011).

45 Brief for Petitioners, *supra* note 21, at 11 (citation omitted).

46 Expert Report of David B. Waisel, MD at 3, DeYoung v. Owens, No. 11-2324-SCJ (N.D. Ga. July 20, 2011).

Georgia Department of Corrections (DOC) "have a powerful interest in preserving *the appearance* that lethal injections in Georgia operate smoothly, meaning subtleties such as the inmates' eyes remaining open are dismissed without thorough review or inquiry."[47] As long as states officials control the flow of information from the execution chamber to the public, the problem for advocates will be primarily visual, and that visual problem demands a visual solution.

II. "YOU HAD TO BE THERE": JUDGING AND WITNESSING

A. *Evidence and Affect*

Recording lethal injections would ameliorate this problem in two ways. First, courts see visual evidence like video and photographs as more "objective" and reliable than eyewitness or even expert reports. Many scholars have troubled the notion that cameras mechanically record objective reality, but video recording has obvious advantages over eyewitness testimony in this context. A videographer would be in the execution chamber, up close, and could capture the subtle signs of a botched execution that witnesses from another room might not see. Second, I argue (perhaps optimistically) that witnessing an execution could produce an affective, subjective response in judges and destabilize the traditionally static roles played by participants in a trial. Instead of neutrally evaluating a witness's account, a judge faced with photographs or video of an execution has to personally engage with that visual evidence, if only with their eyes.

Courts striking down pre-lethal injection methods appealed to various types of evidence to support their decisions. In *Dawson v. State*, the 2001 Georgia case that struck down electrocution, the court examined both autopsy photographs and audio tapes of executions.[48] In invalidating the electric chair, the court said: "We cannot ignore the cruelty inherent in punishments that unnecessarily mutilate or disfigure the condemned prisoner's body."[49] The evidence of such "mutilation" came from postmortem photographs and autopsy reports describing injuries like blisters, burns, and "sloughing or 'slippage' of a large portion of the scalp and the skin."[50]

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47 DeYoung Memo, *supra* note 20, at 13-14.

48 554 S.E.2d 137, 141-43 (Ga. 2001); *see also* Josh Smith, *(Audio) Witness to an Execution: The Georgia Execution Tapes*, JOSHSMITH.XYZ (June 12, 2015), http://joshsmith.xyz/audio-witness-to-an-electrocution-the-georgia-execution-tapes/ [https://perma.cc/WV4N-922L] (featuring a collection of audiotapes documenting Georgia executions originally known as "The Execution Tapes," a radio special created by producer David Isay from subpoenaed recordings).

49 *Dawson*, 554 S.E.2d at 143.

50 *Id.* at 141.

The court came to this conclusion despite testimony from electrocution survivors about its painlessness and expert testimony that electrocution "results in immediate unconsciousness."[51] The court concluded that focusing solely on pain "would lead to the abhorrent situation where a condemned prisoner could be burned at the stake or crucified as long as he or she were [unconscious] . . . , even though such punishments have long been recognized as 'manifestly cruel and unusual.'"[52] Lethal injection, on the other hand, was permissible because it is "minimally intrusive" and "does not produce the mutilation" that electrocution does.[53] In other words, the court was concerned with the visual impact of electrocution on witnesses—including the judges who bore witness to the execution through photographs.

Many of the arguments supporting recording DeYoung and Harris's executions rely on the idea that cameras provide "objective" evidence of pain. For example, the news director at KQED, the California local news station that unsuccessfully sued to record Harris's execution for a documentary, argued that a camera alone can provide "a true and clear and complete and accurate picture that is unmediated by an individual's personal interpretation."[54] The arguments in favor of recording DeYoung's execution are similarly based on the idea that a camera can provide something that human eyes cannot. Death penalty expert Deborah Denno was quoted as saying that videotaping executions "provides objective evidence that is not dependent on eyewitness accounts."[55] In an article describing DeYoung's execution, the camera takes on human qualities ("a video camera watched silently").[56] George Pearl, the forensic videographer who captured the lethal injection, is completely erased in the article.

Thus, video recordings appear to be unmediated, in contrast to affidavits and reports that each introduce another set of potentially unreliable eyes. This mediation allows judges to "shift responsibility onto others" and "diminish[] their responsibility for the infliction of capital punishment . . . . [and] the pragmatic aspect of their interpretive acts."[57] As neutral evaluators of evidence, judges are discursively separate from the citizens on whose behalf executions are carried out, despite being the only legal decisionmakers in the decades that follow a jury's conviction.

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51 *Id.* at 142.

52 *Id.* at 143 (citing *In re* Kemmler, 136 U.S. 436, 446 (1890)). Ironically, William Kemmler was the first person electrocuted pursuant to the Gerry Commission's finding that it was the most "humane" method. BESSLER, *supra* note 2, at 49-50.

53 *Dawson*, 554 S.E.2d at 143.

54 LESSER, *supra* note 2, at 139.

55 Erica Goode, *Video of a Lethal Injection Reopens Questions on the Privacy of Executions*, N.Y. TIMES (July 23, 2011), https://www.nytimes.com/2011/07/24/us/24video.html [https://perma.cc/6FKM-RQRT].

56 *Id.*

57 Markus Dirk Dubber, *The Pain of Punishment*, 44 BUFF. L. REV. 545, 546 (1996).

The idea that visual evidence might disrupt this shifting of responsibility has scientific support. Seeing another person in pain impacts a host of physiological processes, including "increased activation in neural regions underpinning sensory processing and perspective taking" and "increase[d] pain intensity, unpleasantness, and nociceptive reflexes, and reduce[d] pain tolerance and threshold."[58] For some people, this includes actually *feeling* others' pain through "vicarious sensory experiences."[59] Rhetorically, visual evidence allows advocates to simultaneously invoke the objectivity of scientific evidence and provoke a personal response in judges.

B. *Andrew DeYoung*

Recording DeYoung's execution was an attempt to preserve a botched lethal injection in a more tangible way than the eyewitness testimony used to describe previous botched executions. In their motion to record DeYoung's execution, Gregory Walker's counsel pointed out three botched executions over the last year using either pentobarbital or illegally imported sodium thiopental.[60] For instance, during Roy Blankenship's execution in June 2011, a reporter stated that Blankenship "grimaced, gasped and lurched," "had his eyes open and made swallowing motions," and had a "tight grimacing expression on his face."[61] Based on this eyewitness account, an expert witness concluded that "Mr. Blankenship was inadequately anesthetized and was conscious for approximately the first three minutes of the execution and that he suffered greatly."[62] Georgia's Attorney General denied this characterization, calling the reporter's eyewitness account "highly speculative" and the petitioner's use of eyewitness testimony a "ridiculous manipulation" and a "poor[] attempt[] to portray the execution . . . as 'botched.'"[63]

The brief by Walker's counsel to record DeYoung's execution similarly describes two other executions in 2010 and 2011—those of Brandon Rhode and Emanuel Hammond.[64] Both men's eyes were open throughout the process, and one even maintained eye contact with a witnesses as he died, "strongly suggesting that he was conscious."[65] Based on the evidence from

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58 M.J. Giummarra et al., *Affective, Sensory and Empathic Sharing of Another's Pain: The Empathy for Pain Scale*, 19 EUR. J. PAIN 807, 808 (2015) (citations omitted).

59 *Id.*

60 DeYoung Memo, *supra* note 20, at 2, 6-7, 10-11. In 2011, the Georgia DOC's supply of execution drugs was seized by the Drug Enforcement Administration because it was illegally imported from the United Kingdom. *Id.* at 9, 11.

61 Affidavit of David B. Waisel, MD at 2, DeYoung v. Owens, No. 11-2324-SCJ (N.D. Ga. July 20, 2011).

62 *Id.* at 3.

63 AG Brief, *supra* note 22, at 10.

64 DeYoung Memo, *supra* note 20, at 10-11.

65 *Id.*

Rhode's execution, Emanuel Hammond's counsel attempted to stop his executions by arguing that Georgia's protocol violated the Eighth Amendment because it created a substantial risk of unnecessary pain.[66] The motion to preserve included eyewitness testimony, in part to prove that such narrative evidence was insufficient in previous cases. The following exchange exemplifies how pain's unshareability compounds with each new layer of mediation:

> [Counsel]: When you were witnessing [the] execution, did you notice if he moved on the gurney or keep still?
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> [Witness]: He moved once, I remember, sort of like that (indicating) and kind of looked, you know, and then that was it.
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> [Counsel]: . . . [J]ust to clarify for the record, if you could—used "like that" and made a motion. If you could describe for the court what that motion was in words, that would be helpful.
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> [Witness]: He moved his head back like that (indicating), maybe around like that (indicating) and then around like that (indicating).
>
> [Counsel]: Okay. So he—just to reflect what you've been doing, he moved his head back on the gurney?
>
> [Witness]: Back a little bit. I—back a little bit and around a little bit and—
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> . . . .
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> [Counsel]: Almost as if his neck were stiff?
>
> [Opposing Counsel]: Objection.
>
> [Counsel]: I'm just trying to preserve his motion for the record, Your Honor.
>
> [Court]: Well, I understand that, but you can't lead the witness.
>
> [Counsel]: Okay.
>
> [Witness]: Certainly. I just—I remember he moved to the left and to the right and kind of like that (indicating).[67]

The pastor who testified above had witnessed multiple executions, but still struggled to articulate what he did not possess a vocabulary for: death. Perhaps unsurprisingly, eyewitness testimony to a judge about a dead man's internal pain was not convincing.

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66 Transcript of Hearing on Motion for a Stay of Execution at 9:7-12:16, Hammond v. Owens, No. 2011-cv-195623 (Ga. Super. Ct. Jan. 25, 2011).

67 *Id.* at 30:10-31:13, 100:20-101:20.

The state vehemently opposed petitioner's motion to preserve, arguing that the eyewitness testimony was uncertain and that allowing a videographer would "contravene state laws" allowing the warden to choose witnesses.[68] In addition to discrediting reporter accounts of Blankenship's execution, the Attorney General argued that "videotaping the execution of inmate DeYoung would not ensure that this Court had enabled Petitioner to obtain credible evidence that the execution process had not been carried out in a humane manner" because it "would give inmate DeYoung every incentive to create false evidence through false actions."[69] It is unclear how the Attorney General expected DeYoung to create false evidence while rendered adequately unconscious.

Ironically, contradictory eyewitness testimony formed the basis for the opinion that allowed DeYoung's execution to be recorded. The judge noted that the Attorney General "attacked the conclusions suggested by witnesses" but that these arguments instead "tend to underscore the potential relevance of the evidence the petitioner seeks to gather."[70] The judge commented on the "sharply divided" affidavits regarding "the details of Roy Blankenship's response to the initial stages of the execution procedure, as well as contested affidavit evidence regarding the condemned's responses in other executions."[71] Eyewitness testimony is inadequate because "eyewitness perceptions may continue to reflect marked variance."[72] Thus, instead of relying on eyewitness testimony, advocates might find it advantageous to actually emphasize discrepancies between adversary witnesses.

Even after petitioner's motion was granted, the video recording was limited by the DOC's security protocol. Forensic videographer George Pearl, who recorded the execution, described his position as "maybe a foot and a half away from" DeYoung.[73] He was not permitted to move or use lights.[74] Despite decades of expertise in legal photography and videography, Pearl had very little discretion.[75] He said, "[I] didn't really care for where they put me that much. I was down by his knees, toward his legs, on the side. That wasn't really the greatest thing because I wasn't able to move up to where the

68 Order Compelling Respondent to Allow Preservation of Evidence of Execution by Lethal Injection at 4-5, Walker v. Humphrey, No. 08-v-1088 (Ga. Super. Ct. July 19, 2011) (on file with author) [hereinafter DeYoung Order].

69 AG Brief, *supra* note 22, at 33.

70 DeYoung Order, *supra* note 68, at 3-4.

71 Order Denying Certificate of Immediate Review Under O.C.G.A. § 5-6-34(B) at 2, *Walker*, No. 08-V-1088 (Ga. Super. Ct. July 21, 2011).

72 *Id.*

73 Telephone Interview with George Pearl, Owner, Atlanta Legal Photo Servs., Inc. (Jan. 3, 2018).

74 *Id.*

75 *Id.*

injections were happening . . . to videotape that better."[76] Pearl also describes the DOC's hostility toward the recording:

> They didn't want me there. I could tell. They did everything they could to make it disagreeable to me. You have to stand there in this position, you can't move, this and that. You have to turn to stone here. And as soon as you get through videotaping, we want this video recording . . . . It was just like, God, I just—you know (laughs). Total top secret what they were thinking. I didn't think it was that big of a deal, but okay, fine. Especially when nothing happened.[77]

Pearl has never seen the video.[78] As soon as he walked out of the execution chamber, DOC officials took the videotape, put it in an envelope, and placed it under seal at a Fulton County courthouse, where it remains.[79] By all accounts, the execution was uneventful. Pearl said, "He didn't seem to suffer or anything."[80] To my knowledge, no one has ever viewed the tape. Gregory Walker's death sentence was thrown out on other grounds, so it was never used as evidence as originally intended.[81] Imagine, though, if the DeYoung execution had resembled the botched executions described in the *Glossip* petitioner's brief.[82] There is no guarantee that seeing someone writhe on a gurney or hearing "my body is on fire" would provoke a judge to strike down lethal injection as an execution method.[83] But recording executions for evidentiary purposes would, at the very least, increase transparency in lethal injection procedures and could potentially tip the scales for a conflicted judge.

CONCLUSION AND PROPOSALS FOR ABOLITION ADVOCACY

Even within a notoriously textual institution like the law, seeing things is powerful. This has been implicitly confirmed in contexts as diverse as administrative adjudication[84] and anti-abortion advocacy.[85] Abolition groups

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76 *Id.*

77 *Id.*

78 *Id.*

79 *Id.*

80 *Id.*

81 *Death Sentence Thrown Out for Man who Killed Maid*, CBS NEWS (June 1, 2015, 5:12 PM), https://www.cbsnews.com/news/death-sentence-thrown-out-for-man-who-killed-maid/ [https://perma.cc/T8J5-5H9Y].

82 *See* Brief for Petitioners, *supra* note 21, at 19-22.

83 *See id.* at 22 (describing the last words of Charles Warner, one of the men executed using Oklahoma's midazolam protocol).

84 Universal Camera v. NLRB, 340 U.S. 474, 496 (1951) ("[E]vidence supporting a conclusion may be less substantial when an impartial, experienced examiner *who has observed the witnesses and lived with the case* has drawn conclusions different from [the NLRB]." (emphasis added)).

85 *See, e.g.*, CAROL SANGER, ABOUT ABORTION: TERMINATING PREGNANCY IN TWENTY-FIRST-CENTURY AMERICA 107-27 (2017).

already use visual advocacy in their public campaigns against capital punishment, like Amnesty International's "last meal" campaign in Puerto Rico.[86] I suspect that death penalty states already intuit this power, which explains why lethal injection protocols mimic medical procedures, and implementation is largely kept out of the public eye.

To counter this, I propose a collective effort on the part of death penalty advocates to create a catalog of visual evidence that speaks to the pain of botched lethal injection. Courts often fall back on *Baze*'s "intolerable risk" standard to uphold lethal injection protocols despite evidence of subjective pain. Lethal injection's medical apparatus allows legal questions to be framed as medical and thus scientifically knowable. But the modifier "intolerable" in this line of cases is persistent and illuminating: how much risk are we willing to tolerate when putting someone to death? That is, fundamentally, a social, political, and personal question.

Even the most stubborn, death penalty protective courts have proved vulnerable to visual evidence. Recall the Georgia Supreme Court's rejection of the electric chair in *Dawson*, compelled by the evidence presented in audiotapes archiving Georgia executions and postmortem photographs that showed "uncontrovertedly [sic] that the bodies of condemned prisoners in Georgia are mutilated during the electrocution process."[87] Or, consider Alabama's recent botched attempt at executing Doyle Hamm via lethal injection.[88] For two hours, state execution personnel punctured Hamm's ankles, calf, and groin in an attempt to find a viable vein, potentially puncturing Hamm's arteries and causing him to urinate blood.[89] After photographs of the botched execution were released, Alabama settled with Hamm and decided not to pursue his execution further.[90]

By asking judges to bear witness to executions, advocates can start to reverse the doctrinal and figurative erasure of individual condemned bodies. In some sense, this strategy goes against centuries of tradition that considers

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86 Tanya Chen, *A Photographer Captures the Last Meals of Wrongfully Executed Inmates*, BUZZFEED (Oct. 8, 2013, 11:53 AM), https://www.buzzfeed.com/tanyachen/photographer-captures-chilling-images-of-wrongfully-accused [https://perma.cc/MPT3-YB66].

87 Dawson v. State, 554 S.E.2d 137, 143 (Ga. 2001).

88 Bernard E. Harcourt, *The Barbarism of Alabama's Botched Execution*, N.Y. REVIEW OF BOOKS (Mar. 13, 2018, 7:00 AM), https://bit.ly/2TojpRl [https://perma.cc/GGD9-UXFT].

89 *Id.*

90 Joint Stipulation of Voluntary Dismissal, Hamm v. Dunn, No. 17-2083-KOB (N.D. Ala. Mar. 26, 2018); Harcourt, *supra* note 88.

good judging to be "psychologically . . . distan[t]" from their judgments.[91] Indeed, the quintessential image of justice herself is blind.[92]

But strong arguments can be made that judges *should* engage affectively with the parties before them. While "exil[ing] affective response" leads to "legal judgments that are shallow, routinized, devaluative, and even irresponsible," legal decisionmaking is "enriched and refined by the operation of emotions."[93] That neutral judges can "impose rulings that would otherwise be too painful to pronounce" does not serve as a protective measure in the death penalty context.[94] Instead, such critical distance will be used to continue inflicting, justifying, and hiding the pain suffered by those executed at the state's hands.

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91 Judith Resnick, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1885 (1988) ("If freed from having to engage personally with what occurs subsequent to their judgments, judges may be enabled to impose rulings that would otherwise be too painful to pronounce.").

92 *Id.* at 1885-86 ("The judicial icon is a goddess-like figure, frequently shown with scales, sword, and, after the sixteenth century, with a blindfold.").

93 Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997, 2004 (2010).

94 Resnick, *supra* note 91, at 1885.