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## No Clean Hands in a Dirty Business: Firing Squads and the Euphemism of "Evolving Standards of Decency"

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# No Clean Hands in a Dirty Business: Firing Squads and the Euphemism of “Evolving Standards of Decency”

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## INTRODUCTION

“If we, as a society, cannot stomach the splatter from an execution carried out by firing squad, then we shouldn’t be carrying out executions at all.”<sup>1</sup> Judge Kozinski of the Ninth Circuit Court of Appeals laid down this challenge to reform the “inherently flawed” use of lethal

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

injection in carrying out the death penalty.<sup>2</sup> Justice Sotomayor recently voiced similar concerns, stating, “[W]e deserve to know the price of our collective comfort before we blindly allow a State to make condemned inmates pay it in our names.”<sup>3</sup> These judges’ reasoning should underlie any discussion of the death penalty: can we, as a society, handle the reality of the state ending a life on our behalf?

The case that prompted Judge Kozinski’s recommendation, *Wood v. Ryan*, illustrates challenges many states now face to their lethal injection protocols and the risk of botched executions.<sup>4</sup> Joseph Wood was convicted in Arizona of killing his ex-girlfriend and her father in 1989 and sentenced to death.<sup>5</sup> In 2014, the Arizona Attorney General indicated Wood would be executed using two drugs—midazolam and hydromorphone.<sup>6</sup> Until recently, however, most states used the same three-drug protocol: sodium thiopental, then pancuronium bromide, and finally potassium chloride.<sup>7</sup> But Arizona could not acquire its typical drugs.<sup>8</sup> Wood was to be the first inmate in Arizona put to death using the midazolam-hydromorphone combination.<sup>9</sup> Other states had used similar protocols in executions, ending in complications and botched executions.<sup>10</sup>

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2. *Id.*

3. Glossip v. Gross, 135 S. Ct. 2726, 2797 (2015) (Sotomayor, J., dissenting).

4. See Tierney Sneed, *Can the Death Penalty Survive Lethal Injection?*, U.S. NEWS & WORLD REP. (Aug. 7, 2014, 12:01 AM), <http://www.usnews.com/news/articles/2014/08/07/can-the-death-penalty-survive-lethal-injection> [<http://perma.cc/3CCP-SSUR>] (discussing botched executions, the inability to acquire lethal injection drugs, and Kozinski’s opinion in *Wood*).

5. *Wood*, 759 F.3d at 1078.

6. *Id.* Midazolam is a benzodiazepine sedative; however, it has no painkilling properties, so it must be combined with an opioid, like hydromorphone. See David Kroll, *The Drugs Used in Execution by Lethal Injection*, FORBES (May 1, 2014, 4:59 PM), <http://www.forbes.com/sites/davidkroll/2014/05/01/the-pharmacology-and-toxicology-of-execution-by-lethal-injection/> [<http://perma.cc/9VDS-NK52>] (describing the chemistry of lethal injection drugs). A concern with this combination is that it does not produce the same anesthetic effect as a barbiturate (such as sodium thiopental), as it is intended for short-term sedation. See *id.* (calling midazolam an “incomplete anesthesia”).

7. See *Baze v. Rees*, 553 U.S. 35, 44 (2008) (describing the typical three-drug protocol used by thirty of the thirty-six death penalty states in 2008).

8. *Wood*, 759 F.3d at 1088–89 (Bybee, J., dissenting).

9. 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/> [<http://perma.cc/P4T5-D4FU>].

10. See Dana Ford & Ashley Fantz, *Controversial Execution in Ohio Uses New Drug Combination*, CNN, (Jan. 17, 2014, 1:01 PM), <http://www.cnn.com/2014/01/16/justice/ohio-dennis-mcguire-execution/> [<http://perma.cc/U5RG-SBNN>] (describing the execution of Dennis McGuire in Ohio, executed with midazolam and hydromorphone, where McGuire appeared to gasp for air for ten to thirteen minutes); Katie Fretland & Jessica Glenza, *Oklahoma State Report on Botched Lethal Injection Cites Medical Failures*, GUARDIAN (Sept. 4, 2014, 4:47 PM), <http://www.theguardian.com/world/2014/sep/04/oklahoma-inquiry-botched-lethal-injection->

Wood's attorneys sought more information on the drugs—the amounts to be used, their manufacturer and source, and the qualifications of those administering the drugs—eventually seeking to delay Wood's execution until the Arizona Department of Corrections could provide the information.<sup>11</sup> The district court denied Wood's motion, leading Wood to appeal to the Ninth Circuit, claiming a First Amendment “right of access to execution-related governmental information.”<sup>12</sup> Recognizing the importance of “independent public scrutiny” and “an informed public debate” to the implementation of capital punishment, the Ninth Circuit panel granted Wood's motion.<sup>13</sup> The Supreme Court later summarily reversed the panel and vacated the order.<sup>14</sup> Wood's execution would proceed.

Wood was executed on July 23, 2014, receiving fifteen doses each of midazolam and hydromorphone.<sup>15</sup> He died nearly two hours after the procedure began.<sup>16</sup> According to one witness, Wood spent the last hour and a half of his life gasping for air.<sup>17</sup>

In part because of executions like Wood's, other states now face similar legal challenges. Some have responded by passing secrecy laws to hide their “alternative” lethal injection procedures, adopted under circumstances like those in Arizona.<sup>18</sup> Others have considered

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clayton-lockett [<http://perma.cc/C2QH-8CQ9>] (describing the execution of Clayton Lockett in Oklahoma, the first in Oklahoma to use midazolam as a sedative). *See generally State by State Lethal Injection*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/state-lethal-injection> [<http://perma.cc/Q6PQ-H7QP>] (last visited Oct. 14, 2015) (describing recent developments in lethal injection protocols and drugs used).

11. *Wood*, 759 F.3d at 1078–79.

12. *Id.* at 1079–80.

13. *Id.* at 1085. The court particularly noted “the historic openness of the execution itself,” emphasizing the public's interest in understanding how state killing is carried out. *Id.* at 1083. Further, public knowledge promoted fairness, respect for the judiciary, and the ability to determine “whether . . . executions are fairly and humanely administered.” *Id.* at 1085.

14. *Ryan v. Wood*, 131 S. Ct. 21, 21 (2014).

15. Mark Berman, *The Prolonged Arizona Execution Used 15 Doses of Lethal Injection Drugs*, WASH. POST (Aug. 4, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/08/04/the-prolonged-arizona-execution-used-15-doses-of-lethal-injection-drugs/> [<http://perma.cc/9P37-67Q3>]. Arizona's protocol called for a fifty milligram dose of each drug, but Wood received 750 milligrams of each during his 114-minute death. *Id.*

16. Michael Kiefer, *Reporter Describes Arizona Execution: 2 Hours, 640 Gasps*, AZ CENTRAL (Nov. 6, 2014, 10:01 AM), <http://www.azcentral.com/story/news/arizona/politics/2014/07/24/arizona-execution-joseph-wood-eyewitness/13083637/> [<http://perma.cc/5LFU-862Z>].

17. *Id.* Kiefer, who observed Wood's execution, described the two hour process as “death by apnea,” tallying at least 640 times Wood opened his mouth and, at one point, questioning whether Wood would actually die during the procedure. *Id.*; *see also* Berman, *supra* note 9 (recounting the execution and responses, many expressing concern over the length of the procedure).

18. *See* Brian Haas, *Tennessee Plans Executions in Secret*, TENNESSEAN (Mar. 23, 2014, 9:30 AM), <http://www.tennessean.com/story/news/crime/2014/03/23/tennessee-plans-executions-secret/6765403/> [<http://perma.cc/6BQX-EKPG>] (describing Tennessee's law blocking information

returning to older methods, like electrocution or lethal gas, as supplies of lethal injection drugs dwindle.<sup>19</sup> But the frantic search for alternatives avoids the real problem with the modern use of the death penalty: a preference for euphemism.

Modern society prefers to couch its discussion of capital punishment in what Albert Camus called “padded words” to avoid “examin[ing] the penalty in reality.”<sup>20</sup> The American public typically knows little about how capital punishment works in practice, allowing the euphemism to continue unabated.<sup>21</sup> Indeed, developing “experiential barriers” to the realities of capital punishment defines the history of the death penalty in America, as the public seeks to forget the death penalty’s nature as a raw expression of state power carried out on the public’s behalf.<sup>22</sup> In constructing these barriers, the public is more concerned with whether an execution *seems* humane—say, through appearing like a medical procedure, as lethal injection does—than with whether it actually *is* humane.<sup>23</sup> And as long as it remains easy to see condemned defendants as subhuman monsters that “deserve

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regarding the state’s procurement of lethal injection drugs and noting other states’ similar attempts); Alan Johnson, *New Law Will Keep Lethal Injection Drug Supplier Secret*, COLUMBUS DISPATCH (Dec. 20, 2014, 5:38 AM), <http://www.dispatch.com/content/stories/local/2014/12/19/new-law-will-keep-lethal-injection-drug-supplier-secret.html> [http://perma.cc/4PLZ-WJUC] (reporting a new Ohio law shielding the identities of drug manufacturers and execution team members, passed following the botched execution of Dennis McGuire).

19. See Ed Payne & Mariano Castillo, *Tennessee to Use Electric Chair When Lethal Drugs Unavailable*, CNN (Sept. 8, 2014), <http://www.cnn.com/2014/05/22/us/tennessee-executions/> [http://perma.cc/R9QF-CL4R] (noting Tennessee’s mandatory use of the electric chair if the state cannot obtain drugs for lethal injection); Tony Rizzo, *Missouri’s Attorney General Hints at Gas Chamber’s Return*, KAN. CITY STAR (July 3, 2013, 12:39 AM), <http://www.kansascity.com/news/local/article322465/Missouri%E2%80%99s-attorney-general-hints-at-gas-chamber%E2%80%99s-return.html> [http://perma.cc/5YHT-NREF] (noting the return of the gas chamber in Missouri as an “unintended consequence” of delays in executions caused by litigation over lethal injection).

20. ALBERT CAMUS, *Reflections on the Guillotine*, in RESISTANCE, REBELLION, AND DEATH 173, 178 (1960). For further discussion of this problem, see *infra* Section II.D (discussing the supposed medical appearance of lethal injection executions).

21. See *Furman v. Georgia*, 408 U.S. 238, 362 (1972) (Marshall, J., concurring) (“It has often been noted that American citizens know almost nothing about capital punishment.”); AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA’S DEATH PENALTY 9 (2014) (“Capital punishment has become, at best, a hidden reality. It is known, if it is known at all, by indirection.”).

22. See CRAIG HANEY, DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM 4–5 (2005) (discussing the shift away from public executions).

23. See Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 66 (2002) (“The consequences suggest the most duplicitous irony of all: the very method that seems most appealing in the eyes of the public [lethal injection] is also one of the most unjustifiably cruel.”).

it,”<sup>24</sup> it is easy to avoid examining the issue more closely.<sup>25</sup> Possibly due to this lack of examination, public support for the death penalty has remained consistent since 2000, hovering between 60–70%, and a plurality of those polled since 2001 have felt the death penalty is not imposed enough.<sup>26</sup>

Lethal injection, the most popular method of execution since the death penalty resumed in 1976,<sup>27</sup> only compounds the problem of euphemism. While generally considered to be a more humane system of execution,<sup>28</sup> it is another attempt in a long line of methods—from hanging to electrocution to lethal gas to lethal injection—that *appear* more humane, but are not. Instead, they only visit a new form of suffering upon the condemned, to be replaced by the next innovation when challenges to the death penalty mount.<sup>29</sup> Lethal injection lends itself to “padded words” even better than the methods that preceded it, as the use of drugs and a clinical setting serve to “mask the brutality of executions,” letting the public avoid “the fact that the state is committing a horrendous brutality on [its] behalf.”<sup>30</sup> More than ever,

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24. When polled in October of 2014, fourteen percent of those who favor the death penalty do so specifically because “they deserve it,” finishing behind only taxpayer expense and “an eye for an eye.” *Death Penalty*, GALLUP, <http://www.gallup.com/poll/1606/death-penalty.aspx> [<http://perma.cc/SY43-BLNP>] (last visited Oct. 14, 2015). “An eye for an eye” could reasonably be considered a variation on “deserv[ing] it”; however, Gallup frames this response as including “[the punishment] [f]its the crime.” *Id.* Combining the two responses brings the total percentage to forty-nine percent. *Id.* Other responses, such as “[s]et an example,” “[f]air punishment,” and “[b]iblical reasons” strike a similar chord. *Id.*

25. See HANEY, *supra* note 22, at 44 (“[I]t becomes justifiable to kill those who are monsters or inhuman because of their abominable acts . . . because they have been excluded from the universe or morally protected entities.”) (internal quotation marks omitted).

26. *Death Penalty*, *supra* note 24. *But see Shrinking Majority of Americans Support Death Penalty*, PEW RES. CTR. (Mar. 28, 2014), <http://www.pewforum.org/2014/03/28/shrinking-majority-of-americans-support-death-penalty/> [<http://perma.cc/QHF7-4W57>] (noting a slightly steeper decline in support for the death penalty from 1996 to 2013, from seventy-eight percent to fifty-five percent).

27. See *Baze v. Rees*, 553 U.S. 35, 42–43 & n.1 (2008) (recounting lethal injection’s adoption following *Gregg v. Georgia*); *Methods of Execution*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/methods-execution?scid=8&did=245#authorized> [<http://perma.cc/J6F5-4NM9>] (last visited Oct. 14, 2015) (noting over 1,200 executions by lethal injection since 1976); *infra* Section II.D (discussing the history of lethal injection).

28. See *Death Penalty*, *supra* note 24 (finding sixty-five percent of respondents believed lethal injection to be the most humane method, as of May 2014).

29. See SARAT, *supra* note 21, at 7 (“[W]ith each new application of technology to killing, the law has proclaimed its own previous methods barbaric.”); Deborah Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 389–90 (1997) (discussing motivations to change execution methods, including “stay[ing] one step ahead of a constitutional challenge to a particular method of execution” or the death penalty in general); *infra* Part I (discussing how execution methods have developed based on perceptions of the techniques).

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

the death penalty is a matter of “cool, bureaucratic operation,” and methods are chosen in order to “leave[ ] no trace.”<sup>31</sup>

The special concerns of lethal injection—the search for the right drugs, the implication of doctors in the machinery of death, and the perception of decency—led to Judge Kozinski’s conclusion on lethal injection: “The enterprise is flawed.”<sup>32</sup>

So, let us retire it. If the United States is going to conduct executions at all, then it should be by the firing squad. This method better protects the constitutional rights of the condemned, while simultaneously avoiding the dangers of “padded words.” The firing squad is less likely to cause an unconstitutional amount of pain. Further, it only requires bullets and the states’ monopoly on legitimate force to carry out, rather than chemical compounds and medical concerns. And, finally, it promotes a candid evaluation of the act of state killing, because an execution by firing squad can only be seen as a state killing a person. In the search for a method that is both constitutional and honest, the firing squad stands above all other options for carrying out the ultimate punishment.

This Note will analyze the constitutionality and practical value of the firing squad, demonstrating that it both protects an individual’s Eighth Amendment rights and promotes honesty in public discourse. Part I lays out the constitutional standards for execution methods: the general Eighth Amendment analysis of “evolving standards of decency” as well as the more specific pain and dignity standards directly connected to execution methods. This constitutional analysis emphasizes the individual nature of the Eighth Amendment’s protection, arguing that *actual* effects, rather than the appearance of humaneness, are what matter to the constitutionality of execution methods. In other words: is a punishment cruel and unusual *to the condemned*?

Part II examines the four primary methods of execution in American history: hanging, electrocution, lethal gas, and lethal injection. This Part notes the intended march of progress these methods supposedly represent and how the realities of their implementation fall far short.

Part III discusses the firing squad’s methodology and use in America, as well as more recent efforts to reinstate it in light of lethal injection’s difficulties. It then takes up that banner, arguing for the use of the firing squad as the sole method of execution in America. Above and beyond its constitutional advantages, the firing squad encourages

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31. SARAT, *supra* note 21, at 9.

32. Wood, 759 F.3d at 1102 (Kozinski, C.J., dissenting from denial of rehearing).

a populace that understands the death penalty, something Justice Thurgood Marshall believed was crucial to examining the death penalty's legitimacy.<sup>33</sup>

This Note concludes that we have a choice: adopt a more honest method or abandon the entire enterprise. If we cannot stomach the splatter, then we should stop “tinker[ing] with the machinery of death”<sup>34</sup> altogether.

## I. THE RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT

The Eighth Amendment states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>35</sup> However, in the words of the Supreme Court, “Difficulty would attend the effort to define with exactness the extent of the constitutional provision . . . which provides that cruel and unusual punishments shall not be inflicted.”<sup>36</sup> Its general application, across all punishments, is subject to a progressive standard: the Court’s “evolving standards of decency” framework. For execution methods, the Court evaluates punishments for their effect on a condemned’s dignity using a set of standards relating to the pain inflicted. Properly considered, the Eighth Amendment protects an individual’s right to be free from excessive punishments—a broader concern than the mere appearance of humaneness.

### A. *The Evolution of “Evolving Standards of Decency”*

The concept of proportionality in punishments has ancient roots and was regularly treated as a very literal proposition.<sup>37</sup> The Magna

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33. *Furman v. Georgia*, 408 U.S. 238, 361 (1972) (Marshall, J., concurring) (explaining his theory). Marshall’s inquiry—“whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable”—is now known as the “Marshall Hypothesis.” See Carol S. Steiker, *The Marshall Hypothesis Revisited*, 52 *HOW. L.J.* 525, 527–28 (2009) (describing Marshall’s thinking); see also *infra* Section III.D (arguing that the firing squad defeats euphemism and promotes informed standards of decency).

34. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) (describing Justice Blackmun’s struggle to improve implementation of the death penalty and his resignation that “the death penalty experiment has failed”).

35. U.S. CONST. amend. VIII.

36. *Wilkerson v. Utah*, 99 U.S. 130, 135–36 (1878) (evaluating the constitutionality of the firing squad).

37. See Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted*”: *The Original Meaning*, 57 *CALIF. L. REV.* 839, 844–45 (1969) (describing Old Testament, Ancient Greek, and pre-Norman English concepts of equal punishments). The Old Testament law of retribution—“an eye for an eye” of Exodus 21:25—is likely familiar; the Laws of King Alfred’s policy of assigning monetary values for wounds to every body part may not be. *Id.*



Carta shifted this focus from pure proportionality to preventing excessive punishment, thus limiting what the government could inflict on the individual.<sup>38</sup> The English Bill of Rights of 1689 further refined this principle, providing that “excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.”<sup>39</sup> Crossing the Atlantic, these same words appear in the Virginia Declaration of Rights of 1776.<sup>40</sup> Seven additional states included this same provision in their constitutions; the federal government used it in the Northwest Ordinance; and it was eventually enshrined in the Bill of Rights, now with the mandatory “shall” instead of the aspirational “ought.”<sup>41</sup> As understood at the time, a “cruel and unusual punishments” clause restricted not only the excessive *extent* of punishment, but also entire *methods* of punishment.<sup>42</sup> In doing so, it sought to prevent the use of torture and “barbarous” punishments, such as drawing and quartering, burning, or stretching on the rack.<sup>43</sup> At this early stage, the clause’s meaning was left to judicial interpretation,<sup>44</sup> and judges enforced it as a general prohibition on certain methods of execution.<sup>45</sup>

The Supreme Court began to describe a progressive view of the Eighth Amendment in 1910 in *Weems v. United States*.<sup>46</sup> Paul Weems, a U.S. military officer in the Philippines, was convicted of falsifying official documents and received a sentence of fifteen years in *cadena temporal*—imprisonment with hard labor, followed by perpetual monitoring and loss of the right to vote or hold office, as well as other restrictions.<sup>47</sup> While noting that “what constitutes a cruel and unusual punishment has not been exactly decided,” the Court held this

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38. See *id.* at 845–46 (discussing the three chapters of the Magna Carta devoted to responding to excessive punishments). Chapter 14, in particular, was designed to restrain the excessive fines imposed under the discretionary amercement regime that arose following the Norman Conquest, and, for that, it was considered “very likely there was no clause in the Magna Carta more grateful to the mass of the people.” *Id.*

39. *Id.* at 852–53.

40. *Id.* at 853.

41. *Id.* at 840, 853; see also *Furman v. Georgia*, 408 U.S. 238, 243–44 (1972) (Douglas, J., concurring) (describing historical context of the Eighth Amendment).

42. Granucci, *supra* note 37, at 841.

43. *Id.* at 841–42; see also Kristina E. Beard, *Five Under the Eighth: Methodology Review and the Cruel and Unusual Punishments Clause*, 51 U. MIAMI L. REV. 445, 449 (1997) (noting a distinction between early British and early American interpretations).

44. See *Furman*, 408 U.S. at 244 (recounting the limited congressional debate on the Eighth Amendment). In debating the Amendment, one member of the First Congress said determining its meaning “lie[s] with the court to determine.” *Id.*

45. Granucci, *supra* note 37, at 842.

46. 217 U.S. 349 (1910).

47. *Id.* at 357–58, 365–66.

punishment, particularly with its post-release conditions, was unconstitutional.<sup>48</sup> Even though the sentence might not have been excessive in the past, the Court held that the Constitution must be able to adapt to changing times.<sup>49</sup> So, the Eighth Amendment “may therefore be progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by humane justice.”<sup>50</sup> Otherwise, “rights declared in words might be lost in reality.”<sup>51</sup>

The Court reinforced *Weems*'s progressive interpretation forty-eight years later in *Trop v. Dulles*.<sup>52</sup> There, the Court evaluated whether stripping an American citizen of his citizenship was cruel and unusual.<sup>53</sup> After escaping from a stockade in Casablanca, Morocco, in 1944, Private Albert Trop was convicted of wartime desertion, dishonorably discharged, and sentenced to three years of hard labor.<sup>54</sup> A few years after release, Trop applied for a passport, only to find he had been stripped of his citizenship under the Nationality Act of 1940, a punishment he challenged under the Eighth Amendment.<sup>55</sup> Chief Justice Warren, writing for a plurality, agreed, holding that depatriation is a cruel and unusual punishment.<sup>56</sup> According to the Court, the Eighth Amendment exists to protect “nothing less than the dignity of man,” meaning punishments must be “within the limits of civilized standards.”<sup>57</sup> These standards, like the words of the Amendment itself, “are not precise, and . . . their scope is not static.”<sup>58</sup> Rather, “the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>59</sup> Applying these evolving standards to depatriation, the Court found the punishment repugnant to basic constitutional principles, as it causes the individual to lose “the right to have rights.”<sup>60</sup>

*Weems* and *Trop* teach that these evolving standards are, like the rest of the Bill of Rights, intended to protect *people*, and not merely society, from government, safeguarding the individual from imposition

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48. *Id.* at 368, 382.

49. *Id.* at 372.

50. *Id.* at 378.

51. *Id.* at 373.

52. 356 U.S. 86 (1958).

53. *Id.* at 87.

54. *Id.* at 87–88.

55. *Id.* at 88.

56. *Id.* at 101.

57. *Id.* at 100.

58. *Id.* at 100–01.

59. *Id.* at 101.

60. *Id.* at 102.

of cruelty by the state.<sup>61</sup> In this way, “standards of decency” are properly considered as the bounds of what the state may acceptably impose on our fellow human beings. Such concerns are particularly important for death row inmates, who are “among the most despised members of any community,” and thus lack access to the protections of the political process.<sup>62</sup> Regardless of their crimes, they remain human beings, protected by the Constitution,<sup>63</sup> which is sometimes forgotten when discussing the death penalty.<sup>64</sup>

In *Furman v. Georgia*, the Court wholly embraced the evolving standards framework in the death penalty context, using it to invalidate death-sentencing procedures in Georgia and Texas as arbitrary and effectively putting a moratorium on all executions in the United States.<sup>65</sup> The Court fractured—all nine Justices wrote separate opinions debating the constitutionality of executions generally—but five of the Justices, both concurring and dissenting, explicitly recognized *Trop’s* evolving standards language as valid.<sup>66</sup> Justices Brennan and Marshall, seeking to justify their position that the death penalty is per se unconstitutional, attempted to develop more concrete indicators of a society’s evolving standards.

Justice Brennan laid out a set of principles to determine whether a punishment “comport[s] with human dignity,” which included whether the punishment was “unacceptable to contemporary society.”<sup>67</sup> Looking to measure this, Brennan noted the vigorous debate over capital punishment,<sup>68</sup> the rarity with which juries handed down death verdicts, and the regularity of gubernatorial pardons.<sup>69</sup> So, Brennan

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61. See *id.* at 103 (“The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that *authorize and limit* governmental powers in our Nation.”) (emphasis added).

62. Mary Sigler, *The Political Morality of the Eighth Amendment*, 8 OHIO ST. J. CRIM. L. 403, 413 (2011).

63. *Furman v. Georgia*, 408 U.S. 238, 273 (1972) (Brennan, J., concurring) (“[T]he fundamental premise of the clause [is] that even the vilest criminal remains a human being possessed of common human dignity.”).

64. Media reports on death penalty cases tend to emphasize the details of a crime, particularly the heinous aspects, while giving little information about a defendant as a person. HANEY, *supra* note 22, at 52–53, 56 (“Very little information was reported from which readers could . . . feel even a minimum of compassion for defendants who often had experienced troubled and traumatic lives.”).

65. 408 U.S. at 239–40.

66. Brian W. Varland, *Marking the Progress of a Maturing Society: Reconsidering the Constitutionality of Death Penalty Application in Light of Evolving Standards of Decency*, 28 HAMLINE L. REV. 311, 317 & n.47 (2005) (collecting citations from *Furman*).

67. *Furman*, 408 U.S. at 270, 277 (Brennan, J., concurring).

68. *Id.* at 296 (“From the beginning of our Nation, the punishment of death has stirred acute public controversy.”).

69. *Id.* at 299.

“severely question[ed] the appropriateness” of the death penalty, as the punishment’s declining use indicated that it was becoming “more troublesome to the national conscience.”<sup>70</sup>

Justice Marshall sought similar objectivity, asking “whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable.”<sup>71</sup> Marshall intended this inquiry to be more than a public opinion poll. Instead, he asked whether a substantial portion of the public would find capital punishment cruel based on all presently available information about its seemingly high costs and low benefits.<sup>72</sup> Marshall believed, based on the information he had, “the average citizen would find [the death penalty] shocking to his conscience and sense of justice . . . . For this reason alone capital punishment cannot stand.”<sup>73</sup> Since *Furman*, this theory has come to be known as the “Marshall Hypothesis.”<sup>74</sup>

Four years later, in *Gregg v. Georgia*, the Court maintained the evolving standards framework but found the death penalty constitutional, ending *Furman*’s moratorium.<sup>75</sup> The Court recognized that the Eighth Amendment “has been interpreted in a flexible and dynamic manner,” reiterating the progressive interpretation from *Weems* and *Trop*.<sup>76</sup> But the Court added a new layer to the framework, announcing that the analysis of society’s values concerning the death penalty should now be governed by “objective indicia that reflect the *public attitude toward a given sanction*.”<sup>77</sup> To protect this analysis from judges’ “subjective judgment,” the Court looked to history, legislative

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70. *Id.*

71. *Id.* at 361 (Marshall, J., concurring).

72. *Id.* at 362–63.

73. *Id.* Marshall based his conclusion on a multitude of factors, such as the cost of executions, the improper reliance on retribution as a justification, discriminatory imposition of death sentences, the risk of wrongful convictions and executions, and the death penalty’s incompatibility with the idea of rehabilitation. *Id.* at 363–69.

74. See Steiker, *supra* note 33, at 527–28 (exploring the Marshall Hypothesis); see also *infra* Section III.D (further expanding on how an informed populace can change the discussion with regard to the death penalty).

75. 428 U.S. 153, 169, 171–72 (1976). Comparatively, *Gregg* was far less divided than *Furman*: the court split seven to two, rather than five to four, with only Brennan and Marshall (who opposed the death penalty in any form) dissenting. The consolidation was likely the result of the change in death penalty imposition procedures, spurred by *Furman*. See *id.* at 162–68, 207 (discussing Georgia’s amended statutory scheme and then finding it constitutional). Even in *Furman*, only Brennan and Marshall objected to the death penalty on principle; the other three justices in the *Furman* majority were concerned with the statutory scheme instead. *Furman*, 408 U.S. at 256–57 (Douglas, J., concurring); *id.* at 309–10 (Stewart, J., concurring); *id.* at 314 (White, J., concurring).

76. *Gregg*, 428 U.S. at 171.

77. *Id.* at 173 (emphasis added).

enactments, and jury decisions.<sup>78</sup> In the Court's view, these criteria would preserve deference to state legislatures' choice of punishment and to the public's preferences, expressed through voting for those legislatures.<sup>79</sup>

*Gregg's* reliance on objective indicia, as well as Brennan and Marshall's contemplation of public opinion in *Furman*, weakened the Eighth Amendment's power to protect the individual. Applied studiously, these formulations focus on how society feels about a punishment, rather than what the punishment actually does to a condemned. This shift undermines the purpose of the Eighth Amendment by subjecting an individual's rights to popular sentiment and exercises in counting state laws or jury verdicts.

To be sure, there is some value in federalism and majoritarianism, and counting is beguilingly simple.<sup>80</sup> But the concerns of accuracy and justice outweigh this appeal. First, determining what to count is a challenge. For example, take Brennan's observation of jury verdicts. The meaning of jury patterns is unclear: Are juries not using the death penalty because they "question the appropriateness of the punishment?" Or does its rare use demonstrate the discretion capital jurors are supposed to exercise?<sup>81</sup> Or do juries just have fewer chances to impose death sentences as violent crime declines?<sup>82</sup> Counting legislatures presents similar difficulties, as legislatures may not consider all the relevant factors in deciding to use a punishment, particularly for specific applications of a punishment.<sup>83</sup> If one wants to rely on objective criteria, clearer data would help. But these measurement issues are not as worrying as the Court's willingness to subject individual rights to majority preference. The *Gregg* Court, and even Brennan and Marshall (both well-known death penalty

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78. *Id.* at 176–77, 179–80, 181–82; see also Christopher Q. Cutler, *Nothing Less Than the Dignity of Man: Evolving Standards, Botched Executions, and Utah's Controversial Use of the Firing Squad*, 50 CLEV. ST. L. REV. 335, 380 (2003) (describing the "agreed upon" objective factors).

79. *Gregg*, 428 U.S. at 176.

80. See Jacob Lemon-Strauss, *The States are Right: Arguing for the Continued Use of State Legislatures in Forming a National Consensus For the Evolving Standards of Decency*, 47 AM. CRIM. L. REV. 1319, 1325 (2010) (considering state legislatures to be a "moral proxy for the people the legislatures serve").

81. See Sigler, *supra* note 62, at 411 (noting ambiguity of counting jury verdicts).

82. See Justin Wolfers, *Perceptions Haven't Caught Up to Decline in Crime*, N.Y. TIMES (Sept. 16, 2014), [http://www.nytimes.com/2014/09/17/upshot/perceptions-havent-caught-up-to-decline-in-crime.html?\\_r=0&abt=0002&abg=1](http://www.nytimes.com/2014/09/17/upshot/perceptions-havent-caught-up-to-decline-in-crime.html?_r=0&abt=0002&abg=1) [<http://perma.cc/FE8S-R8U6>] (describing the general decline in violent crime, including a fifty-one percent decline in homicides between 1993 and 2012).

83. Sigler, *supra* note 62, at 410–11.

opponents), fell into this “majoritarian trap” while trying to pin down the Eighth Amendment’s slippery language.<sup>84</sup>

This trap undermines an idea fundamental to the Bill of Rights: the rights of man should not be subject to a vote. In the words of the Court, defending the right to not salute the flag in *West Virginia Board of Education v. Barnette*:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.<sup>85</sup>

This concept’s application outside the Eighth Amendment is common, such as the First Amendment’s protection of disfavored, or even hated, speakers.<sup>86</sup> Death row inmates represent this same sort of unpopular group the Constitution seeks to protect, but they have even less political influence.<sup>87</sup> Public opinion shifts, as shown by the states’ reactions to *Furman*,<sup>88</sup> and individual rights should not be subject to such whims. Indeed, a punishment that inflicts an unconstitutional amount of pain

84. *Id.* at 410.

85. 319 U.S. 624, 638 (1943).

86. Sigler, *supra* note 62, at 412–13 (noting the First Amendment’s purpose to protect unpopular speakers against the majority, not just protecting popular ideas). Supreme Court jurisprudence regularly applies this principle. *See, e.g.*, *Nat’l Socialist Party v. Skokie*, 432 U.S. 43, 44 (1977) (per curiam) (Illinois Nazis); *Brandenburg v. Ohio*, 395 U.S. 444, 447, 449 (1969) (per curiam) (Ku Klux Klan members); *Barnette*, 319 U.S. at 629–30 (during WWII, Jehovah’s Witnesses who refused to salute the flag).

87. Sigler, *supra* note 62, at 413; *see also Death Penalty, supra* note 24 (finding deservingness, reciprocity, and expense as primary justifications for executions, rather than individualized concerns). The political process does not protect death row inmates well. For example, in judicial elections, voicing concerns about capital punishment is generally a losing electoral strategy. *See* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 765 (1995) (“When presiding over a highly publicized capital case, a judge who declines to hand down a sentence of death, or who insists on upholding the Bill of Rights, may thereby sign his own political death warrant.”). Even Supreme Court justices are prone to dismiss the concerns of death row inmates because they believe their crimes were terrible. *See* *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Thomas, J., concurring). For example, in *Ayala*, Justice Thomas responded to Justice Kennedy’s concerns about the harshness of solitary confinement by noting that “the accommodations in which Ayala [was] housed [were] a far sight more spacious than those in which his victims . . . now rest” and that Ayala “[would] soon have had as much or more time to enjoy those accommodations as his victims had time to enjoy this Earth.” *Id.*

88. Thirty-five states, as well as the federal government, enacted new death penalty statutes in the wake of *Furman*. *See* *Gregg v. Georgia*, 428 U.S. 227, 232 (1976) (Marshall, J., dissenting) (recognizing that these actions had “a significant bearing on a realistic assessment of the moral acceptability of the death penalty to the American people”).

on its subject—say, burning the condemned alive<sup>89</sup>—is no less unconstitutional when a majority of the public supports it.

In this way, reliance on popular will avoids the central concern of the Eighth Amendment: is the punishment cruel and unusual *to the condemned*? As such, *Gregg's* shifted conception of the evolving-standards-of-decency framework maintains a narrative of progress, without demanding actual progress. Applying *Gregg's* objective indicia, a punishment carries a strong presumption of validity if it is: (1) not forbidden at the founding, (2) adopted by many states, and (3) regularly imposed by juries. If a punishment meets these criteria, the inquiry would turn only on the dignity question,<sup>90</sup> which is unlikely to override a finding that a punishment comports with evolving standards of decency. Moreover, courts particularly focused on objective considerations might deemphasize the dignity analysis, as “human dignity” is open to interpretation (unlike counting legislatures or juries).<sup>91</sup> This skeptical calculus, which minimizes the role of courts making judgments about a punishment in favor of measuring the public’s willingness to use capital punishment, can allow the *appearance* of dignity to override *actual* dignity when applied to execution methods.<sup>92</sup>

### B. “The Mere Extinguishment of Life”

The Court’s more specific standards regarding executions focus on the pain inflicted on the condemned, thus protecting the individual’s human dignity. As long as the Court holds capital punishment in the abstract to be constitutional, “there must be a [humane] means of

89. *Wilkerson v. Utah*, 99 U.S. 130, 135–36 (1878) (considering punishments like burning alive “punishments of torture” which are forbidden by the Eighth Amendment).

90. This question asks whether a punishment involves a gratuitous infliction of pain or poses a substantial risk of needless pain. *See infra* Section I.B.

91. *See Sigler, supra* note 62, at 416 (observing the “moral skepticism” inherent in using objective indicia, where the Court “all but denies the possibility of objective judgment in the face of moral controversy”).

92. Since *Gregg*, the Court has frequently addressed *who* gets executed, rather than *how* the condemned gets executed. *See, e.g., Kennedy v. Louisiana*, 554 U.S. 407, 412–13 (2008) (prohibiting execution in non-homicide cases); *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (juveniles); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (mentally handicapped). *Gregg* and *Furman* also concerned the question of who has had sufficient procedure to be sentenced to death, rather than the method involved. *See Gregg*, 428 U.S. at 206–07 (finding death sentencing procedures valid, contrasting *Furman* where “defendants . . . were being condemned to death capriciously and arbitrarily”). These cases deal with issues where objective indicia are more useful, as societal preferences have more of a place in determining *when* to impose a valid punishment. The majoritarian trap becomes a problem when courts count states and juries to determine *what* a state may validly inflict upon a person.

carrying it out.”<sup>93</sup> In doing so, a punishment must serve legitimate ends.<sup>94</sup> The Court has recognized retribution, deterrence, and incapacitating dangerous criminals as such valid ends.<sup>95</sup> Further, to preserve a condemned’s dignity, a punishment must not be “excessive,” which is a question of pain and proportionality.<sup>96</sup>

Considering excessiveness, an early case observed, “It is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by [the Eighth Amendment].”<sup>97</sup> More than just torture, a cruel punishment involves “a lingering death . . . something more than the mere extinguishment of life.”<sup>98</sup> By *Gregg*, the Court’s language had broadened, prohibiting punishments “involv[ing] the unnecessary and wanton infliction of pain.”<sup>99</sup> Further, the sentence must not be “grossly out of proportion to the severity of the crime.”<sup>100</sup> As such, the penalty must actually serve legitimate ends, rather than “the gratuitous infliction of suffering.”<sup>101</sup> Whatever adjectives used, the inquiry comes back to a person’s “essential dignity,” as “the focus seems to be on whether the pain, physical or mental, offends those basic attributes that make us human.”<sup>102</sup>

That said, in *Baze v. Rees*, the Court accepted that “some risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error.”<sup>103</sup> As such, the Constitution does not require that an execution method must eliminate all risk of pain.<sup>104</sup> However, the Court admitted the Eighth Amendment does consider the risk of harm in determining what is cruel and unusual. That risk must be must be “a substantial risk of serious harm” that is “sure or very likely to cause serious illness and needless suffering.”<sup>105</sup> Such a substantial risk is more than the existence of pain, by accident or natural result of death, and “an isolated mishap alone does not give rise

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93. *Baze v. Rees*, 553 U.S. 35, 47 (2008) (saying this “necessarily follows” from constitutionality).

94. *Gregg*, 428 U.S. at 183.

95. *Id.* at 183–84 & n.28.

96. *Gregg*, 428 U.S. at 173.

97. *Wilkerson v. Utah*, 99 U.S. 130, 136 (1878).

98. *In re Kemmler*, 136 U.S. 436, 447 (1890).

99. *Gregg*, 428 U.S. at 173; *see also* *Weems v. United States*, 217 U.S. 349, 381 (1910) (contrasting such “unrestrained power” with “the spirit of constitutional limitations” embodied in the Eighth Amendment).

100. *Gregg*, 428 U.S. at 173.

101. *Id.* at 183.

102. *Cutler*, *supra* note 78, at 387–88.

103. *Baze v. Rees*, 553 U.S. 35, 47 (2008).

104. *Id.*

105. *Id.* at 49–50.



to an Eighth Amendment violation.”<sup>106</sup> In rebuffing the challenge to Kentucky’s three-drug lethal injection protocol,<sup>107</sup> the Court highlighted the prisoners’ admission that the procedure is humane “if performed properly.”<sup>108</sup> While improper administration of the sodium thiopental *would* cause an unconstitutional amount of pain in the second and third steps, the prisoners in *Baze* had not shown that risk to be “substantial.”<sup>109</sup> Further, the prisoners’ suggested alternative protocol (a one-drug protocol using only sodium thiopental) did not “significantly reduce a substantial risk of severe pain.”<sup>110</sup> Thus, the suggested alternative did not render the three-drug protocol unconstitutional.<sup>111</sup>

Although the Court’s pain standards are more individual-oriented than the objective indicia of evolving standards, they can still leave the door open for public opinion in determining constitutional rights.<sup>112</sup> By emphasizing observers’ interpretation of a prisoner’s pain, the analysis can become “more about the way it appears to those who serve as witnesses, real or imagined, to executions.”<sup>113</sup> But this potential inaccuracy is less problematic than subjecting punishments generally to public opinion. Short of human testing or mind reading, a condemned’s reactions are likely the only way to know what pain the execution is causing. The public perception of gruesomeness should not be the guiding light of evaluating the dignity of a punishment, but observing how actual prisoners react may be all we have.

The Court’s recent decision in *Glossip v. Gross* added a new hurdle to challenging a state’s chosen method of execution by requiring a condemned to find a less potentially harmful way for the state to kill him. In *Glossip*, a group of inmates in Oklahoma challenged the state’s use of midazolam (instead of sodium thiopental) in its three-drug protocol.<sup>114</sup> Noting that the Court “has never invalidated a State’s chosen procedure for carrying out a sentence of death as the infliction

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106. *Id.* at 50.

107. The protocol consists of sodium thiopental (a sedative), then pancuronium bromide (a paralytic), then potassium chloride (to stop the heart). *Id.* at 44. Of the thirty-six death penalty states in 2008, thirty used this same protocol. *Id.*

108. *Id.* at 49.

109. *Id.* at 53–54.

110. *Id.* at 52.

111. *Id.* at 52, 56–57.

112. See SARAT, *supra* note 21, at 14–15 (discussing the Court’s interpretation of “the body in pain”).

113. *Id.* at 15; see also Hon. Fernando J. Gaitan, Jr., *Challenges Facing Society in the Implementation of the Death Penalty*, 35 FORDHAM URB. L. J. 763, 784 (2008) (“I believe it is not unconstitutional for the state to sanitize the execution process so that viewers do not have a disturbing experience in viewing the execution.”).

114. *Glossip v. Gross*, 135 S. Ct. 2726, 2731 (2015).

of cruel and unusual punishment,” the majority opinion (written by Justice Alito) keyed on *Baze*’s discussion of suggested alternative execution methods in denying the challenge.<sup>115</sup> But the *Glossip* Court went further, turning that discussion into a new element for Eighth Amendment claims: “[P]risoners must identify an alternative that is ‘feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.’”<sup>116</sup> The Court then rejected the inmates’ claim because they could not provide a “known and available method of execution” with a lower risk of pain.<sup>117</sup> The inmates could not point to an *available* alternative in part because Oklahoma could not obtain sodium thiopental or pentobarbital, both of which would have been constitutional alternatives under *Baze*.<sup>118</sup>

*Glossip*’s new requirement that a condemned must identify a different, constitutional method that the state can use to kill him inverts basic notions of individual rights.<sup>119</sup> This command is wholly new to the Court’s jurisprudence, turning *Baze*’s attempt to limit challenges based on suggesting alternative protocols into an element of an Eighth Amendment claim.<sup>120</sup> The language from *Baze*—requiring alternatives that are “feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain”—was originally part of a discussion about what alternatives an inmate may propose to properly challenge an execution protocol.<sup>121</sup> In that context, *Baze* sought to limit challenges based on requests for a state to adopt marginally less risky methods, lest courts become “boards of inquiry charged with determining ‘best practices’ for executions.”<sup>122</sup> *Baze* never sought to do more than limit challenges from inmates trying to propose alternatives; it certainly did not add a new element to Eighth Amendment claims *requiring* them to propose alternatives.<sup>123</sup>

115. *Id.* at 2732, 2737.

116. *Id.* at 2737 (quoting *Baze*, 553 U.S. at 52).

117. *Id.* at 2737–38.

118. *Id.* Justice Alito attributed this lack of drug supply to “anti-death-penalty advocates,” who “pressured pharmaceutical companies” in Europe to stop selling to prisons for use in executions. *Id.* at 2733; *see also infra*, Section II.D (discussing shortages of sodium thiopental and states’ attempts to find new drugs).

119. *Glossip*, 135 S. Ct. at 2795 (Sotomayor, J., dissenting) (“Certainly the condemned has no duty to devise or pick a constitutional instrument of his or her own death.”).

120. *Id.* at 2794.

121. *Baze*, 553 U.S. at 52. The full sentence reads: “To qualify [as an alternative that addresses a substantial risk of serious harm] the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain.” *Id.*

122. *Id.* at 51; *Glossip*, 135 S. Ct. at 2794 (Sotomayor, J., dissenting).

123. *Compare Glossip*, 135 S. Ct. at 2738–39 (majority opinion) (requiring petitioners to propose significantly less risky execution methods), *with id.* at 2794–95 (Sotomayor, J., dissenting) (discussing *Baze*).

Beyond adding a new, difficult element to Eighth Amendment challenges, *Glossip*'s new requirement makes the Eighth Amendment itself a comparative analysis, denying its true nature as a categorical prohibition.<sup>124</sup> Under *Glossip*, a condemned automatically loses if he cannot point to an alternative execution method readily available to the state, even if the state's chosen method will pose a constitutionally impermissible risk of pain.<sup>125</sup> This requirement puts the burden on a condemned to construct a way the state can act constitutionally. Such a demand is unheard of; challengers never bear this kind of burden when seeking to "protect[] other enumerated fundamental rights."<sup>126</sup>

Together, *Gregg* and *Glossip* subvert basic notions of individual rights in favor of a false narrative of progress. *Gregg* allows public feeling to determine a capital punishment's constitutionality, enabling the narrative of progress to override the actual effects of that punishment. Then, *Glossip* makes the condemned complicit in this narrative, forcing him—rather than the state—to find a more humane (and constitutionally permissible) tool of state killing. In this way, the Court's faith in the narrative of progress<sup>127</sup> has damaged the individual right against cruel and unusual punishment, an error in need of correction.

## II. THE REALITY OF AMERICAN EXECUTION METHODS

Over time, the choice of execution methods has generally been concerned as much, if not more, with how observers perceive the execution, as opposed to what it actually does to the condemned. "The experience of execution by its witnesses—their 'suffering'—fuels the search for painless death."<sup>128</sup> Society's "evolving standards" have

124. *Id.* at 2793 (Sotomayor, J., dissenting) ("Simply stated, the 'Eighth Amendment categorically prohibits the infliction of cruel and unusual punishments.'" (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989))).

125. *See id.* at 2739 (majority opinion) ("[T]he Eighth Amendment requires a prisoner to plead and prove a known and available alternative." (emphasis added)); *id.* at 2793 (Sotomayor, J., dissenting) ("A method of execution that is intolerably painful—even to the point of being the chemical equivalent of burning alive—will, the Court holds, be unconstitutional if, and only if, there is a 'known and available alternative' method of execution.").

126. Steven Schwinn, *Symposium: The Wonderland Rules for Method-of-Execution Claims*, SCOTUSBLOG (Jun. 30, 2015, 3:16 PM), <http://www.scotusblog.com/2015/06/symposium-the-wonderland-rules-for-method-of-execution-claims/> [<http://perma.cc/AD7Q-GQC9>].

127. *See Glossip*, 135 S. Ct. at 2731–32 (discussing the search for more humane methods). Such faith is probably unwarranted, however. *See infra* Part II (discussing the failure of the search for "more humane" methods).

128. SARAT, *supra* note 21, at 15 (emphasis added). This search is, to an extent, worthy of parody. *See Ohio Replaces Lethal Injection with Humane New Head-Ripping-Off Machine*, THE ONION (May 20, 2014), <http://www.theonion.com/video/ohio-replaces-lethal-injection-with->

attempted to make each successive method more humane, but this march of technology has primarily served to wrap capital punishment in greater amounts of “padded words.”<sup>129</sup> Indeed, capital punishment is now “less about sovereignty than science.”<sup>130</sup>

This Part discusses the four most common methods of execution in the United States—hanging, electrocution, lethal gas, and lethal injection. Fair warning: it explores these methods in graphic detail, and they will appear brutal. Such description is needed. To understand the flawed narrative of progress in execution methods, we must face the mistakes of these methods directly.

### A. *The Long Drop: Hanging*

Hanging is an old method of execution, and one of the simplest. All it requires is a rope tied in a slipknot, “the bough of a particularly sturdy tree,” and a group of sufficient strength to “hoist [the condemned] to the sky.”<sup>131</sup> Left hanging from the tree, the condemned usually died by asphyxiation, strangled by the rope, aided by the loss of blood flow to the brain and whatever damage the raising did to the neck.<sup>132</sup> This protocol became more formalized over time, substituting more reliable crossbeams for tree branches and requiring the condemned to climb a ladder to let the hangman tie his noose to the crossbeam.<sup>133</sup> The hangman turned the ladder, causing the condemned to fall a few inches and hang, asphyxiating.<sup>134</sup> Later developments substituted a horse-drawn cart for the ladder,<sup>135</sup> or, in the late 1700s, used trapdoors to drop the condemned a short distance.<sup>136</sup>

Eventually, in the nineteenth century, executioners in England and the United States began adopting the “long drop” method, dropping the condemned from a scaffold a certain distance, depending on the condemned’s weight.<sup>137</sup> This drop was intended to cause death by “dislocating the uppermost cervical vertebrae, thereby separating the

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humane-new-hea,36077/ [http://perma.cc/V4AP-ZCKY] (calling the machine “a hallmark of compassion”).

129. See SARAT, *supra* note 21, at 9 (“[T]oday, we seek a technology that leaves no trace.”).

130. *Id.*

131. *Id.* at 31.

132. *Id.* at 31–32.

133. *Id.* at 32.

134. *Id.*

135. *Id.* at 33.

136. See *Campbell v. Wood*, 18 F.3d 662, 684 (9th Cir. 1994) (evaluating hanging in Washington State).

137. *Id.*; SARAT, *supra* note 21, at 39. In Ireland, for example, these distances typically ranged from ten to seventeen feet. SARAT, *supra* note 21, at 39.

spinal cord from the brain stem," a theoretically much quicker death than the slow strangulation of older methods.<sup>138</sup> More modern versions, derived from military procedures, include specific requirements about the noose.<sup>139</sup>

This increased efficiency came with a new set of risks. Longer drops would sometimes decapitate the condemned, rather than just break the neck.<sup>140</sup> But too short a drop would leave the condemned to slowly asphyxiate.<sup>141</sup> Using too thin a rope would raise the "chances of partial or complete decapitation," and an overly elastic rope might not transfer enough kinetic energy to the condemned's neck.<sup>142</sup> An error in knot position—deviating from its proper position under the left ear or chin—might not properly transfer energy to stop blood flow to the brain and cause rapid unconsciousness and death.<sup>143</sup> Such errors were frequent in hanging's history.<sup>144</sup>

While hanging was once used in almost every state and territory, only three states even keep it as an option today.<sup>145</sup> Near the end of the nineteenth century, botched hangings, combined with changing public sensibilities, turned American public opinion against the use of hanging.<sup>146</sup> Despite frequent technological improvements to try to make the punishment "more humane,"<sup>147</sup> hanging could not eliminate lingering, painful deaths.<sup>148</sup> These failures fostered an early abolition movement in New York, forcing the state to change methods in order to keep the death penalty.<sup>149</sup> Fortunately for these early death penalty supporters, rapid scientific progress in the early twentieth century

138. SARAT, *supra* note 21, at 39. This "hangman's fracture" was actually rare, and the exact cause of death in many hangings was uncertain. *Id.* at 40.

139. See *Campbell*, 18 F.3d at 683 (describing Washington's hanging protocol at the time). For example, the rope was boiled and stretched "to eliminate most of its elasticity" and "coated with wax or oil so that it will slide easily." *Id.*

140. SARAT, *supra* note 21, at 39.

141. *Campbell*, 18 F.3d at 684.

142. *Id.* at 684–85.

143. *Id.* at 685.

144. See SARAT, *supra* note 21, at 45–59 (describing several kinds of botched hangings in the early 1900s).

145. Delaware, New Hampshire, and Washington primarily use lethal injection, but authorize hanging. *Methods of Execution*, *supra* note 27.

146. SARAT, *supra* note 21, at 42–43, 60.

147. See *Campbell*, 18 F.3d at 684 (mentioning nineteenth century studies determining the long drop method to be "more humane" than earlier methods).

148. See SARAT, *supra* note 21, at 60 ("The history of hanging's evolving technologies, and their frequent mishaps, foretold the fruitless search for other humane and foolproof technologies [for executions].").

149. See Denno, *supra* note 23, at 389 (observing that state legislatures often change their method of execution not out of "humanity" but out of a desire to keep the death penalty).

provided new tools for “clean, clinical, [and] undisturbing method[s] of execution.”<sup>150</sup>

### *B. Shocking Developments: Electrocution*

Execution by electricity began with good intentions: using scientific progress to humanely end the life of a condemned. The use of electricity for executions began in New York, after two doctors conducted an autopsy of a man who had been electrocuted by machinery, finding minimal tissue damage and, they believed, instant, painless death.<sup>151</sup> Some officials in New York began testing electricity as a way to kill stray animals, and the idea made its way to the state legislature as a proposed replacement for hanging.<sup>152</sup> After study, a commission on execution methods determined electrocution was ideal, as it was “sufficient, powerful, rapid, and humane,” and death was “instantaneous.”<sup>153</sup>

In an execution by electrocution, a condemned is strapped into a wooden chair, where prison officials attach electrodes to his shaved head.<sup>154</sup> These electrodes are usually part of a metal skullcap, and the cap is placed on top of a dampened sponge.<sup>155</sup> This step is critical. If the sponge is too wet, the current short-circuits; if it is too dry, the current faces too much resistance.<sup>156</sup> Once the electrodes are prepared, the executioner throws a switch controlling the electricity, sending a high-powered current through the condemned’s body for about thirty seconds.<sup>157</sup> A doctor checks if the prisoner is still alive, and, if so, additional jolts are applied until death.<sup>158</sup>

The intended serenity of electrocution never came to pass, however, as its use often ran into mechanical problems, prolonged executions, and grisly results.<sup>159</sup> Electric chair executions often put the condemned through a much more terrifying ordeal than was

150. SARAT, *supra* note 21, at 60.

151. *Id.* at 61–62.

152. *Id.* at 62–64.

153. *Id.* at 65 (internal quotation marks omitted).

154. *Glass v. Louisiana*, 471 U.S. 1080, 1086 n.13 (1985) (Brennan, J., dissenting from denial of certiorari).

155. *Descriptions of Execution Methods*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/descriptions-execution-methods?scid=8&did=479> [<http://perma.cc/YM6G-YJXH>] (last visited Oct. 16, 2015).

156. *Id.*

157. *Id.*

158. *Id.*

159. *See* SARAT, *supra* note 21, at 67–68 (describing problems with using the electric chair).

promised.<sup>160</sup> For example, William Kemmler, the first man executed in New York's electric chair, had a bloody face afterwards, and "eyewitnesses reported hearing a singeing sound."<sup>161</sup> Kemmler did not die at the first shock, either—the executioners had to turn the machine back on to actually kill him.<sup>162</sup> Later executions faced similar problems: prisoners "cringe[d]" and leapt in their chairs, their faces contorted; "prisoner[s]" eyeballs . . . pop[ped] out and rest on [their] cheeks"; prisoners defecated, urinated, vomited, and bled; and prisoners' brains effectively boiled in their heads.<sup>163</sup> In the end, the condemned's body was "frequently badly burned and disfigured."<sup>164</sup> In the 1990 execution of Jesse Joseph Tafero, the first shock gave off sparks, and "flames surged from his head."<sup>165</sup> In that case, it took four shocks to kill Tafero, in part because the prison staff used the wrong kind of sponge under the electrodes after their old one wore out from repeated use.<sup>166</sup> As incidents like these demonstrate, actual circumstances have undermined the hope that electrocution would lead to quick, painless deaths, instead resulting in burnings and other physical harm.<sup>167</sup>

The failed promise of electricity as a state killing tool restarted the cycle of trying to find a "humane" execution method. Much like the botched hangings in New York almost a century before, Tafero's botched electrocution led to new calls to end the death penalty in Florida.<sup>168</sup> When the Supreme Court agreed to hear an Eighth Amendment challenge to Florida's use of electrocution, the governor called a special session of the Florida legislature to craft a lethal injection protocol, cutting off the challenge.<sup>169</sup> Today, only eight states still authorize the

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160. Perhaps Thomas Edison's involvement should have been a clue. Edison was an early advocate of the electric chair, primarily as a tool in his rivalry with George Westinghouse. *Id.* at 65. In the early days of electric power, Westinghouse's alternating current competed with Edison and his direct current system. *Id.* at 66. To turn public opinion against Westinghouse, Edison published a pamphlet describing the dangers of alternating current; Edison's campaign convinced the New York legislature to forbid the "too dangerous" alternating current for civilian power. *Id.* at 67. Instead, New York adopted Westinghouse's system to power the state's new electric chair. *Id.*

161. Beard, *supra* note 43, at 461.

162. *Id.*

163. *Glass v. Louisiana*, 471 U.S. 1080, 1086–88 (1985) (Brennan, J., dissenting from denial of certiorari) (internal quotation marks omitted).

164. *Id.* at 1088.

165. SARAT, *supra* note 21, at 78.

166. Beard, *supra* note 43, at 461.

167. *Glass*, 471 U.S. at 1088 (Brennan, J., dissenting from denial of certiorari).

168. See SARAT, *supra* note 21, at 87 (describing the aftermath of several botched Florida electrocutions in the 1990s).

169. *Id.*

electric chair, but all of these eight have moved on to lethal injection as their primary method.<sup>170</sup>

### C. Better Killing Through Chemistry: Lethal Gas

Developing parallel to electrocution, lethal gas was believed to be a humane alternative to hanging, and several states adopted it following World War I. First adopted as a method of execution in Nevada in 1921, the plan was to keep the condemned in an airtight cell, and then fill the cell with some sort of poison (or other non-air) gas in the night while the condemned slept.<sup>171</sup> Even before that, doctors in Pennsylvania promoted gassing as “the most humane way to extinguish life” in 1897, recommending carbonic acid or carbon dioxide.<sup>172</sup>

Over time, Nevada realized its plan for sealed individual cells was infeasible. Instead, it converted a separate building in the Carson City prison yard into a gas chamber.<sup>173</sup> Nevada also settled on hydrocyanic acid, “traditionally used for fumigating citrus trees,” as the gas, initially using a heater to evaporate its stable liquid form into gas.<sup>174</sup> This method encountered problems. The first prisoner subjected to the gas chamber took longer to die than expected, as cracks in the walls and a broken heater slowed the filling process.<sup>175</sup> Nevada built a new gas chamber and adopted what would become the typical method of gassing: the condemned would be strapped into a chair over a container of sulfuric acid, and then executioners would drop pellets of potassium cyanide into the container.<sup>176</sup> The ensuing chemical reaction produced hydrogen cyanide gas, which killed the prisoner.<sup>177</sup> As public opinion continued solidifying against hanging, many more states turned to lethal gas.<sup>178</sup>

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170. Alabama, Arkansas, Florida, Kentucky, South Carolina, Tennessee, and Virginia have electrocution as a secondary method. *Methods of Execution*, *supra* note 27. Oklahoma authorizes electrocution only if lethal injection is found unconstitutional, and Tennessee is open to making the chair its primary method if it cannot obtain lethal injection drugs. *Id.*

171. SARAT, *supra* note 21, at 90–91. Nevada’s original protocol did not specify how to build the cell or what gas to use, however. *Id.* at 91.

172. *Id.*

173. *Id.* at 94–95.

174. *Id.* at 95–96.

175. *Id.* at 96.

176. *Id.* at 97.

177. *Id.*; see also *Descriptions of Execution Methods*, *supra* note 155 (describing the procedure for lethal gas).

178. SARAT, *supra* note 21, at 97.



Lethal gas was supposed to cause death “without the possibility of accidents.”<sup>179</sup> Instead, lethal gas ended up reproducing the indignities of older methods in new technological packaging. Prisoners were not knocked out quickly and often struggled against the gas, holding their breath as long as possible.<sup>180</sup>

When the gas actually enters the condemned’s body, it causes death by cellular suffocation—preventing the body from taking in oxygen—resulting in a death “analogous to drowning or strangulation.”<sup>181</sup> A prisoner will “drift[ ] in and out of consciousness” while experiencing additional pain from buildups of lactic acid and adrenaline and muscle spasms.<sup>182</sup> The gas, toxic on its own, causes burning sensations in the nose, lungs, and esophagus; one account said “[i]t literally burns you out from the inside.”<sup>183</sup> These reactions lead to convulsions, which caused additional harm.<sup>184</sup>

Because of these “gruesome spectacles,” as well as unsettling associations with Nazi Germany following World War II, states started to move on to a new method.<sup>185</sup> The gas chamber was only a primary method of execution for about fifty years, but in that time, one in twenty gassings was botched—a higher rate than either hanging or electrocution.<sup>186</sup> Today, just three states still authorize the gas chamber, and all have adopted lethal injection as a primary method.<sup>187</sup> Some, however, have called for the gas chamber’s return.<sup>188</sup>

#### D. “How Envious a Quiet Death”: Lethal Injection

In *Callins v. Collins*, Justice Blackmun—who dissented in *Furman* and concurred in *Gregg*—gave up his efforts to sustain the

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179. *Id.* at 92.

180. *Descriptions of Execution Methods*, *supra* note 155.

181. Allen Huang, *Hanging, Cyanide Gas, and the Evolving Standards of Decency: The Ninth Circuit’s Misapplication of the Cruel and Unusual Clause of the Eighth Amendment*, 74 OR. L. REV. 995, 1004–05 (1995).

182. *Id.* at 1005.

183. *Id.*

184. *Id.* at 1007.

185. See SARAT, *supra* note 21, at 115–16 (noting mounting public pressure against the gas chamber).

186. *Id.* at 116. Between 1900 and 2010, 5.4% of gassings were botched, higher than both hanging (3.12%) and electrocution (1.92%). *Id.* at 177. Only 593 gassings were performed in that time, compared to 2,721 hangings and 4,374 electrocutions. *Id.*

187. Arizona and Missouri authorize the gas chamber, while Wyoming authorizes it only if lethal injection is found unconstitutional. *Methods of Execution*, *supra* note 27.

188. Recently, the Missouri Attorney General has indicated a willingness to restore the use of lethal gas. See Rizzo, *supra* note 19 (reporting gassing’s possible return as an “unintended consequence” of litigation-related delays in the use of lethal injection).

death penalty. He offered a description of a death by lethal injection to open his opinion:

On February 23, 1994, at approximately 1:00 a.m., Bruce Edwin Callins will be executed by the State of Texas. Intravenous tubes attached to his arms will carry the instrument of death, a toxic fluid designed specifically for the purpose of killing human beings. The witnesses, standing a few feet away, will behold Callins, no longer a defendant, an appellant, or a petitioner, but a man, strapped to a gurney, and seconds away from extinction.<sup>189</sup>

Justice Scalia mocked this sympathy.<sup>190</sup> After describing a particularly horrific murder of a young girl, Justice Scalia remarked, “How enviable a quiet death by lethal injection compared with that!”<sup>191</sup>

Justice Scalia’s underlying premise—that lethal injection is a peaceful, humane way to end a life—is commonly held.<sup>192</sup> Implementing this belief in humaneness was the entire purpose of adopting lethal injection, first authorized in Oklahoma in 1977, one year after *Gregg*’s reinstatement of the death penalty.<sup>193</sup> State representatives sought an alternative to the “inhumanity, visceral brutality, and cost of the electric chair”; they found one after consulting with the head of the University of Oklahoma Medical School’s anesthesiology department, who suggested that a series of drugs could be used instead.<sup>194</sup> Once Oklahoma adopted this method, thirty-six states followed suit in the years after.<sup>195</sup> Lethal injection was hailed as a step forward because it “appears more humane and visually palatable relative to other methods.”<sup>196</sup>

That perception comes from the medical appearance of an execution by lethal injection, as “the modern death chamber has come to resemble a hospital room, and executioners to resemble medical

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189. *Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting from denial of certiorari).

190. *See id.* at 1142–43 (Scalia, J., concurring in denial of certiorari) (criticizing Blackmun’s choice of a less grisly murder case to voice his opposition to the death penalty).

191. *Id.* at 1143. Such certainty is troubling, however, as Henry Lee McCollum, the defendant in the case Justice Scalia referenced, was later exonerated by DNA evidence. Ed Mazza, *Scalia Once Pushed Death Penalty for Now-Exonerated Inmate Henry Lee McCollum*, HUFFINGTON POST (Sept. 3, 2014, 12:59 PM), [http://www.huffingtonpost.com/2014/09/02/scalia-death-penalty\\_n\\_5756362.html](http://www.huffingtonpost.com/2014/09/02/scalia-death-penalty_n_5756362.html) [<http://perma.cc/C76X-TTRZ>].

192. *See Death Penalty*, *supra* note 24 (finding sixty-five percent of respondents believed lethal injection to be the most humane method, as of May 2014).

193. SARAT, *supra* note 21, at 117.

194. *Id.*

195. *Baze v. Rees*, 553 U.S. 35, 42–43 (2008) (describing the adoption of lethal injection in the United States).

196. SARAT, *supra* note 21, at 118 (quoting Deborah Denno, *The Future of Execution Methods*, in *THE FUTURE OF AMERICA’S DEATH PENALTY: AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH* 490 (Charles S. Lanier et al. eds., 2009) (emphasis omitted)).

professionals.”<sup>197</sup> The procedure appears medical, as if the condemned were merely being put under anesthesia.<sup>198</sup> Until very recently, almost all states have used the three-step injection process developed by Oklahoma to kill a condemned.<sup>199</sup> First, sodium thiopental, “a fast-acting barbiturate sedative,” causes “a deep comalike unconsciousness.”<sup>200</sup> Next, pancuronium bromide, a paralytic, “inhibits all muscular-skeletal movements and, by paralyzing the diaphragm, stops respiration.”<sup>201</sup> Finally, a dose of potassium chloride “interferes with the electrical signals that stimulate the contractions of the heart, inducing cardiac arrest.”<sup>202</sup> These drugs are delivered by long tubes connecting drips, hidden behind a cement block wall, to needles, usually placed in the veins of a prisoner’s arm.<sup>203</sup>

In part because of its relative complexity, there are several points where a lethal injection execution can go wrong. Overweight prisoners and former drug users “often have veins which are difficult or impossible to find,” leading to prolonged searches for a usable insertion point, risking error and pain.<sup>204</sup> Further, the complexity and shielded nature of the administration methods may make it harder for prison officials to know whether the condemned is actually unconscious before administering the last two drugs.<sup>205</sup> Moreover, the latter two drugs pose a risk of serious harm if used without the first. Pancuronium bromide can cause a prisoner to feel like he is suffocating when it paralyzes the diaphragm.<sup>206</sup> Potassium chloride, on its way to the heart, can cause a burning sensation in a prisoner’s veins.<sup>207</sup> As such, the three-drug protocol’s humanity—and constitutionality—depends almost entirely on the effective and proper administration of the

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197. *Id.* at 119 (citing Deborah Denno, *The Future of Execution Methods*, in *THE FUTURE OF AMERICA’S DEATH PENALTY: AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH* 488 (Charles S. Lanier et al. eds., 2009)).

198. *Id.* (quoting Jonathan I. Groner, *Lethal Injection: A Stain on the Face of Medicine*, 325 *BRIT. MED. J.* 1026, 1026 (2002)).

199. See *Glossip v. Gross*, 135 S.Ct. 2726, 2733–34 (2015) (discussing recent limits on drug supplies that have forced changes in protocols).

200. *Baze*, 553 U.S. at 44.

201. *Id.*

202. *Id.*

203. *Descriptions of Execution Methods*, *supra* note 155.

204. *SARAT*, *supra* note 21, at 123.

205. Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 *B.C. L. REV.* 1367, 1378 (2014).

206. *Id.* at 1377.

207. *Id.* This risk has been compared to “the chemical equivalent of being burned at the stake.” *Glossip v. Gross*, 135 S. Ct. 2726, 2781 (2015) (Sotomayor, J., dissenting).

sedative.<sup>208</sup> Should it be administered incorrectly, the condemned may suffer without showing it, due to the paralytic effect of pancuronium bromide.<sup>209</sup>

This three-drug protocol is the only lethal injection procedure expressly approved by the Supreme Court, with drug substitutions only allowed if they are “substantially similar.”<sup>210</sup> But states are struggling to implement the protocol due to a recent shortage of sodium thiopental.<sup>211</sup> Hospitals have switched to other anesthetic drugs, and the European Union, home to the only large-scale sodium thiopental suppliers, banned exports of the drug in 2011, cutting ties with many U.S. prisons.<sup>212</sup> In the aftermath, states have sought new drugs and protocols to use, with some trying theoretically similar but actually inferior substitutes for sodium thiopental.<sup>213</sup> Other states have turned to compounded drugs, which are more varied in potency and have a higher risk of impurities.<sup>214</sup> These replacement methods have arguably

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208. See *Baze v. Rees*, 553 U.S. 35, 53 (2008) (“It is uncontested that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride.” (emphasis added)).

209. Berger, *supra* note 205, at 1377–78 (discussing ramifications of improper anesthetic administration).

210. *Baze*, 553 U.S. at 61. *Baze* left open the constitutionality of protocols other than the typical three-drug protocol. See *id.* (addressing protocols “substantially similar” to the three-drug protocol); see also SARAT, *supra* note 21, at 121–22 (noting other “major questions” left open after *Baze*). To an extent, *Glossip* addresses one such open question—whether a similar drug can be substituted for sodium thiopental. *Glossip*, 135 S. Ct. at 2731. Yet the Court’s rejection of a challenge to the use of midazolam may not be as full-throated as its endorsement of sodium thiopental in *Baze*: the *Glossip* Court’s holding relies on the inmates’ failure to show the district court clearly erred, rather than an explicit holding that the use of midazolam complies with the Eighth Amendment. *Id.*; see also *id.* at 2792 (Sotomayor, J., dissenting) (noting the preliminary injunction posture of the case, so the inmates “were granted only an abbreviated evidentiary proceeding” and conceding that “perhaps the State could prevail after a full hearing”).

211. See Matt Ford, *Can Europe End the Death Penalty in America?*, THE ATLANTIC (Feb. 18, 2014, 7:06 PM), <http://www.theatlantic.com/international/archive/2014/02/can-europe-end-the-death-penalty-in-america/283790/> [<http://perma.cc/8QM-QACV5>] (describing the shortage).

212. *Id.* This decision has also stymied American manufacturers. See Chris McGreal, *Lethal Injection Drug Production Ends in the US*, THE GUARDIAN (Jan. 23, 2011, 1:17 PM), <http://www.theguardian.com/world/2011/jan/23/lethal-injection-sodium-thiopental-hospira> [<http://perma.cc/27KS-YLNL>] (describing the last US manufacturer, Hospira, ceasing production).

213. Midazolam, discussed in *Glossip*, is one such chosen alternative; it does not have the same ability to maintain unconsciousness as sodium thiopental. See *Glossip*, 135 S. Ct. at 2783 (Sotomayor, J., dissenting) (discussing the biochemical differences between barbiturates, like sodium thiopental or pentobarbital, and benzodiazepines, like midazolam).

214. Berger, *supra* note 205, at 1380–84 (describing state responses and attempts to replace sodium thiopental).

led to a series of botched executions, with inmates convulsing or, in one case, saying, “I feel my whole body burning.”<sup>215</sup>

Further, lethal injection’s medical appearance has limited connection to its actual practice. Physicians are typically only involved in lethal injection at the very end, to confirm the condemned is dead. Generally, the procedure is carried out by a crew including a phlebotomist and an EMT to insert the IVs in the condemned’s veins, assisted by prison personnel.<sup>216</sup> Recent attacks on the death penalty key on this lack of physician involvement, questioning the protocols used, the qualifications of execution teams, and the ensuing legislative response to keep suppliers and executioners secret.<sup>217</sup>

And physician involvement in executions is not forthcoming, as the medicalization of lethal injection poses normative problems. It contradicts another important state value: preventing the “blurring [of] the time-honored line between healing and harming,” essential to public trust in the medical profession.<sup>218</sup> Such concerns bolster the profession’s longstanding opposition to its conscription into state killing.<sup>219</sup> For instance, in the nineteenth century, when early reformers proposed lethal injection instead of hanging, the procedure was rejected because of “objections from the medical community.”<sup>220</sup> The American Medical Association regards participation in executions, including assistance or supervision, as unethical.<sup>221</sup> More recently, the American Pharmacists Association and the International Academy of Compounding Pharmacists both adopted policies discouraging the involvement of pharmacists in executions.<sup>222</sup> Even the Food and Drug

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215. See *id.* at 1385–87 (recounting the botched execution of Michael Lee Wilson, as well as several others using compounded pentobarbital or midazolam).

216. See *Baze v. Rees*, 553 U.S. 35, 45 (2008) (describing Kentucky’s protocol in 2008); *Description of Execution Methods*, *supra* note 155 (“This lack of medical participation can be problematic because often injections are performed by inexperienced technicians or orderlies.”).

217. See *Berger*, *supra* note 205, at 1388–89 (describing state secrecy measures).

218. See *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997) (recognizing a state interest “in protecting the integrity and ethics of the medical profession”); see also *SARAT*, *supra* note 21, at 119 (noting the American medical associations have expressed that “[w]hen the healthcare professional serves in an execution under circumstances that mimic care, the healing purposes of health services and technology becomes distorted”).

219. See *SARAT*, *supra* note 21, at 119 (describing doctors’ opposition to being involved in lethal injection).

220. *Id.* at 118.

221. *Opinion 2.06 – Capital Punishment*, AM. MED. ASS’N, <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion206.page?> [<http://perma.cc/VL8U-NSX2>] (last visited Oct. 16, 2015). The AMA provides for five exceptions to this policy, one of which is certifying death after someone else has declared the condemned dead. *Id.*

222. *APhA House of Delegates Adopts Policy Discouraging Pharmacist Participation in Execution*, AM. PHARMACISTS ASS’N (Mar. 30, 2015), <http://www.pharmacist.com/apha-house-delegates-adopts-policy-discouraging-pharmacist-participation-execution> [<http://perma.cc/9VG2->

Administration avoids involvement with lethal injection, as it does not approve drugs used in lethal injection.<sup>223</sup>

Lethal injection was supposed to be “the final step in the evolution of the technology of state killing,” ending life with quiet, bureaucratic dignity in the privacy of America’s prisons.<sup>224</sup> But its actual practice has been far from foolproof. A higher percentage of lethal injections have been botched than any other method of execution in the United States since 1900.<sup>225</sup> The needle’s failures also bring a slew of practical problems—unique litigation issues, feasibility concerns, and implicating the medical profession in state killing.

Thus far, the promise of technology may have placated an observer’s “evolving standards” and made state killing appear more palatable. But it has done little to ensure the individual rights of America’s condemned. Rather, the progression of execution methods has allowed appearances to supersede actual effects and has let states avoid a constitutional limit on their power to inflict punishments.

### III. GOING BACK TO GO FORWARD: AN ARGUMENT FOR THE FIRING SQUAD

What, then, shall we do? History shows scientific progress is not the way to make executions more humane, so perhaps we have been looking in the wrong direction. “Evolving standards” need not directly match the timeline, and it is time to consider an older method that is *actually* more humane: the firing squad. First, this Part explores the history of the firing squad, to illustrate its practice and usage. Then, it argues for its widespread implementation, as it better comports with the Eighth Amendment, better avoids practical difficulties, and better promotes honest discussion about capital punishment in America.

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29GZJ (calling such participation “fundamentally contrary to the role of pharmacists as providers of health care”); *IACP Board Updates Position on Compounding for Lethal Injections*, INT’L ACAD. OF COMPOUNDING PHARMACISTS, <http://www.iacprx.org/general/custom.asp?page=CC32315LethalIn%20> [<http://perma.cc/3AS6-PNWJ>] (last visited Oct. 16, 2015) (discouraging participation in “the preparation, dispensing, or distribution of compounded medications for use in legally authorized executions”).

223. Ford, *supra* note 211 (noting the FDA’s focus on “ensuring the continued availability of medically necessary drugs”).

224. SARAT, *supra* note 21, at 144.

225. *Id.* at 177. Lethal injections were botched 7.12% of the time and make up more than one-fourth of botchings since 1900. *Id.*

### A. History and Method of the Firing Squad

The firing squad in America dates to 1608, when a man was executed for plotting to betray the Virginia colony to Spain.<sup>226</sup> Since then, the firing squad has been used 144 times in this country,<sup>227</sup> and only thirty-four times since 1900.<sup>228</sup> No state uses the firing squad as a primary method today, but two states keep firing squad protocols on the books, in case lethal injection is found unconstitutional.<sup>229</sup> But only one state—Utah—has ever used the firing squad as a primary method of execution. Thus, information about the firing squad as a civilian punishment comes from Utah's practice.<sup>230</sup> Utah conducted its first firing squad execution in 1861.<sup>231</sup> The most recent execution by firing squad occurred in 2010, when Utah executed Ronnie Lee Gardner.<sup>232</sup>

For executions, a firing squad usually consists of five law enforcement officers, armed with .30-caliber rifles and a single round each.<sup>233</sup> One officer is given a blank round.<sup>234</sup> The officers stand behind a canvas covering with openings through which to aim.<sup>235</sup> The condemned sits in a chair twenty feet away, surrounded by sandbags and restrained by thick straps.<sup>236</sup> A white cloth is pinned over the condemned's heart to provide a target.<sup>237</sup> After a countdown—the

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226. Cutler, *supra* note 78, at 337.

227. *Id.* This number does not include military firing squads, *id.* at 337 n.5, but does include the execution of Ronnie Lee Gardner in 2010. See Nate Carlisle, *Firing Squad: An Eyewitness Account of Gardner's Execution*, SALT LAKE TRIB. (June 18, 2010, 8:05 PM), [http://www.sltrib.com/news/ci\\_15325356](http://www.sltrib.com/news/ci_15325356) [<http://perma.cc/2EVG-KKGA>] (recounting Gardner's execution).

228. SARAT, *supra* note 21, at 177.

229. These states are Oklahoma and Utah. *Methods of Execution*, *supra* note 27. These states both use lethal injection as their primary method. *Id.* Utah allows the use of the firing squad for inmates who chose it before its retirement in 2004. *Id.*; see also Tom Harvey, *Firing Squad Executions Back on the Table in Utah Legislature*, THE SALT LAKE TRIB. (Nov. 21, 2014, 5:13 PM), <http://www.sltrib.com/news/1846892-155/firing-execution-squad-utah-lethal-death> [<http://perma.cc/P7SR-QNVL>].

230. Cutler, *supra* note 78, at 337 (noting, in 2003, "Utah is the only State that actively executes by firing squad").

231. *Id.* at 342, 357. Also, Utah performed the first execution of any kind in the U.S. after Gregg, using the firing squad. *Id.*

232. Carlisle, *supra* note 227.

233. Cutler, *supra* note 78, at 363–64; *Description of Execution Methods*, *supra* note 155.

234. *Description of Execution Methods*, *supra* note 155. The blank round makes it so that the shooters are unsure who fired a fatal round, which diffuses responsibility among the shooters.

235. Cutler, *supra* note 78, at 364.

236. *Id.*

237. *Id.*

“ready, aim, fire” cadence—all five shooters fire at once, piercing the heart and causing rapid death.<sup>238</sup>

At least as practiced in Utah, this process has been remarkably difficult to botch. Christopher Cutler’s detailed account of the firing squad notes only two botched executions by this method.<sup>239</sup> In the first, Wallace Wilkerson’s in 1878, Wilkerson refused to be tied to the chair in the execution chamber, stating, “I intend to die like a man, looking my executioners right in the eye.”<sup>240</sup> When the shots hit, Wilkerson stood up, staggered, and fell, shouting that the squad had missed his heart.<sup>241</sup> “Apparently at the command to fire, Wilkerson drew his shoulders back, and raised the paper target pinned to his jacket,” causing three shots to hit an inch above his heart and another six inches above, in his left arm.<sup>242</sup> Even so, Wilkerson died fifteen minutes later.<sup>243</sup> The second botched firing squad execution, Eliseo Mares’s in 1951, happened when the entire squad missed the heart—deliberately, by some accounts.<sup>244</sup> Mares bled out several minutes later.<sup>245</sup> Outside of such errors, firing squad executions were “generally swift and devoid of major problems.”<sup>246</sup>

### *B. The Firing Squad Better Adheres to the Eighth Amendment*

In light of its practice, the firing squad protects an individual’s right against cruel and unusual punishment better than lethal injection, and certainly better than earlier methods. To start, it satisfies evolving standards of dignity, however measured. Under *Gregg*’s first objective indicator,<sup>247</sup> the historical record does not suggest that the firing squad would be cruel and unusual punishment. While an older punishment, the firing squad is far less gruesome and painful than other methods known at the founding, like burning at the stake or

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238. *Id.* at 364, 413–14.

239. *Id.* at 346–47 (Wallace Wilkerson, in 1878); *id.* at 356–57 (Eliseo Mares, in 1951). These two do put the botch rate at 1.3%, only 0.6% below electrocutions between 1900 and 2010, however. See SARAT, *supra* note 21, at 177. The low rate may also be a function of the small number of civilian firing squads.

240. Cutler, *supra* note 78, at 346.

241. *Id.* at 347.

242. *Id.*

243. *Id.*

244. *Id.* at 356–57.

245. Cutler, *supra* note 78, at 356–57.

246. *Id.* at 347.

247. See *supra* note 78 and accompanying text.



pressing.<sup>248</sup> The firing squad's primary advantage over these methods comes from its quickness and accuracy, thereby avoiding comparisons to torture.<sup>249</sup> *Gregg's* other two indicia, legislative action and jury verdicts, are less clear, chiefly due to small sample size. Only Utah ever fully embraced the firing squad, so a national consensus on it never formed. To be sure, far more states adopted lethal injection, but this does not necessarily represent a rejection of the firing squad.<sup>250</sup> It could also merely be a preference for the former's medical appearance.<sup>251</sup> Utah's demotion of the firing squad in 2004 may indicate a change in standards, but recent calls to restore it (or adopt it) as an alternative method cut against such a change.<sup>252</sup> In fact, Utah brought back the firing squad, albeit as a "backup method," in 2015.<sup>253</sup> These steps show that, at the very least, the firing squad is no more offensive to evolving standards of decency than lethal injection.

However, *Gregg's* criteria should be less important than the punishment's actual effect on the dignity of prisoners. The firing squad may not appear as humane as lethal injection at first glance, due to the latter's medical appearance. But this perception has no bearing on whether a punishment offends the Eighth Amendment.<sup>254</sup> Indeed, if appearance were controlling, it would turn *Weems* and *Trop* on their heads, losing the reality of a punishment in the words that describe it. Based on its actual effect, the firing squad is quick and effective, typically taking only minutes to carry out and causing death in

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248. Cutler, *supra* note 78, at 398–99. Burning at the stake involves a condemned burning alive. Pressing entails the use of large weights to eventually crush a person to death, on belief "that truth could literally be squeezed out of a person." *Id.* at 398 n.5.

249. *Id.* at 399–400; *see also* *Wilkerson v. Utah*, 99 U.S. 130, 134–36 (1878) (holding that shooting was not among punishments of "unnecessary cruelty" under an original understanding of the Eighth Amendment).

250. *See* Cutler, *supra* note 78, at 402 ("The Nation's move toward lethal injection . . . does not necessarily reflect a move away from the firing squad." (emphasis omitted)).

251. *See* Denno, *supra* note 23, at 66 (discussing legislatures' efforts to maintain the death penalty by "present[ing] a medically sterile aura of peace").

252. *See* Harvey, *supra* note 229 (recounting Utah's removal of the firing squad and recent action to restore it); *see also* Karen Kasler, *Federal Court to Weigh Ohio's Execution Drug Cocktail*, NPR (Oct. 31, 2013, 4:48 PM), <http://www.npr.org/2013/10/31/242106845/federal-court-to-weigh-ohios-execution-drug-cocktail> [<http://perma.cc/3DH9-JW3R>] (quoting a prosecutor in Ohio: "They ought to just bring back the firing squad . . . . If they're going to have a death penalty in Ohio, they should carry it out . . . ."); *The Return of the Firing Squad? US States Reconsider Execution Methods*, THE GUARDIAN (Jan. 28, 2014, 6:29 AM), <http://www.theguardian.com/world/2014/jan/28/return-firing-squad-us-states-execution-methods> [<http://perma.cc/6C2A-8WLL>] (describing a bill in Wyoming to allow the firing squad).

253. *Utah Brings Back Firing Squads as Lethal Injection Drugs Remain Scarce*, NPR (Mar. 23, 2015, 10:51 PM), <http://www.npr.org/2015/03/23/394957508/utah-brings-back-firing-squads-as-lethal-injection-drugs-remain-scarce> [<http://perma.cc/K2BU-32N5>].

254. *See* Gaitan, *supra* note 113, at 784 ("Of course, the person who we must be concerned about in Eighth Amendment jurisprudence is the condemned, not the viewer of the execution.").

seconds.<sup>255</sup> Further, death by firing squad has a much lower risk of pain, due to rapid unconsciousness induced by shock and blood loss.<sup>256</sup> Therefore, the firing squad's efficiency and effectiveness means it causes neither "unnecessary and wanton infliction of pain" nor "gratuitous infliction of suffering."<sup>257</sup>

Moreover, the firing squad has a lower risk of botching than lethal injection and thus better avoids a "substantial risk of serious harm."<sup>258</sup> Unlike lethal injection, where any error in the protocol can cause serious pain,<sup>259</sup> the firing squad's risk of error comes from the marksmanship of the firing officers and excess movement by the prisoner. Both are easily remedied: marksmanship through training and modern weaponry, and prisoner movement through restraints.<sup>260</sup> And any cruelty in a firing squad execution is more easily ferreted out. A deliberate miss would be an obvious constitutional violation, as a "gratuitous infliction of suffering."<sup>261</sup> Errors in other execution methods, however, could simply be masked as accidents in preparation, especially with the relatively complex procedures for lethal injection. By simplifying the process, the firing squad better guarantees that executions do not become cruel and unusual punishment.

Finally, death by firing squad is no less dignified than death by lethal injection or any of its predecessors. True, the firing squad sheds some blood.<sup>262</sup> But it does not leave a condemned to strangle, hanging

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255. Cutler, *supra* note 78, at 413. The multiple shots ensure the condemned is "rendered unconscious almost immediately due to shock, organ damage, and blood loss" before bleeding out. P. Thomas Distanislaio, *A Shot in the Dark: Why Virginia Should Adopt the Firing Squad as Its Primary Method of Execution*, 49 U. RICH. L. REV. 779, 801 & n.135 (2015) (citing Veljko Strajina et al., *Forensic Issues in Suicidal Single Gunshot Injuries to the Chest*, 33 AM. J. FORENSIC MED. PATHOLOGY 373, 374 (2012)).

256. Cutler, *supra* note 78, at 413–14.

257. See *Gregg v. Georgia*, 428 U.S. 153, 173, 183 (1976) (describing pain standards).

258. *Baze v. Rees*, 553 U.S. 35, 50 (2008).

259. This concern is particularly acute as states experiment with replacements for sodium thiopental. See Berger, *supra* note 205, at 1377–78 (discussing the risk of improper anesthetization).

260. These safeguards are likely to be more effective than some lethal injection safeguards, such as Oklahoma's precautions that accompany its midazolam protocol. See *Glossip v. Gross*, 135 S. Ct. 2726, 2791–92 (2015) (Sotomayor, J., dissenting) (discussing the problems with Oklahoma's safeguards, such as how monitoring consciousness may do no good if midazolam cannot *maintain* unconsciousness through the pancuronium bromide or sodium thiopental). Also, training execution teams to better perform lethal injection procedures would likely require the involvement of medical personnel, running into the prohibitions on involvement in executions. See *supra* notes 218–219 and accompanying text.

261. See *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (discussing dignity standards).

262. See Carlisle, *supra* note 227 (describing Ronnie Lee Gardner's death and seeing blood pooling on his chest, but little else).

from a scaffold.<sup>263</sup> It does not leave a condemned to burn in a chair.<sup>264</sup> And it neither leaves a condemned suffocating in a box,<sup>265</sup> nor burning from the inside.<sup>266</sup> Even at its worst, firing squad deaths do not rise to these levels. What pain a firing squad inflicts is not the sort of gratuitous suffering forbidden by the Eighth Amendment.

The firing squad succeeds where lethal injection fails. It provides a reliable, efficient, and simple method of execution, even without the trappings of technological advancement that make other methods more publicly palatable. As such, it better fulfills the Eighth Amendment's command that executions cause no more than "the mere extinguishment of life."<sup>267</sup>

### *C. The Firing Squad Is Easier to Implement and Makes Litigation Simpler*

Aside from its Eighth Amendment justifications, the firing squad has practical advantages that solve the problems posed by lethal injection. First, it is less problematic in the face of new forms of litigation about the death penalty, concerning the protocol involved and the qualifications of executioners.<sup>268</sup> These challenges come out of the relative complexity of lethal injections. While the firing squad could face challenges demanding information about protocol and qualifications, states should be more open to answering such questions, and the question will have less concerning answers. The protocol is highly transparent: aim for the heart and pull the trigger. The kind of bullet or rifle could be scrutinized, but that inquiry would be far less searching and complicated than one about how a state procures chemicals to be used in executions.<sup>269</sup> As for qualifications, the most critical qualification of an execution team is its marksmanship training, which should be up to date.<sup>270</sup> This openness would essentially eliminate the

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263. See Beard, *supra* note 43, at 464 (describing botched hangings).

264. *Id.* at 461 (describing botched electrocutions).

265. See *id.* at 463 (describing botched lethal gassings).

266. See Berger, *supra* note 205, at 1377–78 (describing botched lethal injections).

267. *In re Kemmler*, 136 U.S. 436, 447 (1890).

268. See Wood v. Ryan, 759 F.3d 1076, 1079 (2014) (seeking information regarding sources of lethal injection drugs, qualifications of execution team, and development of lethal injection protocol).

269. Unlike pharmaceuticals, guns are particularly familiar to the American public, given the long tradition of firearm ownership in the United States. See McDonald v. Chicago, 561 U.S. 742, 766–80 (2010) (describing the history of gun ownership in America, as well as efforts to protect it).

270. See *Is a Firing Squad More Humane Than Lethal Injection?*, THE WEEK (June 18, 2010), <http://theweek.com/articles/493362/firing-squad-more-humane-than-lethal-injection> [<http://perma.cc/5QN9-V4UV>] (“What if the shooters miss? That is extremely unlikely. The executioners are selected for their marksmanship skills . . .”).

new forms of litigation used against lethal injection, while also eliminating the need for new secrecy rules about executions.

Even when litigation arises, courts will be better able to assess the constitutionality of a firing squad protocol than a lethal injection protocol. As Justice Alito noted in *Glossip*, “[C]hallenges to lethal injection protocols test the boundaries of the authority and competency of federal courts.”<sup>271</sup> To that end, determining the effect of bullets on a human body would be a simpler analysis for courts than determining the chemical processes involved in lethal injection drugs. As such, the firing squad puts far less strain on the courts’ competency.

As part of the transition to nationwide use, the suggestion of the firing squad would also satisfy *Glossip*’s requirement that a condemned plead and prove a readily available alternative. Justice Sotomayor noted in *Glossip* that the Court’s holding may be “an invitation to propose methods of execution less consistent with modern sensibilities.”<sup>272</sup> Advocates should accept this invitation. Justice Sotomayor even suggested the firing squad as an option for those who do, noting its reliability and effectiveness.<sup>273</sup> And the firing squad would satisfy *Glossip*’s demand. Shooting is a well-known act for the government, and bullets are readily available to state departments of correction—surely more so than sodium thiopental. In this way, the firing squad provides a legal resource to those challenging lethal injection. By suggesting the firing squad and easily meeting *Glossip*’s alternatives requirement, death penalty challengers would force courts to address the risk of harm posed by a lethal injection protocol. At that point, the fight would occur on grounds that are properly part of the Eighth Amendment.

In addition, the firing squad better aligns executions with their true nature: expressions of state power.<sup>274</sup> The sovereign power of the state is defined by its “monopoly of the legitimate use of physical force.”<sup>275</sup> Law enforcement officers and guns are essential parts of this monopoly on legitimate force; they are perhaps its most visible expression. Lethal injection, however, forgets this fundamental lesson on state power. Doctors and medicine are not part of the monopoly on legitimate force, or any force at all, and lethal injection’s medical countenance improperly implicates medicine in state killing. The firing

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271. *Glossip v. Gross*, 135 S. Ct. 2726, 2740 (2015).

272. *Id.* at 2796 (Sotomayor, J., dissenting).

273. *Id.*

274. See SARAT, *supra* note 21, at 7–8 (describing executions as “the display of the majestic, awesome power of sovereignty to decide . . . who lives and who dies”).

275. MAX WEBER, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 78 (H.H. Gerth & C. Wright Mills eds. & trans., 1946) (emphasis omitted).

squad obviates these concerns entirely, substituting the appearance of medicine for the unmistakable picture of the state exercising its monopoly of legitimate force. By using the firing squad, the medical profession is not tainted by executions that adopt the veneer of medicine, and executions are put fully in the hands of the entity that legitimately uses them. In the end, trading lethal injection for the firing squad properly aligns executioners with the purpose of executions.

*D. The Firing Squad Defeats Euphemism and  
Promotes Informed Standards of Decency*

The firing squad's final key advantage, particularly over lethal injection, is separate from its constitutional and practical benefits: it rejects euphemism. At the very least, the firing squad is honest. It makes no claim to humaneness solely because it uses more recent technologies, relying instead on what a prisoner actually experiences. Its tools—guns—are designed to cause harm, unlike the co-opted needles and drugs of lethal injection.<sup>276</sup> And any witness will have no doubt what has occurred: a person has just been killed. In contrast, lethal injection does everything possible to avoid the appearance of brutality: executioners pumping chemicals from behind a wall, anesthesia, IVs, and so on.<sup>277</sup> An otherwise ignorant observer would see a medical operation underway. As such, the “serene and medically pristine application of lethal injection” deflects criticism based on its appearance.<sup>278</sup> On an issue as important as capital punishment, this fear of honest debate cannot stand. The firing squad would solve this problem.<sup>279</sup>

This honesty would also promote an informed populace, which Justice Marshall believed was critical to gauging “evolving standards of decency” in *Furman*. The Marshall Hypothesis proposes that “people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable.”<sup>280</sup> At its core, the Marshall Hypothesis suggests that

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276. See *Wood v. Ryan*, 759 F.3d 1076, 1103 (2014) (Kozinski, C.J., dissenting from denial of rehearing) (“And nobody can argue that the weapons are put to a purpose for which they were not intended: firearms have no purpose *other* than destroying their targets.”).

277. See *Description of Execution Methods*, *supra* note 155 (describing procedures for lethal injection).

278. Denno, *supra* note 23, at 68.

279. See *Wood*, 759 F.3d at 1103 (Kozinski, C.J., dissenting from denial of rehearing) (“Sure, firing squads can be messy, but if we are willing to carry out executions, we should not shield ourselves from the reality that we are shedding human blood.”).

280. *Furman v. Georgia*, 408 U.S. 238, 361 (1972) (Marshall, J., concurring); *supra* Section I.A. In adopting this position, Marshall linked the constitutionality of the death penalty to the

support for the death penalty depends heavily on public ignorance. Thus, if people fully understood the death penalty, they would uniformly reject it.<sup>281</sup>

As a constitutional standard, however, the Marshall Hypothesis falls short. On one level, it is highly paternalistic, assuming that those who support capital punishment must be ignorant about reality.<sup>282</sup> More distressing, it “link[s] constitutional standards to public attitudes,” undermining the individual nature of constitutional rights, which are intended to be insulated from public attitudes.<sup>283</sup> Public opinion can be fickle, after all.<sup>284</sup>

Even so, the Marshall Hypothesis’s hopes for an informed citizenry embody other important concerns about the death penalty. The firing squad serves these purposes well. While a poor measure of constitutionality, the Marshall Hypothesis highlights the extent to which knowledge can affect the death penalty debate. It “suggests that views about the death penalty are . . . more prone to change through rational discernment and deep experience.”<sup>285</sup> In this vein, skepticism about the death penalty may be attributable to growing knowledge about it.<sup>286</sup> More generally, knowledge about government action is key to popular control in a democracy. The people cannot express preferences about what a government does, and thus cannot check government action, unless they know what is happening. Such preferences cannot be considered complete when an issue hides behind padded words.

The firing squad casts off the euphemism that plagues discussions about the death penalty, and thus promotes the people’s ability to examine their own evolving standards of decency and express informed preferences. If people can look at an execution by firing squad and still want to maintain the death penalty, then they can express that view, now bolstered by the knowledge that comes with a more open

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opinions of his ideally informed populace. See Sigler, *supra* note 62, at 413 (criticizing this jurisprudential move).

281. See HANEY, *supra* note 22, at 79–80 (discussing the Marshall Hypothesis and testing aspects of it).

282. Steiker, *supra* note 33, at 528.

283. Sigler, *supra* note 62, at 414.

284. See *Gregg v. Georgia*, 428 U.S. 153, 232 (1976) (Marshall, J., dissenting) (acknowledging the backlash to *Furman* and the importance of this expression to his theory).

285. Steiker, *supra* note 33, at 554. This “deep experience” appears to have affected some Supreme Court justices, who changed position on the death penalty over time. *Id.* at 546–52 (discussing the changes by Justices Powell, Blackmun, and Stevens from supporters to opponents of the death penalty).

286. *Id.* at 555.

system.<sup>287</sup> If the people decide they do not want executions carried out in their name, they will have the information to express that, too.<sup>288</sup> In the interest of public understanding, the openness of the firing squad, by avoiding “padded words” and a medical façade, stands apart.

### *E. A Counter: The Appearance of Despotism*

The firing squad is subject to some fair criticisms. First, turning to an older, more “brutal” method could go too far toward promoting retribution.<sup>289</sup> While retribution is a valid purpose for capital punishment, vengeance is not.<sup>290</sup> The firing squad’s more obvious retributive performance could cross the line into vengeance.<sup>291</sup> But this same logic could apply to any execution method; the line between retribution and vengeance is very thin. On this count, the firing squad does not distinguish itself with stronger retributive properties, particularly for heinous crimes.<sup>292</sup>

One could argue in a broader sense that using the firing squad would promote a more brutal society. Methods that are “more messy to the observers” pose a problem because they “may be found to be gruesome and may evoke a more brutal form of government.”<sup>293</sup> Adopting a more gruesome method could appeal most to those who “truly revel in the horror wrought” on condemned prisoners.<sup>294</sup> Even Judge Kozinski, while recommending the firing squad, harbored similar concerns, dismissing the guillotine as “inconsistent with our national

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287. Cf. Paul Elias, *California Voters Retain Death Penalty Despite Costs*, HUFFINGTON POST (Nov. 7, 2012, 4:39 PM), <http://www.huffingtonpost.com/huff-wires/20121107/us-prop-34-death-penalty/> [<http://perma.cc/FAB8-SU4Z>] (reporting on a California referendum, where fifty-two percent of voters chose to retain the death penalty).

288. Cf. *District of Columbia*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/district-columbia> [<http://perma.cc/8QZQ-DQK4>] (last visited Oct. 17, 2015) (noting D.C.’s two-to-one rejection of the death penalty in a 1992 referendum).

289. *Glossip v. Gross*, 135 S.Ct. 2726, 2796–97 (2015) (Sotomayor, J., dissenting) (contemplating that the firing squad “could be seen as a devolution to a more primitive era”).

290. *Gregg v. Georgia*, 428 U.S. 153, 183–84 (1976).

291. Cutler, *supra* note 78, at 414–15.

292. See *SARAT*, *supra* note 21, at 4–5 (describing responses from survivors of the Oklahoma City Bombing to Timothy McVeigh’s execution, with one saying, “Death by injection is too good for McVeigh”).

293. Gaitan, *supra* note 113, at 784.

294. Sacha Baniel-Stark, *Botched Executions & Evolving Standards of Decency: What Can We Learn from Wood’s Death?*, JURIST (Aug. 25, 2014, 6:01 PM), <http://jurist.org/dataline/2014/08/sacha-stark-botched-execution.php> [<http://perma.cc/3FA5-M9EX>]. Baniel-Stark provides good evidence on this point, directing readers to hostile comment threads on the news coverage of Joseph Wood’s botched execution. *Id.*

ethos.”<sup>295</sup> All of these concerns, however, rely primarily on the views of *observers* to determine the appropriateness of what is done to the condemned. As such, these objections do not weigh heavily in the constitutional analysis. Even so, on policy grounds, the firing squad does little more to brutalize society than executions generally.<sup>296</sup> If anything, the search for more advanced methods of execution acts as cover for the brutality of executions.<sup>297</sup> Because the firing squad is more effective at carrying out “humane” executions than supposedly more advanced methods, there is no reason to dismiss it merely because its appearance is distasteful.

The public’s concerns about what *appears* inhumane created the treadmill that is this march of progress—the feeling of progressing without actually going anywhere. On some level, the resemblance to despotism is inherent in capital punishment, as the legalized power to kill is the rawest expression of state authority.<sup>298</sup> “Evolving standards of decency” may have become little more than a feel-good idea in part because we, as a society, have forgotten the role of executions as demonstrations of state power. Indeed, the transition away from public executions came about as society’s sensibilities changed and people “were troubled by such direct contact with the harsh realities of criminal justice and welcomed the experiential barriers that were interposed.”<sup>299</sup> In many ways, America’s debates about execution methods have been an attempt to forget what executions really are. The firing squad would rectify this error.

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295. *Wood v. Ryan*, 759 F.3d 1076, 1103 (2014) (Kozinski, C.J., dissenting from denial of rehearing).

296. See Elizabeth Stoker Bruenig, *There is No Such Thing as a Humane Execution*, NEW REPUBLIC (Mar. 24, 2015), <http://www.newrepublic.com/article/121366/utah-allows-firing-squads-executions> [<http://perma.cc/3ZND-5K54>] (“The debate over particular death penalty methods obscures the cruelty of the entire scheme.”). Indeed, perhaps the whole debate over *how* we kill condemned prisoners obscures the notion that state killing is cruel, no matter the method. In Bruenig’s words, “Worse, as public discourse centers more tightly on methods and less on the overarching brutality of the death penalty as an institution, we numb ourselves to the fact of execution by obsessing over its particularities.” *Id.*

297. See Denno, *supra* note 23, at 66 (discussing how legislatures’ decisions about lethal injection “suggest the most duplicitous irony of all: the very method that seems most appealing in the eyes of the public is also one of the most unjustifiably cruel”).

298. See SARAT, *supra* note 21, at 8 (“Execution methods were chosen for their ability to convey the ferocity of the sovereign’s vengeance.”).

299. HANEY, *supra* note 22, at 46.



## CONCLUSION

Compared to other methods, the firing squad better protects the individual rights embodied in the Eighth Amendment, cabins executions to forces traditionally within the power of the state, and promotes a more informed citizenry. These benefits raise it above the methods that developed parallel to it, which all claimed to have the appearance of modernity. In contrast with today's method of choice, lethal injection, the firing squad dispels the padded words so often used to discuss the death penalty. By looking past mere perception, the firing squad proves itself more effective at avoiding wanton suffering. Further, adopting a more honest method of execution, one that does not hide behind medical appearances, would demonstrate the kind of thinking that should "mark the progress of a maturing society." At bottom, this whole discussion is about honesty, particularly whether we can be honest with ourselves. We must be able to do so, because the death penalty is an expression of state power done in the name of the people, theoretically for our protection.

Killing is always going to be a dirty business. And for too long, American execution methods have hidden this reality. The firing squad, on the other hand, protects the individual rights of the condemned while bringing the reality of executions into the open. That openness clarifies the deeper conversation: should we have executions at all? If we are not willing to have that conversation, or if we are uncomfortable with what our answers say about us, then perhaps it is time to reconsider the entire "flawed enterprise." Absent that decision, we must work to make executions respect the individual rights of the condemned. Moreover, we must make executions honest to their true nature. The firing squad would accomplish those ends.

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