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NOTHING LESS THAN THE DIGNITY OF MAN: THE EIGHTH AMENDMENT AND STATE EFFORTS TO REINSTITUTE TRADITIONAL METHODS OF EXECUTION

James C. Feldman

Abstract: While lethal injection is the predominant method of executing death row inmates in America, European export bans and pharmaceutical manufacturers' refusal to supply execution drugs has impeded the ability of states' departments of corrections to obtain the drugs used for lethal injections. Facing a drug shortage, several death penalty states have considered legislation to reinstate the use of electric chairs, firing squads, and gas chambers. Efforts to restore traditional methods of capital punishment raise questions about whether such methods still comply with the Eighth Amendment's prohibition against cruel and unusual punishments. The Supreme Court has observed that the Eighth Amendment is not static, but draws its meaning from society's "evolving standards of decency." To assess these evolving standards, the Court previously has looked to state laws to determine if a national consensus exists with respect to who is eligible for capital punishment and by what means states carry out death sentences. States have moved away from traditional methods of capital punishment. This trend suggests the traditional methods of capital punishment have fallen out of favor and can no longer withstand Eighth Amendment scrutiny.

INTRODUCTION

If some states and the federal government wish to continue carrying out the death penalty, they must turn away from this misguided path [lethal injection] and return to more primitive—and foolproof—methods of execution [I]f we are willing to carry out executions, we should not shield ourselves from the reality that we are shedding human blood.¹

– Judge Alex Kozinski, United States Court of Appeals for the Ninth Circuit

Since the United States Supreme Court lifted the moratorium on capital punishment in 1976,² lethal injection has been the predominant method of executing death row inmates in the United States.³ In recent

1. *Wood v. Ryan*, 759 F.3d 1076, 1103 (9th Cir. 2014) (Kozinski, C.J., dissenting from denial of rehearing en banc).

2. *See Gregg v. Georgia*, 428 U.S. 153 (1976) (affirming constitutionality of Georgia's revised capital punishment statute for the crime of murder).

3. JOHN D. BESSLER, *CRUEL AND UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS' EIGHTH AMENDMENT* 258 (2012).

years, an export ban by the European Union has made it increasingly difficult for United States prisons to procure the drugs typically used in lethal injections.⁴ The unavailability of lethal injection drugs has led some states to consider legislative proposals to reinstitute traditional methods of execution, including electrocution,⁵ firing squad,⁶ and lethal gas.⁷

The efforts of these states to reinstitute traditional methods of capital punishment raise the question of whether older methods of execution still comply with the Eighth Amendment's prohibition on cruel and unusual punishments.⁸ The Supreme Court has not considered the constitutionality of certain traditional methods of capital punishment in well over a hundred years.⁹ Given the progress in science, medicine, and contemporary notions of morality and punishment, can execution methods once deemed acceptable still pass constitutional muster?

This Comment argues that Supreme Court jurisprudence, particularly with respect to the Eighth Amendment's "evolving standards of decency,"¹⁰ can be used to analyze the constitutionality of the traditional methods of capital punishment. The Court has previously looked to the laws of the states to determine if a consensus exists as to which offenders are eligible for capital punishment.¹¹ Looking again to the laws of the states, this Comment argues that the states' shift away from the use of electric chairs, gallows, gas chambers, and firing squads represents a broadening consensus against traditional methods of execution. This broadening consensus suggests that traditional methods of execution now violate the Eighth Amendment's prohibition on cruel and unusual punishments.

4. Matt Ford, *Can Europe End the Death Penalty in America?*, THE ATLANTIC (Feb. 18, 2014), <http://www.theatlantic.com/international/archive/2014/02/can-europe-end-the-death-penalty-in-america/283790/>.

5. See TENN. CODE ANN. § 40-23-114 (West, Westlaw through 2015 1st Reg. Sess.); S. 11, 2015 Leg., Reg. Sess. (Ala. 2015).

6. See H.R. 11, 2015 Leg., Gen. Sess. (Utah 2015); S. File 13, 63d Leg., 2015 Gen. Sess., (Wyo. 2015); H.R. 1470, 97th Gen. Assemb., 2d Sess. (Mo. 2014).

7. See H.R. 1879, 55th Leg., 1st Sess. (Okla. 2015).

8. U.S. CONST. amend. VIII.

9. See *In re Kemmler*, 136 U.S. 436 (1890); *Wilkerson v. Utah*, 99 U.S. 130 (1878).

10. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

11. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (holding the execution of child rapists violates the Eighth Amendment); *Roper*, 543 U.S. at 578–79 (holding the execution of juvenile offenders violates the Eighth Amendment); *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding the execution of intellectually disabled offenders violates the Eighth Amendment); *Coker v. Georgia*, 433 U.S. 584 (1977) (holding the execution of rapists violates the Eighth Amendment).

Part I of this Comment examines the historical background and evolution of capital punishment in the United States. Part II surveys the common methods used to execute capital offenders prior to lethal injection. Part III considers the lethal injection drug shortages, which have led to proposals to reinstate traditional methods of capital punishment in several states. Part IV analyzes the constitutionality of traditional methods of execution against the framework of the Supreme Court's Eighth Amendment jurisprudence. Part V argues that states' efforts to revert to traditional methods of capital punishment do not meet the "evolving standards of decency" used by the Court to analyze Eighth Amendment issues.

I. THE EVOLUTION OF CAPITAL PUNISHMENT IN AMERICA

A. *Capital Punishment in the Colonies*

The English colonists brought capital punishment with them when they immigrated to America.¹² In the pre-incarceration era of colonial America, capital punishment was the "equivalent of prison today—the standard punishment for a wide range of serious crimes."¹³ American capital punishment drew from England's "Bloody Code,"¹⁴ with colonies imposing capital punishment for a number of crimes, including murder, rape, manslaughter, robbery, burglary, theft, counterfeiting, and arson.¹⁵ Some colonies also enforced capital punishment for crimes like blasphemy, idolatry, adultery, witchcraft, and sodomy.¹⁶ Capital punishment was widely accepted in the colonies, not only for its deterrent and retributive effects, but also for its perceived ability to facilitate repentance in criminals.¹⁷

In the late eighteenth century some "criminals were occasionally pressed to death, drawn and quartered, and burned at the stake."¹⁸ Hanging, however, was the most widely accepted method of executing

12. See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 5 (2002).

13. *Id.* at 23.

14. The "Bloody Code" referred to England's system of laws and punishments during the late seventeenth century through the eighteenth century, which made liberal use of the death penalty, including for minor crimes. JOHN D. BESSLER, *THE BIRTH OF AMERICAN LAW: AN ITALIAN PHILOSOPHER AND THE AMERICAN REVOLUTION* 6–7 (2014).

15. See BANNER, *supra* note 12, at 5.

16. *Id.* at 5–8.

17. See *id.* at 16.

18. ADAM BEDAU, *THE DEATH PENALTY IN AMERICA* 14 (3d ed. 1982).

criminals at America's founding,¹⁹ and remained the predominant method of execution through the end of the nineteenth century.²⁰

Capital punishment in America has changed dramatically since colonial times.²¹ In the late eighteenth century, prison emerged as a means of punishment for those convicted of crimes.²² While states incarcerated criminals for less serious crimes, states still frequently imposed death sentences.²³ As America's system of criminal justice evolved, so did the methods of carrying out capital punishment.

B. *The Eighth Amendment's Prohibition on Cruel and Unusual Punishments*

The Eighth Amendment of the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."²⁴ The United States Supreme Court occasionally has considered whether the existence of the death penalty or the methods by which it is carried out violate this amendment.²⁵ Although the Court has placed some substantive limits on who is eligible for the death penalty,²⁶ except for a brief period in the 1970s,²⁷ the Court has permitted executions to continue despite the trend away from capital punishment in other western democracies.²⁸

19. *Id.* at 15 ("Except when executing spies, traitors, and deserters, who could be shot under federal law, the sole acceptable mode of execution in the United States for a century after the adoption of the Eighth Amendment was hanging.").

20. *See* *Campbell v. Wood*, 511 U.S. 1119, 1119 (1994) (Blackmun, J., dissenting from the Court's denial of a stay of execution).

21. *See* BANNER, *supra* note 12, at 2.

22. *Id.* at 13.

23. *See* BESSLER, *supra* note 14, at 10; BEDAU, *supra* note 18, at 8 (noting some states continued to mandate death sentences for a host of non-homicide crimes).

24. U.S. CONST. amend. VIII.

25. *See, e.g.*, *Baze v. Rees*, 553 U.S. 35 (2008); *In re Kemmler*, 136 U.S. 436 (1890); *Wilkerson v. Utah*, 99 U.S. 130 (1879).

26. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551 (2005) (holding the execution of juvenile offenders violates the Eighth Amendment); *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding the execution of intellectually disabled offenders violates the Eighth Amendment); *Coker v. Georgia*, 433 U.S. 584 (1977) (holding the execution of offenders convicted of rape violates the Eighth Amendment).

27. *See infra* Part I.C.

28. LARRY W. KOCH, COLIN WARK & JOHN F. GALLIHER, *THE DEATH OF THE AMERICAN DEATH PENALTY: STATES STILL LEADING THE WAY*, at ix (2012). While the international trend away from the death penalty has led many legal scholars to question the reasons capital punishment persists in America, *see id.*, this Comment will focus on the interplay between the methods of capital punishment and the Eighth Amendment.

The Supreme Court has identified retribution and deterrence as the primary social purposes of the death penalty.²⁹ The Court has declined to hold that the death penalty is a per se violation of the Eighth Amendment, noting “the punishment of death is not cruel within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous,—something more than the mere extinguishment of life.”³⁰ Over time, the Court has reiterated this view, noting “[w]hatever the arguments may be against capital punishment . . . the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.”³¹ Despite capital punishment’s acceptance, the Court on occasion has revisited the propriety of the death penalty.

C. *Furman v. Georgia: A Short-Lived Moratorium on Capital Punishment*

Concern over racial disparity in the imposition of death sentences led to a brief moratorium on executions in America.³² In 1971, at the urging of the National Association for the Advancement of Colored People, the Court agreed to hear the consolidated appeals of William Furman, Lucious Jackson, and Elmer Branch in *Furman v. Georgia*.³³ All three were African American men on death row. A jury convicted Furman of killing a white homeowner during a burglary, while Jackson and Branch were convicted separately of raping white women.³⁴ By a five-to-four vote, the Court issued a six-sentence decision, holding, “the imposition and carrying out of the death penalty in these cases constitute[s] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”³⁵ Each Supreme Court Justice issued a separate opinion

29. *Roper*, 543 U.S. at 571 (“We have held there are two distinct social purposes served by the death penalty: ‘retribution and deterrence of capital crimes by prospective offenders.’” (quoting *Atkins*, 536 U.S. at 319)).

30. *Kemmler*, 136 U.S. at 447.

31. *Trop v. Dulles*, 356 U.S. 86, 99 (1958).

32. African American men were disproportionately sentenced to death, to say nothing of the thousands of African Americans murdered by lynch mobs in the South. See BESSLER, *supra* note 3, at 3–5.

33. 408 U.S. 238, 239 (1972). Furman and Jackson were on death row in Georgia while Branch awaited execution in Texas. *Id.*

34. See BESSLER, *supra* note 3, at 2.

35. *Furman*, 408 U.S. at 239–40.

articulating his reasoning.³⁶ Several justices expressed concern over the seemingly discriminatory and arbitrary nature by which states imposed death sentences.³⁷ The decision effectively vacated all death sentences pending in the United States at the time the Court decided *Furman* and replaced them with life imprisonment.³⁸ While death penalty opponents heralded *Furman* as a major achievement, the moratorium on capital punishment was short lived.

D. *Gregg v. Georgia: Reinstating Capital Punishment*

The public was quick to condemn the *Furman* decision and the Court soon ended the moratorium on capital punishment when it decided *Gregg v. Georgia*.³⁹ The petitioner in *Gregg* was a hitchhiker convicted of robbing and murdering the two men who gave him a ride.⁴⁰ *Gregg* was sentenced to death under Georgia's revised death penalty statute, which was designed to address the constitutional concerns expressed by the Court in *Furman*.⁴¹ Georgia's revised capital punishment statute enumerated certain aggravating circumstances, one of which must be present before a death sentence could be imposed.⁴² The new law also authorized the jury to consider mitigating circumstances and provided for an automatic appeal of all death sentences to the Georgia Supreme Court.⁴³ Most importantly, Georgia implemented a bifurcated trial proceeding.⁴⁴ In the first phase of the trial, the jury determines the guilt or innocence of the defendant.⁴⁵ If the jury finds the defendant guilty, a second phase commences for the judge or jury to consider aggravating

36. *Id.* at 240.

37. *See, e.g., id.* at 255–57 (Douglas, J., concurring) (“Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority . . .”).

38. *See* BESSLER, *supra* note 3, at 5.

39. 428 U.S. 153 (1976); *see* BANNER, *supra* note 12, at 275 (“Capital punishment was back.”).

40. BANNER, *supra* note 12, at 158–60.

41. *See id.* at 196 (“In the wake of *Furman*, Georgia amended its capital punishment statute . . .”); BESSLER, *supra* note 3, at 5.

42. *Gregg*, 428 U.S. at 196–97.

43. *Id.* at 197–98.

44. *Id.* at 197 (“These procedures require the jury to consider the circumstances of the crime and the criminal before it recommends sentence. No longer can a Georgia jury do as *Furman*'s jury did: reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die.”).

45. *See* LARRY W. YACKLE, BEYOND REPAIR? AMERICA'S DEATH PENALTY 62 (Stephen P. Garvey ed., 2003).

and mitigating factors to determine whether to impose a sentence of death or a lesser level of punishment.⁴⁶ The Court reasoned:

When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman*.⁴⁷

Georgia's revised sentencing procedures led the majority to "hold that the statutory system under which Gregg was sentenced to death does not violate the Constitution."⁴⁸

All told, thirty-eight states enacted new death penalty statutes meeting the constitutionally acceptable guidelines outlined by the Court in *Gregg* by the end of the 1980s.⁴⁹ Under *Gregg*'s new standard, a death sentence is not cruel and unusual punishment if administered in a manner that was not arbitrary, capricious, or discriminatory.⁵⁰ After a four-year hiatus, the modern era of capital punishment began anew.

E. Eighth Amendment and Capital Punishment After Gregg

States have executed over 1400 inmates since the Court's decision in *Gregg*.⁵¹ The Supreme Court has acknowledged that the Eighth Amendment's prohibition on cruel and unusual punishment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society."⁵² Applying this principle to limit which crimes and offenders may be subject to the death penalty, the Court concluded the death penalty constitutes cruel and unusual punishment for the crime of rape,⁵³ as well as when it is applied to juvenile offenders⁵⁴ and the intellectually disabled.⁵⁵ The Court has not gone so far as to declare the death penalty a per se violation of the Eighth Amendment and has

46. *See id.*

47. *Gregg*, 428 U.S. at 191–92.

48. *Id.* at 207.

49. *See KOCH ET AL.*, *supra* note 28, at ix.

50. YACKLE, *supra* note 45, at 1.

51. As of June 17, 2015, 1410 inmates have been executed. *See Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> (last visited June 17, 2015). The federal government administered only three of these executions. *Id.*

52. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

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

54. *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005).

55. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

repeatedly upheld the death penalty against constitutional challenges.⁵⁶

II. TRADITIONAL METHODS OF CAPITAL PUNISHMENT

In American colonial times, “criminals were occasionally pressed to death, drawn and quartered, and burned at the stake.”⁵⁷ But with the passage of the Eighth Amendment as part of the Bill of Rights, such methods were no longer acceptable.⁵⁸ In considering the Eighth Amendment as applied to execution by firing squad, the Court observed that while difficult to define the exact bounds of cruel and unusual punishments, “it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution.”⁵⁹

Toward the end of the nineteenth century, the Court condemned certain antiquated methods of execution as cruel and unusual punishment.⁶⁰ Specifically, in dicta the Court indicated executing criminals by “burning at the stake, crucifixion, breaking on the wheel, or the like” would violate the Eighth Amendment’s prohibition on cruel and unusual punishment.⁶¹ Nevertheless, even recently, the Court has reiterated its endorsement of capital punishment as an appropriate penalty and has largely declined to put restrictions on the methods of carrying out death sentences.⁶²

Methods of execution historically have evolved with efforts to make capital punishment more “humane.”⁶³ States developed new procedures

56. See *Baze v. Rees*, 553 U.S. 35, 47 (2008) (“We begin with the principle, settled by *Gregg*, that capital punishment is constitutional.”); *Gregg v. Georgia*, 428 U.S. 153, 154 (1976) (“[F]or nearly two centuries this Court has recognized that capital punishment for the crime of murder is not invalid *per se*.” (emphasis in original)).

57. See BEDAU, *supra* note 18, at 14. Pressing involves placing a board on top of the condemned and then adding stones to the top of the board until the condemned is crushed to death. Quartering was a method of dismembering the condemned by cutting the body into four pieces. See BANNER, *supra* note 12, at 75.

58. See BEDAU, *supra* note 18, at 15 (noting that at the time the Eighth Amendment was adopted the sole acceptable mode of execution in the United States was hanging).

59. *Wilkerson v. Utah*, 99 U.S. 130, 135–36 (1878) (upholding the firing squad as constitutional).

60. See *In re Kemmler*, 136 U.S. 436 (1890).

61. *Id.* at 446.

62. *Baze v. Rees*, 553 U.S. 35, 48 (2008) (“This Court has never invalidated a State’s chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment.”).

63. See Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocutation and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 95 (2002) (“In line with the paradoxical tale of execution methods generally, the motivation behind the origins of the specific lethal injection procedure that most states follow in this country was linked with improving the humaneness and cost of executions, as well as the palatability of the death

and apparatuses with the goal of affecting quicker, less painful deaths on condemned inmates. This Comment will now consider the “traditional methods” of execution used to carry out death sentences in America prior to the adoption of lethal injection as the predominant method of executing capital offenders.

A. *Hanging*

In the mid-1800s, hanging was the predominant method of execution in the United States.⁶⁴ Hangings were public events, often drawing thousands of spectators,⁶⁵ but over the course of the nineteenth century state legislatures enacted laws to mandate private executions.⁶⁶ Hangings, subsequently, were conducted at prison gallows.⁶⁷ Presently, hanging is a permitted method of execution in Delaware,⁶⁸ New Hampshire,⁶⁹ and Washington State,⁷⁰ but lethal injection is the primary method of execution in all three of these states.⁷¹ Only three prisoners have been executed by hanging since the reinstatement of the death penalty by the Supreme Court’s decision in *Gregg* in 1976.⁷² The last inmate executed by hanging was Bill Bailey in Delaware in 1996.⁷³ In 1994, an inmate challenged Washington State’s method of hanging as violating the Eighth Amendment.⁷⁴ The federal district court held that

penalty.”).

64. *Campbell v. Wood*, 511 U.S. 1119, 1119 (1994) (“[H]anging was the nearly universal form of execution in the United States.” (Blackmun, J., dissenting from the Court’s denial of a stay of execution) (internal quotation marks omitted)); *BEDAU*, *supra* note 18, at 15 (“Except when executing spies, traitors, and deserters, who could be shot under federal law, the sole acceptable mode of execution in the United States for a century after the adoption of the Eighth Amendment was hanging.”).

65. *See BANNER*, *supra* note 12, at 24.

66. *See BESSLER*, *supra* note 3, at 200.

67. *See BANNER*, *supra* note 12, at 157.

68. DEL. CODE ANN. tit. 11, § 4209(f) (West, Westlaw through 2015).

69. N.H. REV. STAT. ANN. § 630:5(XIV) (2015).

70. WASH. REV. CODE § 10.95.180 (2014).

71. TRACY L. SNELL, U.S. DEP’T OF JUSTICE, CAPITAL PUNISHMENT, 2013–STATISTICAL TABLES 7 (2014), available at www.bjs.gov/content/pub/pdf/cp13st.pdf. New Hampshire authorizes hanging only if lethal injection cannot be administered while Delaware authorizes hanging if lethal injection is found to be unconstitutional. *Id.*

72. KATHLEEN A. O’SHEA, *WOMEN AND THE DEATH PENALTY IN THE UNITED STATES, 1900–1998*, at 95 (1999).

73. *Id.* In Delaware, prisoners still on death row who were sentenced to death prior to legislation allowing lethal injection were given the option of lethal injection. Bailey, who a jury convicted of murdering an elderly couple in 1979, opted to hang. *Id.*

74. *Rupe v. Wood*, 863 F. Supp. 1307 (W.D. Wash. 1994), *vacated in part*, 93 F.3d 1434 (9th

hanging was not a per se violation of the Eighth Amendment, but was unconstitutional as applied to inmate Mitchell Rupe, whose morbid obesity posed a high risk of decapitation.⁷⁵

B. *Firing Squad*

Although less frequently implemented as a method of execution, states have occasionally used firing squads to carry out death sentences.⁷⁶ In *Wilkerson v. Utah*,⁷⁷ the Supreme Court considered the constitutionality of execution by firing squad. The Court held that while the Eighth Amendment forbids cruel and unusual punishments, “the authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category.”⁷⁸

Oklahoma and Utah currently authorize the firing squad, but lethal injection remains the primary method of execution in both states.⁷⁹ The firing squad is authorized in Utah only for inmates who chose this method prior to May 3, 2004, or in the event that lethal injection is held unconstitutional, or if the State is unable to procure lethal injection drugs.⁸⁰ Oklahoma permits the use of a firing squad only if lethal injection or electrocution is held unconstitutional.⁸¹

Gary Gilmore was the first person executed in the United States after the Court’s decision in *Gregg* reinstated the death penalty.⁸² Gilmore, who opposed attempts to appeal his murder conviction and death sentence, demanded Utah execute him by a firing squad.⁸³ To carry out a death sentence by firing squad, the condemned inmate is strapped to a chair in front of a sandbag-lined wall.⁸⁴ A cloth target is fastened to the

Cir. 1996).

75. *Id.* Rupe, who a jury convicted of murdering two bank tellers, weighed over 409 pounds. Rupe eventually died in prison from liver disease in 2006. Jennifer Sullivan & Maureen O’Hagan, *Convicted Killer Dies in Prison*, SEATTLE TIMES, Feb. 8, 2006, at B3.

76. See BEDAU, *supra* note 18, at 15; SNELL, *supra* note 71, at 16 (indicating only three executions by firing squad since 1977).

77. 99 U.S. 130 (1878).

78. *Id.* at 134–35.

79. SNELL, *supra* note 71, at 7.

80. UTAH CODE ANN. § 77-18-5.5 (West, Westlaw though 2015 1st Spec. Sess.).

81. OKLA. STAT. ANN. tit. 22, § 1014 (West, Westlaw through 2015 1st Reg. Sess.).

82. See BEDAU, *supra* note 18, at 17.

83. Editorial, *An American Punishment Again*, N.Y. TIMES, Jan. 18, 1977, at 25.

84. Jacob Weisberg, *This Is Your Death*, NEW REPUBLIC, July 1, 1991, at 24.

front of the prisoner's jumpsuit to mark the heart.⁸⁵ Several marksmen positioned twenty feet away simultaneously fire at the prisoner's heart.⁸⁶ Ronnie Lee Gardner was the most recent inmate executed by firing squad in Utah in 2010.⁸⁷

C. *Electrocution*

In the late 1800s, states began to replace their gallows with electric chairs on the theory that execution by electrocution was more humane.⁸⁸ William Kemmler was the first person put to death in the electric chair in 1890 after the Supreme Court rejected his challenge that New York's new method of execution amounted to cruel and unusual punishment.⁸⁹ In upholding the validity of New York's electrocution statute, the Court found:

[B]ut little in it to warrant the belief that this new mode of execution is cruel, within the meaning of the [C]onstitution On the contrary, we agree with the court below that it removes every reasonable doubt that the application of electricity to the vital parts of the human body, under such conditions and in the manner contemplated by the statute, must result in instantaneous, and consequently in painless, death.⁹⁰

To carry out electrocution, the electric chair applies alternating current between 500 and 2000 volts to the condemned prisoner's head and body for about thirty seconds.⁹¹ This process repeats until the shock from electrocution causes respiratory paralysis and cardiac arrest.⁹² Despite numerous accounts of grotesque and botched electrocutions,⁹³ the electric chair remained the predominant method of execution for

85. *Id.*

86. *Id.*

87. Aaron Falk & Emiley Morgan, *Ronnie Lee Gardner Executed by Firing Squad*, DESERET NEWS, June 18, 2010, at A1.

88. See BEDAU, *supra* note 18, at 15; BANNER, *supra* note 12, at 169 ("The cause of the transformation [to electrocution] was an intensified public focus on the suffering of those who were executed.").

89. See BEDAU, *supra* note 18, at 15.

90. *In re Kemmler*, 136 U.S. 436, 443–44 (1890).

91. Weisberg, *supra* note 84, at 24.

92. *Id.*

93. See Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, app. 2 (1997) (compiling a list of post-*Gregg* botched electrocutions).

nearly a century.⁹⁴ In 1915, the Court reiterated its “well-grounded belief that electrocution is less painful and more humane than hanging.”⁹⁵ By 1949, twenty-six states had replaced hanging with electrocution.⁹⁶ One hundred and fifty eight prisoners have been electrocuted since the Court’s decision in *Gregg*.⁹⁷ In 1993, Justices Souter, Blackmun, and Stevens questioned the constitutionality of electrocution and noted the Court had failed to revisit the issue since its decision in *Kemmler* over a hundred years earlier.⁹⁸

Eight states currently authorize the use of the electric chair as a backup method to lethal injection.⁹⁹ In 2008, the Nebraska State Supreme Court struck down the State’s use of electrocution, finding “assumptions about an instantaneous and painless death were simply incorrect” and that “electrocution is unnecessarily cruel in its purposeless infliction of physical violence and mutilation of the prisoner’s body.”¹⁰⁰ The Court concluded electrocution “violates the prohibition on cruel and unusual punishment.”¹⁰¹ Robert Gleason was the most recent inmate electrocuted, when Virginia executed him in 2013.¹⁰²

D. *Lethal Gas*

The first use of lethal gas to carry out the death penalty was in 1924, after Nevada’s Deputy Attorney General convinced members of Nevada’s State Assembly that “lethal gas would be more humane than hanging or the firing squad.”¹⁰³ Under this method of execution, the condemned prisoner is strapped into an airtight chamber where a

94. See BANNER, *supra* note 12, at 295 (noting when the Supreme Court decided *Gregg* in 1976 the electric chair and the gas chamber were the “most common tools of execution”).

95. *Malloy v. South Carolina*, 237 U.S. 180, 185 (1915).

96. *State v. Mata*, 745 N.W.2d 229, 263 (Neb. 2008).

97. SNELL, *supra* note 71, at 16.

98. See *Poyner v. Murray*, 508 U.S. 931, 933 (1993) (“The Court has not spoken squarely on the underlying issue since *In re Kemmler* and the holding of that case does not constitute a dispositive response to litigation of the issue in light of modern knowledge about the method of execution in question.” (internal citation omitted)).

99. *Methods of Execution*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/methods-execution> (last visited Mar. 10, 2015).

100. *Mata*, 745 N.W.2d at 278.

101. *Id.*

102. Justin Jouvenal, *Convicted Killer Dies in Electric Chair*, WASH. POST, Jan. 17, 2013, at B3. Gleason was sentenced to death for killing two other inmates while serving a life sentence in prison. *Id.*

103. See BANNER, *supra* note 12, at 196–98.

chemical reaction is remotely initiated, releasing poisonous hydrogen cyanide into the sealed chamber.¹⁰⁴ After several minutes of exposure to lethal gas, the inmate's spasms subside and the inmate finally succumbs to the lack of oxygen to the brain.¹⁰⁵ States have put to death eleven prisoners in gas chambers since the death penalty was reinstated in 1977.¹⁰⁶ Only Arizona, California, Missouri, Oklahoma, and Wyoming still authorize lethal gas as a means of administering the death penalty.¹⁰⁷ Wyoming and Missouri, however, do not currently have functioning gas chambers.¹⁰⁸ Walter LaGrand was the last prisoner executed by lethal gas in Arizona in 1999.¹⁰⁹

Two death row inmates challenged the constitutionality of California's lethal gas procedures in *Fierro v. Gomez*.¹¹⁰ After an eight-day bench trial, the District Court held:

California's method of execution by administration of lethal gas strongly suggests that the pain experienced by those executed is unconstitutionally cruel and unusual. This evidence, when coupled with the overwhelming evidence of societal rejection of this method of execution, is sufficient to render California's method of execution by lethal gas unconstitutional under the [E]ighth [A]mendment.¹¹¹

The Ninth Circuit Court of Appeals affirmed, but the Supreme Court later vacated the finding of unconstitutionality after the California legislature modified the State's death penalty statute to give death row

104. Weisberg, *supra* note 84, at 26.

105. *Id.*

106. *Methods of Execution*, *supra* note 99.

107. SNELL, *supra* note 71, at 7. Arizona death row inmates sentenced before November 15, 1992, may choose between lethal injection and lethal gas. Lethal injection is used for all inmates sentenced after November 15, 1992. *Id.* at 7 n.b. Wyoming authorizes the use of lethal gas only if lethal injection is held unconstitutional. *Id.* at 7 n.l.

108. Jim Salter, *Executions Could Go Back to Gas Chamber, Electric Chair*, LAS VEGAS REV.-J. (Jan. 28, 2014), <http://www.reviewjournal.com/news/executions-could-go-back-gas-chamber-electric-chair>; see also O'SHEA, *supra* note 72, at 216. In 1988, the Missouri Legislature passed a bill making lethal injection the primary method of execution. *Id.* When Governor John Ashcroft signed the bill into law, he expressed his belief that the method would be a "safer and more humane way to carry out the orders of the court." *Id.* (internal quotation marks omitted).

109. LaGrand, a German national, was convicted of murdering a bank teller during an attempted robbery in Arizona in 1982. Arizona executed LaGrand despite fierce opposition from Germany and an order from the International Court of Justice staying the execution. See ALAN W. CLARKE & LAURELYN WHITT, *THE BITTER FRUIT OF AMERICAN JUSTICE: INTERNATIONAL AND DOMESTIC RESISTANCE TO THE DEATH PENALTY* 58–59 (2007).

110. 865 F. Supp. 1387 (N.D. Cal. 1994), *aff'd*, 77 F.3d 301(9th Cir. 1996), *vacated sub nom.* *Gomez v. Fierro*, 519 U.S. 918 (1996).

111. *Id.* at 1415.

inmates the choice between the gas chamber and lethal injection.¹¹² On remand, the Ninth Circuit determined the inmates lacked standing to challenge California's use of the gas chamber because neither had opted to die by lethal gas.¹¹³

E. Lethal Injection Becomes the Method of Capital Punishment in the United States

In an effort to find a less painful means of executing prisoners, death penalty states have “altered [their] method[s] of execution over time to more humane means of carrying out the sentence. That progress has led to the use of lethal injection by every jurisdiction that imposes the death penalty.”¹¹⁴ While lethal injection may be perceived as a more humane method of imposing death sentences, the transition to lethal injection was also an economic decision.¹¹⁵ Oklahoma was the first state to adopt lethal injection in 1977, in part because the State was reluctant to spend money on repairing the Department of Corrections' electric chair.¹¹⁶ The legislatures in Texas, Idaho, and New Mexico quickly followed suit,¹¹⁷ and Texas was the first state to carry out an execution by lethal injection when it executed Charles Brooks, Jr. in 1982.¹¹⁸ Lethal injection is currently the sole or primary means of execution in all states that have the death penalty.¹¹⁹

To administer lethal injection, prison officials strap the condemned inmate to a table or hospital gurney and attach an intravenous drip to the inmate's arm.¹²⁰ Lethal injection usually involves the use of a three-drug cocktail.¹²¹ The first drug, typically sodium thiopental or pentobarbital,

112. *Fierro v. Gomez*, 77 F.3d 301, 309 (9th Cir. 1996), *vacated sub nom.*, *Gomez v. Fierro*, 519 U.S. 918 (1996).

113. *Fierro v. Terhune*, 147 F.3d 1158, 1160 (9th Cir. 1998).

114. *Baze v. Rees*, 553 U.S. 35, 40–41 (2008).

115. See BANNER, *supra* note 12, at 297 (“And from the perspective of the state, one great benefit of lethal injection was that it was cheap.”).

116. See O'SHEA, *supra* note 72, at 292.

117. See BEDAU, *supra* note 18, at 17.

118. Robert Reinhold, *Technician Executes Murderer in Texas by Lethal Injection*, N.Y. TIMES, Dec. 7, 1982, at A19.

119. See BESSLER, *supra* note 3, at 258.

120. See Weisberg, *supra* note 84, at 26–27 (describing the execution of an inmate in Texas).

121. See Seema K. Shah, *Experimental Execution*, 90 WASH. L. REV. 147, 170–71 (2015) (summarizing the adoption of modern lethal injection protocols). The cocktail of drugs used in lethal injection has varied in recent years as state departments of corrections have been unable to secure supplies of drugs traditionally used for lethal injections. See *infra* Part III.A.

is an anesthetic meant to put the inmate to sleep.¹²² The second drug, typically pancuronium bromide, is a muscle relaxant used to paralyze the inmate.¹²³ Finally, a lethal dose of potassium chloride is administered to stop the inmate's heart.¹²⁴ "The proper administration of the first drug ensures that the prisoner does not experience any pain associated with the paralysis and cardiac arrest caused by the second and third drugs."¹²⁵ Proponents of lethal injection argue the method is much less violent than the electric chair and amounts to "a quick, merciful snuffing out" of the condemned inmate's life.¹²⁶

Despite its popularity as a more "humane" method of execution, lethal injection has met stiff opposition in the medical community.¹²⁷ Medical professionals have been highly critical of the use of lifesaving drugs to inflict death.¹²⁸ In 1980, the American Medical Association adopted a resolution discouraging physicians from participating in lethal injections, contending such assistance violates a doctor's Hippocratic Oath.¹²⁹ Because medical ethics generally preclude physicians from participating in executions, there is a danger that poorly trained technicians will fail to locate a working vein, complicating the procedure and in some cases resulting in conscious inmates complaining of intense pain during lethal injection.¹³⁰

It was on these very grounds that the Court in 2008 considered an Eighth Amendment challenge to Kentucky's lethal injection protocol in *Baze v. Rees*.¹³¹ The inmates in *Baze* argued the improper administration of the lethal injection drugs, particularly of sodium thiopental, might result in an excruciatingly painful execution amounting to cruel and unusual punishment.¹³² In a plurality opinion, Chief Justice Roberts upheld Kentucky's lethal injection protocol, holding the inmates had "not carried their burden of showing that the risk of pain from

122. Ford, *supra* note 4. More recently, states have used the sedative midazolam in place of sodium thiopental and pentobarbital. *Id.*

123. *Baze v. Rees*, 553 U.S. 35, 44 (2008).

124. *Id.*

125. *Id.*

126. Vince Beiser, *A Guilty Man [And the History of Lethal Injection]*, in *THE DEATH PENALTY: DEBATING THE MORAL, LEGAL, AND POLITICAL ISSUES* 107, 109 (Robert M. Baird & Stuart E. Rosenbaum eds., 2011).

127. See Denno, *supra* note 93, at 373.

128. See BEDAU, *supra* note 18, at 18.

129. *Id.* at 17–18.

130. Weisberg, *supra* note 84, at 27.

131. 553 U.S. 35 (2008).

132. See BESSLER, *supra* note 3, at 244.

maladministration of a concededly humane lethal injection protocol, and the failure to adopt untried and untested alternatives, constitute cruel and unusual punishment.”¹³³ The Court again declined to put limits on the methods used to put inmates to death.

The Court most recently revisited lethal injection in *Glossip v. Gross*,¹³⁴ when it considered a challenge to Oklahoma’s use of a sedative, midazolam, as the first drug in a three-drug lethal injection cocktail.¹³⁵ The inmates argued midazolam was not designed to affect or maintain unconsciousness and is incapable of masking the intense pain caused by the second and third drugs administered during lethal injection.¹³⁶ A five-to-four majority of the Supreme Court was unconvinced, and on June 29, 2015, the Court upheld Oklahoma’s new three-drug lethal injection protocol.¹³⁷ The majority held that the inmates failed to establish that the risk of harm was substantial compared to known alternative methods of execution,¹³⁸ and that the district court did not commit clear error in finding midazolam was likely to render the condemned inmates insensate to pain.¹³⁹

III. UNAVAILABILITY OF LETHAL INJECTION DRUGS SPURS STATES’ EFFORTS TO REINSTITUTE TRADITIONAL METHODS OF EXECUTION

A. *Unavailability of Lethal Injection Drugs and Questions About New Lethal Injection Procedures Hinder States’ Efforts to Execute Capital Offenders*

Although the Court upheld the constitutionality of lethal injection in *Baze* and *Glossip*, European Union opposition to using medications for lethal injection has complicated the administration of capital punishment in America.¹⁴⁰ The United States has come under intense international pressure to end capital punishment.¹⁴¹ The European Union strongly

133. *Baze*, 553 U.S. at 41.

134. 576 U.S. ___, 135 S. Ct. 2726 (2015).

135. *Id.*

136. *Id.* at 2729.

137. *Id.*

138. *Id.* at 2738.

139. *Id.* at 2729.

140. See Ford, *supra* note 4.

141. See CLARKE & WHITT, *supra* note 109, at 2 (“Most of the world has repudiated the death penalty Considerable international pressure—particularly in matters of extradition and consular relations—is being brought to bear on the United States to abolish state execution, and this pressure

opposes the death penalty and its “abolition is also a precondition for candidate countries seeking accession to the EU.”¹⁴² European aversion to capital punishment has “grown so strong that Britain and Germany banned the shipment of sodium thiopental to the United States.”¹⁴³ The manufacturers of the anesthetizing drugs propofol and phenobarbital have similarly taken measures to keep their drugs from reaching states’ departments of corrections for use in executions.¹⁴⁴

Efforts to obtain the drugs subject to the European Union’s export ban from domestic manufacturers have also faltered. In January 2011, the sole manufacturer of sodium thiopental in the United States announced that it would no longer make the drug due to concerns of product diversion for use in capital punishment.¹⁴⁵ In the medical field, sodium thiopental has largely been replaced by newer anesthetics, meaning there is a limited market for the drug in United States hospitals.¹⁴⁶ Additionally, sodium thiopental only has a four-year shelf life, making it difficult for United States prisons to stockpile supplies.¹⁴⁷ States unable to obtain supplies of drugs traditionally used to administer lethal injection have turned to lightly regulated compounding pharmacies to obtain lethal injection drugs,¹⁴⁸ but the methods of securing the drugs and the identities of the providers have been the subject of extensive litigation, bringing capital punishment to a halt in several states.¹⁴⁹ Death sentences have been delayed as states attempt to develop new lethal injection procedures with substitute drugs.¹⁵⁰

is mounting steadily.”).

142. Political and Security Committee, *EU Guidelines on Death Penalty*, at 4, No. 8416/13 (Apr. 12, 2013).

143. See KOCH ET AL., *supra* note 28, at ix.

144. See Letter from Fresenius Kabi’s Scott Meacham, Exec. Vice President, Fresenius Kabi USA, LLC, to Healthcare Providers (Aug. 28, 2012), <http://deathpenaltyinfo.org/documents/FreseniusPropofolStatement.pdf> (manufacturer of propofol); Press Release, Hikma Pharmaceuticals, Hikma Pharmaceuticals Strongly Objects to the Use of Its Products in Capital Punishment (May 15, 2013), available at <http://www.deathpenaltyinfo.org/documents/HikmaStatement.pdf> (manufacturer of phenobarbital).

145. Carol J. Williams, *Loss of Drug New Setback for Death Penalty*, L.A. TIMES, Jan. 22, 2011, at A1.

146. Ford, *supra* note 4.

147. *Id.*

148. See *Lethal Injection*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/lethal-injection> (last visited Feb. 7, 2015).

149. Josh Sanburn, *Death Lab: Missouri Eyes Its Own Lethal Injection Pharmacy*, TIME (June 7, 2014), <http://time.com/2838377/lethal-injection-missouri/>.

150. See *Death Penalty in Flux*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/death-penalty-flux/#exe> (last visited Aug. 31, 2015).

Efforts to find substitute lethal injection drugs have posed new challenges for death penalty states. After several botched lethal injections using the sedative midazolam in place of sodium thiopental and pentobarbital,¹⁵¹ several death row inmates challenged Oklahoma's new lethal injection procedures.¹⁵² The Court narrowly upheld Oklahoma's lethal injection protocol, providing a pathway for states to continue lethal injections using midazolam.¹⁵³ Yet, pharmaceutical companies are already taking steps to inhibit states from using midazolam for executions. Akorn Pharmaceuticals, an American manufacturer of midazolam, has publicly stated its strong opposition to the use of its products in executions, and has taken steps to prevent sales of the drug to prison systems.¹⁵⁴ It remains to be seen if the pharmaceutical industry will similarly be able to restrict the supply of midazolam to United States prisons, as was the case with sodium thiopental and pentobarbital.¹⁵⁵

B. *State Efforts to Reinstitute Traditional Methods of Capital Punishment*

The inability to procure the drugs necessary to carry out lethal injections and uncertainty regarding the constitutionality of new lethal injection procedures have created a perplexing situation. Thousands of inmates are currently on death row in America;¹⁵⁶ however, many states have no supply of the drugs needed to carry out lethal injections.¹⁵⁷ As if

151. See, e.g., Alan Johnson, *Capital Punishment – Expert: Inmate’s Execution Inhumane*, COLUMBUS DISPATCH, Aug. 13, 2014, at 1B (reporting inmate Dennis McGuire “gasp[ed], choked, clenched his fists and appeared to struggle against his restraints for about 10 minutes after the administration of” midazolam and hydromorphone, before dying twenty-six minutes later); Erik Eckholm, *One Execution Botched, Oklahoma Delays the Next*, N.Y. TIMES, Apr. 30, 2014, at A1 (reporting inmate Clayton Lockett regained consciousness after the administration of midazolam and was speaking and writhing in intense pain for over ten minutes before finally dying forty-three minutes after the execution began).

152. See, e.g., Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, *Warner v. Gross*, No. 14-7955, 2015 WL 302647 (Jan. 13, 2015), 2015 WL 309509.

153. *Glossip v. Gross*, 576 U.S. ___, 135 S. Ct. 2726 (2015).

154. Tracy Connor, *Drug-Maker Akorn Bans Sedative Midazolam for Executions*, NBC NEWS (Feb. 20, 2015), <http://www.nbcnews.com/storyline/lethal-injection/drug-maker-akorn-bans-sedative-midazolam-executions-n309191>.

155. See Ed Pilkington, *Controversial Oklahoma Lethal Injection Drug Approved by US Supreme Court*, THE GUARDIAN (June 29, 2015), <http://www.theguardian.com/us-news/2015/jun/29/midazolam-supreme-court-oklahoma> (noting states “still face the challenge of acquiring lethal injection drugs in the face of a worldwide boycott of sales to US corrections departments”).

156. SNELL, *supra* note 71, at 1.

157. See generally Ford, *supra* note 4 (discussing state efforts to find new supplies of lethal

channeling Judge Kozinski's dissent in *Wood v. Ryan*,¹⁵⁸ the situation has led to proposals in several states to return to traditional methods of capital punishment.¹⁵⁹ This Comment examines the various state legislative proposals to reinstate electrocution, the firing squad, and lethal gas as a means of administering death sentences. Since 2014, seven states (Alabama, Missouri, Oklahoma, Tennessee, Utah, Virginia, and Wyoming) have considered legislative proposals to reinstitute traditional methods of execution, and three states (Oklahoma, Tennessee, and Utah) have enacted laws reauthorizing the use of lethal gas, the electric chair, and the firing squad.¹⁶⁰ A summary of these legislative proposals and the three enacted laws follows.

1. *Alabama Considers the Electric Chair*

On January 27, 2015, Alabama State Senator Cam Ward pre-filed legislation to reinstate electrocution as an authorized method of carrying out death sentences.¹⁶¹ Alabama previously used the electric chair as the State's primary method of execution until it switched to lethal injection in 2002.¹⁶² The proposal would permit the use of the electric chair to execute inmates if a court holds the State's lethal injection procedures are unconstitutional or if the State is unable to procure lethal injection drugs.¹⁶³ The companion bill passed the Alabama House of Representatives on March 11, 2015,¹⁶⁴ but language reinstating the electric chair was subsequently dropped by the Senate Judiciary Committee in favor of a provision designed to keep the source of lethal injection drugs confidential.¹⁶⁵

injection drugs).

158. 759 F.3d 1076, 1102–03 (9th Cir. 2014) (Kozinski, C.J., dissenting from denial of rehearing en banc) (“If some states and the federal government wish to continue carrying out the death penalty, they must turn away from this misguided path [lethal injection] and return to more primitive—and foolproof—methods of execution.”), *vacated*, 135 S. Ct. 21 (2014).

159. *See infra* Part III.B.

160. *See infra* Part III.B.

161. S. 11, 2015 Leg., Reg. Sess. (Ala. 2015).

162. Pat Duggins, *State Lawmaker: “Bring back the Electric Chair,”* ALA. PUB. RADIO (Feb. 4, 2015), <http://apr.org/post/state-lawmaker-bring-back-electric-chair-signing-day-college-bound-athletes>.

163. Ala. S. 11; H.R. 18, 2015 Leg., Reg. Sess. (Ala. 2015).

164. Ala. H.R. 18.

165. Brian Lyman, *Electric Chair Won't Come back to Alabama*, MONTGOMERY ADVERTISER (June 4, 2015), <http://www.montgomeryadvertiser.com/story/news/politics/southunionstreet/2015/06/03/electric-chair-come-back-alabama/28442249/>.

2. *Missouri: Legislature Considers the Firing Squad, Attorney General Favors a State-Run Lab to Produce Lethal Injection Drugs*

Missouri similarly has been unable to obtain the drugs necessary to carry out lethal injections.¹⁶⁶ Missouri law still authorizes the use of lethal gas,¹⁶⁷ but the State has not executed an inmate with lethal gas since the 1960s,¹⁶⁸ and does not currently have a functioning gas chamber.¹⁶⁹

Missouri is considering two proposals to address the unavailability of lethal injection drugs. In both 2014 and 2015, State Representative Rick Brattin introduced bills to authorize the use of the firing squad to administer death sentences.¹⁷⁰ Upon introduction, Brattin argued the firing squad is “no less humane than lethal injection.”¹⁷¹ The legislation, however, did not receive a hearing in 2014, or in 2015.¹⁷²

In 2014, Missouri Attorney General Chris Koster expressed his “belief [that] the legislature should remove market-driven [drug manufacturers’] . . . pressures from the system . . . [and] appropriate funds to establish a state-operated, DEA-licensed, laboratory to produce the execution chemicals in our state.”¹⁷³ Koster argued, “Missouri should not be reliant on merchants whose identities must be shielded from public view or who can exercise unacceptable leverage over this

166. Sanburn, *supra* note 149 (“Like most states with the death penalty, Missouri is struggling to obtain execution drugs.”).

167. MO. ANN. STAT. § 546.720(1) (West, Westlaw through 2015 Veto Sess.) (“The manner of inflicting the punishment of death shall be by the administration of lethal gas or by means of the administration of lethal injection.”).

168. See O’SHEA, *supra* note 72, at 216.

169. *Id.*; Mark Berman, *The Recent History of States Contemplating Firing Squads and Other Execution Methods*, WASH. POST (May 22, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/05/22/the-recent-history-of-states-contemplating-firing-squads-and-other-execution-methods/>.

170. H.R. 1470, 97th Gen. Assemb., 2d Reg. Sess. (Mo. 2014); H.R. 1347, 98th Gen. Assemb., 1st Reg. Sess. (Mo. 2015).

171. Kevin Murphy, *Firing Squad’s Use Is Urged*, COLUMBUS DISPATCH (Jan. 18, 2014), http://www.dispatch.com/content/stories/national_world/2014/01/18/firing-squads-use-is-urged.html.

172. For the current status of this legislation, see *HB 1470*, MO. HOUSE REPRESENTATIVES, <http://www.house.mo.gov/billssummary.aspx?bill=HB1470&year=2014&code=R> (last visited Aug. 10, 2015).

173. Press Release, Chris Koster, Mo. Attorney Gen., Bar Association of Metropolitan St. Louis Bench & Bar Remarks: The Death Penalty in Missouri and Challenges of Lethal Injection (May 29, 2014), *available at* <http://ago.mo.gov/docs/default-source/press-releases/bamslbenchbarmeetingspeech.pdf?sfvrsn=2>.

profound state act.”¹⁷⁴ The Missouri Legislature has yet to act on Attorney General Koster’s proposal.

3. *Oklahoma Authorizes Use of Nitrogen Hypoxia for Executions*

Two Oklahoma legislators proposed legislation to allow for executions by nitrogen hypoxia if a court holds lethal injection unconstitutional or if lethal injection drugs are unavailable.¹⁷⁵ The proposal would use nitrogen instead of the hydrogen cyanide typically used in gas chamber executions.¹⁷⁶ Nitrogen hypoxia causes asphyxiation by depriving the body of oxygen.¹⁷⁷ According to the bill’s sponsor, Senator Anthony Sykes, “[t]he death penalty is a just and appropriate punishment for our worst criminals and nitrogen hypoxia is recognized as one of the most humane methods for carrying out the sentence.”¹⁷⁸ On March 3, 2015, the Oklahoma House passed the legislation by a vote of 85-10.¹⁷⁹ The Senate subsequently passed the legislation by a vote of 41-0 on April 9, 2015, and Governor Mary Fallin signed it into law.¹⁸⁰

4. *Tennessee Brings Back the Electric Chair*

In 2014, the Tennessee Legislature passed a law reinstating electrocution as an authorized means of carrying out death sentences with overwhelming support.¹⁸¹ The legislation was intended “to address

174. *Id.*

175. Ashby Jones, *Oklahoma Lawmakers Eyeing New Execution Method: Nitrogen Gas*, WALL ST. J. L. BLOG, (Feb. 10, 2015, 12:31 PM), <http://blogs.wsj.com/law/2015/02/10/oklahoma-lawmakers-eyeing-new-execution-method-nitrogen-gas/>.

176. *Id.*

177. U.S. CHEM. SAFETY & HAZARD INVESTIGATION BD., NO. 2003-10-B, HAZARDS OF NITROGEN ASPHYXIATION 1 (2003).

178. Press Release, Okla. State Senate, Senate Committee Advances Bill to Modify Execution Procedure (Feb. 10, 2015), *available at* http://www.oksenate.gov/news/press_releases/press_releases_2015/pr20150210a.htm.

179. H.R. 1879, 55th Leg., 1st Sess. (Okla. 2015); Barbara Hoberock, *Oklahoma Gov. Mary Fallin Signs Bill Adding Nitrogen Gas as State Execution Method*, TULSA WORLD (Apr. 18, 2015), http://www.tulsaworld.com/news/capitol_report/oklahoma-gov-mary-fallin-signs-bill-adding-nitrogen-gas-as/article_6368deaf-7905-5285-8393-8b5c5497ccb2.html.

180. *Id.*

181. TENN. CODE ANN. § 40-23-114 (West, Westlaw through 2015 1st Reg. Sess.). The legislation reinstating electrocution passed the Tennessee House by a vote of 68-13, and passed the Senate by a vote of 23-3. *See SB 2580*, TENN. GEN. ASSEMBLY, <http://wapp.capitol.tn.gov/apps/BillInfo/default.aspx?BillNumber=SB2580&GA=108> (last visited July 14, 2014).

delays” in carrying out death sentences “due to a shortage of lethal injection drugs.”¹⁸² The Tennessee General Assembly feared that if the state were required to disclose its supplier of lethal injection drugs, the shortage might be exacerbated.¹⁸³ Previously, Tennessee could only electrocute inmates who committed their crimes before December 31, 1998.¹⁸⁴ The new law allows the Tennessee Department of Corrections to electrocute condemned inmates if (1) “[l]ethal injection is held to be unconstitutional;”¹⁸⁵ or (2) if “the Commissioner of Corrections certifies to the Governor that one or more of the ingredients essential to carrying out a sentence of death by lethal injection is unavailable through no fault of the [Tennessee] Department [of Corrections].”¹⁸⁶

5. *Utah Legislature Reinstates the Firing Squad*

In March 2015, the Utah Legislature passed legislation to reinstate the use of firing squads for executions.¹⁸⁷ The legislation makes firing squads the default method of execution in Utah if the State is unable to obtain lethal injection drugs thirty days prior to an execution.¹⁸⁸ The bill’s sponsor, Representative Paul Ray, characterized the legislation as necessary to avoid “drawn out legal battle[s]” regarding substitute lethal injection drugs and procedures.¹⁸⁹ Representative Ray argued, “[s]ince we’ve already done firing squads . . . it just makes sense that that’s our backup plan to keep the firing squad if we can’t get the drug cocktail.”¹⁹⁰ The bill advanced out of the House Law Enforcement and Criminal Justice Standing Committee¹⁹¹ and the full House of Representatives in

182. *Highlights of New Laws Enacted on July 1 in Tennessee*, TENN. SENATE REPUBLICAN CAUCUS, <http://www.tngopsenate.com/highlights-of-new-laws-enacted-on-july-1-in-tennessee/> (last visited Feb. 3, 2015).

183. *Id.*

184. SNELL, *supra* note 71, at 7 n.j.

185. TENN. CODE ANN. § 40-23-114(e)(1).

186. *Id.*

187. H.R. 11, 2015 Leg., Gen. Sess. (Utah 2015).

188. *Id.*

189. *Audio: House Law Enforcement and Criminal Justice Committee*, UTAH HOUSE REPRESENTATIVES (Feb. 4, 2015), http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=18197&meta_id=533769 (statement of Rep. Paul Ray at 22:40 minutes).

190. Katie McKellar, *Anti-Capital Punishment Group Protests Firing Squad Bill*, DESERET NEWS (Jan. 27, 2015), <http://www.deseretnews.com/article/865620518/Anti-capital-punishment-group-protests-firing-squad-bill.html?pg=all>.

191. Michelle L. Price, *Bill to Bring Back Firing Squad in Utah Clears 1st Hurdle*, KSL.COM (Feb. 4, 2015), <http://www.ksl.com/?nid=157&sid=33357137>.

Utah subsequently passed the bill.¹⁹² On March 10, 2015, the Utah Senate passed the legislation,¹⁹³ and on March 23, 2015, Utah Governor Gary Herbert signed the bill into law.¹⁹⁴ Governor Herbert indicated in a press release that lethal injection is still the preferred method of capital punishment, but that this legislation would expand the State's options if it cannot legally obtain the necessary drugs.¹⁹⁵

6. *Virginia Considers Reinstating the Electric Chair*

The Virginia Legislature contemplated legislation to reinstitute electrocution in 2014.¹⁹⁶ Virginia's House of Delegates passed a bill authorizing electrocution as the means of execution if the Director of the Virginia Department of Corrections certifies that lethal injection is not available for any reason.¹⁹⁷ The legislation narrowly failed to garner enough support in the Virginia Senate and was reassigned to a legislative committee for further study.¹⁹⁸

7. *Wyoming: A Solution Without a Problem*

Wyoming does not currently have any inmates on death row.¹⁹⁹ The state has executed only one person since the Supreme Court decided

192. Erica Palmer, *Firing Squad Bill Passes Utah House After Tough Debate*, SALT LAKE TRIB. (Feb. 13, 2015), <http://www.sltrib.com/home/2178285-155/firing-squad-bill-passes-utah-house>.

193. H.R. 11, 2015 Leg., Gen. Sess. (Utah 2015); Lee Davidson, *Utah Appears on Verge of Restoring Firing Squad for Executions*, SALT LAKE TRIB. (Mar. 11, 2015), <http://www.sltrib.com/home/2275697-155/utah-appears-on-verge-of-restoring>.

194. Mark Berman, *Utah Governor Signs Bill Making Firing Squads the State's Backup Execution Option*, WASH. POST (Mar. 23, 2015), <http://www.washingtonpost.com/news/post-nation/wp/2015/03/23/utah-governor-signs-bill-making-firing-squads-the-states-backup-execution-option/>.

195. Press Release, Gov. Gary Herbert, Statement on H.B. 11, Death Penalty Procedure Amendments (Mar. 10, 2015), http://www.utah.gov/governor/news_media/article.html?article=20150310-1.

196. H. Del. 1052, 2014 Leg., Reg. Sess. (Va. 2014).

197. *Id.*; see also *HB 1052 Method of Execution; Director of DOC Certifies that Lethal Injection Isn't Available, Electrocution*, VA. LEGIS. INFO. SYS., <http://lis.virginia.gov/cgi-bin/legp604.exe?141+sum+HB1052> (last visited Sept. 4, 2015).

198. Rachel Weiner, *Virginia Electric Chair Bill Dies for the Year in State Senate*, WASH. POST (Feb. 10, 2014), http://www.washingtonpost.com/local/virginia-politics/virginia-electric-chair-bill-dies-for-the-year-in-state-senate/2014/02/10/ed6d1468-9260-11e3-b227-12a45d109e03_story.html.

199. SNELL, *supra* note 71, at 9. At the time that the Wyoming Legislature drafted legislation to authorize the firing squad, Wyoming's lone death row inmate was Dale Eaton. Eaton was sentenced to death in 2004 for the rape and murder of a teenager in 1988. Eaton's death sentence was reversed in 2014 based on ineffective assistance of counsel during the sentencing phase of his trial. See *Eaton v. Wilson*, No. 09–CV–261–J, 2014 WL 6622512 (D. Wyo. Nov. 20, 2014).

Gregg in 1976.²⁰⁰ Despite Wyoming's infrequent use of capital punishment, its legislature is considering authorizing the use of firing squads as a backup method of executing death row inmates should the State be unable to secure lethal injection drugs.²⁰¹ On January 16, 2015, the Wyoming Senate passed a bill authorizing the use of a firing squad should lethal injection be held unconstitutional "or if the sentencing court finds execution by lethal injection cannot be performed within the time prescribed by law" due to a shortage of lethal injection drugs.²⁰² One of the bill's proponents, Senator Bruce Burns, stated, "[i]f we are going to continue to have the death penalty, then we are going to have to have an available secondary form of execution."²⁰³ The head of Wyoming's Department of Corrections testified to a legislative committee that Wyoming has no lethal injection drugs on hand²⁰⁴ and that he supports the use of a firing squad in part because it is "less expensive than constructing a gas chamber or an electric chair."²⁰⁵ Wyoming Governor Matt Mead indicated he would sign the bill into law if it also passes Wyoming's House of Representatives.²⁰⁶ On February 12, 2015, the Wyoming House narrowly passed the bill after amending the language to require that an anesthetic be used to render the inmate unconscious before he is shot,²⁰⁷ but the bill ultimately failed in conference between the two legislative chambers.²⁰⁸

200. Mark Hopkinson was the last inmate executed in Wyoming in 1992. See Mark Berman, *The Recent History of States Contemplating Firing Squads and Other Execution Methods*, WASH. POST (May 22, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/05/22/the-recent-history-of-states-contemplating-firing-squads-and-other-execution-methods/>.

201. Dan Frosch, *Wyoming Considers Firing Squad as Death-Row Backup*, WALL ST. J. (Jan. 25, 2015), <http://www.wsj.com/articles/wyoming-considers-firing-squad-as-death-row-backup-1422230396>.

202. S. 13, 63d Leg., 2015 Gen. Sess. (Wyo. 2015).

203. Frosch, *supra* note 201.

204. See Reid Wilson, *With Lethal Drugs in Short Supply, Wyoming Considering Firing Squads*, WASH. POST (May 22, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/05/22/with-lethal-drugs-in-short-supply-wyoming-considering-firing-squads/>.

205. Frosch, *supra* note 201.

206. *Id.*

207. Wyo. S. 13 (as passed by House, Feb. 12, 2015).

208. Erin Jones, *Firing Squad Bill Fails*, WYO. PUB. RADIO (Mar. 12, 2015), <http://wyomingpublicmedia.org/post/firing-squad-bill-fails>.

IV. EIGHTH AMENDMENT JURISPRUDENCE AS A FRAMEWORK FOR EVALUATING THE TRADITIONAL METHODS OF CAPITAL PUNISHMENT

The Supreme Court previously has looked to state laws and public opinion to assess whether a national consensus exists with respect to whom should be eligible for capital punishment.²⁰⁹ This Comment argues that the majority of states' rejection of the traditional methods of execution, as well as declining public support for capital punishment in general, suggest that the traditional methods of capital punishment once considered acceptable by the Court can no longer withstand Eighth Amendment scrutiny in contemporary society. Under the "evolving standards of decency" framework for evaluating punishments, traditional methods of capital punishment likely violate the Eighth Amendment's prohibition on cruel and unusual punishment.

A. *The Eighth Amendment and "Evolving Standards of Decency"*

In his majority opinion in *Baze*, Chief Justice Roberts observed that, "[t]his Court has never invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment."²¹⁰ Yet, the Supreme Court has repeatedly reaffirmed dicta from *Trop v. Dulles*²¹¹ that observed that the Eighth Amendment's prohibition on cruel and unusual punishment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society."²¹² In *Trop*, as with earlier cases, the Court recognized that the scope of the Eighth Amendment is not static.²¹³ "A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail."²¹⁴ The decisions upholding the constitutionality of execution by

209. *See, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008); *Roper v. Simmons*, 543 U.S. 551, 561 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002).

210. *Baze v. Rees*, 553 U.S. 35, 48 (2008).

211. 356 U.S. 86 (1958).

212. *See, e.g.*, *Hall v. Florida*, ___ U.S. ___, 134 S. Ct. 1986, 1992 (2014); *Kennedy*, 554 U.S. at 419; *Roper*, 543 U.S. at 561 (citing *Trop*, 356 U.S. at 101).

213. *Trop*, 356 U.S. at 100–01 (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910) (noting the Eighth Amendment, "in the opinion of the learned commentators, may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice")).

214. *Atkins*, 536 U.S. at 311.

firing squad and electric chair cited by Chief Justice Roberts are over a century old.²¹⁵ In her dissent in *Baze*, Justice Ginsburg concluded that “[w]hatever little light our prior method-of-execution cases might shed is thus dimmed by the passage of time.”²¹⁶

The Court has explained that evolving standards of decency “must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule.”²¹⁷ This Comment will next explore whether contemporary notions of the death penalty and cruel and unusual punishment have evolved to a point where society is no longer willing to accept traditional methods of execution.

B. The Supreme Court Previously Has Looked to the States as a Means of Determining National Consensus in Capital Cases

The Court frequently has looked to the laws of the states in an effort to discern the existence of a national consensus with respect to capital punishment. In determining whether a consensus exists, the Court explained:

The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question. These data give us essential instruction. We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment²¹⁸

With an eye toward determining national consensus, the Court has previously looked to the laws of the states in placing substantive limits on the application of the death penalty. In *Roper*, a majority of the Court determined there is a national consensus against executing juvenile offenders.²¹⁹ In *Atkins v. Virginia*,²²⁰ the Court indicated that the execution of developmentally disabled offenders “has become truly unusual, and it is fair to say that a national consensus has developed against it.”²²¹ In *Kennedy v. Louisiana*,²²² the Court found evidence of a

215. *Baze*, 553 U.S. at 115 (Ginsburg, J., dissenting) (“*Wilkerson* was decided 129 years ago, *Kemmler* 118 years ago, and *Resweber* 61 years ago.”).

216. *Id.*

217. *Kennedy*, 554 U.S. at 420.

218. *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (holding the execution of juvenile offenders violates the Eighth Amendment).

219. *Id.*

220. 536 U.S. 304 (2002).

221. *Id.* at 315–16 (“It is not so much the number of these States that is significant, but the consistency of the direction of change.”).

national consensus against use of the death penalty as punishment for child rape.²²³ While the majority of the Court in *Baze* indicated that there is no national consensus against lethal injection,²²⁴ the modern Court has not specifically considered if a national consensus exists against older methods of capital punishment. Following the methodology used by the Court in previous capital cases, it is useful to review which states currently allow traditional methods of execution to carry out death sentences.

C. *Few States Maintain and Use Traditional Methods of Execution*

Traditional forms of capital punishment remain legal in some way, shape, or form in fifteen states.²²⁵ Yet, states have used the traditional methods just 175 times since the Supreme Court reinstated the death penalty in *Gregg*, compared to over 1200 executions by lethal injection during the same period.²²⁶ Additionally, in most circumstances states only permit the use of traditional methods if lethal injection is not available or if a trial court sentenced an inmate to death prior to a state adopting lethal injection as the primary method of execution.²²⁷

Once the predominant method of executing criminals,²²⁸ states have trended away from hanging based on a commonly held belief that newer methods of execution are “less painful and more humane than hanging.”²²⁹ Executions by hanging are extremely rare in the modern era; only three states authorize hanging and no inmates have been

222. 554 U.S. 407 (2008).

223. *Id.* at 426 (“[O]nly six of those jurisdictions authorize the death penalty for rape of a child. Though our review of national consensus is not confined to tallying the number of States with applicable death penalty legislation, it is of significance that, in 45 jurisdictions, petitioner could not be executed for child rape of any kind.”).

224. *Baze v. Rees*, 553 U.S. 35, 53 (2008) (“[W]e note at the outset that it is difficult to regard a practice [lethal injection] as ‘objectively intolerable’ when it is in fact widely tolerated. Thirty-six States that sanction capital punishment have adopted lethal injection as the preferred method of execution.”).

225. SNELL, *supra* note 71, at 4.

226. *Id.* at 16; *Methods of Execution*, *supra* note 99.

227. *See, e.g.*, UTAH CODE ANN. § 77-18-5.5 (West, Westlaw through 2015 1st Spec. Sess.) (authorizing use of the firing squad if lethal injection is held unconstitutional or if Utah is unable to procure lethal injection drugs); TENN. CODE ANN. § 40-23-114(e) (West, Westlaw through 2015 1st Reg. Sess.) (permitting the use of the electric chair if lethal injection is held unconstitutional or if Tennessee is unable to procure lethal injection drugs).

228. *See supra* Part II.A.

229. *Malloy v. South Carolina*, 237 U.S. 180, 185 (1915); *see also* BANNER, *supra* note 12, at 196–98 (describing Nevada’s adoption of lethal gas based on the belief “lethal gas would be more humane than hanging”).

hanged since 1996.²³⁰

Executions by firing squad are similarly rare.²³¹ Only two states authorize firing squads as a backup to lethal injection, and Utah is the only state to actually employ a firing squad in the modern (post-*Gregg*) era of capital punishment.²³² Despite the frequency with which firearms cause death in the United States,²³³ they rarely are used to administer death sentences for capital offenders. Even though some noted jurists have argued that firing squads may be quicker and less painful than lethal injection,²³⁴ firing squads remain largely a relic of a past era of capital punishment.

In the early 1970s, lethal gas was the second most used method of capital punishment and was the sole method of execution in ten states.²³⁵ Currently, only five states authorize the use of lethal gas, three of which do not have functioning gas chambers.²³⁶ Of the remaining two states (Arizona and California), execution by lethal gas remains restricted. Lethal gas is only authorized in Arizona for inmates sentenced prior to November 1992.²³⁷ California's gas chamber at San Quentin State Prison has been the subject of so much litigation it has not been used to execute an inmate since 1993.²³⁸

After lethal injection, electrocution is the most prevalent method of capital punishment.²³⁹ Nevertheless, only one state has reauthorized the electric chair since 1949,²⁴⁰ whereas eighteen states either have enacted legislation to remove electrocution as an option or have seen

230. See *supra* Part II.A.

231. See *supra* Part II.B.

232. See *supra* Part II.B.

233. In 2013, firearms were responsible for 11,208 homicides in the United States. Another 21,175 people took their own lives with a firearm. U.S. CTR. FOR DISEASE CONTROL, DEATHS: FINAL DATA FOR 2013, at tbl.18, available at http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_02.pdf.

234. See *Glossip v. Gross*, 576 U.S. ___, 135 S. Ct. 2726, 2796 (2015) (Sotomayor, J., dissenting) (“[T]here is evidence to suggest that the firing squad is significantly more reliable than other methods, including lethal injection”); *Wood v. Ryan*, 759 F.3d 1076, 1103 (9th Cir. 2014) (Kozinski, C.J., dissenting from denial of rehearing en banc) (arguing “[t]he firing squad strikes me as the most promising,” because of its instantaneous infliction of death and uninterrupted supply of bullets to carry out executions).

235. *Fierro v. Gomez*, 865 F. Supp. 1387, 1405 (N.D. Cal. 1994), *vacated sub nom.*, *Fierro v. Terhune*, 147 F.3d 1158 (9th Cir. 1998).

236. Salter, *supra* note 107.

237. ARIZ. REV. STAT. ANN. § 13-757 (2014).

238. See O'SHEA, *supra* note 72, at 76.

239. See *supra* Part II.C.

240. See *supra* Part III.B.4.

electrocution struck down by state courts as unconstitutional.²⁴¹ Once thought to be “in all respects, scientific and humane,”²⁴² electrocution is currently only authorized as a backup to lethal injection in eight states.²⁴³

Table 1: Methods of Carrying Out Death Sentences in the United States²⁴⁴

Method	Number of inmates executed using this method post-Gregg	States that have, at one time, authorized use	Current number of states authorizing use
Electrocution	158	26 ²⁴⁵	8 (Alabama, Arkansas, Florida, Kentucky, Oklahoma, South Carolina, Tennessee, Virginia)
Firing Squad	3	3 ²⁴⁶	2 (Oklahoma, Utah ²⁴⁷)

241. See *State v. Mata*, 745 N.W.2d 229 (Neb. 2008); *Dawson v. State*, 554 S.E.2d 137 (Ga. 2001).

242. See BEDAU, *supra* note 18, at 15.

243. SNELL, *supra* note 71, at 7.

244. The data in this table comes from SNELL, *supra* note 71, and the Death Penalty Information Center, see *Methods of Execution*, *supra* note 99, unless indicated otherwise.

245. *Mata*, 745 N.W.2d at 263.

246. See, e.g., IDAHO CODE ANN. § 19-2716 (West 2000). The Idaho Legislature repealed the firing squad provision of Idaho’s death penalty statute in 2009. IDAHO CODE ANN. § 19-2716 (West, Westlaw through 2015 1st Reg. & 1st Extraordinary Sess.).

247. Utah currently does not authorize capital offenders to choose death by firing squad, but allows for the use of a firing squad for inmates who chose this method prior to its elimination in 2004. UTAH CODE ANN. § 77-18-5.5 (West, Westlaw through 2015 1st Spec. Sess.). Eight inmates are currently on death row in Utah, seven of whom were convicted and sentenced prior to 2004. Of the seven inmates sentenced prior to 2004, three chose the firing squad. See Emiley Morgan, *Is the Death Penalty Dead in Utah?*, DESERET NEWS (Sept. 30, 2013), <http://www.deseretnews.com/article/865587321/Is-the-death-penalty-dead-in-Utah.html?pg=all>; Palmer, *supra* note 192.

Hanging	3	Universal	3 (Delaware, New Hampshire, Washington)
Lethal Gas	11	10	5 (Arizona, California, Missouri, Oklahoma, Wyoming) ²⁴⁸
Lethal Injection	1236	38	31

D. Seven States Have Abolished the Death Penalty in the Last Eight Years

In addition to the trend away from traditional methods of capital punishment, there is a trend away from capital punishment in general. Since 2007, seven states have abolished the death penalty.²⁴⁹ During that same period, no state where capital punishment is illegal has adopted or reinstated capital punishment.²⁵⁰ Currently, thirty-one states and the federal government authorize capital punishment while nineteen states and the District of Columbia have abolished the death penalty.²⁵¹ Additionally, governors in three death penalty states have declared moratoria on capital punishment and will not allow any executions during their respective tenures.²⁵²

248. Neither Wyoming nor Missouri currently has a functioning gas chamber. See *supra* note 108 and accompanying text.

249. Connecticut, Illinois, Maryland, Nebraska, New Jersey, New Mexico, and New York have all abolished capital punishment since 2007. *States With and Without the Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Feb. 7, 2015).

250. *Id.*

251. *Id.*

252. See Maria L. La Ganga, *Holmes Case May Test Vow on Death Penalty*, LA TIMES, July 22, 2015, at A1 (“Gov. John Hickenlooper has made it his policy that no one in Colorado will be executed as long as he is in office.”); Ian Lovett, *Executions Are Suspended by Governor in Washington*, N.Y. TIMES, Feb. 12, 2014, at A12 (noting that Washington Governor Jay Inslee declared a moratorium on executions during his tenure); William Yardley, *Oregon Governor Says He Will Block Executions*, N.Y. TIMES, Nov. 23, 2011, at A14 (noting that Governor John Kitzhaber declared a moratorium on executions in Oregon); Aimee Green, *Gov. Kate Brown Extends Ban on Executions but Her Stance on Death Penalty Unclear*, THE OREGONIAN (Feb. 20, 2015), http://www.oregonlive.com/politics/index.ssf/2015/02/gov_kate_brown_extends_ban_on.html

E. Public Opinion Polls Show Declining Support for the Death Penalty and Less Support for Traditional Methods of Execution

The Court previously has looked to public opinion polling to help gauge attitudes towards capital punishment,²⁵³ but also has declined to “rest constitutional law upon such uncertain foundations” as public opinion surveys.²⁵⁴ In essence, the Court has treated polling as one of several indicia of public sentiment, but alone it is not a dispositive indicator of national consensus on the death penalty. Polling is secondary to other indicia of national consensus such as the number of jurisdictions that permit a particular method of execution and the frequency with which that method is used to execute offenders.²⁵⁵

An October 2014 Gallup Poll found that sixty-three percent of Americans support capital punishment for persons convicted of murder.²⁵⁶ This is consistent with other recent public opinion surveys on capital punishment, which have tracked the steadily diminishing support for the death penalty over the last two decades.²⁵⁷ A 2014 NBC News Poll indicated that while a majority of Americans still support the death penalty, overall support was much lower for electrocution (eighteen percent of respondents), lethal gas (twenty percent of respondents), hanging (eight percent of respondents), and the firing squad (twelve percent of respondents).²⁵⁸ Another poll found that while sixty-one

(noting that Governor Kate Brown extended Oregon’s moratorium on the death penalty after Governor Kitzhaber’s resignation).

253. *See* Woodson v. North Carolina, 428 U.S. 280, 298 n.34 (1976) (“A study of public opinion polls on the death penalty concluded that despite the increasing approval for the death penalty reflected in opinion polls during the last decade, there is evidence that many people supporting the general idea of capital punishment want its administration to depend on the circumstances of the case, the character of the defendant, or both.” (internal quotations omitted)).

254. *Stanford v. Kentucky*, 492 U.S. 361, 377 (1989), *abrogated by* *Roper v. Simmons*, 543 U.S. 551 (2005).

255. *Id.* (“A revised national consensus so broad . . . must appear in the operative acts (laws and the application of laws) that the people have approved.”).

256. Jeff Jones & Lydia Sand, *Americans’ Support for Death Penalty Stable*, GALLUP (Oct. 23, 2014), <http://www.gallup.com/poll/178790/americans-support-death-penalty-stable.aspx> (survey conducted Oct. 12–15, 2014).

257. *See, e.g.*, Damla Ergun, *New Low in Preference for the Death Penalty*, ABC NEWS (June 5, 2014), <http://abcnews.go.com/blogs/politics/2014/06/new-low-in-preference-for-the-death-penalty/> (survey conducted May 29–June 1, 2014, finding that “61 percent continue to support the death penalty”); Michael Lipka, *Support for Death Penalty Drops Among Americans*, PEW RES. CTR. (Feb. 12, 2014), <http://www.pewresearch.org/fact-tank/2014/02/12/support-for-death-penalty-drops-among-americans/> (survey conducted Mar. 21–Apr. 8, 2013, finding that “[w]hile a majority of Americans (55%) favor the death penalty for persons convicted of murder . . . that number has declined significantly over the last two decades”).

258. Tracy Connor, *Americans Back Death Penalty by Gas or Electrocution If No Needle: Poll*,

percent of respondents support capital punishment, if lethal injection were outlawed or otherwise unavailable, less than half of the poll's respondents favored using another method such as the electric chair or gas chamber.²⁵⁹ While support for particular methods of execution is far less frequently surveyed than is overall support for capital punishment, the limited data available suggests that there is less public support for traditional methods of execution than there is for lethal injection.²⁶⁰

V. TRADITIONAL METHODS OF EXECUTION LIKELY VIOLATE THE EIGHTH AMENDMENT'S PROHIBITION ON CRUEL AND UNUSUAL PUNISHMENTS

The Court's recent decision in *Glossip* may ultimately delay a reevaluation of the constitutionality of the traditional methods of capital punishment, as the majority's decision has provided a pathway for states to continue lethal injections using midazolam. But it is also likely that the European Union and pharmaceutical manufacturers will take steps to inhibit midazolam's use in lethal injections.²⁶¹ If states are again unable to secure lethal injection drugs, there may be renewed focus on the traditional methods of capital punishment.

If states persist in reinstating older methods of capital punishment as a solution to the lethal injection drug shortage, challenges by capital defendants and public pressure may require that the Supreme Court revisit the question of whether the traditional methods withstand constitutional scrutiny. The Court has not evaluated the constitutionality of any one of the traditional methods of capital punishment in almost seventy years.²⁶² In 2008, a plurality of the Court cited the *Kemmler* and *Wilkerson* decisions for the proposition that the Court has never struck down a method of execution as violating the Eighth Amendment, despite the fact that these cases are over a century old.²⁶³ The difference in the present state of medical knowledge as compared to when *Kemmler* and *Wilkerson* were decided alone should be sufficient to justify an inquiry

NBC NEWS (May 15, 2014), <http://www.nbcnews.com/storyline/lethal-injection/americans-back-death-penalty-gas-or-electrocution-if-no-needle-n105346> (survey conducted May 7–10, 2014).

259. See Ergun, *supra* note 257, at 5.

260. See *id.*; Connor, *supra* note 258.

261. See *supra* Part III.A.

262. See *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) (holding that the electrocution of an inmate a second time after the first electrocution attempt failed because of a mechanical defect in the electric chair would not violate the Eighth Amendment).

263. *Baze v. Rees*, 553 U.S. 35, 115 (2008) (Ginsburg, J., dissenting) (“*Wilkerson* was decided 129 years ago, *Kemmler* 118 years ago, and *Resweber* 61 years ago.”).

into the traditional methods of execution.²⁶⁴ As the Nebraska State Supreme Court observed, many outdated “assumptions about an instantaneous and painless death were simply incorrect.”²⁶⁵

If the Supreme Court has cause to revisit the traditional methods of execution, the previously articulated Eighth Amendment framework of the “evolving standards of decency that mark the progress of a maturing society” should guide the legal analysis.²⁶⁶ To determine what these evolving standards of decency are, the Court previously has surveyed state laws for indicia of a consensus with respect to which offenders are eligible for capital punishment.²⁶⁷ This same approach can be used to determine if a consensus exists with respect to the methods of capital punishment.

In *Roper*, the Court found evidence of a national consensus against executing juvenile offenders where only twenty states permitted executing juvenile offenders.²⁶⁸ In *Kennedy*, the Court determined there was a consensus against executing child rapists where only six states permitted such punishment.²⁶⁹ In *Atkins*, the Court found evidence of a consensus against executing offenders with intellectual disabilities where thirty states prohibited the execution of such persons.²⁷⁰ Conversely, in *Baze*, the Court held there was no national consensus against lethal injection where at the time thirty-six states authorized its use to administer death sentences.²⁷¹

The fact that a large majority of death penalty states do not permit the use of electrocution,²⁷² hanging,²⁷³ lethal gas,²⁷⁴ or firing squad²⁷⁵ is a

264. See *Poyner v. Murray*, 508 U.S. 931, 933 (1993) (Souter, J., dissenting from denial of certiorari).

265. *State v. Mata*, 745 N.W.2d 229, 278 (Neb. 2008).

266. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

267. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (holding the execution of juvenile offenders violates the Eighth Amendment).

268. *Id.* at 552–53 (“[Thirty] States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach.”).

269. *Kennedy v. Louisiana*, 554 U.S. 407, 426 (2008) (“Only six of those jurisdictions authorize the death penalty for rape of a child. Though our review of national consensus is not confined to tallying the number of States with applicable death penalty legislation, it is of significance that, in 45 jurisdictions, petitioner could not be executed for child rape of any kind.”).

270. *Atkins v. Virginia*, 536 U.S. 304, 313–17 (2002).

271. *Baze v. Rees*, 553 U.S. 35, 53 (2008) (“[W]e note at the outset that it is difficult to regard a practice [lethal injection] as ‘objectively intolerable’ when it is in fact widely tolerated. Thirty-six States that sanction capital punishment have adopted lethal injection as the preferred method of execution.”).

272. Eight of thirty-one death penalty states. See *supra* Part IV.C, tbl.1.

strong indicator that the traditional methods of capital punishment may not meet the Eighth Amendment's evolving standards of decency. The percentages are even lower when the nineteen states that do not permit the death penalty at all are factored in.²⁷⁶ The percentage of states authorizing traditional methods of capital punishment ranges from a low of four percent for hanging, to a high of sixteen percent for electrocution.²⁷⁷ These percentages are well within the range that the Court has previously cited to find evidence of a national consensus against a particular capital punishment practice.²⁷⁸

The Court has not limited its inquiry into objective indicia of national consensus to the mere number of states permitting a form of capital punishment. In *Atkins*, Justice Kennedy writing for the majority noted, "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change."²⁷⁹ Looking to the direction of change, the last thirty years reflect a noticeable trend of states consistently moving away from methods of execution that they consider less humane than lethal injection.²⁸⁰ Of the thirty-one states with the death penalty, only Washington State authorizes a traditional method of execution (hanging) as a primary form of capital punishment along with lethal injection.²⁸¹ As of this writing, only three states (Oklahoma, Tennessee, and Utah) have actually adopted laws to reinstitute a traditional method of capital punishment.²⁸² Despite the recent efforts of some states to reinstitute traditional methods of capital punishment, the overall trend over the last three decades has been overwhelmingly away from such methods.

Advocates of capital punishment may counter-argue that the trend

273. Three of thirty-one death penalty states. *See supra* Part IV.C, tbl.1.

274. Five of thirty-one death penalty states. *See supra* Part IV.C, tbl.1.

275. Two of thirty-one death penalty states. *See supra* Part IV.C, tbl.1.

276. The electric chair is permitted in sixteen percent of all states, hanging in six percent of states, the gas chamber in ten percent of states, and the firing squad in four percent of states. *See supra* Part IV.C, tbl.1.

277. Two out of fifty states (four percent) permit hanging and eight out of fifty states (sixteen percent) permit electrocution. *See supra* Part IV.C, tbl.1.

278. *See, e.g.,* *Roper v. Simmons*, 543 U.S. 551, 564 (2005) (finding a consensus against capital punishment for juvenile offenders where such punishment is permitted in only forty percent of states); *Atkins v. Virginia*, 536 U.S. 304, 313–16 (2002) (finding a consensus against executing intellectually disabled offenders where only forty percent of states allowed the practice).

279. *Atkins*, 536 U.S. at 315–16.

280. *See supra* Part IV.C.

281. SNELL, *supra* note 71, at 4.

282. *See supra* Part III.B.

away from traditional methods of execution and towards lethal injection is part of an effort to find a *more* humane way of executing inmates, which does not necessarily mean the traditional methods of execution are so inhumane that they violate the Eighth Amendment. Yet, numerous examples of extreme pain and suffering as a result of botched electrocutions,²⁸³ hangings,²⁸⁴ gassings,²⁸⁵ and even firing squads,²⁸⁶ raise legitimate questions about the humanity of such methods. Following the example set by Nebraska's high court,²⁸⁷ Americans should engage in an honest discussion of whether the traditional methods of execution can withstand the Eighth Amendment's prohibition on cruel and unusual punishments. As Judge Kozinski so graphically stated in *Wood*, "[i]f we, as a society, cannot stomach the splatter from an execution carried out by firing squad," perhaps it will advance the discussion of whether we should "be carrying out executions at all."²⁸⁸

CONCLUSION

For thirty years, lethal injection has been the predominant method used to administer death sentences in America. Opposition to the death penalty has impeded the ability of states to obtain the drugs used for lethal injections. Faced with challenges obtaining drugs necessary for lethal injections, some states have considered legislative proposals to reinstate the electric chair, firing squad, and gas chamber.

The Supreme Court has repeatedly asserted that the Eighth Amendment is not static, but rather "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society."²⁸⁹ In an effort to determine the evolving standards of decency with respect to capital punishment, the Court has looked to the laws of

283. See Denno, *supra* note 93, at app. 2 (compiling a list of post-*Gregg* botched electrocutions).

284. Roberta M. Harding, *The Gallows to the Gurney: Analyzing the (Un)Constitutionality of the Methods of Execution*, 6 B.U. PUB. INT. L.J. 153, 164 (1996).

285. *Id.* at 166.

286. 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, 370 (2003) (after the Supreme Court upheld the constitutionality of the firing squad in *Wilkerson v. Utah*, Wallace "Wilkerson's last moments were filled with terror, pain, and disgrace. His executioners missed their target. He bled to death over a 15-minute period").

287. See *State v. Mata*, 745 N.W.2d 229 (Neb. 2008).

288. 759 F.3d 1076, 1103 (9th Cir. 2014) (Kozinski, C.J., dissenting from denial of rehearing en banc).

289. See, e.g., *Hall v. Florida*, ___ U.S. ___, 134 S. Ct. 1986, 1992 (2014); *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008); *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

the states as objective indicia of national consensus. Of the thirty-one states that currently authorize the death penalty, only a handful of states still allow for traditional methods of capital punishment. The national trend of the states away from the traditional methods of capital punishment indicates that these methods have fallen out of favor, suggesting that these methods can no longer withstand Eighth Amendment scrutiny.