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Let's Make a Deal: Waiving the Eighth Amendment by Selecting a Cruel and Unusual Punishment

JEFFREY L. KIRCHMEIER*

"Of two evils, the least should be chosen."

—Cicero, De Officiis, III, 1.

"The clause seems to express a great deal of humanity, ... but ... it seems to have no meaning in it."


I. INTRODUCTION

In Benton, Louisiana, a 45-year-old former elected official and baseball coach who was accused of child molestation was given a choice.1 The judge told the defendant that if he pleaded guilty he could choose between: (1) a 45-year prison sentence or (2) castration and a 25-year sentence.2

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2. See id. The castration involved surgery to remove the defendant's testicles instead of “chemical castration,” which requires defendants to take chemicals to suppress their sex drive. See id. See also Around the U.S.: Molester Castrated In Try to Avoid 100-Year Term, DALLAS MORNING NEWS, Jan. 21, 1998, at 16A, available in LEXIS, News Library, Dalnws File [hereinafter Molester Castrated] (noting that a convicted child molester underwent voluntary castration, hoping the Illinois judge would use that fact to give the defendant a lighter sentence); Linda Beckman, Comment, Chemical Castration: Constitutional Issues of Due Process, Equal Protection, and Cruel and Unusual Punishment, 100 W. VA. L. REV. 853 (1998) (arguing that chemical castration is not a cruel and unusual punishment).
In Virginia, a criminal defendant agreed to leave the state as part of a plea bargain. The deal was made even though the Supreme Court had held that banishment is cruel and unusual punishment.

In 1997, when Washington state’s primary method of execution was hanging and inmates could choose lethal injection, a 410-pound defendant refused to choose lethal injection, thereby selecting hanging by default. He made that choice despite the fact he would likely be decapitated if hanged. Previously, the Supreme Court indicated that beheading is a cruel and unusual punishment.

In 1999 in Arizona, two German brothers each chose the gas chamber over lethal injection for his method of execution, as their attorneys gambled that the courts would find that execution by gas is cruel and unusual punishment. The gamble lost. Although the United States Court of Appeals for the Ninth Circuit issued stays of execution and held that execution by gas is cruel and unusual punishment, the United States Supreme Court lifted the stays. Subsequently, once again the state gave each of the brothers the choice of execution method, and the first brother chose lethal injection and the second chose the gas chamber. Each was executed by his chosen method.

Most people may only wonder at the difficulty of choosing one’s own punishment when those options involve mutilation, torture, death, or all

3. See Rutherford v. Blankenship, 468 F. Supp. 1357, 1360-61 (W.D. Va. 1979) (holding that condition of banishment as part of a plea bargain violates the Eighth Amendment); see also Dear Wing Jung v. United States, 312 F.2d 73, 76 (9th Cir. 1962) (holding that banishment as a condition of suspension of sentence violates either the Eighth Amendment or due process of law).


6. See id. Washington’s execution protocol provides calculations for the length of rope for defendants weighing 120 to only 220 pounds. See id. “An engineer estimated that Mr. Rupe could be executed by a rope three feet, six inches long without fear of decapitation. But a biomechanical engineer testified he couldn’t predict what would happen with a shorter rope.” Id.


8. See Jerry Nachtigal, Arizona Executes German Citizen by Lethal Injection, DAYTON DAILY NEWS, Feb. 25, 1999, at 4A, available in LEXIS, News Library, Daydnw File. At the time, the United States Court of Appeals for the Ninth Circuit had held that execution by gas was cruel and unusual punishment. See Fierro v. Gomez, 77 F.3d 301, 309 (9th Cir. 1996) (holding that execution by lethal gas under California protocol is cruel and unusual punishment), vacated and remanded, 519 U.S. 918 (1996) (remanding case in light of change in California’s death penalty statute making lethal injection the default method of execution), on remand, Fierro v. Terhune, 147 F.3d 1158 (1998). In the case of the German brothers, however, the United States Supreme Court indicated that the lethal gas claim was waived. See Stewart v. LaGrand, 119 S. Ct. 1018, 1020 (1999).


12. See id.
three. Generally, members of our society can take comfort in the fact that they will not be subjected to cruel and unusual punishments because of protections we are afforded by the Eighth Amendment. However, the cases discussed above raise the issue of whether a criminal defendant may be subjected to a cruel and unusual punishment if the defendant chooses that punishment over a constitutional punishment.

This Article addresses the question of whether the cloak of “choice” can elevate an unconstitutional punishment to a constitutional one. Until recently, some commentators assumed that certain punishments were unconstitutional under all circumstances. However, the Supreme Court recently indicated that an elected punishment may never be a cruel and unusual punishment.

This Article begins with a discussion of the Eighth Amendment, including a discussion of the Supreme Court’s analysis regarding what punishments are cruel and unusual. Next, this Article addresses areas where the Court has allowed defendants to waive Eighth Amendment protections in various contexts. Then, this Article discusses the Supreme Court and lower court decisions that address whether one may waive Eighth Amendment protections by choosing a cruel and unusual punishment.

Finally, this Article explains that at least in the context of punishment type, a defendant’s choice should not waive Eighth Amendment protections. The ban on cruel and unusual punishments is a right that differs significantly from other constitutional criminal rights. First, the Eighth Amendment protects individuals, but the Supreme Court has indicated that the amendment also serves a societal purpose by prohibiting the use of especially cruel punishments. The ban on cruel and unusual punishments preserves the right of society not to have barbarous punishments used on its behalf. Second, the waiver of this right differs from the waiver of other

13. U.S. CONST. amend. VIII.
14. Also, recent activities regarding the use of the electric chair highlight the importance of the issue. Florida legislators and Governor Jeb Bush have agreed to hold a special session early in 2000 to consider giving condemned inmates the choice between the electric chair and lethal injection. See John Kennedy, Death-Penalty Changes for New Year: The Electric Chair is Expected to Get Pushed Aside for Lethal Injection, and Bush Wants a Speedier Appeals Process, ORLANDO SENTINEL, Dec. 10, 1999, at D4, available in LEXIS, News Library, Orsent File. The legislative action was in response to the United States Supreme Court’s decision to grant review of Florida’s use of the electric chair. See id.; see also Bryan v. Moore, 120 S. Ct. 394 (1999) (granting petition for writ of certiorari to address the constitutionality of the use of the electric chair). Meanwhile, after a recent execution in Ohio, Governor Bob Taft was surprised to learn that his state still allows the electric chair as an option and asked legislators to ban its use. See Sandy Theis, Taft Calls for an End to Electric Chair Use, PLAIN DEALER, Nov. 24, 1999, at 1A, available in LEXIS, News Library, Clevdp File.
15. See, e.g., Steven A. Blum, Public Executions: Understanding the “Cruel and Unusual Punishments” Clause, 19 HASTINGS CONST. L.Q. 413, 451 (1992) (“One may not consent to cruel and unusual punishment. For example, even if given the choice of punishments between torture and death, the prisoner could not choose torture.”).
constitutional criminal rights because such Eighth Amendment waivers do not benefit individuals or society. Third, to allow such Eighth Amendment waivers would permit legislatures to create any punishment options it desired, such as boiling in oil, drawing and quartering, or beheading. Therefore, the Eighth Amendment prohibits the use of a cruel and unusual punishment even if the defendant has chosen that punishment over a constitutional one.

II. EIGHTH AMENDMENT BACKGROUND

A. Origins of the "Cruel and Unusual Punishments" Clause

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The language of the Eighth Amendment derives from the English Bill of Rights of 1689, though there were previous documents, such as the Bible and the Magna Carta, that were concerned that sentences be proportional. By the time the "cruel and unusual punishment" provision was adopted as part of the Eighth Amendment in 1791, the language had been used in several other documents in the United States so that the phrase was considered constitutional "boilerplate" language.

17. U.S. Const. amend. VIII. The Eighth Amendment prohibition against cruel and unusual punishments applies to the states through the Fourteenth Amendment. See U.S. Const. amend. XIV; Robinson v. California, 370 U.S. 660, 667 (1962) (holding that a state law that makes narcotics addiction a crime violates the Eighth Amendment).

18. "In fact, the entire text of the Eighth Amendment is taken almost verbatim from the English Declaration of Rights, which provided "[t]hat excessive Bail ought not to be required nor excessive Fines imposed nor cruel and unusual Punishments inflicted..." Harmelin v. Michigan, 501 U.S. 957, 966 (1991) (Scalia, J., plurality opinion) (quoting English Declaration of Rights of 1689).

19. The first historical, sanctioned, and arguably moral version of like for like in Western culture is the lex talionis, or law of exact retaliation. Readers will be familiar with the lex talionis in the 'eye for eye, tooth for tooth' language of three separate passages of the Jewish Torah, or biblical Pentateuch. MARVIN HENBERG, RETRIBUTION: EVIL FOR EVIL IN ETHICS, LAW, AND LITERATURE 60 (1990); see also Exodus 21:22-25; Deuteronomy 19:19-21; Leviticus 24:17-21. Interestingly, these three Biblical provisions that provide the "eye for an eye" language actually address three specific crimes: "hurting a pregnant woman, perjury, and guarding Yahweh's altar against defilement." HENBERG, supra, at 69.

20. See Daniel E. Hall, When Caring Meets the Eighth Amendment: Whipping Offenders in the United States, 4 WIDENER J. PUB. L. 403, 409-10 (1995); see also Solem v. Helm, 463 U.S. 277, 285-86 (1983) (discussing English history of guaranteeing proportional punishments). One commentator, in reviewing the history of the development of the Eighth Amendment, argues that the American framers misinterpreted English law. See Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 CAL. L. REV. 839, 860-65 (1969). According to Mr. Granucci, under English law, the prohibition against cruel and unusual punishments only reflected a prohibition on excessive punishments, but the Americans interpreted it to proscribe torturous punishments. See id. at 865. Cf. Harmelin, 501 U.S. at 967-85 (Scalia, J., plurality opinion) (arguing that the Eighth Amendment does not have a general proportionality component); Weems v. United States, 217 U.S. 349, 385-413 (1910) (White, J., dissenting) (arguing that the Eighth Amendment only prohibits torturous punishments and does not have a proportionality component).

21. See Granucci, supra note 20, at 840. In the United States, the clause was first used in the Declaration of Rights in Virginia's Constitution upon a proposal by George Mason. See id. Before it was
Perhaps because the language was already accepted in the country, apparently there was little discussion of the meaning of the terms "cruel and unusual punishment" by the members of the First Congress. As one commentator noted:

In the glorious act of framing a social compact expressive of the supreme law, Americans tended simply to draw up a random catalogue of rights that seemed to satisfy their urge for a statement of first principles—or for some of them. That task was executed in a disordered fashion that verged on ineptness.

Thus, there has been considerable debate about the original meaning of the ban on cruel and unusual punishments, and the main source of the meaning of the terms "cruel and unusual" has been the Supreme Court's interpretation.

B. The Supreme Court's Eighth Amendment Analysis

The Supreme Court has developed several principles from the Eighth Amendment. First, the Eighth Amendment prohibits particular punishments that are inherently unacceptable and beyond civilized standards. Second, the amendment prohibits punishments that are excessive in relation to the crime or the criminal. Third, the amendment requires appro-

 adopted in the U.S. Constitution, eight other states adopted the phrase and the federal government used the clause in the Northwest Ordinance of 1787. See id.

22. See Hall, supra note 20, at 411-12 n.35; Furman v. Georgia, 408 U.S. 238, 244 (1972) (Douglas, J., concurring). "The Eighth Amendment received little attention during the proposal and adoption of the Federal Bill of Rights." Harmelin, 501 U.S. at 979 (Scalia, J., plurality opinion).

23. Granucci, supra note 20, at 840-41 n.8.


[We face substantial obstacles to ascertaining the original intention in this instance: (a) we have no text or document in which the framers stated their shared intention (if they even had one) in including the Clause in the eighth amendment; (b) the framers left no statement telling us what they understood the language of this Clause to mean; (c) we have no list prepared by the framers specifying the properties a punishment must have to be prohibited under the Clause; (d) they provided no exhaustive catalogue of the punishments they regarded as prohibited under this Clause. Since we have no explicit indication in any of these four ways of what they understood by the Clause, any knowledge that we claim of their intention in using it must be based on very indirect evidence.

Id. at 893. Cf. generally Granucci, supra note 20.

26. See, e.g., Margaret J. Radin, The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause, 126 U. PA. L. REV. 989, 997-1000 (1978). In addition to the three principles listed above, Professor Radin notes that the Eighth Amendment also applies to prison conditions and the power to criminalize. See id. at 992-96.

27. See, e.g., Weems v. United States, 217 U.S. 349, 381 (1910) (addressing hard labor).

28. See, e.g., Harmelin v. Michigan, 501 U.S. 957, 994 (1991) (majority of Justices concluding that the Eighth Amendment has a proportionality component for capital punishment cases); Solem v. Helm, 463 U.S. 277, 303 (1983) (setting aside, as disproportionate under the Eighth Amendment, a sentence of life imprisonment under a South Dakota recidivist statute); Enmund v. Florida, 458 U.S. 782, 801 (1982) (holding that imposing a death sentence for felony murder defendant who did not kill or con-
priate procedures to ensure that a punishment is imposed in a way that is fair to the degree required by the punishment and consistent with the objectives of that punishment. 29

The beginning of the Court’s interpretation of the Eighth Amendment starts almost ninety years after the ratification of the Eighth Amendment, when the United States Supreme Court made its first substantive ruling regarding the meaning of “cruel and unusual punishments” in Wilkerson v. Utah. 30 In that case, the Court held that an execution by shooting as a punishment for first degree murder was not a cruel and unusual punishment. 31 Although the Court rejected the defendant’s arguments, it did indicate that certain forms of torture would be prohibited by the Eighth Amendment, and it referred to examples of where a prisoner is drawn or dragged to the place of execution, embowelled alive, beheaded and quartered, dissected in public, or burned alive. 32 The Court added that other punishments “in the same line of unnecessary cruelty” violate the Eighth Amendment. 33

The Court expanded the discussion twelve years later in upholding a challenge to execution by electrocution under the Fourteenth Amendment in In re Kemmler. 34 “Punishments are cruel when they involve torture or a lingering death . . . . It implies there is something inhuman and barbarous,—something more than the mere extinguishment of life.” 35 Although these early Eighth Amendment cases focused on the history and cruel nature of certain punishments, subsequent cases began to place more empha-

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29. See, e.g., Gregg v. Georgia, 428 U.S. 153, 188 (1976) (noting that the death penalty cannot be imposed under sentencing procedures that create a “substantial risk” that it will be imposed “in an arbitrary and capricious manner”).

30. 99 U.S. 130 (1878). The Eighth Amendment was ratified in 1791. See Jonathan A. Vold, Note, The Eighth Amendment “Punishment” Clause After Helling v. McKinney: Four Terms, Two Standards, and a Search for Definition, 44 DePaul L. Rev. 215, 220 (1994). Fourteen years before Wilkerson, the Court held that the Eighth Amendment did not apply to the states, but it added that there was nothing cruel or unusual in a $50 fine and three-months imprisonment at hard labor for the illegal sale and keeping of intoxicating liquors. See Pervear v. Commonwealth, 72 U.S. 475, 479-80 (1866).

31. See Wilkerson, 99 U.S. at 137.

32. See id. at 135-36.

33. Id. at 136.

34. 136 U.S. 436 (1890). At the time Kemmler was decided, the Court did not apply the Eighth Amendment to the states, so the challenge was based upon the Fourteenth Amendment. See id. at 446. In Glass v. Louisiana, 471 U.S. 1080 (1985), the Court denied a petition for writ of certiorari that raised an Eighth Amendment challenge to the electric chair. Such a denial is not a ruling on the merits, but Justice Brennan in dissent noted that electric chair claims are typically rejected on the basis of Kemmler and that the case “was grounded on a number of constitutional premises that have long since been rejected and on factual assumptions that appear not to have withstood the test of experience.” Id. at 1081 (Brennan, J., dissenting). Recently, the Supreme Court granted a petition of certiorari to address the constitutionality of Florida’s use of the electric chair. See Bryan v. Moore, 120 S. Ct. 394 (1999).

sis on contemporary society's views regarding acceptable punishments.\(^{36}\)

In 1910, the Supreme Court finally undertook its first comprehensive
discussion of the Eighth Amendment in \textit{Weems v. United States}.\(^{37}\) In that
case, the Court's focus shifted from the original meaning of the Eighth
Amendment toward a more contemporary interpretation.\(^{38}\) In \textit{Weems}, the
defendant was convicted of falsifying a public and official document and
given the sentence of fifteen years of \textit{cadena temporal}.\(^{39}\) Weems chal-
lenged the sentence of \textit{cadena temporal}, which included "hard and painful
labor"\(^{40}\) as being cruel and unusual punishment in violation of the Philip-
ines Bill of Rights.\(^ {41}\)

The Court began by noting that the Philippine Bill of Rights provision
was taken from the United States Constitution, so "it must have the same
meaning."\(^ {42}\) The Court then discussed the history of the Eighth Amend-
ment and the cases discussed above.\(^ {43}\) The Court noted, however, "Time
works changes, brings into existence new conditions and purposes.
Therefore a principle, to be vital, must be capable of wider application than the
mischief which gave it birth. This is peculiarly true of constitutions."\(^ {44}\)
Further, the Court stated: "The clause of the Constitution, in the opinion of
the learned commentators may be therefore progressive and is not fastened
to the obsolete, but may acquire meaning as public opinion becomes en-
lighted by a humane justice."\(^ {45}\) Thus, the Court reasoned that it was not
bound by the original meaning of the terms and that while legislatures have
discretion to determine the appropriate punishment for crimes, it is up to
the judiciary to determine the constitutional limits of punishment.\(^ {46}\) How-
ever, in addressing the present facts, the Court stated that the conditions at

\(^{36}\) See, e.g., Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972);
Jacobowitz, Note, \textit{Rattling Chains and Smashing Rocks: Testing the Boundaries of the Eighth Amend-

\(^{37}\) 217 U.S. 349 (1910). "No case has occurred in this court which has called for an exhaustive
definition." \textit{Id.} at 369. See also Pressly Millen, Note, \textit{Interpretation of the Eighth Amendment—Rum-

\(^{38}\) See \textit{Weems}, 217 U.S. at 378. See also Void, \textit{supra} note 30, at 221.

\(^{39}\) See \textit{Weems}, 217 U.S. at 357-58.

\(^{40}\) \textit{Id.} at 364. The Court noted that those sentenced to \textit{cadena temporal}
"shall labor for the benefit of the state. They shall always carry a chain at the ankle, hanging from
the wrists; they shall be employed at hard and painful labor, and shall receive no assistance what-
ssoever from without the institution." There are, besides, certain accessory penalties imposed,
which are defined to be (1) civil interdiction; (2) perpetual absolute disqualification; (3) subjec-
tion to surveillance during life.

\textit{Id.} (Quoting Philippine Penal Code Arts. 105, 109).

\(^{41}\) See id. at 363-65.

\(^{42}\) Id. at 367.

\(^{43}\) See id. at 368-73.

\(^{44}\) Id. at 373.

\(^{45}\) Id. at 378.

\(^{46}\) See id. at 379.
the time of the adoption of the Constitution provided sufficient guidance.\textsuperscript{47} The sentence of \textit{cadena temporal} is cruel and unusual because "[i]t is cruel in its excess of imprisonment and that which accompanies and follows imprisonment"\textsuperscript{48} and "[i]t is unusual in its character."\textsuperscript{49} Additionally, the Court expressed concern that the punishment was excessive in relation to the crime.\textsuperscript{50}

Over the next fifty years, the Court addressed the Eighth Amendment in only a handful of cases.\textsuperscript{51} Among these, the Court in \textit{Louisiana ex rel. Francis v. Resweber}\textsuperscript{52} held that having to repeat an electrocution to successfully execute a defendant was not cruel and unusual punishment.\textsuperscript{53} It was not until 1958 in \textit{Trop v. Dulles},\textsuperscript{54} however, that the Court extensively expanded on the discussion of the Eighth Amendment in \textit{Weems}.

In \textit{Trop}, the petitioner, a native born American, had lost his United States citizenship because of his conviction by court-martial for desertion during war.\textsuperscript{55} A plurality of the Court held that denationalization as a punishment is prohibited by the Eighth Amendment.\textsuperscript{56} The plurality began its

\textsuperscript{47} See id. at 375.
\textsuperscript{48} Id. at 377.
\textsuperscript{49} Id. Although the Court noted that the statute would have been struck down even if it were a "[f]ederal enactment," it also seemed more willing to strike down the punishment because it was foreign: "It has no fellow in American legislation. Let us remember that it has come to us from a government of a different form and genius from ours." Id.
\textsuperscript{50} See id. at 380-82. "Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense." Id. at 366-67.

In a dissenting opinion joined by Justice Holmes, Justice White argued that the Court wrongly gave a proportionality component to the Eighth Amendment:

The word cruel, as used in the Amendment, forbids only the lawmaking power, in prescribing punishment for crime and the courts in imposing punishment from inflicting unnecessary bodily suffering through a resort to inhuman methods for causing bodily torture, like or which are of the nature of the cruel methods of bodily torture which had been made use of prior to the Bill of Rights of 1689, and against the recurrence of which the word cruel was used in that instrument.

Id. at 409 (White, J., dissenting).

\textsuperscript{51} See Trop v. Dulles, 356 U.S. 86 (1958) (holding that revoking citizenship is a violation of cruel and unusual punishment); \textit{Louisiana ex rel. Francis v. Resweber}, 329 U.S. 459, 464 (1947) (holding that a second electrocution after the first attempt failed was not cruel and unusual); \textit{United States ex rel. Milwaukee Soc. Democratic Pub'l g Co. v. Burleson}, 255 U.S. 407, 430, 435 (1921) (Brandels, J., dissenting) (arguing that a fine imposed for mail fraud, which may compound indefinitely over time, constitutes an excessive fine in violation of the Eighth Amendment); \textit{Badders v. United States}, 240 U.S. 391, 393-94 (1916) (holding that crime of mailing letters in execution of scheme to defraud, which made mailing of each letter a separate offense, did not violate Eighth Amendment).

\textsuperscript{52} 329 U.S. 459 (1947).

\textsuperscript{53} See id. at 464. Also, in \textit{Resweber}, four Justices stated that the Eighth Amendment applies to the states through the Fourteenth Amendment. See id. at 462-63. A majority of the Court would support this conclusion fifteen years later in \textit{Robinson v. California}, 370 U.S. 660, 664-68 (1962).

\textsuperscript{54} 356 U.S. 86 (1958).

\textsuperscript{55} See id. at 88.

\textsuperscript{56} See id. at 101-04.
Eighth Amendment analysis by noting that denationalization was not disproportionate to the crime of wartime desertion,\textsuperscript{57} thus framing the issue as whether the penalty is forbidden by "the principle of civilized treatment guaranteed by the Eighth Amendment."\textsuperscript{58}

In looking at the punishment of denationalization per se, the opinion noted that just because the death penalty may be acceptable does not mean that any punishment short of death is permitted.\textsuperscript{59} The plurality briefly discussed the history of the Eighth Amendment, noting, "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards."\textsuperscript{60}

Then, the plurality made a statement that has often been repeated in Eighth Amendment cases: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."\textsuperscript{61}

The Court held that denationalization as a punishment does violate the Eighth Amendment, and the opinion noted that "[i]t is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development."\textsuperscript{62} The plurality looked at practices in other countries, concluding that a denationalized citizen is stateless, "a condition deplored in the international community of democracies,"\textsuperscript{63} and he may be subject to banishment, "a fate universally decried by civilized people."\textsuperscript{64} Thus, the plurality used objective societal standards as part of its Eighth Amendment analysis.

Another point of interest in the \textit{Trop} case is that the plurality, in a footnote, discussed a possible distinction between the terms "cruel" and "unusual."\textsuperscript{65} Noting that some decisions by the Court have only examined a punishment "in light of the basic prohibition against inhuman treatment,"\textsuperscript{66} the opinion stated that if the word "unusual" is to have any meaning, it should signify "something different from that which is generally done."\textsuperscript{67} This aspect of \textit{Trop} also reflected an essential connection between current societal standards and the meaning of the Eighth Amendment.

\textsuperscript{57} See id. at 99. The opinion noted that wartime desertion may be punishable by death. See id.
\textsuperscript{58} Id.
\textsuperscript{59} See id.
\textsuperscript{60} Id. at 100.
\textsuperscript{61} Id.
\textsuperscript{62} Id. at 101.
\textsuperscript{63} Id. at 102. The opinion noted that a United Nations survey of nationality laws of 84 countries revealed that only two imposed denationalization as a penalty for desertion. See id. at 103.
\textsuperscript{64} Id. at 102.
\textsuperscript{65} See id. at 100 n.32.
\textsuperscript{66} Id. The Court concluded that denationalization as a punishment meets such a test for being "unusual." See id.
\textsuperscript{67} Id.
After subsequent cases held that the Eighth Amendment applies to the states through the Fourteenth Amendment, the next major Eighth Amendment cases involved the death penalty. In Furman v. Georgia, in a long and fractured decision, the Court held that the death sentences before it, which were imposed under a sentencing system of complete jury discretion, violated the Eighth Amendment. While two of the Justices reasoned that the death penalty was unconstitutional in all cases, the other three Justices who voted to strike down the statutes focused on the arbitrary nature of the process in which the sentences were imposed. Thus, the Justices indicated that not only does the Eighth Amendment contain a prohibition on certain punishments and have a proportional guarantee, it also mandates certain procedural requirements, at least in the context of capital cases.

In Furman, the Justices followed the “evolving standards” approach of Trop, again reflecting the connection between the interpretation of the Eighth Amendment and societal standards. Despite the nine separate opinions, all of the Justices rejected a strict historical interpretation of the Eighth Amendment and refused to limit the amendment’s restrictions to punishments that were prohibited in the late Eighteenth Century.

A few years later, the Court again addressed the issue of capital punishment under the Eighth Amendment in Gregg v. Georgia. In that case, the Court upheld the constitutionality of the death penalty and the guided discretion sentencing scheme that was at issue.

The Gregg plurality began its analysis by quoting the “evolving stan-

68. See Powell v. Texas, 392 U.S. 514 (1968) (holding that a law prohibiting intoxication in a public place was not cruel and unusual); Robinson v. California, 370 U.S. 660 (1962) (holding that law making narcotics addiction a crime violates the Eighth Amendment).

69. 408 U.S. 238 (1972). Furman is often overlooked in evaluations of the Court’s Eighth Amendment analysis because of the subsequent decision in Gregg v. Georgia, 428 U.S. 153 (1976). Furman, however, was never overruled and it remains good law. One difficulty with the case is the fact that each Justice wrote a separate opinion, creating an overwhelming overall length of the decision. See Bob Woodward & Scott Armstrong, The Brethren: Inside the Supreme Court 220 (1981) (“The nine separate opinions totaled 50,000 words, 243 pages—the longest decision in the Court’s history.”).

70. See Furman, 408 U.S. at 239-40.

71. See id. at 305-06 (Brennan, J., concurring); id. at 358-60 (Marshall, J., concurring).

72. See id. at 256 (Douglas, J., concurring); id. at 309-10 (Stewart, J., concurring); id. at 313 (White, J., concurring).

73. See id. at 241-43 (Douglas, J., concurring); id. at 265-66 (Brennan, J., concurring); id. at 307-08 (Stewart, J., concurring); id. at 312-14 (White, J., concurring); id. at 329 (Marshall, J., concurring) (“a penalty that was permissible at one time in our Nation’s history is not necessarily permissible today”); id. at 382 (Burger, C.J., dissenting, joined by Blackmun, Powell, and Rehnquist, JJ.) (“the Eighth Amendment prohibition cannot fairly be limited to those punishments thought excessively cruel and barbarous at the time of the adoption of the Eighth Amendment”).

74. 428 U.S. 153 (1976). In Gregg, Justice Stewart wrote the main opinion, which was joined by Justices Powell and Stevens. See id.

75. See id. at 168-69.
dards" language from *Trop.* The plurality stressed that "an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment." The plurality then used a two-prong analysis in determining whether a punishment violates the Eighth Amendment. First, a court must look at contemporary standards, examining "objective indicia that reflect the public attitude toward a given sanction." Second, a punishment must accord with "the dignity of man." At the least, a punishment must not be excessive, meaning (1) "the punishment must not involve the unnecessary and wanton infliction of pain," and (2) "the punishment must not be grossly out of proportion to the severity of the crime."

Applying the first prong of the analysis to the death penalty per se, the plurality looked to history, state legislatures’ responses to *Furman,* popular votes, and jury verdicts. The plurality noted that the enactment of new death penalty statutes after *Furman* and jurors’ willingness to impose the death penalty weighed in favor of finding that contemporary society accepts the death penalty and that, therefore, it does not violate the Eighth Amendment.

Concerning the subjective prong, the plurality looked to the justifications for the death penalty, such as retribution and deterrence, noting that "the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering." Finally, the plurality looked at whether the punishment was disproportionate to the crime and found that the death penalty is not a cruel and unusual punishment.

Thereafter, the plurality examined whether Georgia’s procedures imposing the death penalty violated the Eighth Amendment. Thus, the opinion reasserted that the Eighth Amendment mandates certain procedural requirements in capital cases.

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77. *Id.*

78. *Id.*

79. *Id.* (quoting *Trop,* 356 U.S. at 100).

80. *Id.*

81. *Id.* This analysis does not require a legislature to select the least severe penalty. *See id.* at 175. Furthermore, the Court presumes a punishment selected by a democratically elected legislature is valid. *See id.*

82. *See id.* at 176-82.

83. *See id.* at 182.

84. *See id.* at 183.

85. *Id.*

86. *See id.* at 187.

After that decision, the Supreme Court consistently followed Gregg's principles, using both an objective and subjective analysis for determining whether a punishment is unconstitutional under the Eighth Amendment. Most of the subsequent Eighth Amendment cases dealt either with procedures for imposing the death penalty or with prison conditions, where the Court has held that the Eighth Amendment applies to conditions of confinement that are not imposed as part of the sentence.

Only rarely has the Supreme Court struck down a specific punishment as cruel and unusual, as it did in Weems and Trop. However, one year after Gregg, in Coker v. Georgia, the Court struck down the use of the death penalty for a defendant convicted of raping a woman because the punishment was disproportionate to the crime. In that case, one of the foundations for the Court's ruling was the objective indicators that contemporary society—as reflected in the form of legislatures and juries—had rejected the death penalty for rape crimes. In other capital cases, the Court has looked at societal standards and similarly limited the application of the death penalty on such factors as the age of the defendant, insanity

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Many of the prison cases address evolving standards of decency in the context of prison conditions and prisoners' medical needs. The "deliberate indifference" standard applied in these cases, however, is not applicable to punishment methods discussed in this Article. See Rhodes, 452 U.S. at 346-47 (noting that deliberate indifference analysis relies upon a different determination from that of proportionality analysis); Estelle, 429 U.S. at 102-04 (holding that deliberate indifference to medical needs of a prisoner is cruel and unusual punishment).

91. See Helling, 509 U.S. at 29-30.


93. See Coker, 433 U.S. at 593-97. The plurality noted that few states had capital punishment statutes for rape crimes and few juries imposed that punishment on rape defendants. See id.

of the defendant,95 and the role the defendant played in the homicide.96

Also, in 1983, the Court, in Solem v. Helm,97 addresses an Eighth Amendment challenge to a life sentence.98 Helm, who had six prior felony convictions, had been convicted of passing a bad check and was given a sentence of life without the possibility of parole under a South Dakota recidivist statute.99 The Court held that the sentence violated the Eighth Amendment because it was "significantly disproportionate to [the] crime."100 The Court explained that its proportionality analysis under the Eighth Amendment is guided by objective criteria, including a comparison with contemporary sentences imposed in that jurisdiction and other jurisdictions.101 Although Harmelin v. Michigan102 later questioned the validity of the test used in Solem,103 a majority of the Justices in Harmelin reaffirmed that the Eighth Amendment has a proportionality requirement.104

Perhaps because of the limited number of punishments used in the United States during its relatively short history, the Court has not had to address the constitutionality of many punishments. Today, however, several states are experimenting with alternative sentences, such as castration for sex offenders. In addition to the use of the castration option in individual sentencings, state legislatures recently have passed statutes that provide for "chemical castration" as a punishment105 and one state, Texas, has

95. See Ford v. Wainwright, 477 U.S. 399, 409-10 (1986) (holding that it violates the constitution to execute an insane defendant).
96. See Tison v. Arizona, 481 U.S. 137, 158 (1987) (holding that to execute a felony murder defendant who did not actually kill the victim, the defendant must have had major participation in the felony and shown reckless indifference to human life); Enmund v. Florida, 458 U.S. 782, 788 (1982) (holding that it violates the Constitution to execute felony murderer who did not kill or attempt to kill).
98. See id. at 283.
99. See id. at 279-82.
100. Id. at 303. Cf. Rummel v. Estelle, 445 U.S. 263, 284-85 (1980) (rejecting an Eighth Amendment challenge and holding that determining the appropriate length of a sentence is the role of the state legislature in upholding a life sentence pursuant to a Texas recidivist statute).
101. The Court noted:

In sum, a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.

Solem, 463 U.S. at 292.
103. See id. at 965.
104. See id. at 996 (Kennedy, J., concurring in part, joined by O'Connor and Souter, JJ.) (arguing that stare decisis directs adherence to a proportionality requirement); id. at 1012 (White, J., dissenting, joined by Blackmun and Stevens, JJ.) (arguing that the Eighth Amendment includes "a proportionality principle"); id. at 1027 (Marshall, J., dissenting) (same). Only Justices Scalia and Chief Justice Rehnquist argued that the Eighth Amendment—at least for non-capital cases—does not have a proportionality requirement. See id. at 965, 990-94.
105. At least six states—California, Florida, Georgia, Iowa, Louisiana, and Montana—have laws permitting chemical castration. See CAL. PENAL CODE § 645(b) & (d) (West 1999) (requiring twice convicted sex abusers of children 13 or younger, as a condition of parole, to receive regular shots of a
passed a statute allowing surgical castration.\textsuperscript{106} The Court has not had the opportunity to address whether castration is a cruel and unusual punishment, though at least one state supreme court has held that surgical castration is a cruel and unusual punishment.\textsuperscript{107}

To date, the Court has never struck down a method of execution as "cruel and unusual," although individual Justices have argued in dissent that certain methods are unconstitutional.\textsuperscript{108} The Supreme Court and lower federal courts have noted in dicta that beheading is one of the traditional methods of execution prohibited by the Eighth Amendment.\textsuperscript{109} As noted above, the Court has also mentioned that other punishments, such as public dissection and burning alive, would violate the Eighth Amendment.\textsuperscript{110} Further, lower federal courts have held that execution by hanging\textsuperscript{111} and by


\textsuperscript{107} See State v. Brown, 326 S.E.2d 410, 412 (S.C. 1985) (holding that castration is a cruel and unusual punishment). Recently, the Oklahoma legislature considered a bill that would allow castration for convicted sex offenders, but "[e]ven its most ardent supporters in the House believe it is unconstitutional because it would impose cruel and unusual punishment." Tim Talley, Politically Charged Legislation, THE JOURNAL RECORD (Oklahoma City, Okla.), Mar. 16, 1999, available in 1999 WL 9844009.

Of the two types of castration in sex offender statutes, surgical castration is more likely unconstitutional than the use of chemical castration, which is not permanent and is seen more as a type of treatment by some. See Beckman, supra note 2, at 880-93 (arguing that chemical castration is not a cruel and unusual punishment for male sex offenders). Cf. Robert D. Miller, Forced Administration of Sex-Drive Reducing Medications to Sex Offenders: Treatment or Punishment?, 4 PSYCHOL. PUB. POL'y & L. 175, 183-88, 195-99 (1998) (questioning legality and ethics of constitutionality of chemical treatment of criminal defendants).


\textsuperscript{110} See Wilkerson, 99 U.S. at 135.

\textsuperscript{111} See Rupe, 863 F. Supp. at 1315 (holding that hanging a defendant who weighs over 400 pounds presented a significant risk of decapitation and therefore the method was unconstitutional), case held
gas are cruel and unusual punishments, though neither holding yet has been upheld by the Supreme Court. Recently, especially gruesome executions in Florida's electric chair have raised questions about that method of execution, and the Supreme Court has granted a petition for a writ of certiorari to evaluate the electric chair.

In the analysis of specific execution methods, the lower courts have generally followed the Supreme Court in examining both objective and subjective factors. Although one Ninth Circuit decision placed more emphasis on subjective factors, the Supreme Court has continued to look

moot by Rupe, 93 F.3d at 1438-39 (noting that under new Washington law, a capital defendant will be executed by lethal injection unless he or she chooses to be hanged). See also Campbell v. Wood, 511 U.S. 1119, 1121-22 (1994) (Blair against dissenting from denial of stay of execution and denial of petition for writ of certiorari) (arguing that execution by hanging violates the constitution).

112. See LaGrand v. Stewart, 173 F.3d 1144, 1149 (9th Cir.) (holding that Arizona's use of the gas chamber violates the Eighth Amendment, rev'd and injunction vacated, Stewart v. LaGrand, 119 S. Ct. 1018, 1021 (1999); Fierro v. Gomez, 77 F.3d 301, 309 (9th Cir.) (holding California's use of gas chamber violates the Eighth Amendment), vacated and remanded, 519 U.S. 918 (1996) (remanding case in light of change in California's death penalty statute making lethal injection the default method of execution).

113. See Deborah W. Denno, Is Electrocuion an Unconstitutional Method of Execution? The Engineering of Death Over the Century, 35 WM. & MARY L. REV. 551, 690 (1994) (arguing that execution in the electric chair is a cruel and unusual punishment); Jo Becker, Court May Be Ready to Rethink Chair, ST. PETERSBURG TIMES, July 10, 1999, at 1A, available in LEXIS, News Library, Sunpete File ("[A]mid signs that the state Supreme Court is willing to reconsider Florida's method of executing killers, Gov. Jeb Bush . . . reiterated his support for the electric chair"); Mike Schneider, Electric Chair Faces New Court Challenge: Lawyer Says It's Cruel, Unusual, SUN-SENTINEL, July 28, 1999, at 6B, available in LEXIS, News Library, Sunsent File (reporting that: "Flames erupted during the executions of [Jesse] Tafero and [Pedro] Medina in 1990 and 1997; and during [Allen] Davis' execution [in July 1999], blood gushed from the mask covering his face, poured over his collar and chest, then oozed through the buckle holes on the chest strap holding him in the oaken chair").

114. See Bryan v. Moore, 120 S. Ct. 394 (1999) (granting petition for writ of certiorari to address the constitutionality of Florida's use of the electric chair).

115. See Fierro, 77 F.3d at 309 (holding that execution by lethal gas under California protocol is cruel and unusual punishment), vacated and remanded, 519 U.S. 918 (1996) (remanding case in light of change in California's death penalty statute making lethal injection the default method of execution).

116. See Campbell v. Wood, 18 F.3d 662, 682-83 (9th Cir. 1994) (holding that execution by hanging is not a cruel and unusual punishment and noting that fact that few states use hanging is not dispositive). In Campbell, the court stressed that review of methods of execution should rely more on evidence of pain involved in the challenged method than on the number of states that use that method of execution. See id. at 682. The court held, "[w]e cannot conclude that judicial hanging is incompatible with evolving standards of decency simply because few states continue the practice." Id.

In a strong dissent, the dissenting judges criticized the majority for not following Supreme Court precedent on the proper analysis. See id. at 692-711 (Reinhardt, J., dissenting). Judge Reinhardt wrote:

If only a single, narrow "unnecessary infliction of pain" test applies to Eighth Amendment challenges to methods of punishment, the majority must be truly sagacious in discovering this rule, for it is the first court in more than two centuries of the Bill of Rights ever to have suggested it. In fact, the premise upon which the majority's holding is founded is so novel and extraordinary it was not even suggested by the state.

Id. at 706. Others have criticized the majority decision on that ground that it "constituted an unsophisticated and disappointing exercise in Eighth Amendment jurisprudence." Deborah Denno, Getting to Death: Are Executions Constitutional?, 82 IOWA L. REV. 319, 340 (1997) [hereinafter Denno, Getting
to objective standards—such as jurors and legislatures—in its Eighth Amendment analysis. 117

Thus, in addition to requiring certain procedures, the Eighth Amendment prohibits certain punishments per se and prohibits punishments that are disproportionate to the crime. Although the Supreme Court has not found many punishments to be "cruel and unusual," there are some punishments that it has found unconstitutional and others, such as torture and beheading, that the Court has indicated would violate the constitution.

III. WAIVER OF EIGHTH AMENDMENT CLAIMS

A. General Eighth Amendment Waiver

Although certain punishments and procedures violate the Eighth Amendment, there is an issue of whether a defendant may waive Eighth Amendment protections. The Court has long permitted criminal defendants to waive constitutional rights such as the Fourth Amendment right to be free from searches and seizures absent probable cause,118 the Fifth Amendment right against compulsory self-incrimination,119 the Sixth Amendment right to a jury trial,120 the Sixth Amendment right to confrontation,121 and the Sixth Amendment right to counsel.122

The Supreme Court has established requirements for a waiver of rights such as the right to counsel and the prohibition against compulsory self-incrimination.123 The defendant’s waiver, as reflected in the trial record,

to Death]. See also Campbell, 511 U.S. at 1121-22 (Blackmun, J., dissenting from denial of petition for writ of certiorari) (describing lower court’s conclusion as “surprising” considering the Court’s Eighth Amendment precedents).

117. See, e.g., Penry v. Lynaugh, 492 U.S. 302, 335 (1989) (rejecting argument that there is a national consensus against executing the mentally retarded and holding that it does not violate the constitution to permit such executions); Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (plurality opinion allowing execution of 16 and 17 year olds); Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (plurality opinion holding that it violates the Eighth Amendment to execute 15 year olds).

118. See Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973) (holding that the police do not need probable cause to search if the defendant consented to the search).


120. See id. (noting that a defendant waives the right to a jury trial when the defendant pleads guilty).

121. See id. (noting that a defendant waives the right to confront one’s accusers when the defendant pleads guilty).


123. See Brian R. Boch, Note, Fourteenth Amendment—The Standard of Mental Competency to Waive Constitutional Rights Versus the Competency Standard to Stand Trial, 84 J. CRIM. L. & CRIMINOLOGY 883, 890 (1994).
must be voluntary and "intelligent and knowing."\(^{124}\)

In the Constitutional context, a waiver may occur in various situations that do not require a voluntary, intelligent and knowing waiver.\(^{125}\) For example, a defendant who fails to raise an Eighth Amendment issue at the appropriate time will waive that claim,\(^{126}\) and failure to follow certain state procedural rules will result in the waiver of all claims.\(^{127}\) Even the timing of other Court decisions may allow a defendant to be executed despite a constitutional violation in the case.\(^{128}\) For these types of waivers of Eighth


125. "If a defense attorney fails to cross-examine a witness, neglects to raise and preserve a point, or allows the time for appeal to pass, he may be waiving constitutional rights of his client." Michael E. Tigar, Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel, 84 HARV. L. REV. 1, 16 (1970). Of course, in this context, the waiver often occurs because of something the defendant's attorney did or failed to do and the defendant may not even be aware that a waiver is occurring. See id. at 16-19; see, e.g., Coleman v. Thompson, 501 U.S. 722, 752-54 (1991) (holding that federal courts would not review capital defendant's claims where defense attorney filed notice of appeal in state habeas proceedings three days late). Recently, a book was published about Roger Coleman's attempts to get the courts to consider his evidence of innocence despite the error made by his attorneys. See generally JOHN C. TUCKER, MAY GOD HAVE MERCY (1997) (discussing Roger Coleman's case).

126. See McCleskey v. Zant, 499 U.S. 467, 502-03 (1991) (adopting strict waiver rule for defendants who fail to raise an issue in their first habeas corpus petition); see also Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. § 2244 (Supp. II 1997)) (same). Although McCleskey and some of the other cases cited in support of the above paragraph did not specifically involve Eighth Amendment claims, the Court made no distinction regarding the constitutional basis for the underlying claim. Also, subsequent cases have applied these cases to Eighth Amendment claims. See, e.g., Gomez v. United States Dist. Court, 503 U.S. 653 (1992) (per curiam) (holding that the abuse of the writ doctrine regarding claims not raised in a first habeas petition bars consideration of capital defendant's Eighth Amendment claim that execution by gas is cruel and unusual punishment); cf. Herrera v. Collins, 506 U.S. 390, 417 (1993) (assuming that executing a defendant who made a post-trial "truly persuasive demonstration of 'actual innocence'" would violate the Eighth Amendment despite any procedural waiver).

In Herrera, the plurality implied that the abuse of writ doctrine would not apply to Herrera's second habeas petition's Eighth Amendment innocence claim were he able to make a "truly persuasive demonstration of 'actual innocence.'" Id. Further, at least five Justices indicated that they would require some federal substantive review of a capital defendant's claim of actual innocence, apparently even in spite of any procedural default or abuse of the writ. See id. at 444 (Blackmun, J., dissenting, joined in part by Stevens and Souter, JJ.) (arguing that if a prisoner can show "he is probably actually innocent," the execution would violate the Constitution); id. at 419 (O'Connor, J., concurring, joined by Kennedy, J.) ("I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution.").

127. See Coleman, 501 U.S. at 752 (holding that an attorney error in failing to file a state habeas appeal on time was not "cause" to excuse petitioner's procedural default); Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977) (holding that federal courts will not consider claim unless certain requirements are met where defendant's counsel failed to object to constitutional violation at trial); see also Herrera, 506 U.S. at 427 (Scalia, J., concurring) (arguing that there is no constitutional right to judicial consideration of newly discovered evidence of innocence brought forth after conviction).

128. See Teague v. Lane, 489 U.S. 288, 315-16 (1989) (holding that "new rule" will not apply to benefit a defendant if the defendant was in post-conviction proceedings when the Court announced the new rule). For example, in O'Dell v. Netherland, 521 U.S. 151, 157-58 (1997), the Court held that habeas petitioner O'Dell would not benefit from a decision that was a "new rule," and O'Dell was
Amendment or other constitutional rights, the Court does not require that the waiver be knowing, intelligent, and voluntary, though in the procedural default area, the Court used to apply a somewhat similar standard.\textsuperscript{129}

In the Eighth Amendment context, the voluntary, knowing and intelligent waiver standard does apply to capital defendants who desire to be executed and waive the right to appeal and the right to present mitigating evidence at trial.\textsuperscript{130} The issue of waiving Eighth Amendment rights by foregoing a direct appeal in a capital punishment case was addressed in a cursory order by the Court in the case that involved the first post-\textit{Furman} execution.\textsuperscript{131} In \textit{Gilmore v. Utah},\textsuperscript{132} the Court held that Gary Gilmore made a knowing and intelligent waiver of all of his federal rights when he decided to forego any appeals after his conviction and sentencing.\textsuperscript{133} Although Chief Justice Burger's concurring opinion noted that the situation of a defendant waiving his claims and asking to be executed "may be unique in the annals of the Court,"\textsuperscript{134} since \textit{Gilmore}, there have been several volunteers for execution who waived their rights.\textsuperscript{135} Several lower courts have addressed the issue of whether a capital defendant may waive the right to present mitigating evidence at trial,\textsuperscript{136} and some states have

\textsuperscript{129} In \textit{Fay v. Noia}, 372 U.S. 391, 438 (1963), the Court created a "deliberate bypass" rule that allowed federal habeas petitioners to seek relief even if they procedurally defaulted state court remedies if the petitioner had not deliberately bypassed the state procedures. The Court abandoned the "deliberate bypass" rule in \textit{Wainwright}, 433 U.S. at 87, which required a federal habeas petitioner to show "cause and prejudice" or "actual innocence" before a federal court would review claims that were procedurally defaulted in the state courts.

\textsuperscript{130} See \textit{Gilmore v. Utah}, 429 U.S. 1012, 1013 (1976) (holding that the capital defendant waived his right to appeal); Silagy v. Peters, 905 F.2d 986, 1008 (7th Cir. 1990) (holding that capital defendant waived his right to present mitigating evidence); State v. Smith, 993 S.W.2d 6, 8 (Tenn. 1999) (holding that a capital defendant's instructions to counsel to limit or forego presentation of mitigating evidence may not be overridden by the trial court if the defendant is competent and knowingly and voluntarily waived his right to present such evidence).

\textsuperscript{131} For an excellent account of Gary Gilmore's life, see \textit{Mikal Gilmore, Shot in the Heart} (1994).

\textsuperscript{132} 429 U.S. 1012 (1976).

\textsuperscript{133} See id. at 1013.

\textsuperscript{134} Id. at 1013 n.1 (Burger, C.J., concurring).

\textsuperscript{135} Of the 477 people executed between the \textit{Gregg} decision in 1976 and September 1998, more than 12%, or 60 persons, were volunteers. See \textit{Ann W. O'Neill, When Prisoners Have a Death Wish; A Rising Number of Inmates Are Volunteering to Be Executed; For Some in Gripes of Depression, It Is a Desperate Bid to Gain Control over Their Lives}, \textit{L.A. Times}, Sept. 11, 1998, at A1, available in LEXIS, News Library, Lat. File. In some states—such as Oklahoma (36%), South Carolina (27%), and Arizona (25%)—the percentage of volunteer executions is much higher. \textit{See Amy Greene & Anthony Thornton, State Executes Molester's Killer}, \textit{The Daily Oklahoman}, Aug. 5, 1998, at 1, available in LEXIS, News Library, Dyonki File. \textit{See generally Jane L. McClellan, Note, Stopping the Rush to the Death House: Third-Party Standing in Death-Row Volunteer Cases}, 26 \textit{Ariz. St. L.J.} 201, 202-14 (1994).

\textsuperscript{136} See, e.g., \textit{State v. Felde}, 422 So. 2d 370, 393 (La. 1982) (holding that there is no Eighth or Sixth Amendment violation when a defendant chooses not to present mitigating evidence); \textit{Bishop v. State},
statutes that prohibit the waiver of the right to appeal in capital cases.137

Although the Court allowed the waiver of certain Eighth Amendment rights in the execution volunteer context in Gilmore, four Justices dissented, with three of them specifically addressing the waiver issue.138 Justice White, in an opinion joined by Justices Brennan and Marshall, wrote "that the consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment."139 Justice Marshall wrote a separate opinion arguing that a defendant could not agree to be executed under an unconstitutional statute because the Eighth Amendment "also expresses a fundamental interest of society in ensuring that state authority is not used to administer barbaric punishments."140

Similarly, in Lenhard v. Wolff,141 Justice Marshall again wrote a dissent that questioned the constitutionality of such waivers, and that reiterated that the Eighth Amendment not only protects the rights of individuals, but also embodies a fundamental interest of society against state administration of barbaric punishments.142 Therefore, "[s]ociety's independent stake in enforcement of the Eighth Amendment's prohibition against cruel and unusual punishment cannot be overridden by a defendant's purported waiver."143

Also, in Whitmore v. Arkansas,144 Justice Marshall, in a dissent joined
by Justice Brennan, argued that a capital defendant should not be able to waive his right to appeal to the state supreme court. 145 He stated that “A defendant’s voluntary submission to a barbaric punishment does not ameliorate the harm that imposing such a punishment causes to our basic societal values and to the integrity of our system of justice.” 146 He added, “Certainly a defendant’s consent to being drawn and quartered or burned at the stake would not license the State to exact such punishments.” 147

B. Waiver of the Eighth Amendment in the Choice of Punishment Context

Despite such pronouncements by Justices Marshall and White, the question remained of whether a defendant may be subjected to an otherwise cruel and unusual punishment when the defendant chooses that punishment. The Supreme Court recently indicated that the answer might be "yes" if the defendant made a voluntary, knowing and intelligent waiver. Courts have been divided on this issue in the few instances where it has arisen. The few "choice" cases involve three different types of punishment choices: (1) choice of banishment; (2) choice of castration; and (3) choice of an unconstitutional method of execution.

1. Banishment Cases

As noted above, the Court in Trop held that the imposition of banishment as a punishment violates the Eighth Amendment. 148 Lower courts, however, have discussed whether the use of banishment as a punishment option is unconstitutional. In Dear Wing Jung v. United States, 149 the United States Court of Appeals for the Ninth Circuit addressed the constitutionality of a district court’s suspension of a sentence of imprisonment on the condition that the defendant leave the United States. 150 The Ninth Circuit stated that the condition was “either a ‘cruel and unusual’ punishment or a denial of due process of law. Be it one or the other, the condition is unconstitutional.” 151 Importantly, in vacating the sentence, the court noted that the fact that the defendant was, at least theoretically, free to remain in the country and serve his sentence did not validate the imposition of an unconstitutional condition upon the sentence. 152

Another conditional banishment case, Rutherford v. Blankenship, 153 reached a similar result. In that case, a defendant "voluntarily and know-

146. Id. at 173.
147. Id.
148. See supra notes 54-67 and accompanying text.
149. 312 F.2d 73 (9th Cir. 1962).
150. See id. at 75.
151. Id. at 76.
152. See id. at 75-76.
ingly” agreed to leave Virginia as part of a plea bargain. The district court held that the condition of banishment, even if accepted voluntarily and knowingly, was “null, void, and unenforceable” as being against public policy or unconstitutional. One federal district court, however, permitted banishment as a condition of parole given by executive clemency. In Carchedi v. Rhodes, the defendant was granted early parole by executive clemency upon the condition that he not return to Ohio without special permission for a period of forty years. When the defendant later filed a complaint seeking to nullify the banishment condition, the district court noted that the governor had broad powers and that a parolee “may not be entitled to the full range of rights accorded other citizens.” However, the court assumed that the defendant’s constitutional claims had some merit, but that he waived his right to challenge the constitutionality of the banishment condition. “[A] prospective parolee may, under certain narrow circumstances, waive the right to object to an arguably unconstitutional condition of his or her commutation and parole.” Here, the court held that the defendant voluntary and knowingly waived his challenge to the banishment condition. To some extent, Carchedi is distinguishable from the other conditional banishment cases because it involved a parole condition given by the broad powers of the governor and not a sentencing condition offered by a court. Still, the case is arguably inconsistent with Dear Wing Jung and Rutherford.

2. Castration Cases

In addition to the banishment context, at least one state court has held

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154. Id. at 1360.
155. Id. at 1361.
156. See id. at 1360. See also Henry v. State, 280 S.E.2d 536 (S.C. 1981) (holding that it was against public policy for a trial judge to impose banishment from the state as a condition of probation— even if the defendant agreed to the sentence).
158. See id. at 1011-12.
159. See id. at 1014.
160. Id. at 1015. The court added that “the government may impose upon the parolee certain conditions of liberty which would be unconstitutional if applied to ordinary individuals.” Id.
161. See id. at 1016.
162. Id. The Carchedi court wrote further:

The government, in effect, is offering to allow the prisoner to regain his or her freedom in return for a promise to abide by rules which, to a greater or lesser extent, limit the exercise of fundamental rights . . . . In these situations, if the individual who received the benefit later challenges the terms of the bargain, and if all other prerequisites of waiver have been met, he or she is deemed to have waived the right given up.

Id.
163. See id. at 1017-18.
164. See, e.g., United States v. Consuelo-Gonzalez, 521 F.2d 259, 265 (9th Cir. 1975) (noting that there is no presumption that parole conditions that restrict otherwise inviolable constitutional rights are impermissible).
that castration as a condition to suspension of a sentence violates the constitution. In three cases in *State v. Brown*, the Supreme Court of South Carolina held that because castration as a punishment is cruel and unusual, castration as a condition to suspension of a sentence for criminal sexual conduct was void. There are newspaper reports of other castration option cases, and Texas recently became the first state to pass a statute permitting orchiectomy, or surgical castration, as a punishment option. Several other state statutes allow "chemical castration" as a punishment option. However, apparently no castration option cases besides Brown have made it to the appellate courts.

3. Execution Method Cases

Finally, the third type of potentially unconstitutional punishment choice is where the state permits capital defendants to choose their method of execution and one of the options is an unconstitutional method of execution. These choice situations have developed from states adopting new execution methods. When a state adopts a new method, instead of resentencing defendants who were sentenced to the old method, it gives those

166. See id. at 412. Although the court cited to the state constitution's prohibition on cruel and unusual punishment, it cited two federal cases for the proposition that mutilation is a cruel and unusual punishment. See id. (citing Davis v. Berry, 216 F. 413 (D. Iowa 1914); Mickle v. Henrichs, 262 F. 687 (D. Nev. 1918)).
167. See id. at 411-12. Judges "are allowed a wide, but not unlimited, discretion in imposing conditions of suspension or probation and they cannot impose conditions which are illegal and void as against public policy." Id. at 411.
168. See Molester Offered Choice, supra note 1, at 6; see also John M.R. Bull, Texas Trucker Pleads No Contest to Molesting Lawrenceville Boy, PITTSBURGH POST-GAZETTE, June 8, 1999, at B-1, available in LEXIS, News Library, Pstgaz File (defense attorney suggested that molesting defendant might be willing to be chemically castrated in return for a reduced sentence, and district attorney noted that castration "was the first thing that ran through my mind"); Greiner, supra note 105, at 8 (Oklahoma senators passed legislation to give judges the option of sentencing sex offenders to chemical neutering or surgical castration); Molester Castrated, supra note 2, at 16A (noting that a convicted child molester underwent voluntary castration, hoping the Illinois judge would use that fact to give the defendant a lighter sentence).
169. See Tomaso, supra note 106, at 33A, (noting that Texas recently passed a statute that allows repeat sex offenders to undergo voluntary surgical castration); TEX. GOV’T CODE ANN. § 501.061 (West 1999).
170. See supra note 105.
171. In Briley v. California, 564 F.2d 849, 852-53 (9th Cir. 1977), the plaintiff brought a Civil Rights Act suit to recover for violation of his rights in a plea bargain where he was allowed to plead guilty to a lesser offense than child molestation because he consented to castration. The court, however, did not address whether castration as a punishment violated the Eighth Amendment. See id.

One may argue that chemical castration, as opposed to surgical castration, is a "treatment" and not a "punishment," and therefore is not subject to Eighth Amendment analysis. Viewing the nature of the procedure in light of current Eighth Amendment cases, however, indicates that the procedure would be subject to Eighth Amendment analysis. See Bund, supra note 105, at 180-89 (concluding that California's chemical castration law, as written, is unconstitutional because it is unnecessary for some sex offenders and it is inflicted arbitrarily).
defendants a choice, while sentencing all new capital defendants to be executed by the new method.\(^{172}\) Thus, generally only inmates sentenced prior to the enactment of the new statute are given a choice.\(^{173}\)

The statutes that give defendants a choice of execution methods are of two types depending on the default method of execution. Under one type of choice statute, if the defendant does not choose a method, the defendant is executed by the old method in effect at the time of sentencing.\(^{174}\) Under the other type, if a defendant does not choose a method, the defendant is executed by the new method.\(^{175}\)

The cases involving execution choice have come out of the Ninth Circuit, which includes California and Arizona, states that each employ the gas chamber as an option, and Washington, which has hanging as an option. Some lower courts have found these current methods of execution unconstitutional. In 1996, in *Fierro v. Gomez*,\(^{176}\) the Court of Appeals for the Ninth Circuit held that California’s use of lethal gas to execute prisoners was a cruel and unusual punishment.\(^{177}\) In 1994, in *Rupe v. Wood*,\(^{178}\) the District Court for the Western District of Washington held that hanging a man who weighed over 400 pounds would likely result in decapitation and would constitute cruel and unusual punishment.\(^{179}\) Thus, the issue eventually arose regarding how choice statutes would affect whether one could be executed by hanging or in the gas chamber.\(^{180}\)

In *Campbell v. Wood*,\(^{181}\) an en banc United States Court of Appeals for the Ninth Circuit addressed the constitutionality of hanging under Wash-

\(^{172}\) See Denno, *Getting to Death*, supra note 116, at 394-96.

\(^{173}\) In South Carolina, however, capital defendants sentenced after that state’s choice statute was enacted also get to choose their method of execution. See id. at 396; S.C. CODE ANN. §24-3-530(A-B) (Law. Co-op. 1998).

\(^{174}\) See Denno, *Getting to Death*, supra note 116, at 394-96.

\(^{175}\) See id.

\(^{176}\) 77 F.3d 301 (9th Cir. 1996) [hereinafter Fierro II], vacated and remanded, Gomez v. Fierro, 519 U.S. 918 (1996) (remanding case in light of change in California’s death penalty statute making lethal injection the default method of execution), on remand, Fierro v. Terhune, 147 F.3d 1158 (1998) [hereinafter “Fierro III”].

\(^{177}\) See id. at 309.

\(^{178}\) 863 F. Supp. 1307 (W.D. Wash. 1994), issue dismissed as moot, 93 F.3d 1434 (9th Cir. 1996).

\(^{179}\) See id. at 1315.

\(^{180}\) *Fierro II* involved a choice statute of the type where the gas chamber was the default method of execution. See *Fierro II*, 77 F.3d at 303. Subsequently, the California legislature amended the death penalty statute to make lethal injection the default method of execution. See *Fierro III*, 147 F.3d at 1159-60. In *Fierro III*, the court held that because neither of the Section 1983 plaintiffs had chosen lethal gas yet, the issue of the constitutionality of that method was not yet ripe. See id. at 1160; see also Poland v. Stewart, 117 F.3d 1094, 1104 (9th Cir. 1997) (holding that under a similar Arizona statute, the defendant’s Eighth Amendment claim was not ripe because he had not yet chosen lethal gas as the method of execution); Rupe v. Wood, 93 F.3d 1434, 1438-39 (9th Cir. 1995) (dismissing as moot a challenge to hanging as a method of execution where Washington State amended its death penalty statute to make lethal injection the default method and the defendant had not yet made a choice).

\(^{181}\) 18 F.3d 662 (9th Cir. 1994) (en banc).
ington’s statute, where the defendant could choose lethal injection. 182 In
holding that the constitutionality of hanging was justiciable despite the fact
that the defendant chose that method, 183 the court cited Dear Wing Jung,
which “rejected the argument that the government may cloak unconsti-
tutional punishments in the mantle of ‘choice.’” 184 The court, however, went
on to hold that execution by hanging, as done in Washington, does not
violate the Eighth Amendment. 185

In one Ninth Circuit case, Poland v. Stewart, 186 the Court of Appeals
rewrote and issued its opinion on the waiver issue three times. In the first
opinion and its amended opinion, the court held that because the defendant
would have to affirmatively choose lethal gas under the Arizona statute to
be executed by that method, his choice would waive the protections of the
Eighth Amendment. 187 About six months later, however, the court wrote a
superseding opinion that did not resolve the choice issue, instead conclud-
ing that because the defendant had not selected lethal gas and in Arizona
lethal injection was the default method, the claim regarding lethal gas was
not ripe for review. 188

In conflict with the reasoning of the initial Poland opinions, another

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182. See id. at 680-81.
183. The Ninth Circuit panel that initially addressed the issue held in a per curiam opinion that the
execution method issue was nonjusticiable because the state of Washington gave defendants a choice
between hanging and lethal injection. See Campbell, 978 F.2d at 1518. Interestingly, one of the judges
on the panel who voted with the rest of the judges to hold that the issue was nonjusticiable, Judge
Poole, dissented from the en banc decision. Apparently, Judge Poole changed his mind and rejected
the nonjusticiability argument and concluded that hanging is a cruel and unusual method of execution. See
Campbell v. Wood, 18 F.3d 662, 729 (9th Cir. 1994) (Poole, J., dissenting).
184. Campbell, 18 F.3d at 680 (citing Dear Wing Jung v. United States, 312 F.2d 73, 75-76 (9th Cir.
1962). The court also referred to the probation choice cases. See id. at 680-81 (citing United States v.
Terrigno, 838 F.2d 371, 374 (9th Cir. 1988); United States v. Consuelo-Gonzalez, 521 F.2d 259, 264
(9th Cir. 1975)).
185. See id. The court found no error in the district court’s findings that “the risk of death by
decapitation was negligible, and that hanging according to the protocol does not involve lingering death,
mutilation, or the unnecessary and wanton infliction of pain.” Id. The dissent disagreed, arguing that
the district court’s findings were clearly contrary to the evidence at the hearing:
The evidence at the hearing left no doubt that hanging entails a risk of slow, painful stran-
gulation. This risk has existed under all hanging protocols used throughout history, and it is
simply fanciful, or worse, to conclude that the Washington protocol, which is substantially
the same as these procedures, will eliminate this risk.
Id. at 711 (Reinhardt, J., concurring and dissenting). In conclusion, Judge Reinhardt stated, “Until we
reverse today’s decision, our circuit will have a blotch on its reputation that will be a constant embar-
rassment to us all.” Id. at 717. As noted earlier, in Campbell, the dissent’s interpretation of Supreme
Court precedent regarding the use of objective factors seems more consistent with Supreme Court
precedent than the majority’s view. See supra note 116.
186. 117 F.3d 1094, 1104-05 (9th Cir. 1997), superseding, Poland v. Stewart, 104 F.3d 1099, 1996
WL 764695, *11-12 (9th Cir. 1996), amending, Poland v. Stewart, 92 F.3d 881, 891-92 (9th Cir. 1996).
187. See Poland, 92 F.3d at 891-92; Poland, 104 F.3d 1099, 1996 WL 764695 at *11-12.
188. See Poland, 117 F.3d at 1104. See also LaGrand v. Stewart, 133 F.3d 1253, 1264 (9th Cir.
1998) (holding that Walter LaGrand’s challenge to lethal gas was not ripe until he selected that method
of execution).
panel of the Ninth Circuit held in *LaGrand v. Stewart* that a defendant's voluntary choice of lethal gas did not waive his claim that the use of lethal gas violates the Eighth Amendment. *190* Arizona has a death penalty statute where lethal injection is the default method, *191* and in *LaGrand*, the defendant had chosen lethal gas. *192* The court noted that "the law of the circuit" is that "Eighth Amendment protections may not be waived, at least in the area of capital punishment." *193* Thus, the court went on to address the defendant's challenge of lethal gas as an execution method, holding that lethal gas was a cruel and unusual punishment *194* and enjoining the state of Arizona from executing Karl LaGrand by that method. *195* Although the Ninth Circuit granted Karl LaGrand a stay of execution on the gas chamber issue, *196* the Supreme Court subsequently vacated the stay without comment. *197* Mr. LaGrand was allowed to change his execution method at the last minute, *198* and he was executed by lethal injection. *199*

Almost immediately, however, the issue arose again when Karl's brother, Walter, was scheduled to be executed, and he also chose lethal gas as his method of execution. After the Ninth Circuit court restrained and enjoined the State of Arizona from executing Walter by lethal gas, *200* the Supreme Court granted the state's petition for writ of certiorari and vacated

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189. 173 F.3d 1144 (9th Cir. 1999), rev'd, 119 S. Ct. 1018 (1999).
190. See id. at 1148.
192. See *LaGrand*, 173 F.3d at 1149.
193. Id. at 1148.
194. See id. at 1148-49. The court based its holding regarding the constitutionality of lethal gas on the facts found by the California district court in *Fierro v. Gomez*, 865 F. Supp. 1387, 1404 (N.D. Cal. 1994), after an eight-day bench trial. See *LaGrand*, 173 F.3d at 1148-49.

An inmate [in the gas chamber] probably remains conscious anywhere from 15 seconds to one minute, and there is a substantial likelihood that consciousness, or a waxing and waning of consciousness, persists for several additional minutes. During this time, inmates suffer intense, visceral pain, primarily as a result of lack of oxygen to the cells. The experience of 'air hunger' is akin to the experience of a major heart attack, or to being held under water. Other possible effects of the cyanide gas include tetany, an excruciating pain contraction of the muscles, and painful build-up of lactic acid and adrenaline. Cyanide-induced cellular suffocation causes anxiety, panic, terror and pain.

Id. (quoting *Fierro II*, 77 F.3d 301, 308 (9th Cir. 1996) (quoting *Fierro*, 865 F. Supp. at 1404)).
195. See id. at 1149.
196. See id.
197. See *Stewart v. (Karl) LaGrand*, 119 S. Ct. 1107 (1999). Apparently, the case name is listed wrong because it lists the defendant as "Terry Hinze LaGrand" instead of "Karl Hinze LaGrand" (the first name of the petitioner in the case was "Terry"). See id. Justice Stevens dissented from the order vacating the stay, arguing that the Court should address, *inter alia*, the issue of whether an inmate who chooses to be executed by lethal gas waives his right to argue that lethal gas is unconstitutional. See id. (Stevens, J., dissenting).
199. See *Cohen*, supra note 11, at A14. At the last minute, the state once again gave Karl LaGrand the option to select his execution method, and that time he chose lethal injection. See id.
the injunction. Thus, Walter LaGrand was executed in Arizona’s gas chamber on March 3, 1999.

The following is the Supreme Court’s complete analysis in _LaGrand_ of whether a capital defendant may consent to be executed by an otherwise unconstitutional method of execution:

By declaring his method of execution, picking lethal gas over the state’s default form of execution—lethal injection—Walter LaGrand has waived any objection he might have to it. See _e.g._, _Johnson v. Zerbst_, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). To hold otherwise, and to hold that Eighth Amendment protections cannot be waived in the capital context, would create and apply a new procedural rule in violation of _Teague v. Lane_, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

Additionally, the Court found that the gas issue was procedurally defaulted because Walter LaGrand did not raise the issue on direct appeal.

Not only was the Court’s analysis of the merits of the issue cursory, but, as Justice Stevens pointed out in dissent, the issue did not receive full briefing and argument before the Court. Perhaps the Court devoted little effort to the issue because of the time constraints dictated by Walter LaGrand’s execution, which was scheduled for only hours after the Court’s decision. Another reason that the Court may not have analyzed the issue sufficiently is because the analysis and conclusion are dicta because of the Court’s conclusion that the issue was procedurally defaulted.

The Court’s analysis of the merits of the issue is interesting, in part, because of the authority the Court relied upon. First, the Court cited _Johnson v. Zerbst_, which did not involve the Eighth Amendment but was a Sixth Amendment case. Further, because _LaGrand_ came to the Court on habeas, the Court cited _Teague v. Lane_ for the proposition that even if the Eighth Amendment prohibition on cruel and unusual punishments

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201. See id.
203. _Walter LaGrand_, 119 S. Ct. at 1020.
204. See id. The Court also held that Walter LaGrand failed to show cause to overcome the bar because there was sufficient debate about the constitutionality of execution by gas at the time of LaGrand’s appeal. See id. The Ninth Circuit had found cause and prejudice to excuse the default. See id.
205. See id. at 1021 (Stevens, J., dissenting).
206. See Reuters, _Arizona Puts 2nd German Citizen to Death_, _The Orlando (Fla.) Sentinel_, March 4, 1999, at A4, available in LEXIS, News Library, Orsent File.
207. See _Walter LaGrand_, 119 S. Ct. at 1021.
208. 304 U.S. 458, 459 (1938). In _Johnson_, the Court held that the habeas petitioner was entitled to relief if he could show that the petitioner did not competently and intelligently waive his Sixth Amendment right to counsel. See id. at 468-69.
could not be waived in the capital context, such a ruling would not benefit LaGrand because it would be a new rule. Under Teague, except for two exceptions, a defendant may not benefit from a "new rule" of law in federal habeas corpus proceedings if the new rule was announced after the defendant's conviction became final. In its cursory analysis, the Court seemed to ignore the fact that a "new rule" could have applied to LaGrand if one of the Teague exceptions applied. Further, because Johnson was not directly on point and because Dear Wing Jung was decided in 1962 consistently with LaGrand's position, arguably, Walter LaGrand was not even asking for a "new rule."

Beside the facts that the Court used cursory reasoning and did not cite a case that was directly on point, it ignored the reasoning used by the lower courts that had addressed the issue. This lack of analysis is somewhat surprising considering that most of the lower court decisions supported a contrary conclusion and that, prior to LaGrand, commentators seemed to assume that an unconstitutional punishment could not be used even if a defendant consented.

Perhaps, however, the Court opted not to wrestle with this complex issue because it could base its decision on the procedural default issue and on the Teague procedural issue. In this respect, the Court indicated that it could reach a different result if a case were to reach the Court on a certio-


211. See Teague, 489 U.S. at 310. See also O'Dell v. Netherland, 521 U.S. 151, 157-59 (1997) (holding that a requirement for a jury instruction in capital cases regarding parole eligibility was a "new rule").

212. Arguably, Walter LaGrand's case could fit within the first exception. See Teague, 489 U.S. at 311-14. Liebman and Hertz explain the two exceptions as follows:
The first exception permits retroactive application of new rules that "place[] 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe'" including "rules forbidding criminal punishment of certain primary conduct [and] . . . rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." The second exception permits retroactive application of new rules that "require[] the observance of 'those procedures that . . . are implicit in the concept of ordered liberty.'"

JAMES S. LIEBMAN & RANDY HERTZ, 2 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 934-35 (3rd ed. 1998) (citations omitted). The Court's failure to even address the exceptions illustrates the inadequate treatment given to the issue.

213. See supra notes 149-52 and accompanying text. However, if Dear Wing Jung was not dictated by Supreme Court precedent, then LaGrand was asking for a new rule.

214. Although this issue previously has not been addressed extensively, some commentators have briefly made note of the issue and assumed that the Eighth Amendment cannot be waived in this context. See Blum, supra note 15, at 451 ("One may not consent to cruel and unusual punishment. For example, even if given the choice of punishments between torture and death, the prisoner could not choose torture."); Richard W. Garnett, Why Informed Consent? Human Experimentation and the Ethics of Autonomy, 36 CATH. L. W. 455, 501 (1996) ("No defendant could ever meaningfully consent to an Eighth Amendment violation; after all, who is he to demand that we violate our moral commitments?"). But see Beckman, supra note 2, at 893 (arguing that convicted paraphilics should be allowed to waive constitutional protections to receive chemical castration treatment).
rari grant from a direct appeal rather than from habeas review and if the issue were not defaulted.²¹⁵ Thus, the LaGrand opinion failed to fully resolve the choice issue, and it remains open until the Court addresses the issue in a different procedural posture.²¹⁶

IV. THE PUBLIC INTEREST IN THE EIGHTH AMENDMENT BAN ON CRUEL AND UNUSUAL PUNISHMENTS DOES NOT PERMIT WAIVER BY INDIVIDUALS

There are three reasons why the Constitution does not allow defendants to waive the Eighth Amendment ban on cruel and unusual punishment.²¹⁷ First, the Supreme Court’s own Eighth Amendment analysis indicates a strong societal interest in the ban on cruel and unusual punishments that should not be waived by one individual. Second, such Eighth Amendment waivers should not be permitted because they differ significantly from waivers of other constitutional rights since such Eighth Amendment waivers, unlike other constitutional waivers, provide no benefits and are a detriment to society. Third, allowing such waivers and allowing any punishment as a choice would lead to absurd results and deprive the Eighth Amendment of meaning.

A. Supreme Court Precedent Reveals a Societal Interest in the Eighth Amendment That Should Not Be Waived by an Individual

As discussed above, the Court has consistently allowed certain constitutional rights to be waived by criminal defendants. Although the Court

²¹⁵. This outcome, however, puts state capital defendants in a Catch 22. Arguably, after a capital defendant’s direct appeal, the choice of execution issue likely will not be ripe for review because execution is not imminent because of the availability of habeas review and because, at that point, the defendant likely will not have had to choose an execution method. Then, after habeas review when the choice issue is ripe, the defendant cannot win because the Court would then have to apply a “new rule.”

²¹⁶. Arguably, however, if Eighth Amendment protections cannot be waived, then Teague should not prevent the Court from considering Eighth Amendment arguments.

²¹⁷. Initially, in considering waiver, there is an issue of whether a criminal defendant selecting certain punishments, such as the means of death, can ever really make a “knowing, voluntary and intelligent” waiver. The choice situation has an element of coercion, and many defendants may not be able to make such a “free” choice. For example, several studies indicate that a large proportion of capital defendants are brain damaged, mentally ill, mentally retarded and/or victims of childhood abuse. Such defendants may never be able to “knowingly, voluntarily and intelligently” make such a choice. See Michael Mello & Donna Duffy, Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates, 18 N.Y.U. REV. L. & SOC. CHANGE 451, 481-84 (1990-91) (discussing reports and noting that “many condemned inmates are illiterate, uneducated, mentally impaired, or any combination of all three”); Welsh S. White, Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care, 1993 U. ILL. L. REV. 323, 338-39 (1993) (noting various studies and reports indicating a significant number of capital defendants with mental retardation or mental diseases). See generally DOROTHY OTNOW LEWIS, M.D., GUILTY BY REASON OF INSANITY: A Psychiatrist Explores the Minds of Killers (1998). This coercion issue, however, is beyond the scope of this Article.
has held that certain constitutional rights may be waived by criminal defendants, it does not necessarily follow that a defendant may waive the right not to be subjected to a cruel and unusual punishment. As noted above, in an execution volunteer case, *Lenhard v. Wolff*,218 Justice Marshall wrote a dissent that questioned the constitutionality of Eighth Amendment waivers. Justice Marshall argued that the Eighth Amendment not only protects individuals, "it also expresses a fundamental interest of society in ensuring that state authority is not used to administer barbaric punishments."219 Therefore, he argued, society's interests in the ban on cruel and unusual punishments cannot be overridden by a defendant's waiver.220 Justices Brennan, Marshall, and White expressed similar concerns in *Whitmore v. Arkansas.*221

The problem with this argument, however, is that society has an interest in all rights in the Bill of Rights being enforced, and Justice Marshall's argument could mean that defendants could not waive other rights, like the right to a jury trial. Actually, Justice Harlan made a similar argument in 1883 in *Hop I v. Utah,*222 regarding the right of a defendant to be present at trial.223 In that case, Justice Harlan stated "which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with, or affected by the consent of the accused."224 Since then, however, the Court has held in numerous cases that certain constitutional rights may be waived.225 This Article does not argue that all of those cases should be overruled;226 the question is whether this Eighth Amendment right differs from those other constitutional rights.

The Supreme Court's own Eighth Amendment analysis provides a significant reason why waiver should not apply in the context of the application of the Eighth Amendment to barbaric punishments. Unlike the analysis used regarding other rights, the Eighth Amendment analysis used by the Court to evaluate each punishment is based, in large part, on current societal standards, illustrating the public's interest in the Eighth Amendment.227

As discussed above, the Supreme Court looks to both objective and subjective factors in determining whether a punishment violates the Eighth

219. Id. at 811 (Marshall, J., dissenting) (quoting Gilmore v. Utah, 429 U.S. 1012, 1019 (1976)).
220. See id. at 811-12.
222. 110 U.S. 574 (1884) (holding that defendant's failure to object did not waive objection to proceedings that occurred outside his presence, overruled by Diaz v. United States, 223 U.S. 442, 458 (1912) (rejecting the *Hop I* statement that a trial can never continue in a defendant's absence).
223. See id. at 578-79.
224. Id. at 579. But see Johnson v. Zerbst, 304 U.S. 458, 462 (1938) (setting out standards for waiver of the right to counsel).
225. See, e.g., Johnson, 304 U.S. at 462.
226. The question of whether the Court should hold that any other constitutional criminal rights cannot be waived is beyond the scope of this Article.
227. See discussion supra Part III.B.
Amendment.228 In Weems, the Court looked at contemporary standards to strike down the punishment of hard and painful labor for document falsification.229 There, the Court stated that the Eighth Amendment "may acquire meaning as public opinion becomes enlightened by a humane justice."230 In Trop, the Court struck down denationalization as a punishment in part because it was a rare form of punishment in today's "international community of democracies."231 There, the Court said the Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."232 The Court has continued to rely upon objective societal standards as it has addressed the death penalty in cases beginning with Furman and Gregg.233 For example, in Gregg, a plurality stated that the cruel and unusual punishment clause requires courts to examine "objective indicia that reflect the public attitude toward a given sanction."234 The same analysis has continued in subsequent cases,235 and the Justices continue to evaluate the "national consensus"236 from such indicators as legislative enactments and jury verdicts in interpreting the Eighth Amendment.237

This reliance on objective factors in Eighth Amendment analysis creates a mandate from the Court that permitted punishments must reflect our contemporary society. The Court has indicated an overall community concern with the types of punishments society inflicts by using such terms as "public attitude,"238 "national consensus,"239 "human dignity,"240 and "humane justice."241 Additionally, the use of the term "unusual" in the Eighth

228. See discussion supra Part III.B.
230. Id.
232. Id. at 101.
233. See discussion supra Part II.B.
236. See Penry, 492 U.S. at 334-40 (examining whether there is objective evidence of an emerging "national consensus" against execution of the mentally retarded).
237. See supra notes 82-83, 92-93 and accompanying text.
238. See Gregg, 428 U.S. at 173.
239. See Penry, 492 U.S. at 334-40.
240. See Gregg, 428 U.S. at 182. Terms such as "human dignity" are used by the Court in the context of evaluating subjective factors, but they also reflect a societal concern.
Amendment itself indicates a concern with punishments that are out of the ordinary from contemporary society. This requirement that the Eighth Amendment comply with today's world illustrates a societal interest beyond that of other rights whose main focus is on the protection of individuals.\(^{242}\) Thus, the Eighth Amendment is unique\(^{243}\) in that it protects the interests of contemporary society, and an individual should not be able to waive that protection from barbaric punishments.\(^{244}\)

The Eighth Amendment ban on cruel and unusual punishments has a societal base that is more comparable to some constitutional rights than to others. For example, First Amendment rights are society based, so the Court would likely hold that a criminal defendant could not waive First Amendment rights if a judge were to give the defendant the options of prison or attending the judge’s church every week. Societal interests in the separation of church and state would prevent a defendant from electing to go to the judge’s church even if the defendant “waived” the right to object by choosing that option over prison. Indeed, several courts have held that such sentences are unconstitutional.\(^{245}\) The ban on cruel and unusual pun-

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242. However, also in the context of the Fourteenth Amendment and the incorporation debate, the Court has looked at the effects of time: “Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.” Wolf v. Colorado, 338 U.S. 25, 27 (1949). Outside the criminal justice context, the Court has also affirmed that the meaning of the constitution is not static. See, e.g., Roe v. Wade, 410 U.S. 113, 163 (1973) (incorporating consideration of modern technology in determining when a fetus becomes viable). Still, in the criminal justice area, the Eighth Amendment is unique in requiring an analysis of society’s current views in interpreting the meaning of “cruel and unusual.” The meaning of the phrase can, theoretically, change in a very short time, depending on societal change. If, for example, within the next few years, every state except for Texas were to get rid of the death penalty, in the face of such a “national consensus,” the Court could hold that the death penalty violates the Eighth Amendment.

243. It has been argued that other Constitutional amendments protect the rights of others besides the accused. See, e.g., William J. Stuntz, Waiving Rights in Criminal Procedure, 75 VA. L. REV. 761, 779 (1989) (“Fourth, Fifth and Sixth Amendment rights might be seen as protecting primarily persons other than those who claim their protection in criminal cases.”). The Supreme Court has said that the right to a jury trial is a right not only of the accused, but of the government. See Singer v. United States, 380 U.S. 24, 36 (1965). Thus, it does not violate the Constitution to require the government’s and Court’s concurrence in a waiver. See id. at 36-37. Certainly other amendments protect other interests beyond that of the individual defendant. However, as discussed above, the Eighth Amendment is unique in that waiver of the ban on “cruel and unusual” punishments never benefits society, and it is unique in the extent to which the Court relies upon contemporary standards for interpreting the Eighth Amendment.

244. The focus of this Article is on the Eighth Amendment’s protections against torturous or disproportionate punishments. Therefore, a discussion of whether the unique qualities of the Eighth Amendment should also mean that Eighth Amendment procedural rights should also be unwaivable is beyond the scope of this Article. Arguably, such procedural rights are distinguishable from other Eighth Amendment rights. However, Eighth Amendment interests in prohibiting the arbitrary use of the death penalty supports the argument that those rights should not be waivable either. See Ceterer, supra note 136, at 127-29 (arguing that Eighth Amendment prohibits defendants from waiving their rights to present mitigating evidence and to appeal).

245. See Kerr v. Farney, 95 F.3d 472 (7th Cir. 1996) (requiring an inmate to attend religion-based narcotics rehabilitation meetings violates the Establishment Clause of the First Amendment); State v. Evans, 796 P.2d 178, 179-80 (Kan. Ct. App. 1990) (holding that probation condition requiring church
ishments, as well as the Establishment Clause of the First Amendment, are unique because they help "define who we are as a nation." Here, however, such an analysis of every constitutional right is beyond the scope of this Article. For present purposes, it is enough to distinguish the Eighth Amendment right from other constitutional criminal rights where the Court does permit waiver. As discussed above, the Eighth Amendment right differs significantly from those other rights, and therefore, waiver should not be allowed in this context.

B. Eighth Amendment Waiver Differs from Other Constitutional Waivers

Not only does the Eighth Amendment ban on cruel and unusual punishments differ from other constitutional criminal rights under current Supreme Court cases, but as a practical matter, waiver of such Eighth Amendment rights differs significantly from the waiver of other criminal rights. Obviously, both types of rights are important, but the effects of these waivers differ in important ways.

The justification for disallowing waiver of constitutional rights applies with more force where the issue involves a barbaric punishment instead of a procedural violation. First, unlike the choice of punishment context, a defendant may benefit from waiving certain other rights, like the right to a jury trial. Further, society actually benefits by allowing defendants to waive their trial rights. As one commentator noted, plea-bargains play an important role in our criminal justice system, and, thus, "[i]t is waiver of rights that permits the system of criminal justice to work at all." Another

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attendance at a specific church and 1,000 hours of maintenance at that church violated the Free Exercise Clause of the First Amendment); State v. Morgan, 459 So. 2d 6, 10 (La. Ct. App. 1984) (holding that a condition of probation that the defendant regularly attend an organized church of his choice violates the Establishment Clause of the First Amendment); Griffin v. Coughlin, 673 N.E.2d 98, 111 (N.Y. 1996) (holding that prison's requirement that in order to qualify for a family reunion program the petitioner must participate in a treatment program that incorporates religious aspects violates the Establishment Clause of the First Amendment); Taylor v. Commonwealth, 38 S.E.2d 444, 448-49 (Va. 1946) (holding that a probation condition for delinquent boys requiring them to attend Sunday school and church violates the First Amendment); cf. Warner v. Orange County Dep't of Probation, 115 F.3d 1068, 1075 (2d Cir. 1995) (holding that a probation condition that the petitioner attend Alcoholics Anonymous violated the First Amendment establishment clause, but noting that the condition might be constitutional if the petitioner were given other options); In re Quirk, 705 So. 2d 172, 182 (La. 1997) (in a judiciary proceeding, noting that the law is not clear on the issue of whether a judge may make, or offer as an alternative, church attendance as a condition of probation).


247. For example, defendants gain some benefits when they waive their right to a jury trial: their case is resolved quickly and without the uncertainty of a jury verdict. However, it is difficult to argue that a defendant, who may be mentally ill, benefits from selecting a cruel punishment.

248. Tigar, supra note 125, at 8. Professor Tigar comments further:

In reality, in most criminal cases, perhaps as many as ninety percent in some jurisdictions, the model [of a complete fair trial] has no direct relevance to real life, since the defendant cuts short the process by pleading guilty to the offense charged or some lesser included offense. Other defendants shorten the process by waiving a jury trial, or by failing to raise
commentator has argued that allowing waiver of Fourth, Fifth, and Sixth Amendment rights makes sense if one views waiver as not harming the people those rights were designed to protect.\footnote{249} Thus, as a practical matter, waiver of other constitutional rights offers societal and individual benefits that are not present in the torturous punishment waiver context.\footnote{250}

In addition to the consideration of waiver benefits, another reason that waiver should not apply in the brutal punishment context is because such a waiver is more detrimental to society than other constitutional criminal right waivers. Allowing a government to impose a particularly brutal punishment has a more substantial detrimental effect upon society than a defendant waiving his right to appeal or a right to an attorney. An individual who consents to have his house searched does not hurt society to the degree that a brutal punishment does.\footnote{251}

The government's use of a brutal punishment, however, would harm society more greatly. There have been various studies that illustrate the harmful effects of even typical executions on the public, and there is evidence that executions can have a detrimental effect on society by actually increasing crime.\footnote{252} For example, historically, public executions had a possible defenses on procedural and technical grounds. Criminal courts are crowded now; imagine their utter breakdown in the wake of every defendant insisting on a plenary trial.

\textit{Id.}

\footnote{249} See Stuntz, \textit{supra} note 243, at 779. Professor Stuntz argues that Fourth, Fifth and Sixth Amendment rights may be seen as primarily protecting persons other than those claiming those rights. See \textit{id.} at 779. Professor Stuntz argues further:

Once one accepts this view of the relevant rights, waiver doctrines that permit police to take advantage of defendants' mistakes, and even to engage in active deception, may make fairly good sense. If the rights themselves seek to protect the interests of third parties rather than the interests of the defendants asserting them, then one would expect waiver doctrine to turn on a series of differentiation problems, protecting unworthy defendants when, but only when, they could not be separated from the rights' intended beneficiaries.

\textit{Id.} at 767.

\footnote{250} One may argue that Gary Gilmore did not benefit from waiving his appeals because he may have obtained relief on appeal. However, arguably, a capital defendant whose execution is inevitable may benefit from a speedier execution to avoid the prolonged terror of waiting to be killed. See Lackey v. Texas, 514 U.S. 1045, 1045-47 (1995) (Stevens, J., memorandum respecting denial of certiorari) (discussing merits of argument that a prolonged stay on death row constitutes a cruel and unusual punishment); \textit{In re Medley}, 134 U.S. 160, 172 (1890) (noting that "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it"). Of course, such a conclusion assumes that such a defendant would know when the execution is inevitable and is capable of making a knowing and voluntary waiver. See discussion \textit{supra} note 214.

On the other hand, though a masochist might disagree, it is difficult to argue that one obtains any benefit from being tortured to death instead of being killed in a less painful way. Still, assuming surgical castration is an unconstitutional punishment, reasonable minds may disagree as to whether society benefits from providing the option of castration to repeat sex offenders.

\footnote{251} Indeed, the Supreme Court has held that the Fourth Amendment does not require a consent search to be "knowing and intelligent." See Schneckloth v. Bustamonte, 412 U.S. 218, 237, 241 (1973).

\footnote{252} "In 1980, two sociologists, William Bowers and Glenn Pierce, did a study going right back to 1907. They found that in New York, within a thirty-day period following every execution, between
harmful effect on the public, sometimes resulting in riots.\textsuperscript{253} By the late 1820s in the United States, essayists argued for private executions to replace public hangings.\textsuperscript{254} "Legislators, editors, ministers, and merchants decried public hangings as festivals of disorder that subverted morals, increased crimes, excited sympathy with the criminal, and wasted time."\textsuperscript{255} One writer stated that "a hundred persons are made worse, where one is made better by public execution."\textsuperscript{256} Today, the general public is protected from the sight of executions.\textsuperscript{257} Still, some people are still directly touched by executions, such as the judicial and executive decision-makers, the crime victim's family, the defendant's family, prison guards, reporters, lawyers, and the executioner.\textsuperscript{258} The horrors of an especially torturous

\textbf{1907 and 1963, there were two or three murders over and above the expected rate.} Michael Kroll, \textit{The Write Stuff, in A PUNISHMENT IN SEARCH OF A CRIME} 299, 302 (Ian Grey & Moira Stanley eds., 1989). George Bernard Shaw explained, "It is the deed that teaches, not the name we give it. Murder and capital punishment are not opposites that cancel one another, but similars that breed their kind."

\textbf{GEORGE BERNARD SHAW, MAN AND SUPERMAN} 232 (1903).

Albert Camus wrote about the guillotine:

\begin{quote}
Let us be frank about the penalty which can have no publicity, that intimidation which works only on respectable people, so long as they are respectable, which fascinates those who have ceased to be respectable and debases or deranges those who take part in it. It is a penalty, to be sure, a frightful torture, both physical and moral, but it provides no sure example except a demoralizing one. It punishes, but it forestalls nothing; indeed it may even arouse the impulse to murder.
\end{quote}

\textbf{Albert Camus, \textit{Reflections on the Guillotine, in RESISTANCE, REBELLION AND DEATH}} 174, 197 (Alfred A. Knoff, 1961). Camus also noted, "Statistics drawn up at the beginning of the century in England show that out of 250 who were hanged, 170 had previously attended one or more executions. And in 1886, out of 167 condemned men who had gone through the Bristol prison, 164 had witnessed at least one execution." \textit{Id.} at 189.


\textbf{254. See id. at 95.}

\textbf{255. Id.}

\textbf{256. Id (quoting ESCRITOR, Dec. 1, 1826, at 359).} Another commentator wrote:

\begin{quote}
Executions in the times when they were universally public, were occasions for rioting, revelry and ribaldry, and seldom was the demeanour of the crowd decorous in the face of death. And seldom, too, did a public execution act as a deterrent. More often than not in the crowd would be friends of the criminal who had escaped by the merest accident being in his place and who, the very next day, would continue their criminal practices for which they had watched one of their number hang. In many accounts of the Tyburn and Newgate hangings one reads that pickpockets plied their trade busily among the crowd. It was considered the proper thing to be present at an important execution.
\end{quote}

\textbf{JOHN LAURENCE, A HISTORY OF CAPITAL PUNISHMENT} 183 (1960).

\textbf{257.} "However many die, privacy is likely to remain the pre-eminent feature of executions. So powerful still is the belief that the public should be prevented from observing the execution, even television, which daily brings quivering images of sanitized death into the family room, is not permitted to broadcast the affair." MASUR, \textit{supra} note 253, at 162.

\textbf{258. See, e.g., EDMUND BROWN, PUBLIC JUSTICE, PRIVATE MERCY: A GOVERNOR'S EDUCATION ON DEATH ROW} 163 (1989). Former Governor Brown, who oversaw many executions, wrote:

\begin{quote}
[T]he longer I live, the larger loom those fifty-nine decisions about justice and mercy that I had to make as governor. They didn't make me feel godlike then: far from it; I felt just the opposite. It was an awesome, ultimate power over the lives of others that no person or gov-
\end{quote}
killing would affect those people. Further the public still reads and hears reports about executions, and if people were to read about a defendant being boiled in oil, there would probably be some detrimental societal effects. For example, Americans who read about the July 1999 electric chair execution of Allen Davis—where blood gushed from his mask and oozed through his chest strap—may think less of themselves and their government.²⁵⁹

Such societal concerns about brutal punishments have been expressed by others. During a debate about capital punishment in the House of Lords in England, Lord Chancellor Gardiner stated:

When we abolished the punishment for treason that you should be hanged, and then cut down while still alive, and then disemboweled while still alive, and then quartered, we did not abolish that punishment because we sympathized with traitors, but because we took the view that it was a punishment no longer consistent with our self respect.²⁶⁰

The detriments of such Eighth Amendment waivers should be considered in the Court's Eighth Amendment analysis. As the Court has stated, "While the State has the power to punish, the [Eighth] Amendment stands to assure that the power be exercised within the limits of civilized standards."²⁶¹

Thus, the difference between the waiver of the ban on cruel and unusual punishments and the waiver of other rights given to defendants by other constitutional amendments is that the waiver of those other rights, in general, provides a benefit to defendants and to society, so the constitution should allow such waivers. In the Eighth Amendment context, there is generally no benefit for defendants or society in allowing defendants to be punished in a cruel and unusual manner. In fact, such punishments would have a detrimental effect on society. Therefore, the Court should not permit waivers of such Eighth Amendment rights, as it does for other consti-

²⁵⁹. See Mike Schneider, Electric Chair Faces New Challenge: Lawyer Says It's Cruel, Unusual, SUN-SENTINEL, July 28, 1999, at 6B, available in LEXIS, News Library, Sunsen File (reporting that during Davis' execution, "blood gushed from the mask covering his face, poured over his collar and chest, then oozed through the buckle holes on the chest strap holding him in the oaken chair").

²⁶⁰. People v. Anderson, 493 P.2d 880, 889 (Cal. 1972) (quoting 268 HANSARD, PARL. DEB. H.L. 703 (5th ser.1965)). See, e.g., Campbell v. Wood, 18 F.3d 662, 701 (9th Cir. 1994) (Reinhardt, J., concurring in part and dissenting in part) ("We reject barbaric forms of punishment as cruel and unusual not merely because of the pain they inflict but also because we pride ourselves on being a civilized society.").

tutional criminal rights.

C. Logic Dictates that Such Eighth Amendment Waivers Should Not Be Permitted

The problems with holding that a defendant may waive the ban on cruel and unusual punishments are best illustrated by some specific examples. If a rape defendant may waive his Eighth Amendment rights and be castrated in exchange for a lighter prison sentence, courts could allow thieves to have their hands chopped off and Peeping Toms to have their eyes gouged out. In order to raise some money for the state treasury and a victim’s family, the government could pass a bill allowing capital defendants a monetary bonus if they choose—over lethal injection—public execution by guillotine in a coliseum before a paid audience.

Further, if, as the Court implies in *LaGrand, Johnson* permits Eighth Amendment waivers, then rape defendants, child defendants, and insane defendants could choose the death penalty even though the Court has held that it violates the Eighth Amendment to execute those categories of defendants. To go further, if the Court were to eventually hold that the death penalty itself is a cruel and unusual punishment, defendants would still be able to choose that punishment as an option over prison. Perhaps a new Court TV show could be developed along the lines of the old *Let’s Make a Deal* show, with defendants choosing among various punishment options, such as a one-year prison sentence or “what’s behind Curtain Number Two.” As long as defendants are given constitutional options, any punishment would be constitutional when reformed through the power of choice.

These absurd situations could result from the reasoning of the *LaGrand* opinion. Yet, it is difficult to believe that the Court would actually permit deals such as a minor consenting to being executed. The Court must draw the line somewhere and prevent some Eighth Amendment waivers. Because of the strong societal interests in preventing the use of barbaric punishments and because such Eighth Amendment waivers harm society, the Court should draw the line in a way that does not allow defendants to elect to be punished in a cruel and unusual manner.

Hopefully, we will continue to live in a society where such deals are not made. Yet, the purpose of the Constitution—and the Eighth Amend-

262. See Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (holding that it is unconstitutional to execute defendants under 16 years old); Ford v. Wainwright, 477 U.S. 399, 417-18 (1986) (holding that it violates the Constitution to execute the insane); Coker v. Georgia, 433 U.S. 584, 592 (1977) (holding that it is unconstitutional to execute a defendant for rape). Indeed, it appears unlikely that the Court would allow a child to waive the Eighth Amendment protections in this context. The torturous punishment context seems more similar to the bans on executed children and the insane, where waiver would probably not be allowed, than in the context of a volunteer who is permitted to waive the Eighth Amendment right to protect mitigating evidence.
ment in particular—is to guarantee that such punishments never occur in today's society. Because the Eighth Amendment protects societal interests regarding the method of execution, that protection cannot be waived by an individual.

V. CONCLUSION

The punishment choice issue has not come up very often, probably because once a defendant selects a punishment, that defendant is unlikely to challenge its constitutionality. In *LaGrand*, the issue apparently arose because the defendants chose the gas chamber so that they could raise the issue that it was a cruel and unusual punishment.263 Perhaps the Court viewed this strategy as a lawyer tactic to delay the executions and thus, that may be why the Court disposed of the issue without much discussion. Yet, there are important societal interests at stake that the Court should address.

Perhaps nothing reflects a society more than the punishments it imposes on the most despised.264 A review of world history illustrates the gradual development of society's views of appropriate punishments. In the United States, we believe that today we are more enlightened than our ancestors because we no longer permit punishments such as beheading, crucifixion, burning alive, starvation in dungeons, or "tearing to death by red-hot pincers."265 It is illogical to assume only that we are more enlightened than our predecessors but not that our descendants will likely be more enlightened than us. Thus, when evaluating the constitutionality of a punishment, the Court has made provisions for considering our development toward a more enlightened society.

The intimate relationship between the Eighth Amendment and our "evolving standards"266 and "public attitude"267 requires the Court to continue to recognize the societal interest in the ban on cruel and unusual punishments. The Eighth Amendment requires that the awesome power to punish is "exercised within the limits of civilized standards,"263 and permitting waiver of the Eighth Amendment ban on cruel and unusual pun-

263. See Associated Press, *German Citizen Is Put to Death in Gas Chamber*, Chi. Trib., March 4, 1999, at 5, available in LEXIS, News Library, Chtrib File ("Both brothers chose the gas chamber in hopes that courts would rule the method cruel and unusual and therefore unconstitutional.").


265. Laurence, *supra* note 256, at 2. Perhaps one of the more interesting punishments of ancient times was the Roman punishment for parricides. "They were thrown into the water in a sack, which contained also a dog, a cock, a viper and an ape. This superstitious form of punishment persisted, in some countries, into the Middle Ages." Id. at 3. Under the implications of *LaGrand*, such a punishment would be constitutional as an option to prison.

266. See *Trop*, 356 U.S. at 101.


ishments would harm society and weaken the Eighth Amendment. As a district court judge stated, “What is at stake here is our collective right as a civilized people not to have cruel and unusual punishment inflicted in our name.”

The Eighth Amendment protects the individual being punished, but it also protects the rest of American society and how we view ourselves and how the rest of the world views us. The Eighth Amendment bans cruel and unusual punishments, and that means that citizens of the United States have the right to live in a country that does not torture or maim its citizens. Therefore, if the Eighth Amendment is to have any meaning, the Court should strictly follow the demand that “nor cruel and unusual punishments [be] inflicted,” even if a defendant desires such a punishment. It is our right.

270. U.S. CONST. amend. VIII.