IF AT FIRST YOU DON'T SUCCEED: CONSTITUTIONAL CHALLENGES TO SECOND EXECUTION ATTEMPTS

In states where the death penalty is still legal, lethal injection is the preferred method of execution, despite the fact that it has the highest rate of error of any execution method used in the United States. Increased media attention on lethal injection errors and death penalty issues in general has illuminated a number of issues that the Supreme Court has thus far declined to address. The Court's hesitance to hear death penalty challenges has resulted in a number of unanswered questions. This Note attempts to address one of those unanswered questions—if a prisoner survives a botched execution, what constitutional challenges might the prisoner raise? Using Rommell Broom's case as a proxy, this Note predicts the relative success or failure of a similarly situated defendant's claims brought pursuant to the Eighth and Fifth Amendments. Although it is likely that challenges brought by survivors of botched executions will be unsuccessful, increased litigation in this area may compel the Supreme Court to finally acknowledge the growing practical and legal issues associated with the implementation of the death penalty.

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I. INTRODUCTION

Although Rommell Broom's execution on September 15, 2009, began like any other, the execution technicians soon encountered difficulties during the intravenous line insertion process.[1] Two

1. Petition for a Writ of Certiorari at 3, Broom v. Ohio, 137 S. Ct. 590 (2016) (mem.) (No. 16-5580), *cert. denied.*

technicians unsuccessfully attempted to insert the intravenous lines at three different points on Broom's body.[2] One of the technicians made two additional insertion attempts, which caused Broom to cry out in pain.[3] The attempts continued for nearly two more hours.[4] During that time, Broom sustained at least eighteen different punctures, one of which struck bone.[5] Some technicians needed to take approximately twenty-five-minute breaks.[6] The execution technicians exhibited signs of distress such as sweating and rushing out of the room.[7] Finally, the Ohio Governor stayed Broom's execution for one week.[8]

As a result of the botched execution, Broom filed federal and state habeas corpus petitions, a state post-conviction relief action, and a federal civil rights action.[9] The Ohio Court of Appeals upheld the rescheduling of Broom's execution, finding neither his Fifth nor Eighth Amendment claims persuasive.[10] While the Ohio Court of Appeals asserted that multiple execution attempts should be "tempered," the court refused to adopt a bright-line rule prohibiting multiple execution attempts.[11]

The Supreme Court of Ohio similarly declined to find or apply a bright-line constitutional prohibition on more than one execution attempt.[12] The Supreme Court of Ohio agreed with the appellate court's Fifth Amendment double jeopardy analysis, stating that Broom would not be subject to "multiple punishments" because the lethal injection drugs never actually began to flow.[13] Moreover, Broom's botched execution was not cruel or unusual because it was accidental.[14] Ultimately, Broom took his case to the Supreme Court of the United States.[15] The Supreme Court denied certiorari, with Justices Breyer and Kagan dissenting.[16]

Considering the negative treatment of Broom's claims and the rarity of similar claims, why should the Supreme Court ever consider the issue? One reason is increased information about and attention

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2. *Id.*
3. *Id.*
4. *Id.* at 4–5.
5. *Id.*
6. *Id.* at 4.
7. *Id.* at 3–4.
8. *Id.* at 6.
9. *Id.* at 6–7.
10. State v. Broom, No. 96747, 2012 WL 504504, at *1, *4–6 (Ohio Ct. App. Feb. 16, 2012).
11. *Id.* at *6.
12. State v. Broom, 51 N.E.3d 620, 631 (Ohio 2016).
13. *Id.* at 626–27.
14. *Id.* at 631.
15. *See generally* Broom v. Ohio, 137 S. Ct. 590 (2016) (mem.).
16. *Id.*

paid to errors related to imposing the death penalty.[17] Since 1973, there have been 161 exonerations for capital crimes.[18] From 1973 to 1999, there was an average of 3.03 exonerations per year, while between 2000 and 2013, there was an average of 4.29 exonerations per year.[19] The risk of executing the innocent might compel courts to more closely examine the constitutional principles governing the administration of the death penalty.

Another reason to consider Broom's claims is that these types of challenges may become more and more common. Thirty-two states still employ the death penalty, all of which use lethal injection.[20] Since 1976, states have executed 1,294 people via lethal injection.[21] States began employing lethal injection as a more humane alternative to firing squads, hanging, and electrocution.[22] While lethal injection has become more prevalent, lethal injection drugs have become less available.[23] The limited availability of the drugs has forced states to be more experimental, increasing the possibility of error in a method of execution already riddled with issues.[24]

The Supreme Court has repeatedly struck down or refused to hear challenges regarding botched executions.[25] Despite the Court's hesitancy to engage with this issue, states often deviate from protocol and too often botch executions.[26] In the United States, there have been 276 botched executions in the last 120 years,[27] and lethal

17. *See generally Innocence and the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/innocence-and-death-penalty (last updated Dec. 30, 2017).

18. *Id.*

19. *Id.*

20. *State by State Lethal Injection*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/state-lethal-injection (last visited Mar. 13, 2018); *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR. http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last updated Nov. 9, 2016).

21. DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 3 (2018), http://www.deathpenaltyinfo.org/documents/FactSheet.pdf.

22. Lee Black & Robert M. Sade, *Lethal Injection and Physicians: State Law vs. Medical Ethics*, 298 J. AM. MED. ASS'N 2779, 2779 (2007).

23. *See* Erik Eckholm, *Pfizer Blocks the Use of Its Drugs in Executions*, N.Y. TIMES (May 13, 2016), https://www.nytimes.com/2016/05/14/us/pfizer-execution-drugs-lethal-injection.html.

24. Michael L. Radelet, *Examples of Post-*Furman *Botched Executions*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions (last updated Mar. 1, 2018).

25. *See generally* Glossip v. Gross, 135 S. Ct. 2726 (2015) (striking down a constitutional challenge to the use of a three-drug cocktail with the potential to cause great pain if administered improperly); Baze v. Rees, 553 U.S. 35 (2008) (holding that the risk of improper administration did not render the three-drug lethal injection protocol cruel and unusual despite the possibility of significant pain).

26. Radelet, *supra* note 24.

27. *Id.*

injection has had the highest rate of error of any method of execution.[28] Despite the prevalence of the problem, botched executions were not a fixture in the national consciousness until 2014, when several high-profile botched executions caught the media's attention.[29]

In January 2014, Ohio piloted a previously untested two-drug lethal injection cocktail.[30] Dennis McGuire was the first to be executed using this new protocol.[31] Although deaths by lethal injection normally take ten to fifteen minutes, McGuire gasped and snorted for over twenty-five minutes before dying.[32] In April 2014, Ohio stated that it would increase the dosages of the lethal injection drugs used on McGuire for future executions.[33] Later that month, Clayton Lockett died of a heart attack forty-three minutes after receiving a lethal injection in Oklahoma.[34] The execution technicians attempted to insert intravenous lines for over an hour before they were able to find a usable vein.[35] Beginning three minutes after the first lethal injection drug was administered, Lockett writhed, groaned, and struggled for sixteen minutes until the Director of the Oklahoma Department of Corrections stopped the execution.[36] An investigation into Lockett's execution revealed that one of his veins had collapsed during administration of the drug.[37] Three months later, in Arizona, Joseph Wood's execution lasted for nearly two

28. *Id.*

29. Mark Berman, *Another Execution Gone Awry. Now What?*, WASH. POST (July 24, 2014), https://www.washingtonpost.com/news/post-nation/wp/2014/07/24/another-execution-gone-awry-now-what/?utm_term=.ef960bc21f82.

30. Josh Sanburn, *Ohio Ups Lethal-Injection Dosages After Controversial Execution*, TIME (Apr. 28, 2014), http://time.com/80092/ohio-lethal-injection-dosages-execution/.

31. *Id.*

32. *Id.*

33. *Id.*

34. Greg Botelho & Dana Ford, *Oklahoma Stops Execution After Botching Drug Delivery; Inmate Dies*, CNN (Oct. 9, 2014, 2:55 PM), http://www.cnn.com/2014/04/29/us/oklahoma-botched-execution/; New Docs Detail Chaos of Oklahoma's Botched Execution of Clayton Lockett, NBC NEWS (Mar. 17, 2015, 3:26 PM), https://www.nbcnews.com/news/us-news/new-docs-detail-chaos-oklahomas-botched-execution-clayton-lockett-n325021.

35. Radelet, *supra* note 24.

36. Katie Fretland, *Oklahoma Execution: Clayton Lockett Writhes on Gurney in Botched Procedure*, GUARDIAN (Apr. 30, 2014, 7:58 AM), https://www.theguardian.com/world/2014/apr/30/oklahoma-execution-botched-clayton-lockett.

37. *Id.*

hours.[38] Throughout that time, Wood struggled for breath, gasping over 600 times before eventually dying.[39]

The persistence of legal and procedural errors in inflicting the death penalty may force the Supreme Court to consider a death penalty challenge in the near future. In December 2016, the Supreme Court denied certiorari in *Sireci v. Florida*,[40] thereby declining to review a prisoner's Eighth Amendment challenge to a forty-year delay in receiving the death penalty.[41] Justice Breyer dissented in the denial, stating that "the time has come" for the Court to reevaluate the constitutionality of the death penalty.[42] In his opinion, Justice Breyer referenced the *Broom* case, calling it one of many "especially cruel" executions that the Supreme Court has recently refused to review.[43]

Justice Breyer's dissent also highlights how the Supreme Court's hesitancy to answer, or even hear, death penalty challenges has led to many unanswered questions.[44] This Note will attempt to address one of those unanswered questions—if a prisoner survives a botched execution, what constitutional challenges could the prisoner raise? This Note will use Rommell Broom's case as a proxy to evaluate the relative success or failure of a similarly situated defendant's ("*Broom* Defendant's") claims. Part II will analyze arguments brought under the Eighth Amendment, while Part III will analyze Fifth Amendment claims.

Although precedent is scarce, a *Broom* Defendant likely could raise two constitutional arguments. The first is under the Eighth Amendment's Cruel and Unusual Punishment Clause, while the second is under the Fifth Amendment's Double Jeopardy Clause. Under the Cruel and Unusual Punishment Clause, a *Broom* Defendant could raise claims under the general "dignity of man" limitation, the proportionality limitation, and the method of execution limitation. A *Broom* Defendant's strongest claim is likely the general dignity of man limitation. However, the method of execution limitation might also be successful, depending on how courts classify the challenged method of execution.

Under the Fifth Amendment, the success of a *Broom* Defendant's double jeopardy claim likely hinges on when jeopardy "attaches," if and when the defendant developed a legitimate expectation of finality

38. Mark Berman, *Arizona Execution Lasts Nearly Two Hours; Lawyer Says Joseph Wood Was 'Gasping and Struggling to Breathe'*, WASH. POST (July 23, 2014), https://www.washingtonpost.com/news/post-nation/wp/2014/07/23/arizona-supreme-court-stays-planned-execution/?utm_term=.0820c546271f.

39. *Id.*

40. 137 S. Ct. 470 (2016) (mem.)

41. *Id.* at 470.

42. *Id.* at 471 (Breyer, J., dissenting).

43. *Id.*

44. *See id.*

in his original sentence, and whether a second execution attempt constitutes an increased sentence or an additional punishment. While a *Broom* Defendant could likely establish that jeopardy did attach, he is unlikely to establish a legitimate expectation of finality and an increased sentence. A *Broom* Defendant likely would not have a legitimate expectation of finality in his original sentence because the death penalty is automatically appealable. Additionally, under a strict formalist approach, a second execution attempt may not constitute an increased sentence. However, if a court uses a substantive approach, it may find that the cumulative effect of what a *Broom* Defendant endured constitutes an increased sentence or additional punishment. Thus, a *Broom* Defendant's double jeopardy claim will depend heavily on whether a court prioritizes form over substance.

II. EIGHTH AMENDMENT ARGUMENTS

The Eighth Amendment prohibits "cruel and unusual punishment."[45] A punishment is "cruel and unusual" when it does not accord with the "dignity of man."[46] While the Supreme Court has held that the death penalty itself is constitutional under the Eighth Amendment,[47] the Court has nevertheless placed the following limitations on how, when, and against whom a state can administer capital punishment: (1) proportionality limitations[48] and (2) specific method of execution limitations.[49] This Part will discuss a *Broom* Defendant's potential Eighth Amendment claims and their relative probability of success.

A. The Dignity of Man Limitation

The dignity of man limitation is a general Eighth Amendment requirement for all punishments and is not specific to the death penalty.[50] A punishment that dehumanizes the prisoner does not comport with the dignity of man.[51] Dehumanization can occur through traditionally recognized forms of torture, such as crucifixion or burning alive,[52] but it can also occur through prolonged, systematic mistreatment.[53] For example, the Supreme Court has defined failing

45. U.S. CONST. amend. VIII.
46. Trop v. Dulles, 356 U.S. 86, 99–100 (1958).
47. Gregg v. Georgia, 428 U.S. 153, 207 (1976).
48. Miller v. Alabama, 567 U.S. 460, 469 (2012).
49. *Id.* at 503.
50. *See e.g.*, Furman v. Georgia, 408 U.S. 238, 270–71 (1972) (Brennan, J., concurring) (discussing the concept of "dignity of man" in the infliction of punishment on prisoners).
51. *Id.*
52. *Id.* at 264–65, 271, 278.
53. United States v. Bailey, 444 U.S. 394, 423 (1980); Estelle v. Gamble, 429 U.S. 97, 104–05 (1976).

to protect prisoners from rape and denying them proper medical care as failing to comport with the dignity of man under the Eighth Amendment.[54] In addition to physical mistreatment, the dignity of man limitation also extends to punishments that inflict severe emotional and mental anguish.[55] In *Trop v. Dulles*,[56] the Court labeled expatriation as cruel and unusual punishment due to the severe mental anguish of losing one's nationality.[57] The Court stated that expatriation was a punishment "more primitive than torture" due to its potential to cause "ever-increasing fear and distress."[58] Thus, physical torture is not a prerequisite for invalidating a punishment on dignity of man grounds under the Eighth Amendment.[59]

A *Broom* Defendant could likely argue that a second execution inflicts severe mental and emotional anguish by analogizing a botched execution to a mock execution. A mock execution occurs when someone creates a severe fear of death by exposing a victim to a seemingly life-threatening situation.[60] The Central Intelligence Agency used mock executions to intimidate Abu Ghraib prisoners by faking detainee assassinations during interrogations.[61] Under the United Nations' Convention on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, mock executions fall within the internationally recognized definition of psychological torture.[62] Therefore, international standards recognize that mock executions cause severe emotional and psychological trauma.[63]

In Broom's case specifically, the state likely subjected Broom to severe fear of death paired with a life-threatening situation during the period in which the state attempted to insert intravenous lines.[64]

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54. *Bailey*, 444 U.S. at 423; *Estelle*, 429 U.S. at 104–05.
55. Trop v. Dulles, 356 U.S. 86, 101–02 (1958).
56. 356 U.S. 86 (1958).
57. *Id.* at 101–02.
58. *Id.*
59. *Id.* at 100–01.
60. Nora Sveaass, *Destroying Minds: Psychological Pain and the Crime of Torture*, 11 N.Y. CITY L. REV. 303, 315 (2008).
61. CIA INSPECTOR GEN., SPECIAL REVIEW: COUNTERTERROMISM DETENTION AND INTERROGATION ACTIVITIES 70 (May 7, 2004), https://fas.org/irp/cia/product/ig-interrog.pdf.
62. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987); DEP'T OF THE ARMY, HUMAN INTELLIGENCE COLLECTOR OPERATIONS 5–21 (2006), https://fas.org/irp/doddir/army/fm2-22-3.pdf; Dawn J. Miller, *Holding States to Their Convention Obligations: The United Nations Convention Against Torture and the Need for a Broad Interpretation of State Action*, 17 GEO. IMMIGR. L.J. 299, 320 (2003) ("Psychological torture [under the U.N. Convention Against Torture] includes mock executions.").
63. Sveaass, *supra* note 60.
64. Petition for a Writ of Certiorari, *supra* note 1, at 10–11.

The second execution attempt will likely be even more traumatic for Broom because he has already had the experience of a painfully botched execution.[65] Finally, the years of delay between the two execution attempts will possibly result in "ever-increasing fear and distress" even more severe than that which the *Trop* Court contemplated in the expatriation context.[66] Thus, a *Broom* Defendant could likely assert a cognizable claim that he endured unconstitutional psychological torture under the dignity of man limitation.

The likelihood of success of such a claim is unclear. No cases challenging the use of mock executions on American citizens have reached the Supreme Court.[67] In fact, only one case challenging mock executions employed against American citizens has even reached a federal appellate court.[68] The Ninth Circuit rejected an Eighth Amendment dignity of man challenge from a defendant claiming that delaying his execution was akin to performing a mock execution.[69] While Broom's ordeal is much more similar to a mock execution than is a delay, without additional analogous precedent, the outcome of a *Broom* Defendant's dignity of man claim is unclear.

B. The Proportionality Limitation

The first constitutional limitation placed on the death penalty is proportionality. To fulfill the proportionality requirement, the punishment must logically relate to the culpability of the individual offender.[70] The Supreme Court has used the proportionality limitation to invalidate the use of the death penalty on juvenile offenders[71] and the intellectually disabled.[72] The primary inquiry in assessing the proportionality of capital punishment is whether its use on a particular prisoner violates "evolving standards of decency."[73] To ascertain modern standards of decency, the Supreme Court first examines relevant state statutes.[74]

When evaluating modern standards of decency, the Supreme Court limits its analysis to statutes that directly address the

65. *Id.* at 22–23.
66. Trop v. Dulles, 356 U.S. 86, 102 (1958).
67. *See generally* Nevius v. McDaniel, 218 F.3d 940 (9th Cir. 2000) (demonstrating that the highest court a mock execution case has reached is the federal appellate court).
68. *Id.* at 946.
69. *Id.*
70. Roper v. Simmons, 543 U.S. 551, 560 (2005).
71. *Id.* at 578.
72. Atkins v. Virginia, 536 U.S. 304, 321 (2002).
73. Miller v. Alabama, 567 U.S. 460, 469 (2012) (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)).
74. *Atkins*, 536 U.S. at 312.

prisoner's specific situation.[75] For example, while considering the constitutionality of capital punishment for minors in *Roper v. Simmons*,[76] the Court gave little weight to general state legislative trends regarding the death penalty.[77] Instead, the Court examined whether states had enacted statutes banning the death penalty specifically for minors and the frequency with which states executed minors.[78] The Court held that there was a national consensus against imposing the death penalty on minors because eighteen states specifically prohibited the practice.[79] Examining these statutes allowed the Court to conclude that executing minors did not comport with modern decency standards and, as such, violated the proportionality requirement.[80]

Similarly, in *Atkins v. Virginia*,[81] the Court again ignored general death penalty legislative trends and instead focused on the number of states that specifically forbade executing the intellectually disabled.[82] While only a small number of states had explicitly banned the practice,[83] very few states actually performed any of these executions.[84] States' consistent refusal to impose capital punishment on the intellectually disabled constituted a national consensus and was a sufficient basis for the Court to hold that executing the intellectually disabled violated modern standards of decency.[85]

In addition to states' execution legislation and practices, the Court has also been willing to consider social science statistics and public opinion data when determining modern standards of decency.[86] In *Furman v. Georgia*,[87] the Court instituted a de facto moratorium on the death penalty because studies suggested that states were carrying out the death penalty in a racially discriminatory manner.[88] At the time, there was a legislative trend favoring the death penalty, with forty states allowing capital punishment.[89] Despite the

75. *Roper*, 543 U.S. at 564.
76. 543 U.S. 551 (2005)
77. *Id.* at 564–65.
78. *Id.*
79. *Id.* at 564.
80. *Id.* at 567–68.
81. 536 U.S. 304 (2002).
82. *Id.* at 315–16.
83. *Id.* at 314–15.
84. *Id.* at 316.
85. *See id.*
86. Furman v. Georgia, 408 U.S. 238, 250–51 (1972) (examining statistics that showed racial and economic disparities and possible discrimination in the application of the death penalty).
87. 408 U.S. 238 (1972).
88. *Id.* at 251.
89. *Part I: History of the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/part-i-history-death-penalty (last visited Mar. 13, 2018).

legislative consensus, the Court felt that the social science data indicating racial disparities and arbitrariness in the application of the death penalty outweighed the national legislative consensus.[90] This demonstrates that the Court may, at times, be willing to balance social science data and states' legislative judgments to ascertain evolving standards of modern decency.

To raise a proportionality challenge under the evolving standards of decency theory, a *Broom* Defendant would first need to narrowly define and identify a legislative trend or national consensus.[91] Like the defendants in *Roper* and *Atkins*, a *Broom* Defendant would need to show legislative trends targeting the specific aspect of capital punishment challenged, not just general data relating to the death penalty or even lethal injection.[92] Therefore, due to a heavy constitutional presumption in favor of the death penalty, a *Broom* Defendant would have to demonstrate a legislative trend or national consensus prohibiting subsequent execution attempts following a botched execution.[93]

At present, no such narrowly defined consensus exists. Very few states have taken any kind of action regarding botched executions. California and Kentucky require public hearings on methods of execution.[94] Arizona and Oklahoma have carried out independent reviews following botched executions but have not statutorily mandated such reviews.[95] Additionally, the American Bar Association included in its 2015 Mid-Year Report to the House of Delegates a resolution to provide "immediate, thorough, and independent" reviews of executions where the prisoner "appears to suffer" or where the execution is otherwise prolonged or deviates from protocols.[96] However, most states still give discretion to their departments of corrections (or analogous agencies) when dealing with

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90. *Furman*, 408 U.S. at 305 (Brennan, J., concurring).

91. *See* Roper v. Simmons, 543 U.S. 551, 564 (2005) (examining the national consensus against the death penalty as applied to juveniles); Atkins v. Virginia, 536 U.S. 304, 316–17 (2002) (noting the national consensus against the death penalty as applied to the intellectually disabled).

92. *Roper*, 543 U.S. at 564; *Atkins*, 536 U.S. at 316–17.

93. Baze v. Rees, 553 U.S. 13, 53 (2008) (plurality opinion) (stating that the death penalty itself is constitutional); *Roper*, 543 U.S. at 564 (same).

94. Alan Greenblatt, *States Struggle To Find An Execution Method That Works*, NPR (Apr. 30, 2014, 6:18 PM), http://www.npr.org/2014/04/30/308379972/states-struggle-to-find-an-execution-method-that-works.

95. Eyder Peralta, *Oklahoma Governor Calls For Review Of Botched Execution*, NPR (Apr. 30, 2014, 3:06 PM), http://www.npr.org/sections/thetwo-way/2014/04/30/308372080/oklahoma-governor-calls-for-independent-review-of-botched-execution.

96. VIRGINIA E. SLOAN ET AL., AM. BAR ASS'N, DEATH PENALTY DUE PROCESS REVIEW PROJECT: REPORT TO THE HOUSE OF DELEGATES, REPORT 13 (2015), http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/2015_my_108b.authcheckdam.pdf.

botched executions and require little to no independent oversight.[97] While there are a handful of states monitoring botched executions, none have enacted binding legislation to recognize claims from survivors of botched executions or to provide them with some kind of relief.[98]

Although no consensus against subsequent execution attempts exists, there is an identifiable legislative trend toward banning the death penalty: nineteen states and the District of Columbia have abolished the practice completely[99] and gubernatorial moratoria are in place in four more states.[100] Social data also supports discontinuing the death penalty, specifically the use of lethal injection. According to a September 2016 Pew Research Center poll, only forty-nine percent of Americans approve of the death penalty for those convicted of murder.[101] American companies no longer manufacture lethal injection drugs,[102] and the Federal Drug Administration ("FDA") has not approved lethal injection drugs.[103] Additionally, approximately seven percent of the lethal injections that have occurred between 1970 and 2010 have been botched.[104] However, these facts are not drastic enough to evince a national consensus against second execution attempts.

This lack of narrowly tailored legislative evidence means that a *Broom* Defendant's proportionality claims are likely to be unsuccessful. Although these statistics may be sufficient to show that there is some trend toward monitoring executions more closely, the legislation and data are presumably not strong enough to demonstrate that evolving standards of decency would prohibit a second execution attempt. A majority of states still allow the death penalty and continue to find ways to procure death penalty drugs despite the absence of FDA approval.[105] Thus, a court is unlikely to

97. Greenblatt, *supra* note 94.
98. *Id.*; Peralta, *supra* note 95.
99. *States With and Without the Death Penalty*, *supra* note 20.
100. *Id.*
101. Baxter Oliphant, *Support for Death Penalty Lowest in More Than Four Decades*, PEW RESEARCH CTR.: FACTTANK (Sept. 29, 2016), http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades/. The same poll reveals that forty-two percent of Americans oppose the death penalty in such circumstances. *Id.*
102. Chris McGreal, *Lethal Injection Drug Production Ends in the US*, GUARDIAN (Jan. 23, 2011, 1:17 PM), https://www.theguardian.com/world/2011/jan/23/lethal-injection-sodium-thiopental-hospira.
103. Ellen Brait, *FDA Warns Ohio That Importing Lethal Injection Drug Would be Illegal*, GUARDIAN (Aug. 19, 2015, 4:36 PM), https://www.theguardian.com/us-news/2015/aug/19/fda-warns-ohio-importing-lethal-injection-drug-illegal.
104. Radelet, *supra* note 24.
105. Brait, *supra* note 103.

view these statistics as strong enough evidence to find a repeat execution attempt unconstitutional on proportionality grounds.

C. *The Method of Execution Limitation*

The second limitation on capital punishment restricts the manner in which states may execute people. States cannot execute prisoners in a manner that involves "torture or a lingering death."[106] Torture or a lingering death is the infliction of pain beyond what is "minimally necessary" to end an individual's life or beyond the "mere extinguishment of [human] life."[107] The primary indicator of whether a method of execution violates the Eighth Amendment is objective evidence of pain inherent in the challenged method.[108] Such unconstitutional methods of execution include disembowelment, decapitation, immolation, and public dissection.[109] In addition to evaluating physical pain, the Court also notes that unconstitutional methods of execution commonly superadd "gratuitous" terror or humiliation.[110]

The Supreme Court articulated the method of execution limitation in both *Baze v. Rees*[111] and *Louisiana ex rel. Francis v. Resweber*.[112] In *Baze*, the Court evaluated an Eighth Amendment challenge to lethal injection.[113] The *Baze* Court stated that in order to be unconstitutional, lethal injection would need to be "inhuman and barbarous."[114] Additionally, it would have to present an "objectively intolerable risk of harm."[115] The *Baze* Court noted that "isolated mishaps[s]" do not constitute "objectively intolerable risk[s] of harm" nor are they "inhuman and barbarous" because they are unintentional.[116] However, the *Baze* Court also excluded a hypothetical series of abortive attempts at electrocution from the definition of "isolated mishap."[117]

In *Resweber*, the Court examined a method of execution claim after a prisoner survived an execution attempt due to an electric chair malfunction.[118] To the *Resweber* Court, the method of execution

106. *In re* Kemmler, 136 U.S. 436, 447 (1890).
107. Glass v. Louisiana, 471 U.S. 1080, 1084 (1985) (Brennan, J., dissenting).
108. *Id.*
109. Wilkerson v. Utah, 99 U.S. 130, 135 (1878).
110. *Glass*, 471 U.S. at 1084 (Brennan, J., dissenting); *see also* Gregg v. Georgia, 428 U.S. 153, 173 (1976) ("The punishment must not involve the unnecessary and wanton infliction of pain.").
111. 553 U.S. 35 (2008) (plurality opinion).
112. 329 U.S. 459 (1947).
113. *Baze*, 553 U.S. at 41 (plurality opinion).
114. *Id.* at 48–49.
115. *Id.* at 50.
116. *Id.* at 49–50.
117. *Id.* at 50.
118. Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 460–61 (1947) (plurality opinion).

limitation required the state to carry out executions in a "careful and humane manner."[119] Ultimately, a plurality rejected the defendant's claim, holding that the pain caused by the electric chair malfunction was a necessary part of a humane execution by electrocution.[120] The *Resweber* dissent, in contrast, defined the "method of execution" at issue not as death by electrocution but as death by repeated electrocutions.[121] The dissent consequently stated that it was unlikely that any legislature would authorize such a penalty.[122] The dissent also emphasized that a constitutional method of execution would result in "instantaneous" and "substantially painless" death, such that the penalty is "no more than" the termination of life.[123] The dissent urged that death by electrocution was only constitutional when it was thought to be painless.[124]

A *Broom* Defendant could raise a method of execution challenge under the *Baze* and *Resweber* standards. The *Baze* plurality indicated that a series of abortive attempts at electrocution might not constitute an isolated accident,[125] while the *Resweber* dissent indicated that death by repeated electrocutions would be impermissible.[126] Under *Baze*, a *Broom* Defendant could argue that the state inflicted a series of abortive attempts at lethal injection when attempting to insert the intravenous lines. In Broom's case, the technicians punctured his skin at least eighteen times and deep enough to strike bone on one occasion.[127] Under *Resweber*, a *Broom* Defendant could argue that when he is executed, he will have suffered death by repeated needle punctures and lethal injection as opposed to death simply by lethal injection. He could also assert that his ordeal is even more impermissible than the *Resweber* defendant's ordeal because the defendant in that case stated that the electric current only "tickled" him.[128] In contrast, Broom was in "a great deal" of pain.[129] Thus, a *Broom* Defendant could use the analysis in *Baze* and *Resweber* to raise a colorable method of execution claim.

However, a *Broom* Defendant will encounter several difficulties in analogizing to *Baze* and *Resweber*. First, to exclude his ordeal from *Baze*'s isolated accident exception, a *Broom* Defendant would have to address the state's intent. A *Broom* Defendant must show that the state deliberately inflicted pain beyond what is necessary to carry out

119. *Id.* at 462.
120. *Id.* at 464.
121. *Id.* at 474 (Burton, J., dissenting).
122. *Id.*
123. *Id.*
124. *Id.*
125. Baze v. Rees, 553 U.S. 35, 50 (2008) (plurality opinion).
126. *Resweber*, 329 U.S. at 474 (Burton, J., dissenting).
127. Petition for a Writ of Certiorari, *supra* note 1, at 5.
128. *Resweber*, 329 U.S. at 480–81 n.2 (Burton, J., dissenting).
129. Petition for Writ of Certiorari, *supra* note 1, at 4.

a humane execution.[130] In *State v. Broom*,[131] the Supreme Court of Ohio stated that Broom's execution attempt did not violate the method of punishment limitation because there was no evidence that the state deliberately intended to cause Broom any pain.[132] The Supreme Court of Ohio further stated that the Eighth Amendment does not mandate that the execution team perform the protocol perfectly and that practicality requires courts to make allowances for accidents.[133] Therefore, not even deviation from protocol is indicative of deliberate intent to cause pain.[134] Consequently, a *Broom* Defendant would likely encounter issues of proof when trying to evade the isolated accident exception.

Similarly, a *Broom* Defendant would likely encounter resistance to the *Resweber* analogy unless the technicians actually applied the lethal injection drug rather than just attempted to insert the intravenous needles.[135] In *Resweber*, the dissent's theory about death by repeated electrocutions was predicated on the fact that electric currents did in fact pass through the defendant's body.[136] Therefore, to characterize a *Broom* Defendant's execution in the same manner, the state would likely have had to start applying lethal injection drugs in order to properly analogize to *Resweber*.

In addition to the *Baze* and *Resweber* standards, a *Broom* Defendant could also argue that carrying out a second execution attempt would violate the requirement that the death penalty be no more painful than the mere extinguishment of life.[137] A *Broom* Defendant could argue that another execution attempt would be superadding pain, terror, and distress to what is constitutionally required to be a painless procedure.[138] Like the electrocution in *Resweber*, lethal injection's constitutionality is predicated on its intended painlessness.[139] In Broom's case, however, there is objective

130. *See Baze*, 553 U.S. at 50 (plurality opinion) (holding that a second attempt at an execution was not an Eighth Amendment violation when the first attempt failed due to an accident and there was no suggestion of malevolence).

131. State v. Broom, 51 N.E.3d 620, 631 (Ohio 2016).

132. *Id.*

133. *See id.* at 632 (holding that deviation from protocol is not an automatic constitutional violation).

134. *See id.*

135. *Id.* at 626–27.

136. Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 479 (1947) (Burton, J., dissenting).

137. Glass v. Louisiana, 471 U.S. 1080, 1084 (1985) (Brennan, J., dissenting from denial of certiorari) (quoting *In re* Kemmler, 136 U.S. 436, 447 (1890)).

138. *See id.* (explaining that the Eighth Amendment prohibits unnecessary infliction of pain); *see also* Gregg v. Georgia, 428 U.S. 153, 173 (1976) ("[T]he punishment must not involve the unnecessary and wanton infliction of pain.").

139. *See* Glossip v. Gross, 135 S. Ct. 2726, 2740 (2015) (holding that, to succeed, challengers of lethal injection procedures must show there is substantial risk of severe pain).

evidence that he suffered a "great deal of pain" during his botched execution.[140] The technician inserted intravenous lines in at least eighteen different points on Broom's body and, at one point, struck bone, causing Broom to cry out.[141] Broom cried throughout the process, causing the Director of the Ohio Department of Rehabilitation and Correction to remark that he had never seen a defendant cry from the intravenous insertion process.[142] A *Broom* Defendant could argue that a second execution attempt would be more than the "mere extinguishment of life" because of the cumulative effect of the physical and emotional trauma resulting from multiple execution attempts.

The success of a *Broom* Defendant's method of execution claims likely depends on his ability to narrowly define the challenged method of execution. To succeed under the method of execution limitation, a *Broom* Defendant would need to define the challenged method of execution not just as lethal injection but as multiple lethal injection attempts. Narrowly defining the method of execution in this manner is essential because lethal injection as a method of execution carries a heavy presumption in favor of constitutionality.[143]

Resweber and *Baze* give some indication that the Supreme Court might recognize such a narrowly defined challenge.[144] The dissent in *Resweber* narrowly defined the challenged method of execution as death by numerous electrocution attempts, rather than just electrocution.[145] Additionally, the *Baze* plurality indicated that it might recognize a challenge to a series of abortive attempts at electrocution.[146] However, the Supreme Court has never invalidated a state's chosen method of execution.[147] Consequently, lethal injection enjoys a presumption of constitutionality that likely cannot be overcome if the Supreme Court will not recognize a *Broom* Defendant's narrowly defined claim.[148]

All in all, the success of a *Broom* Defendant's Eighth Amendment claims is a matter of perception. If a court perceives the claims to be about the death penalty or lethal injection generally, the claims would likely not succeed, as the constitutionality of both the death penalty and lethal injection has been firmly established. However, if a court

140. Petition for a Writ of Certiorari, *supra* note 1, at 4.
141. *Id.* at 4–5
142. *Id.* at 4
143. Baze v. Rees, 553 U.S. 35, 61 (2008) (plurality opinion).
144. *Id.*; Louisiana. *ex rel.* Francis v. Resweber, 329 U.S. 459, 471 (1947) (Frankfurter, J., concurring).
145. *Resweber*, 329 U.S. at 476 (Burton, J., dissenting).
146. *Baze*, 553 U.S. at 50 (plurality opinion) (quoting *Resweber*, 329 U.S. at 471 (Frankfurter, J., dissenting)).
147. Glossip v. Gross, 135 S. Ct. 2726, 2732 (2015) (quoting *Baze*, 553 U.S. at 48 (plurality opinion)).
148. *Baze*, 553 U.S. at 61 (plurality opinion).

perceives a *Broom* Defendant's claims not to be a challenge against lethal injection per se but against multiple lethal injection attempts, a court might be more willing to consider his claims. Ultimately, succeeding on any Eighth Amendment claim is very unlikely due to the heavy constitutional presumption in favor of the death penalty.

III. FIFTH AMENDMENT ARGUMENTS

The Fifth Amendment states that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb."[149] The Supreme Court has distilled this ban on double jeopardy into at least two distinct protections: (1) a safeguard against prosecution for the same offense after acquittal,[150] and (2) protection from multiple punishments for the same offense.[151] A *Broom* Defendant's Fifth Amendment arguments would fall under the latter protection. To raise a double jeopardy argument under this second protection, a *Broom* Defendant would likely have to argue that jeopardy attached at the time of the first execution attempt,[152] that he had a legitimate expectation of finality at the time of the first execution attempt,[153] and that a second execution attempt would be an additional punishment or an increase in sentence.[154] While a *Broom* Defendant could likely establish the attachment of jeopardy and a legitimate expectation of finality, his successful characterization of the second execution attempt as an additional punishment or increased sentence is improbable.

A. The Attachment of Jeopardy

The Fifth Amendment's double jeopardy protection is not implicated until jeopardy "attaches."[155] Jeopardy attaches in jury trials when the jury is "empaneled and sworn."[156] At first glance, a *Broom* Defendant's attachment argument appears to be relatively simple because a jury is undoubtedly empaneled and sworn when it issues its capital punishment sentence.[157] However, the plurality in

149. U.S. CONST. amend. V.

150. Green v. United States, 355 U.S. 184, 188 (1957).

151. North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

152. *See* Crist v. Bretz, 437 U.S. 28, 38 (1978) (holding that jeopardy attaches when the jury is empaneled and sworn).

153. Jones v. Thomas, 491 U.S. 376, 394 (1989) (quoting United States v. DiFrancesco, 499 U.S. 117, 139 (1980)).

154. *See* United States v. Halper, 490 U.S. 435, 448–49 (1989) (holding that a defendant already punished in a criminal prosecution cannot be subjected to a civil penalty that serves to punish).

155. *Crist*, 437 U.S. at 32.

156. *Id.* at 35.

157. *See id.* at 38 (explaining that constitutional double jeopardy protection attaches at the beginning of a criminal trial, when the jury is empaneled and sworn, before the jury would have issued a sentence).

Resweber complicates this argument by holding that rescheduling an execution after a mechanical error is no less constitutional than granting a new trial to a defendant who erroneously received the death penalty after a legal error.[158] Although the plurality did not explain why the two scenarios were indistinguishable,[159] Justice Frankfurter provided some insight in his concurrence by rejecting the double jeopardy claim through the Fourteenth Amendment Due Process Clause.[160]

While *Resweber* may appear to bar a successful double jeopardy claim in botched execution scenarios, Justice Frankfurter's analysis actually highlights a crucial difference between the defendant in *Resweber* and a *Broom* Defendant. At the time *Resweber* was decided, the Fifth Amendment had not yet been incorporated to apply to the states.[161] Therefore, *Resweber* does not preclude a Fifth Amendment double jeopardy claim in a botched execution scenario. While a court could be swayed by the plurality's reasoning in *Resweber*, the precedent is weaker considering the plurality was unable to truly analyze a Fifth Amendment double jeopardy claim at the time. Therefore, a *Broom* Defendant might be successful in establishing attachment at the time of the first and second execution attempts.

B. A Legitimate Expectation of Finality

Additional punishments or increases in punishments are impermissible under the Fifth Amendment if the defendant has a "legitimate 'expectation of finality in the original sentence.'"[162] A defendant does not have a legitimate expectation of finality in an original sentence if the sentence is subject to appeal[163] or if his sentence is not the maximum designated by the legislature.[164] Courts evaluate a defendant's legitimate expectation of finality in the original sentence using an objective standard of knowledge.[165] A

158. Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 462–63 (1947) (plurality opinion).

159. *Id.* at 463.

160. *Id.* at 469–70 (Frankfurter, J., concurring).

161. *See generally* Benton v. Maryland, 395 U.S. 784 (1969) (incorporating the Fifth Amendment's double jeopardy protection to apply to the states).

162. Jones v. Thomas, 491 U.S. 376, 393–94 (1989) (Scalia, J., dissenting) (quoting United States v. DiFrancesco, 449 U.S. 117, 139 (1980)).

163. *DiFrancesco*, 449 U.S. at 136.

164. *See Jones*, 491 U.S. at 381 (stating that a defendant is protected by double jeopardy when his punishment exceeds limits set by the legislature).

165. *See DiFrancesco*, 449 U.S. at 136 (explaining that a defendant is "charged with knowledge of the statute" under which a court convicts him); Smith v. Wenderlich, 826 F.3d 641, 651 (2d Cir. 2016) (stating that a defendant is "presumed to be aware" of the legality of his sentence); State v. Robtoy, No. 28338-7-II, 2003 WL 22890379, at *5 (Wash. Ct. App. Dec. 9, 2003) (noting that a defendant is "charged with knowledge" of the statute under which a court convicts him).

defendant is charged with the objective knowledge that his sentence is subject to appeal or increase, regardless of whether he is subjectively aware of those facts.[166] Therefore, a defendant is deemed to be unable to form a legitimate expectation of finality in a sentence that is subject to appeal or in a sentence that falls below the maximum sentence a court can impose for a given offense.[167]

Jurisdictions disagree about when exactly this legitimate expectation of finality must arise, and the Supreme Court has never ruled on that question.[168] Some courts have stated the legitimate expectation of finality arises only when the sentence has been fully completed.[169] Other courts hold that a legitimate expectation of finality can be formed when a sentence is substantially completed.[170] Substantial completion is a case-by-case, fact-specific determination that is normally applied to the amount of prison time served on a particular sentence.[171]

Due to the jurisdictional variation on when a legitimate expectation of finality must arise, the outcome of a *Broom* Defendant's claim on this theory is unpredictable. However, in a *Broom* Defendant's case, a court might concede that a legitimate expectation of finality could arise before the sentence is fully completed. Otherwise, it would be impossible for a *Broom* Defendant to ever have a legitimate expectation of finality in his sentence—his sentence would not be fully completed until after his death. Therefore, the validity of a *Broom* Defendant's legitimate expectation of finality

166. *DiFrancesco*, 449 U.S. at 136.

167. *See id.* at 137 (noting that a defendant does not have a legitimate expectation of finality when there is a possibility of "revocation of probation and the imposition of imprisonment").

168. *See id.* (stating that a defendant does not have "the right to know at any specific moment in time what the exact limit of his punishment will turn out to be").

169. United States v. Silvers, 90 F.3d 95, 101 (4th Cir. 1996); *see also* United States v. Daddino, 5 F.3d 262, 265 (7th Cir. 1993) (stating that the defendant had a legitimate expectation of finality when he "completed service of his incarceration and paid all fines and restitution," and therefore the court "could not disturb these aspects of his sentence").

170. *See* DeWitt v. Ventetoulo, 6 F.3d 32, 34–35 (1st Cir. 1993) (explaining that a defendant may have a legitimate expectation of finality when there has been "a substantial lapse in time" between a final decision and a court's attempt to increase his sentence); United States v. Lundien, 769 F.2d 981, 987 (4th Cir. 1985) (noting that a defendant may have a legitimate expectation of finality when he has "served so much of his sentence that his expectations as to its finality have crystallized").

171. Ward v. Williams, 240 F.3d 1238, 1244 n.10 (10th Cir. 2001) (stating that serving three-quarters of a four-year sentence does not constitute substantial completion); *DeWitt*, 6 F.3d at 35 (emphasizing that "there is no single touchstone" or "multi-part formula" to determine substantial completion); State v. Robtoy, No. 28338-7-II, 2003 WL 22890379, at *5 (Wash. Ct. App. Dec. 9, 2003) (determining that serving two years of a life sentence was not substantial completion of the sentence).

would likely depend in part on whether his sentence was "substantially completed." Given the rarity of botched execution claims, there is scarce precedent regarding substantial completion of a death sentence, and the *Resweber* analysis did not reach the defendant's legitimate expectation of finality.[172]

A *Broom* Defendant may be able to construe the intravenous line insertion attempts and preparation for death as "substantial completion." After a botched execution attempt, a *Broom* Defendant's death penalty would potentially include several hours of intravenous insertion attempts, years of delay, and then another execution attempt. Because death by lethal injection is intended to be instantaneous,[173] a *Broom* Defendant would have "served more time" on his punishment than was prescribed. Without precedent as a guide, it is very difficult to say whether a court would accept such framing. Thus, one of the obstacles facing a *Broom* Defendant is how to prove that his preparation for execution and his subsequent botched execution qualify as substantial completion of a death sentence. A *Broom* Defendant's legitimate expectation of finality argument also faces the obstacle of the objective standard. The death penalty carries an automatic right to direct appeal, seemingly defeating a *Broom* Defendant's legitimate expectation of finality under an objective standard.[174] The fact that a *Broom* Defendant subjectively believed that he was going to die on the day that the state attempted to execute him is of no consequence to the legitimate expectation of finality analysis.[175]

Although the death penalty carries an automatic right to appeal, it is also the maximum penalty a court can impose.[176] A *Broom* Defendant's legitimate expectation of finality argument might be strengthened by the unique harshness of his punishment. Part of the legitimate expectation of finality analysis involves examining if there is an objective possibility that a sentence could be increased or whether the court gave a more lenient sentence than what the legislature permits for a given crime.[177] With capital punishment, a

172. *See* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463–64 (1947) (plurality opinion) (discussing whether imposing a second punishment would constitute cruel and unusual punishment and not whether the defendant had a legitimate expectation of finality after the botched electrocution attempt).

173. *See id.* at 474 (Burton, J., dissenting) (explaining that an execution is constitutional if it is "instantaneous and substantially painless").

174. *See* United States v. DiFrancesco, 449 U.S. 117, 136 (1980).

175. *See id.* (stating that a defendant whose sentence is subject to an appeal "has no expectation of finality in his sentence until the appeal is concluded or the time to appeal has expired").

176. *See, e.g.*, State v. Broom, 533 N.E.2d 682, 689 (Ohio 1988) (upholding the defendant's sentence of death on appeal).

177. *See DiFrancesco*, 449 U.S. at 137 (explaining that a defendant does not have a legitimate expectation of finality when there is a possibility of "revocation of probation and the imposition of imprisonment").

defendant likely cannot have an objective reason to believe that his sentence would be increased.[178] Therefore, a *Broom* Defendant may be able to argue that in the unique context of the death penalty, a legitimate expectation of finality crystallized because capital punishment is the maximum penalty permitted by the legislature.

The success of a *Broom* Defendant's legitimate expectation of finality theory in his double jeopardy claim depends almost entirely on when a court requires this expectation to arise. If a court determines that the expectation arises before the completion of the sentence, the claim would then depend on what constitutes "substantial completion." Due to the lack of precedent on this point, it is nearly impossible to say what a person must experience in order to have substantially completed a death sentence. Without more judicial guidance, the success of a double jeopardy claim premised on a legitimate expectation of finality theory is unclear.

C. An Increased Sentence

The Fifth Amendment prohibits sentence increases if a defendant has a legitimate expectation of finality in his sentence.[179] If some circumstance undermines the legitimacy of the expectation of finality, however, an increased sentence is permissible.[180] Evaluating a sentence increase turns on assessing the "actual sanctions imposed"[181] by analyzing the underlying character of a punishment.[182] For example, in *United States v. Halper*,[183] the Supreme Court held that the Fifth Amendment's Double Jeopardy Clause was implicated in the context of a civil sanction.[184] Normally, civil sanctions do not implicate the Double Jeopardy Clause.[185] However, the Supreme Court's analysis went beyond the strict classification of the sanction as civil and examined its character and impact on the defendant.[186] The Court held that the fine imposed was so disproportionate to the actual economic harm suffered that it had to be punitive in nature.[187] Although the sanction was classified as civil, the Court favored substance over form and held that the Double Jeopardy Clause was implicated because the fine was, in reality, a

178. *See id.* (stating that a defendant does not have a legitimate expectation of finality when his punishment could later be increased—a scenario that could not apply to a defendant sentenced to death).
179. Jones v. Thomas, 491 U.S. 376, 393–94 (1989).
180. *See id.*
181. United States v. Halper, 490 U.S. 435, 447 (1989).
182. *Id.*
183. 490 U.S. 435 (1989)
184. *Id.* at 446.
185. U.S. CONST. amend. V.
186. *Halper*, 490 U.S. at 447–48.
187. *Id.* at 452.

punishment that served criminal law's aims of retribution and deterrence.[188]

If a *Broom* Defendant could establish a legitimate expectation of finality, he would also face difficulties in the increased sentence prong of the analysis. To analyze whether there has been an increase in sentence, courts examine the actual sentence imposed.[189] The actual sanction imposed on a *Broom* Defendant remains capital punishment.[190] Under that formalist analysis, a *Broom* Defendant's sentence could not increase. A *Broom* Defendant's claim might have more success if a court uses the *Halper* approach and examines the underlying character of the sentence imposed.[191] In Broom's case, for example, the underlying character of what was actually imposed was more than the "mere extinguishment of life."[192] A constitutional execution should be "instantaneous" and "substantially painless."[193] What was actually imposed on Broom was neither instantaneous nor substantially painless.[194] If a court uses *Halper*'s substance-over-form approach, a *Broom* Defendant might be able to establish an increased sentence.

More than likely, a *Broom* Defendant's double jeopardy claim would fail. He would probably be unable to successfully argue that his botched execution qualifies as substantial completion of his death sentence. Even if he is successful in that argument, his legitimate expectation of finality would likely still be defeated by the automatic appealability of his death sentence. Finally, even if he is successful in establishing a legitimate expectation of finality, he likely could not establish that there was an increase in his sentence unless a court used the *Halper* approach. All in all, a *Broom* Defendant's double jeopardy claim would likely be unsuccessful.

IV. CONCLUSION

A *Broom* Defendant's constitutional claims have little chance of success. The death penalty's heavy presumption of constitutionality would likely defeat his Eighth Amendment claims, while his Fifth Amendment claims would likely fail due to his lack of a legitimate expectation of finality. However, as executions continue to be botched, the Supreme Court may be compelled to reexamine the administration of the death penalty.

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188. *Id.* at 448

189. *Id.* at 447.

190. State v. Broom, 51 N.E.3d 620, 623 (Ohio 2016).

191. *Halper*, 490 U.S. at 447.

192. Glass v. Louisiana, 471 U.S. 1080, 1084 (1985) (quoting *In re* Kemmler, 136 U.S. 436, 447 (1890)).

193. Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 474 (1947) (Burton, J., dissenting).

194. Ohio v. Broom, No. 96747, 2012 WL 504504, at *1 (Ohio Ct. App. Feb. 16, 2012).

Opponents of death penalty reform cite the particularly heinous crimes one must commit in order to receive capital punishment.[195] Rommell Broom, for example, raped and killed a fourteen-year-old girl.[196] However, defining and upholding our constitutional principles is not about what a defendant did or did not do. To the contrary, ensuring constitutionality is about how we, as a society, choose to define ourselves, not *because of* what a defendant might have done but *in spite of* it. Do we allow our constitutional ideals to define our conduct or do we allow the conduct of those we most condemn to dictate our constitutional ideals? Until the Supreme Court hears any of the continuing death penalty challenges, this question will remain unanswered.

Kristina Wilson[*]

195. Geo Ilyin, *5 Reasons Some People Think the World Needs the Death Penalty*, AMNESTY INT'L (Oct. 10, 2015), https://www.amnesty.org.au/5-reasons-some-people-think-the-world-needs-the-death-penalty/.

196. Brief in Opposition to Petition for Writ of Certiorari at 1, Broom v. Ohio, 137 S. Ct. 580 (2016) (mem.) (No. 16-5580), *cert denied*.

* J.D. Candidate 2018, Wake Forest University School of Law; B.A. English and Spanish 2013, Georgetown University. I am grateful to Kelsey Mellan and the rest of the incredible *Wake Forest Law Review* Board and Staff. I also thank Professor Mark Rabil for invaluable insight and inspiration. I lastly thank my grandparents, Stephen and Marie Gardella, my parents, Thomas and Tina Wilson, my brother, Patrick Wilson, and my fiancé, Albert Alwang, for unceasing patience, love, and support. I would not be anywhere without them.