

LINCOLN MEMORIAL UNIVERSITY LAW REVIEW

VOLUME 8

SUMMER 2021

ISSUE 3

DISABILITIES ON DEATH ROW:

THE ADA, ABLEISM, AND ALTERNATIVES TO THE EIGHTH AMENDMENT

*Christopher Hill*¹

I. INTRODUCTION

In one of the most recent death penalty cases,² the Supreme Court of the United States held that the Eighth Amendment to the Constitution's prohibition against cruel and unusual punishment does not guarantee a painless death and that the execution was constitutional if there was not "superadded" pain³, despite the inmate's disability which caused him extreme pain when he was required to lie down on a gurney.

While the Court used an Eighth Amendment analysis to determine whether additional pain triggers further protection for a death row inmate, it may be time to view some cruel and unusual punishment claims under a disability lens. This article will explore the use of disability law and potential legislation to provide accommodations for

¹ Christopher Hill, J.D., LL.M, Founder, 13th Amendment Center
I would like to thank the 2019-2020 staff of the UDC Law Review, the staff of the LMU Law Review, the several professors at UDC David A. Clarke School of Law who read earlier drafts, and my wife Kendra D. Hill, who assisted with editing.

² *Bucklew v. Precythe*, 139 S. Ct. 1112 (2019).

³ *Id.* at 1125.

inmates with disabilities during executions. Accommodations for death row inmates may be unpopular—and even gruesome—to consider, but they may be the best way to ensure that an execution is as painless as possible. The article will review recent incidents involving “botched” executions where persons with disabilities such as obesity, small veins, and heart conditions were executed despite their disabilities and will propose a legislative framework for addressing these and other potential disability-related matters in death penalty cases. The article will also explore the concept of ableism, which is defined as “discrimination or social prejudice against people with disabilities based on the belief that typical abilities are superior[.]”⁴ and how it can affect potential legislation or jury decision on condemned inmates with disabilities.

II. A HISTORY OF THE MODERN DEATH PENALTY AND LIMITATIONS ON ITS USE UNDER THE EIGHTH AMENDMENT

The law usually views the rights of condemned inmates through the lens of the Eighth Amendment to the Constitution of the United States. The Eighth Amendment states: “[E]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁵

In 1972, the United States Supreme Court abolished the death penalty as arbitrary and capricious and, therefore, cruel and unusual punishment in violation of the Eighth Amendment.⁶ This was thought to be the end of capital punishment in the United States. However, the Supreme Court soon ruled in 1976 that legislative fixes were required to ensure that executions were not arbitrary and capricious, nor cruel and unusual, thereby making the death penalty constitutional once again.⁷

⁴ Rakshitha Arni Ravishankar, *Why You Need to Stop Using These Words and Phrases*, HARV. BUS. REV. (Dec. 15, 2020), <https://hbr.org/2020/12/why-you-need-to-stop-using-these-words-and-phrases>

⁵ U.S. CONST. amend. VIII.

⁶ *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972).

⁷ *Gregg v. Georgia*, 428 U.S. 153 (1976).

Following the ruling that made the death penalty constitutional, the Supreme Court began to review the parameters of the death penalty. In death penalty jurisprudence under the Eighth Amendment, the Supreme Court often looks at state-level cases and assesses evolving standards of decency to determine whether there should be limits on the use of the death penalty.⁸

A. DEATH PENALTY ELIGIBILITY

A few states passed legislation that made some inmates ineligible for the death penalty based on the characteristics of the person who committed the crime (age, intellectual disability) or the crime itself (crimes that did not involve homicide).⁹ An initial area of review dealt with the types of crimes that should be death penalty eligible. The United States Supreme Court ruled that the death penalty was unconstitutional if it was a “grossly disproportionate and excessive punishment for [a] crime”¹⁰ In 1977, for example, the rape of an adult woman was no longer considered a death-eligible offense.¹¹ In 1982, the Court held that those who did not kill, or attempt to kill, anyone during the commission of a felony should not be subject to capital punishment.¹²

Another line of cases looked at whether certain people should be death penalty “ineligible,” meaning that the person could not receive the death penalty for a capital crime. In *Atkins v. Virginia*, the Supreme Court saw that many state legislatures exempted those with mental retardation from execution, thus it outlawed the death penalty for people with

⁸ *Trop v. Dulles*, 356 U.S. 86 (1958).

⁹ *Status of the juvenile death penalty prior to Roper v. Simmons by state*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/united-states-supreme-court/significant-supreme-court-opinions/roper-v-simmons-resource-page/status-of-the-juvenile-death-penalty-prior-to-roper-v-simmons-by-state> (last visited Nov. 7, 2019); *State Statutes Prohibiting the Death Penalty for People with Intellectual Disability (pre-Atkins)*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/state-statutes-prohibiting-the-death-penalty-for-people-with-intellectual-disability> (last visited Nov. 7, 2019).

¹⁰ *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

¹¹ *Id.*

¹² *Edmund v. Florida*, 458 U.S. 782 (1982). *But see* *Tison v. Arizona*, 481 U.S. 137 (1987).

intellectual disabilities.¹³ In *Roper v. Simmons*, the Supreme Court prohibited executions of anyone under eighteen years old at the time of their crime.¹⁴ In *Kennedy v. Louisiana*,¹⁵ the Court ruled that capital punishment for non-homicide child rape is illegal.

In another limitation, the Supreme Court determined that an otherwise death-eligible (*i.e.*, could receive the death penalty for a capital crime) inmate unable to understand the reason for their execution due to a severe mental illness could not be executed.¹⁶ A person may know that they committed a crime, and they may know that they are going to be executed,¹⁷ however, if the person does not understand the reason for their execution because of a mental illness, then they are incompetent to be put to death.¹⁸ This only prevents a person with a *severe* mental illness from being put to death. It does not make them ineligible for the death penalty.

B. METHODS OF EXECUTION

Methods of execution have never been ruled unconstitutional by the Supreme Court.¹⁹ In fact, in 1878, the Court ruled that execution by firing squad was constitutional in the case of *Wilkerson v. Utah*.²⁰

The only other time a method has been challenged in the Supreme Court is in *Baze v. Rees*,²¹ where the Court decided that the three-drug cocktail used in Kentucky did not constitute cruel and unusual punishment because it did not cause a substantial risk of unnecessary pain.²² The three-drug cocktail consists of sodium thiopental, pancuronium bromide, and potassium chloride.²³ The first drug administered is sodium thiopental which is supposed to

¹³ *Atkins v. Virginia*, 536 U.S. 304 (2002).

¹⁴ *Roper v. Simmons*, 543 U.S. 551 (2005).

¹⁵ *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

¹⁶ *Panetti v. Quarteman*, 551 U.S. 930 (2007).

¹⁷ *Id.* at 957-58.

¹⁸ *Id.*

¹⁹ *Methods of Execution*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/methods-of-execution>.

²⁰ *Wilkerson v. Utah*, 99 U.S. 130 (1878).

²¹ *Baze v. Rees*, 553 U.S. 35 (2008).

²² *Id.*

²³ *Id.* at 44.

make the inmate unconscious.²⁴ The second drug used is pancuronium bromide which paralyzes the inmate.²⁵ Finally, the third drug injected in the cocktail is the poison that causes cardiac arrest: potassium chloride.²⁶ If the sodium thiopental does not work and the inmate is conscious for the injection of the pancuronium bromide, he or she will be conscious but paralyzed and unable to scream in pain.²⁷ The same excruciating pain will exist while the third drug is administered which can make for an awful death.²⁸

While most states use the same three-drug cocktail as Kentucky, inmates are still free to challenge it in court.²⁹ Building on the *Baze* decision, the Supreme Court addressed Oklahoma's execution protocol in *Glossip v. Gloss*.³⁰ In *Glossip*, inmates on Oklahoma's death row brought a federal suit.³¹ The condemned inmates argued that Oklahoma's method of execution violated the Eighth Amendment's prohibition against cruel and unusual punishment because the technique used would create "an unacceptable risk of severe pain."³² The petitioners in *Glossip* maintained that the use of midazolam, the first drug used in the state's three-drug cocktail, was not adequate to make a person unconscious. If that drug does not work, the inmate is not made unconscious, so when the paralytic is injected, the person is awake for all of the pain of the process.³³ The Supreme Court of the United States affirmed the ruling of the Tenth Circuit Court of Appeals.³⁴ Justice Alito's opinion stated the following:

For two independent reasons, we also affirm. First, the prisoners failed to identify a known and available alternative method of execution that entails a lesser risk of pain, a requirement of all Eighth Amendment

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 121-22 (Ginsburg, J., dissenting).

²⁸ *Id.* at 113-14.

²⁹ *Id.* at 99 (Alito, J., concurring).

³⁰ *Glossip v. Gloss*, 576 U.S. 863 (2015).

³¹ *Id.* at 867.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

method-of-execution claims. See *Baze v. Rees*, 553 U.S. 35, 61, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008) (plurality opinion). Second, the District Court did not commit clear error when it found that the prisoners failed to establish that Oklahoma's use of a massive dose of midazolam in its execution protocol entails a substantial risk of severe pain.³⁵

This means that the inmates did not provide the Court with a way that they could be killed without pain nor did they prove that the risks involved in the use of the drug intended to make them unconscious were sufficient to violate the Eighth Amendment.³⁶

Inmates may find more compassion under reviews based on state constitutions, rather than under the federal Constitution. The Supreme Court of Nebraska ruled that its electric chair was cruel and unusual punishment under its' state constitution.³⁷ Judge William Connolly of the Nebraska Supreme Court said, "[w]e recognize the temptation to make the prisoner suffer, just as the prisoner made an innocent victim suffer. But it is the hallmark of a civilized society that we punish cruelty without practicing it."³⁸

III. LIMITATIONS OF EIGHTH AMENDMENT JURISPRUDENCE FOR CASES INVOLVING EXECUTION OF INMATES WITH DISABILITIES

As discussed earlier, the Supreme Court of the United States recently decided the case of *Bucklew v. Precythe*. Bucklew, an inmate on Missouri's Death Row had a rare condition that made lying down on a gurney to be executed extremely painful.³⁹ Specifically, he could choke on his own blood when he was in a supine position.⁴⁰ The Court had to decide whether executing Bucklew in a manner that might cause additional pain triggers the Eighth Amendment's

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Nebraska v. Mata*, 275 Neb. 1, 79 (2008).

³⁸ *Id.* at 69.

³⁹ *Id.* at 1120.

⁴⁰ *Id.*

prohibition against cruel and unusual punishment,⁴¹ The Court ruled against Bucklew, holding that the Eighth Amendment does not guarantee a painless death and that the execution is constitutional if there is no “superadded” pain.

In *Bucklew*, the central question was if the Eighth Amendment’s prohibition against cruel and unusual punishment would be violated if it caused the appellant “excruciating” or “extreme” pain.⁴² The Court stated:

[Bucklew] acknowledges that the U.S. Constitution permits a sentence of execution for his crimes. He accepts, too, that the State's lethal injection protocol is constitutional in most applications. But because of his unusual medical condition, he contends the protocol is unconstitutional as applied to him. Mr. Bucklew raised this claim for the first time less than two weeks before his scheduled execution. He received a stay of execution and five years to pursue the argument, but in the end neither the district court nor the Eighth Circuit found it supported by the law or evidence. Now, Mr. Bucklew asks us to overturn those judgments. We can discern no lawful basis for doing so.⁴³

Given the high bar to establishing that a manner of execution (or the execution itself) constitutes cruel and unusual punishment, the *Bucklew* case demonstrates the difficulty in using the Eighth Amendment to address physical disabilities for inmates on death row. While under the Court’s analysis, Bucklew’s physical disability did not prevent his execution under the Eighth Amendment, this author argues that this should not have been the end of considerations related to his physical disability. Instead, Bucklew should have received additional consideration under the Americans with Disabilities Act regarding his physical disability.

⁴¹ *Id.* at 1123.

⁴² *Id.* at 1120.

⁴³ *Bucklew*, 139 S. Ct. at 1118-19.

IV. THE ADA AND PHYSICAL DISABILITIES OF INMATES

A. GENERAL OVERVIEW OF THE ADA

The Americans with Disabilities Act (ADA) protects individuals with disabilities. It provides that “[n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”⁴⁴

While the ADA was created and conceived to protect those with disabilities, Supreme Court opinions did not necessarily follow the spirit of this law.⁴⁵ In 2008, in response to the Supreme Court decisions, Congress passed the ADA Amendments Act⁴⁶ which created a three-prong test to determine if a person is qualified to be covered by the Act. It defined disability as followed:

- (1) In general. Disability means, with respect to an individual -
 - (i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
 - (ii) A record of such an impairment; or
 - (iii) Being regarded as having such an impairment as described in paragraph (l) of this section. This means that the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both “transitory and minor.”⁴⁷

⁴⁴ 42 U.S.C. § 12132 (2018); *see also* 28 C.F.R. §§ 35.130(a); 35.152(b)(1) (2018).

⁴⁵ Chai Feldblum, Kevin Barry, & Emily Benfer, *The ADA Amendments Act of 2008*, 13 TEX. J. CIV. LIB. & CIV. RTS. 187, 193 (2008).

⁴⁶ *Id.* at 239.

⁴⁷ 29 C.F.R. § 1630.2(g)(1)-(3) (2018).

In addition to the three-pronged definition of disability, the Amendments also clarified the definitions of physical and mental impairments under the ADA:

- (h) Physical or mental impairment means -
 - (1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or
 - (2) Any mental or psychological disorder, such as an intellectual disability (formerly termed “mental retardation”), organic brain syndrome, emotional or mental illness, and specific learning disabilities.⁴⁸

Under the ADA, a person claiming a disability must have a substantial limitation of a major life activity.⁴⁹ This includes a person caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.”⁵⁰ It also includes the ability to use major bodily functions, such as “functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily functions includes the operation of an individual organ within a body system.”⁵¹

⁴⁸ 29 C.F.R. § 1630.2 (h)(1)-(2) (2018).

⁴⁹ 29 C.F.R. § 1630.2 (i) (2018).

⁵⁰ 29 C.F.R. § 1630.2 (i) (2018).

⁵¹ 29 C.F.R. § 1630.2 (ii) (2018).

B. TITLE II OF THE ADA

Title II of the ADA prohibits discrimination of people with disabilities by public entities in services, programs, or activities.⁵² Public entities must make reasonable changes to any of the aforementioned that may be discriminatory.⁵³ While it may seem odd, and even grotesque, to consider an execution as a “service” to a condemned inmate, an inmate with disabilities deserves all the protection that the law can provide. That protection should come even when it requires a different application of the law. A view of the definitions in Title II of the ADA demonstrates how state prisons owe protections to condemned prisoners with disabilities.

Title II of the ADA states:

SEC. 201. DEFINITION.

(1) PUBLIC ENTITY.—The term “public entity” means—

- (A) any State or local government;
- (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and
- (C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 103(8) of the Rail Passenger Service Act).

(2) QUALIFIED INDIVIDUAL WITH A DISABILITY.—The term “qualified individual with a disability” means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in

⁵² 42 U.S.C.S. § 12131 (201)-(202) (2018).

⁵³ 28 C.F.R. § 35.130 (b)(7) (2018).

programs or activities provided by a public entity.⁵⁴

In 1998, the Supreme Court held that “[s]tate prisons fall squarely within the statutory definition of “public entity,” which includes “any department, agency, special purpose district, or other instrumentality of a State or States or local government.”⁵⁵ State prisons desiring to execute an individual would be governed by Title II of the ADA.

Under state law, execution protocols would be “rules, policies, or practices...” under Title II of the ADA. It would be here that the analysis can change from an Eighth Amendment cruel and unusual claim to a claim under Title II.

To protect inmates with disabilities from an unbearable death, we should consider using established disability law where Eighth Amendment jurisprudence currently fails. While those who drafted Title II of the ADA may not have considered this use of the statute, it should be reviewed and looked at as an avenue to keep a person with a disability alive or give them an accommodation to the humane death that inmates without disabilities are supposed to receive.

V. THE NEED FOR ADA ACCOMMODATIONS DURING EXECUTIONS

While it may seem odd to think of an execution as a service, activity, or program for purposes of disability analysis, this author contends that it is a covered activity that correctional facilities must implement without discrimination and for which reasonable modifications should be made, as needed.

If inmates with disabilities are not going to be afforded the protection of the Eighth Amendment prohibition against cruel and unusual punishment, they should be given the protection of Title II of the ADA. While defense attorneys often want the abolition of capital punishment, they do not

⁵⁴ *Id.*

⁵⁵ Pa. Dept. of Corr. v. Yeskey, 524 U.S. 206, 208-09 (1998).

want their clients to suffer while the death penalty is still the law.⁵⁶

A. A REVIEW OF BOTCHED EXECUTIONS

Some may argue that there is no non-violent way for the state to kill a person. Gary Gilmore was the first execution after the *Gregg* decision.⁵⁷ He was killed by a Utah firing squad.⁵⁸ Charles Brooks of Texas was the first person ever executed by lethal injection.⁵⁹

Executions have gone wrong for a long time. Even one of the most famous death penalty cases in United States history, the 1953 execution of Ethel Rosenberg, who some considered wrongfully convicted, was seen as botched.⁶⁰ After five hits of electricity, doctors finally pronounced Rosenberg dead.⁶¹

Botched executions during lethal injections are also well documented. It took just over one and a half hours⁶² and two doses of drugs to execute Angel Diaz.⁶³ After an autopsy, it was found that drugs were injected into Diaz's soft tissue and a needle went straight through his vein.⁶⁴

Ohio is particularly bad at executing people. In 2006, Joseph Clark shouted, "It don't work!" as the execution team

⁵⁶ Ty Alper, *The Truth about Physician Participation in Lethal Injection Executions*, 88 N.C. L. REV. 11 (2009).

⁵⁷ *U.S. Capital Punishment History*, HOUSTON CHRONICLE (Feb. 4, 2001, 6:30 AM), <https://www.chron.com/news/article/U-S-capital-punishment-history-2000595.php?jwsourc=cl>.

⁵⁸ *Id.*

⁵⁹ Robert Reinhold, *Technician Executes Murderer in Texas by Lethal Injection*, N.Y. TIMES (Dec. 7, 1982), <https://www.nytimes.com/1982/12/07/us/technician-executes-murderer-in-texas-by-lethal-injection.html>.

⁶⁰ Jack Woliston, *Rosenbergs Go Silently to Electric Chair*, UNITED PRESS INTERNATIONAL (June 20, 1953), <https://www.upi.com/Archives/1953/06/20/Rosenbergs-go-silently-to-electric-chair/5084629411212/>.

⁶¹ *Id.*

⁶² Chris Tish & Curtis Krueger, *Second dose needed to kill inmate*, BLOGGER (Dec. 14, 2006), <http://angel-diaz-florida.blogspot.com/2006/12/second-dose-needed-to-kill-inmate-angel.html>.

⁶³ *Id.*

⁶⁴ Ben Crair, *Photos from a Botched Lethal Injection*, NEW REPUBLIC (May 29, 2014), <https://newrepublic.com/article/117898/lethal-injection-photos-angel-diazs-botched-execution-florida>.

tried to find a suitable vein.⁶⁵ Twenty-five minutes elapsed before the team found the first vein.⁶⁶ Forty more minutes went by before Clark's executioners found another vein.⁶⁷ It was one and a half hours before Clark was dead.⁶⁸

An overweight Ohio inmate named Christopher Newton suffered a fate similar to Clark's.⁶⁹ The execution team could not find a suitable vein.⁷⁰ A striking illustration of the terrible circumstances of the execution is that even though he was going to die at their hands, the prison officials allowed him to have a bathroom break during the long delay.⁷¹

On September 15, 2009, the State of Ohio attempted to execute Romell Broom.⁷² After two hours, Broom's execution could not be completed because the team conducting the procedure could not find a suitable vein.⁷³ The team hit his arm but missed his veins, leaving Broom in severe pain.⁷⁴ When the execution team found a vein, they still could not succeed because the vein bulged and made it difficult to use for the injection.⁷⁵ After nearly an hour, the warden summoned the prison doctor to see if he could find a vein to finish the execution.⁷⁶ Despite the warden's demand that the doctor only look to see if a vein could be found, the prison physician tried to put a catheter in Broom's foot because they could not find a vein in any other place.⁷⁷ The State finally stopped trying to kill Broom.

⁶⁵ Adam Liptak, *Trouble Finding Inmate's Vein Slows Lethal Injection in Ohio*, N.Y. TIMES, (May 3, 2006),

<https://www.nytimes.com/2006/05/03/us/03inmate.html>.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *After state's longest delay ends, man executed for cellmate murder*, ASSOCIATED PRESS (May 28, 2007),

https://www.cleveland.com/metro/2007/05/after_states_longest_delay_man.html.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Broom v. Jenkins*, No. 1:10 CV 2058, 2019 WL 1299846, at *1 (N.D. Ohio 2019).

⁷³ *Id.* at *2.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at *3.

⁷⁷ *Id.*

Clayton Lockett's story is similar to Romell Broom's. Lockett, a condemned inmate in Oklahoma, was scheduled to be executed on April 29, 2014.⁷⁸ Lockett was not killed by the execution protocol because the "chemicals did not enter into the offender."⁷⁹ The vein collapsed.⁸⁰ He died of a heart attack.⁸¹

B. POTENTIAL IMPACT OF PHYSICAL DISABILITIES ON EXECUTIONS

While some have argued that incompetent executioners may be at fault for botched executions,⁸² another factor leading to botched executions is the disability status of the condemned. For Clark⁸³ and Broom,⁸⁴ intravenous drug use made veins difficult to find. Their addictions may have afforded opportunities for accommodations since addiction is a disability under the ADA.⁸⁵ Newton's obesity also made finding a suitable vein

⁷⁸ Est. of Clayton Lockett v. Fallin, No. CIV-14-1119-HE, 2015 WL 3874883, at *1 (W.D. Okla. 2015).

⁷⁹ *Id.* at *3.

⁸⁰ *Id.* at *2.

⁸¹ Josh Levs, Ed Payne & Greg Botelho, *Oklahoma's Botched Lethal Injection Marks New Front in Battle over Executions*, CNN (Sep. 8, 2014, 7:16 AM), <https://www.cnn.com/2014/04/30/us/oklahoma-botched-execution/index.html>. (The process took so long that eventually Lockett's body gave in before the state could get the execution right).

⁸² Dr. Jay Chapman, creator of the three-drug cocktail stated that "it never occurred to me when we set this up that we'd have complete idiots administering the drugs." Elizabeth Weil, *The Needle and the Damage Done*, N.Y. TIMES MAG. (Feb. 11, 2007), <https://www.nytimes.com/2007/02/11/magazine/11injection.t.html>.

⁸³ Jim Provance & Christina Hall, *Clark Execution Raises Lethal-Injection Issues*, THE BLADE (May 4, 2006, 11:42 AM), <https://www.toledoblade.com/news/local/2006/05/04/Clark-execution-raises-lethal-injection-issues/stories/feed/index.rss>.

⁸⁴ *Log Blames Execution Problems on Drug Use*, WBNS (Sep. 16, 2009, 4:52 PM), <https://www.10tv.com/article/log-blames-execution-problems-drug-use>.

⁸⁵ *Fact Sheet: Drug Addiction And Federal Disability Rights Laws*, U.S. DEPT. OF HEALTH AND HUMAN SERVICES (Oct. 25, 2018), <https://www.hhs.gov/sites/default/files/drug-addiction-aand-federal-disability-rights-laws-fact-sheet.pdf>.

difficult.⁸⁶ Small veins also fall under the category of disability because they affect the circulatory system, which under the ADA is proof of physical impairment.⁸⁷ The argument that an inmate is too obese to kill has been used in other cases, but—at most—has only resulted in a temporary stay of execution.⁸⁸

Russell Bucklew⁸⁹ suffered from cavernous hemangioma, which caused tumors made from clumps of blood vessels to affect his head, neck, and throat.⁹⁰ Cavernous hemangioma is a physical impairment disability.⁹¹ It substantially limits the major life activity of sleeping.⁹² Bucklew clearly fits the definition of a disabled person under the ADA and he should have received ADA accommodation (even during his execution) in addition to Eighth Amendment considerations. While incarcerated, Bucklew chose and was permitted to sleep at a forty-five-degree angle to mitigate his condition.⁹³ If the state required Bucklew to be supine during his execution, there was a fear that excruciating pain could be caused by the intravenous chemicals used in lethal injection because the tumors in his mouth would obstruct his breathing.⁹⁴ During the execution, Missouri did not provide any accommodations for Bucklew.⁹⁵

Obesity can also be a disability per the statutory definition because it affects several bodily functions and systems in the body.⁹⁶ Obesity is distinguished from ordinary

⁸⁶ Christina Ng, *Execution of 486-Pound Death Row Inmate 'Simply Will Not Work,' Attorneys Say*, ABC NEWS (Sept. 18, 2012), <https://abcnews.go.com/US/486-pound-death-row-inmate-fat-execute/story?id=17261585>.

⁸⁷ 29 C.F.R. § 1630.2 (h)(1)-(2) (2018).

⁸⁸ *Id.*

⁸⁹ The State of Missouri executed Russell Bucklew on October 1, 2019. *Missouri Inmate Executed Despite Activists' Concerns He Could Suffer Because of His Rare Disease*, CNN.com (Oct. 1, 2019, 10:03 PM), <https://www.cnn.com/2019/10/01/us/missouri-execution-russell-bucklew-rare-disease-trnd/index.html>.

⁹⁰ *Bucklew*, 139 S. Ct. at 1120.

⁹¹ 29 C.F.R. § 1630.2 (h)(1) (2018).

⁹² *Bucklew*, 139 S. Ct. at 1137.

⁹³ *Id.*

⁹⁴ *Id.* at 1138.

⁹⁵ *Missouri Inmate Executed*, *supra* note 90. (Bucklew did not suffer from his disability during the execution but it does not moot out the purpose of this article.)

⁹⁶ *Richardson v. Chi. Transit Auth.*, 926 F.3d 881 (7th Cir. 2019).

weight gain because it must be caused by an underlying physiological condition.⁹⁷

In Ohio, the State intended to execute Ronald Post.⁹⁸ Post weighed 486 pounds.⁹⁹ There was a fear that the execution would be torturous because it would take too many needle sticks to execute him.¹⁰⁰ Post's obesity was partly caused by back and knee problems.¹⁰¹ If he had not been granted clemency, and if he had lived¹⁰² Post (who had received clemency because of poor representation and who died before he could be executed)¹⁰³ could have used the recent Seventh Circuit decision in *Richardson v. Chicago Transit Authority*, and claimed his obesity as a disability under the ADA.¹⁰⁴ His obesity had the underlying physiological disability of back and knee pain. Title II of the ADA could have required an accommodation for his then-scheduled execution.

C. USING TITLE II OF THE ADA TO MINIMIZE BOTCHED EXECUTIONS

Most ADA cases are brought under Title I of the Act, which covers employment.¹⁰⁵ Title II is most useful for the theory that condemned inmates should receive accommodations for their disabilities. Title II of the ADA covers persons living in correctional facilities.¹⁰⁶

Under the circumstances of an execution, the public entity, the state prison, which desires to kill the inmate must provide a reasonable accommodation for a disabled inmate.

⁹⁷ *Id.* at 886.

⁹⁸ Christina Ng, *Execution of 486-Pound Death Row Inmate 'Simply Will Not Work,' Attorneys Say*, ABC NEWS (Sept. 18, 2012), <https://abcnews.go.com/US/486-pound-death-row-inmate-fat-execute/story?id=17261585>.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Ronald Post, Obese Inmate Spared Execution, Dies in Ohio Prison Hospital*, CBS NEWS (July 26, 2013), <https://www.cbsnews.com/news/ronald-post-obese-inmate-spared-execution-dies-in-ohio-prison-hospital/>.

¹⁰⁴ *Richardson*, 926 F.3d at 881.

¹⁰⁵ 42 U.S.C. § 12101 (2018).

¹⁰⁶ 28 C.F.R. § 35.101 (2018).

This means that execution protocols must account for disabilities when considering the execution of an inmate with disabilities.

State prisons fulfill Title II's definition of a public entity. An inmate like Russell Bucklew fulfills the requirement of a "qualified person with a disability." If the state wishes to proceed with the execution, he, and other inmates with disabilities, should be provided with modifications to make their execution as humane as it would be for an inmate without disabilities.

VI. ABLEISM AS A POTENTIAL LIMITATION TO ADDRESSING PHYSICAL DISABILITIES OF DEATH ROW INMATES

It is difficult to discuss disability issues without discussing ableism. Very much like racism, sexism, and homophobia, ableism is systemic, and it creates systems that affect the political, economic, and social power of people living with disabilities.¹⁰⁷ Ableism means that the aforementioned institutional systems work to the disadvantage of people with disabilities.¹⁰⁸

This matters in the death penalty context because severe mental illnesses and physical disabilities are not recognized in any state as a bar to execution. When the death penalty was brought back in *Gregg*, part of the reason capital punishment became legal again was because the Court believed the recognition of mitigating factors would lead to less arbitrary decisions.¹⁰⁹ In *Lockett v. Ohio*, the Supreme Court of the United States ensured that mitigating factors were considered by jurors. The Court reasoned that a person would have an increased chance of getting the ultimate punishment if jurors did not consider the potential that a defendant's background that would lessen the possibility of a death sentence.¹¹⁰

Unfortunately, unless the defense presents evidence of physical or mental disabilities as mitigation to the crime, they will not be considered as reasons for a jury not to impose

¹⁰⁷ Jamelia N. Morgan, *Reflections on Representing Incarcerated People with Disabilities: Ableism in Prison Reform Litigation*, 96 DENV. L. REV. 973 (2019).

¹⁰⁸ *Id.*

¹⁰⁹ *Gregg*, 428 U.S. at 193.

¹¹⁰ *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

the death penalty. Mental disabilities are often presented as mitigation.¹¹¹ Physical disabilities are likely not, or at least not used as often. Whether a jury believes that mental or physical disabilities are worthy of consideration of mitigation could be influenced by their feelings of ableism. This means that people living with disabilities may not be seen as important enough to consider, even though a defendant's life may have been ruled by their disabilities.

Further, ableism may make it difficult for people to generally support the idea of accommodations for prisoners, especially for those on death row. Inmates who are on death row have often committed the most heinous of crimes. When combined with the systemic disadvantages of ableism for those with disabilities, it decreases the inclination to provide relief to these inmates, even more for those who are "merely" physically disabled. This is why providing accommodations under the ADA is important in the context of the death penalty. In addition to the ADA, potential state-level legislation could reduce the impact of ableism by requiring the consideration of disabilities during executions.

A. POTENTIAL STATE-LEVEL LEGISLATION

There have been bills drafted and introduced in state legislatures that would prohibit a person with severe mental illnesses from being convicted of capital crimes, which could lead to execution.¹¹² Many of these bills mention the mental illnesses a person must live with to be ineligible for the death penalty.¹¹³ There has also been much written about making people living with severe mental illnesses death ineligible, including by the American Bar Association.¹¹⁴

Not much, if anything, has been written about abolishing or limiting the death penalty for physical disabilities. Potential state legislation could be drafted to

¹¹¹ *Id.* at 594 (the Ohio Death Penalty Statute listed psychosis or mental deficiency is a mitigating factor).

¹¹² *Resources on Severe Mental Illness and Death Penalty*, A.B.A., https://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/severe-mental-illness-initiative/resources/ (last visited June 7, 2021).

¹¹³ *Id.* (SMI exemption bills, fiscal impact analysis, testimony and legislative hearings).

¹¹⁴ *Id.*

include the definitions of certain physical illnesses that could make a person ineligible for the death penalty. Additionally, states could specify certain physical conditions (such as small veins and morbid obesity) that require proactive consideration of accommodations by prison officials, without requiring requests by the inmates.

VII. FUTURE AREAS FOR RESEARCH

A. PHYSICAL DISABILITIES THAT SHOULD MAKE AN INMATE DEATH INELIGIBLE

There are several areas of research that should be explored related to inmates living with disabilities who are on death row. One area for research concerns physical impairments that should make inmates ineligible for the death penalty. For example, if a person solicits a murder for hire and is incapacitated due to paralysis, that person may be found guilty of a capital crime but, perhaps, should not be eligible for execution.

Additionally, if a person suffers a disability while they are incarcerated on death row, they should not be executed because the disability may make a part of the lethal injection protocol miserable since they may suffocate during the process. Future research should explore the specific types of physical disabilities that might make an inmate death penalty ineligible.

B. REPARATIONS OR SUPPORT FOR DISABILITIES OF EXONEREES

A study of the psychological effects of unlawful convictions on eighteen European men found that they suffered several psychological illnesses.¹¹⁵ These included post-traumatic stress disorder, enduring personality change, depressive disorders, panic disorders, and sleep disorders.¹¹⁶ The men also had trouble adjusting to life outside of prison. They were unprepared to live unsupervised lives and lacked

¹¹⁵ Adrian Grounds, *Psychological Consequences of Wrongful Convictions and Imprisonment*, 46 CAN. J. CRIM. JUST. 2, 165, 167-68 (2004).

¹¹⁶ *Id.* at 168-69.

a sense of direction.¹¹⁷ They were still living with the effects of being turned down appeal after appeal. They dwelled on their contact with the criminal justice system long after they left it.¹¹⁸ They had difficulty in building new relationships and had to deal with the breakup of existing relationships due to separations during incarceration.¹¹⁹

Some states provide monetary reparations for those who have been wrongfully convicted.¹²⁰ Others do not. Research should be done to determine whether exonerees should receive reparations (or enhanced reparations), community-based support, and/or mental health support from states.

VIII. CONCLUSION

While the struggle of litigating the death penalty as cruel and unusual punishment is not only worthwhile but necessary, capital punishment abolition has been accomplished through state legislation. This means that statehouses can bring it back if they so choose. The abolition of the death penalty can only be permanent with a decision of the Supreme Court of the United States.

It is unlikely that capital punishment will be abolished under the Eighth Amendment anytime soon. This makes it important that condemned inmates with disabilities—who will have their sentences carried out—should have protections from suffering beyond that which is contemplated by the death penalty protocols. The ADA is an alternative to the Eighth Amendment in assisting condemned inmates.

Inmates with disabilities should be able to get relief from any excruciating pain that they may suffer while being executed. Title II of the ADA is a vehicle to attempt to alleviate that pain. Several people who have suffered botched executions meet the requirements for ADA protection since they have at least one disability that substantially limits a major life activity. Most importantly, under Title II of the

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 171.

¹²⁰ *Compensating the Wrongly Convicted*, INNOCENCE PROJECT, <https://innocenceproject.org/compensating-wrongly-convicted/> (last visited June 7, 2021).

ADA, the execution process—a function of a state or federal criminal justice entity—must protect our vulnerable populations, no matter how reprehensible people find them to be. Even those who commit reprehensible offenses are entitled to humane treatment and allowed the protection of their rights.