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HUMANE PROPOSALS FOR SWIFT AND PAINLESS DEATH

By Bryce Buchmann

INTRODUCTION

“How enviable a quiet death by lethal injection compared with that!” United States Supreme Court Justice Antonin Scalia wrote after describing the gruesome murder of an eleven-year-old girl.¹

As an apparently swift and painless way to carry out a death sentence, lethal injection is the preferred method of execution in the United States today.² But in 2014, four botched executions in Oklahoma, Ohio and Arizona forced courts, state governments, and the nation to question the assumption that lethal injection is guaranteed to induce the “quiet death” imagined by Justice Scalia.³ Following the botched executions of 2014, the Supreme Court granted certiorari to review the cases of four prisoners challenging Oklahoma’s lethal injection protocol.⁴ In a 5-4 decision the Supreme Court held in *Glossip v. Gross* that Oklahoma’s method of execution – a three-drug cocktail similar to that used in other states – did not violate the Eighth Amendment prohibition of cruel and unusual punishment.⁵

Had *Glossip* invalidated the Oklahoma execution protocol, it would have been the first time the Supreme Court has ever declared a method of execution unconstitutional.⁶ Although every challenged execution method survived Eighth Amendment scrutiny, states have continuously sought better means of inflicting the ultimate punishment since the nineteenth century; changing execution procedures in search of less gruesome, more humane

¹ *Callins v. Collins*, 510 U.S. 1141, 1143 (1994). Justice Scalia referred to the crime allegedly committed by death row prisoner Henry McCollum in his concurrence denying certiorari for the plaintiff in *Callins*. *Id.* The concurrence was a response to Justice Blackmun’s dissent which suggested the death penalty was unconstitutional. *Id.* at 1143–59. Henry McCollum has since been exonerated by DNA evidence for the 1983 murder Justice Scalia referred to. Jonathan M. Katz & Erik Eckholm, *DNA Evidence Clears Two Men in 1983 Murder*, N.Y. TIMES, Sept. 2, 2014, http://www.nytimes.com/2014/09/03/us/2-convicted-in-1983-north-carolina-murder-freed-after-dna-tests.html?_r=0.

² *Methods of Execution*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/methods-execution> (last visited Feb. 25, 2016).

³ See Ben Crair, *2014 is Already the Worst Year in the History of Lethal Injection*, NEW REPUBLIC (July 24, 2014), <http://www.newrepublic.com/article/118833/2014-botched-executions-worst-year-lethal-injection-history> (discussing the executions of Joseph Wood, Michael Wilson, Dennis McGuire and Clayton Lockett which each occurred with unexpected complications which caused prisoners to express severe pain and suffering).

⁴ *Warner v. Gross*, 135 S. Ct. 1173 (2015) *cert. granted*, *Warner v. Gross*, 776 F.3d 721 (10th Cir. 2015) (denying Charles Warner, Richard Glossip, John Grant and Benjamin Cole injunctive relief regarding the use of Oklahoma’s three-drug cocktail used for executions).

⁵ *Glossip v. Gross*, 135 S. Ct. 2726 (2015).

⁶ *Id.* at 2732 (“this Court has never invalidated a State’s chosen procedure for carrying out a death sentence as the infliction of cruel and unusual punishment”) (quoting *Baze v. Rees*, 553 U.S. 35, 48 (2008)).

ways to effectively terminate the lives of those sentenced to death.⁷ Unfortunately, with each new method of execution came new challenges and flaws.⁸ Lethal injection is no different.⁹

This comment will provide reasons why lethal injection is not the appropriate method of execution in the United States, discuss factors that should be considered in selecting a method of execution and conclude that several alternative methods of punishment are preferable to lethal injection. Part I of this comment will detail the history of lethal injection in the United States and the issues associated with the practice. Part II examines how the government determines which method of execution is appropriate. Finally, Part III provides proposals for more humane punishment and concludes the comment.

I. THE HISTORY OF LETHAL INJECTION

In the late nineteenth century the New York state senate initiated “A Commission to Investigate and Report the Most Humane and Practical Method of Carrying into Effect the Sentence of Death in Capital Cases.”¹⁰ The Commission’s report rejected lethal injection because “the use of [the hypodermic needle] is so associated with the practice of medicine, and as a legitimate means of alleviating human suffering, that it is hardly deemed advisable to urge its application for the purposes of legal executions against the almost unanimous protest of the medical profession.”¹¹ Subsequently, executions continued in the United States for nearly one hundred years through various methods without use of the hypodermic needle.

Almost a century after the New York State Commission ruled out death by injection, the first lethal drug combination developed for use in American executions was conceived in Oklahoma in 1977.¹² After the Oklahoma Medical Association declined to assist state authorities in their search for a

⁷ AUSTIN SARAT, *GRUESOME SPECTACLES* 3–4 (Stanford University Press 2014); Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocuting and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 65 (2002).

⁸ SARAT, *supra* note 7 at 179–210 (describing, in Appendix B, every botched execution in the United States from 1890 to 2010. This list of 276 executions includes electrocutings, hangings, lethal gas, and lethal injections).

⁹ SARAT, *supra* note 7 at 145, 198–210.

¹⁰ SARAT, *supra* note 7 at 63.

¹¹ N.Y. COMM’N ON CAPITAL PUNISHMENT, *THE REPORT OF THE COMMISSION TO INVESTIGATE AND REPORT THE MOST HUMANE AND PRACTICAL METHOD OF CARRYING INTO EFFECT THE SENTENCE OF DEATH IN CAPITAL CASES* 75 (1888) [hereinafter *NEW YORK STATE COMM’N*].

¹² Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 *FORDHAM L. REV.* 49, 65–66 (2007).

lethal injection drug, the state's chief medical examiner, Dr. Jay Chapman, a forensic pathologist by trade, recommended a three-drug cocktail.¹³ The drugs prescribed by Dr. Chapman and now widely accepted as the lethal injection protocol included an anesthetic to render the prisoner unconscious, a paralytic to stop the prisoner's breathing, and a final drug to stop the prisoner's heart.¹⁴ In the following years, more than thirty states emulated Oklahoma's protocol and adopted almost identical procedures for administration of the death penalty.¹⁵ In 2008, a Kentucky prisoner brought his challenge of this drug regimen to the Supreme Court which resulted in the *Baze v. Rees* opinion holding that the protocol was constitutional under the Eighth Amendment.¹⁶ In 2015, the Court clarified in *Glossip* (addressing a different combination of drugs with the same intended effects) that a lethal injection protocol satisfied the Eighth Amendment when a prisoner could not *prove* a substantial risk of severe pain and did not suggest an alternative method of execution that entails a lesser risk of pain.¹⁷ With these rulings, the Supreme Court has made it extremely difficult for a prisoner to successfully challenge a state's lethal injection protocol in federal court.¹⁸

As demonstrated by the history of execution methods, however, the Supreme Court's approval of a procedure does not insulate lethal injection from popular criticism and democratic pressure to seek a new method. The following paragraphs will describe problems with lethal injection in the United States.

A. Lack of Expertise

There are a substantial number of practical concerns unique to lethal injection that will continue to raise issues with state protocols. On the ground level, the process of administering the lethal drugs is often performed by correctional facility staff who are not trained as medical professionals.¹⁹ An

¹³ *Id.*

¹⁴ Jonathan Yehuda, *Tinkering with the Machinery of Death: Lethal Injection, Procedure, and the Retention of Capital Punishment in the United States*, 88 N.Y.U. L. REV. 2319, 2331–32 (2013).

¹⁵ See Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 375 (1997). See also *State by State Lethal Injection*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/state-lethal-injection> (last visited Feb. 6, 2016).

¹⁶ *Baze v. Rees*, 553 U.S. 35 (2008).

¹⁷ *Glossip v. Gross*, 135 S. Ct. at 2731 (2015).

¹⁸ Michael Scott Leonard, *Justices Uphold Oklahoma Lethal Injection, Tightening Standards for Death Penalty Plaintiffs*, 31 WESTLAW J. PHARMACEUTICAL 2 (2015).

¹⁹ Denno, *supra* note 7, at 66 (“Legislatures delegate death to prison personnel and executioners who are not qualified to devise a lethal injection protocol, much less carry one out.”); See, e.g., Denno, *supra* note 12, at 56–57 (calling attention to California and Kentucky protocols that allowed improperly trained personnel to conduct executions).

execution team must locate the prisoner's vein, insert the catheter, and inject the drugs at proper intervals.²⁰ All of this must be done with precision and efficiency as a convicted criminal lies strapped to a gurney awaiting the termination of his life.²¹ Lack of expertise may be the reason why so many botched lethal injections failed to go as planned.²²

Preventing resolution of the expertise deficit, medical doctors are ethically prohibited from assisting in executions. The Hippocratic Oath in its original form plainly stated, "I will neither give a deadly drug to anybody who asked for it, nor will I make a suggestion to this effect."²³ Accordingly, the American Medical Association firmly refuses to play any role in the lethal injection arena, officially stating in their Code of Ethics, "A physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution."²⁴

B. Botched Executions

The term "botched" has been used to denote executions which failed to go as planned.²⁵ Sometimes this means the execution inflicted unnecessary pain and suffering, sometimes the execution took longer than expected, and sometimes more than one attempt was required to complete the act.²⁶ Many argue that even excessively painful deaths are justified in light of horrific crimes committed by the condemned.²⁷ Regardless of whether we accept this argument, the problem with "botched" executions remains. What separates capital punishment from unlawful murder are the legal process of adjudication and the routinized administration of punishment which Chief Justice Melville Fuller writing for the Supreme Court mentioned in 1890

²⁰ Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 381–82 (1997).

²¹ *See id.*

²² *See SARAT*, *supra* note 7, at 120 ("It is not uncommon for executioners to have trouble finding a vein into which they can insert a line to deliver the lethal drugs").

²³ Peter Tyson, *The Hippocratic Oath Today*, NOVA (Mar. 27, 2001), <http://www.pbs.org/wgbh/nova/body/hippocratic-oath-today.html>.

²⁴ *AMA Code of Medical Ethics: 2.06 Capital Punishment*, AM. MED. ASS'N, <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion206.page?> (last visited Feb. 6, 2016).

²⁵ *SARAT*, *supra* note 7, at 5 ("Botched executions occur when there is a breakdown in, or departure from, the 'protocol' for a particular method of execution.").

²⁶ *See SARAT*, *supra* note 7, at 179–210 (describing botched hangings, electrocutions, death by lethal gas, and lethal injections).

²⁷ *See, e.g., SARAT*, *supra* note 7, at 4–5 (quoting a survivor of the 1995 Oklahoma City bombing talking about the execution of Timothy McVeigh saying, "I want him to experience just a little of the pain and torture that he has put us through.").

should not be “something more than the mere extinguishment of life.”²⁸

Recent botched executions demonstrate the unreliability of lethal injection procedures.²⁹ In 2014 the executioner in Oklahoma had difficulty finding a usable vein for Clayton Lockett’s execution which resulted in an ordeal that lasted more than an hour.³⁰ Once a usable vein was located in Lockett’s groin and the drugs were administered, Lockett began breathing heavily, writhing on the gurney, clenching his teeth, and straining to lift his head off the gurney.³¹ Twenty minutes after the first drug was administered the execution was halted; Lockett died of a heart attack another twenty minutes later.³²

The use of midazolam – an anesthetic not used in executions before 2014 – may have been a source of complications in Lockett’s execution.³³ But 2014 was not the first year of botched lethal injections. For his book, *Gruesome Spectacles*, Amherst College Professor Austin Sarat compiled a list of seventy-three botched lethal injections that took place between 1984 and 2010.³⁴ The Death Penalty Information Center (DPIC) reports thirty-two botched lethal injections accompanied by a note that their list is not exhaustive.³⁵ Executions described by Sarat and DPIC as botched include an injection of chemicals into a prisoner’s soft tissue instead of the vein; a ninety minute affair involving a prisoner saying “it don’t work,” and then moaning, crying and making “guttural noises” before passing away; failed attempts to find a usable vein in 2009 for a prisoner who remains on Ohio’s death row as the state tries to find an efficient way to kill him; and numerous drawn out executions which included audible and visible expressions of

²⁸ William W. Berry III, *American Procedural Exceptionalism: A Deterrent or a Catalyst for Death Penalty Abolition?*, 17 CORNELL J.L. & PUB. POL’Y 481, 483 (2008) (“The perceived fairness of the process affirms the retributive notion that the execution of a murderer achieves justice for society. [...] This belief in fairness of judicial proceedings provides justification for the expression of retributive impulses.”); *In re Kemmler*, 136 U.S. 436, 447 (1890) (“Punishments are cruel when they involve torture or a lingering death; but 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 human life.”) (denying a prisoner’s claim on the grounds that the Eighth Amendment did not apply to the States and stating in dicta what the expectations of capital punishment should be).

²⁹ Crair, *supra* note 3.

³⁰ Michael L. Radelet, *Examples of Post-Furman Botched Executions*, DEATH PENALTY INFO. CTR. 4 (last updated July 24, 2014), http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions#_edn60.

³¹ *Id.*

³² *Id.*

³³ See Glossip, 135 S. Ct. at 2782 (Sotomayor, J., dissenting).

³⁴ See SARAT, *supra* note 7, at 198–210.

³⁵ Radelet, *supra* note 30 (detailing a collection of botched execution stories introduced with a note that the cases discussed “are not presented as a comprehensive catalogue of all botched executions”).

pain, violent convulsions and emotional distress.³⁶

Austin Sarat concluded that 7.2% of lethal injection executions in the United States had been botched as of 2010, making it the least effective method of execution employed in American history.³⁷ Problems with lethal injection including lack of expertise, non-participation of the medical community and various national and international bans on the sale, importation and use of certain drugs for executions call for a new evaluation of execution methods.³⁸ Regardless of how we describe executions that fail to go according to plan, it remains clear that lethal injection is not always the humane, quiet and peaceful method of execution it once purported to be. Lethal injection has been a failed experiment in American justice and must be replaced with a more humane punishment. The rest of this comment will discuss factors to be considered in the search for a better method of inflicting capital punishment.

II. SELECTING A METHOD OF EXECUTION

“Nothing but the best will do in the business of state killing,” Sarat wrote after pouring over the history of botched executions.³⁹ To be legitimate, methods of execution must effectively serve the purposes of inflicting the ultimate punishment. The following analysis will show that lethal injection fails to meet expectations which would be more effectively served by alternative methods of execution.

Historically, governments used the death penalty to demonstrate power and control over their subjects.⁴⁰ Before democratic governance and constitutional protections, executions were a “display of the majestic, awesome power of sovereignty to decide who suffers and who goes free, who lives and who dies.”⁴¹ With the purpose of making government authority well-

³⁶ SARAT, *supra* note 7, at 117–45, 198–210; Radelet, *supra* note 30.

³⁷ SARAT, *supra* note 7, at 177 (referencing appendix, containing a chart providing data on botched execution rates according to execution methods employed in the United States from 1900 to 2010; the rates of executions gone wrong were 7.12% of lethal injections, 5.4% of lethal gassings, 3.12% of hangings, 1.92% of electrocutions, and 0% of executions by firing squad).

³⁸ Ed Pilkington, *Europe moves to block trade in medical drugs used in US executions*, THE GUARDIAN, Dec. 20, 2011, <http://www.theguardian.com/world/2011/dec/20/death-penalty-drugs-european-comm> (showing that the European Union has banned companies from exporting drugs to the U.S. for use in executions); Ed Pilkington, *Death penalty states illegally imported drugs for executions despite warnings*, THE GUARDIAN, Oct. 23, 2015, <http://www.theguardian.com/us-news/2015/oct/23/death-penalty-states-drugs-illegal-sodium-thiopental> (stating that some states have illegally bypassed federal regulations to obtain certain drugs for lethal injections).

³⁹ SARAT, *supra* note 7, at 7.

⁴⁰ SARAT, *supra* note 7, at 7–10.

⁴¹ SARAT, *supra* note 7, at 7.

known and deterring others from committing similar acts punishable by death, “execution methods were chosen for their ability to convey the ferocity of the sovereign’s vengeance.”⁴² But as society and its governance evolved, so too did justifications for capital punishment. Reinstating the death penalty after a nationwide moratorium in 1976, three members of the Supreme Court joined in concurrence that retribution and deterrence were valid policy reasons for use of the death penalty; these reasons have since been consistently recognized by members of the Court.⁴³

In addition to the criminal punishment justifications for executions, methods of imposing death are limited by the need to ensure that capital punishment is rendered in a bureaucratic manner (as opposed to the lawless nature of crimes punished), and the condemned do not endure unnecessary pain during the execution process.⁴⁴ These requirements of execution methods may be described as humane interests, exemplary of mankind’s preference for law-and-order, and aversion to needless suffering. The policy goals of retribution and deterrence combined with humane considerations should serve as the foundations for selecting the appropriate method of punishment.

A. Retribution and Deterrence

Since the Supreme Court acknowledged retribution and deterrence as the reasons for imposing capital punishment, multiple studies have been conducted to determine whether the punishment of death deters prospective offenders from committing capital crimes.⁴⁵ Based on this research, most criminologists agree there is no empirical evidence to support the hypothesis that capital punishment has a deterrent effect.⁴⁶ Additionally, a 2014 Gallup poll found that a majority of respondents described a retributive purpose as their reason for favoring the death penalty while only 13% mentioned preventing future crimes.⁴⁷ Although it is conceivable that new un-

⁴² SARAT, *supra* note 7, at 7.

⁴³ See *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (“The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.”); see also *Lackey v. Texas*, 514 U.S. 1045 (1995) (denying certiorari and citing to *Gregg v. Georgia*); Gross, 135 S. Ct. at 2748-49 (Scalia, J., concurring).

⁴⁴ SARAT, *supra* note 7, at 10–11.

⁴⁵ Michael L. Radelet & Traci L. Lacoock, *Do Executions Lower Homicide Rates?: The Views of Leading Criminologists*, 99 J. CRIM. L. & CRIMINOLOGY 489, 490, 504 (2009).

⁴⁶ *Id.* But see Glossip, 135 S. Ct. at 2748 (arguing the need for deterrence supports the imposition of capital punishment).

⁴⁷ See *Death Penalty*, GALLUP, <http://www.gallup.com/poll/1606/death-penalty.aspx> (last visited Feb. 24, 2016) (responding to an open ended question of why death penalty proponents favor the death penalty, 35% of respondents to “An eye for an eye/They took a life/Fits the crime,” 14% said “They deserve

tested approaches to capital punishment or different forms of analysis could alter the scientific consensus, retribution currently stands as the only substantial justification for conducting executions.⁴⁸

Retribution is widely recognized as the most important purpose of executions from a variety of different perspectives. Some death penalty advocates point to retribution as the sole justification for capital punishment.⁴⁹ The family of a victim often wants their loved one's killer put to death.⁵⁰ Many people believe that whatever pain the condemned suffers in a botched execution is justified in comparison with the pain and suffering caused by the criminal acts that warranted a death sentence.⁵¹

B. Humane Consideration

The purpose of retribution can be served by any method of execution regardless of how violent or gruesome it may be, and the deterrence rationale would be supported by punishment known to be painful, but the desire for humanity places certain restraints on application of the ultimate punishment. Whether a method of execution is humane has been the central question for governments seeking new ways to carry out death sentences.

In 1888, the New York State Commission tasked with finding a preferable alternative to hanging recognized "dealing humanely with the individual," as a necessary consideration for capital punishment.⁵² Subsequently,

it," and 4% said it serves justice. Only 7% said "They will repeat crime/Keep them from repeating it," and 6% said "Deterrent for potential crimes/Set an example").

⁴⁸ See Corinna B. Lain, *The Highs and Lows of Wild Justice*, 50 TULSA L. REV. 503, 514 (2015) ("Today's death penalty is all about retribution—we put people to death because we think they deserve it.") (citing to GALLUP, *supra* note 47).

⁴⁹ See, e.g., THANE ROSENBAUM, *PAYBACK* 198 (Univ. of Chicago Press 2013) (writing in support of capital punishment, Fordham Law Professor Thane Rosenbaum identified retribution as the main purpose of having the death penalty, explaining, "Retribution itself can provide its own justification for punishment—wrongdoers receive what they deserve because of what they have done, regardless of whether it helps prevent a future act."); see also Campbell Robertson, *The Prosecutor Who Says Louisiana Should 'Kill More People'*, N.Y. TIMES, July 7, 2015, http://www.nytimes.com/2015/07/08/us/louisiana-prosecutor-becomes-blunt-spokesman-for-death-penalty.html?_r=0 (reporting that Louisiana District Attorney Dale Cox described retribution as a "valid societal interest," in support of his argument that the death penalty should be used more often).

⁵⁰ See SCOTT TUROW, *ULTIMATE PUNISHMENT: A LAWYER'S REFLECTIONS ON DEALING WITH THE DEATH PENALTY* 49 (2003).

⁵¹ See, e.g., Paul Thornton, *Nothing 'botched' about Oklahoma execution, these readers say*, L.A. TIMES, April 30, 2014, <http://www.latimes.com/opinion/opinion-la/la-ol-oklahoma-execution-mailbag-20140430-story.html>; see SARAT, *supra* note 7, at 4–5 (quoting an emergency worker who removed bodies from the site of the 1995 Oklahoma City bombing talking about Timothy McVeigh, "They should amputate his legs with no anesthesia... and then set him over a bunch of bamboo shoots and let them grow up into him until he's dead").

⁵² See NEW YORK STATE COMM'N, *supra* note 11, at 13–14.

changes in state execution protocols have been motivated by political pressures in favor of humane executions regardless of Eighth Amendment protections.⁵³

When the Supreme Court of Nevada reviewed the state's law implementing lethal gas as the method of punishment in 1923 the Court recognized that the legislature "sought to provide a method of inflicting the death penalty in the most humane manner known to modern science."⁵⁴ As Chief Justice John Roberts wrote for a plurality in *Baze v. Rees*, state legislatures have consistently fulfilled the role of implementing execution procedures "with an earnest desire to provide for a progressively more humane manner of death."⁵⁵ The need for humane executions has been a consistent driving force behind the long and tiresome search for swift and painless means of imposing the death sentence.⁵⁶

Unfortunately, each new method of conducting executions came with its own problems. As public hangings often exhibited slow and painful deaths by suffocation, the "long drop" method was introduced to break the necks of the condemned and render prisoners lifeless without strangulation or suffocation.⁵⁷ This method, however, did not consistently deliver the desired results and eventually gave way to technological advances allowing executions by electrocution.⁵⁸ Over the next hundred years many found that electrocution did not prove humane in every case and some governments introduced the gas chamber instead.⁵⁹ Despite some botched executions, lethal gas remained the preferred method of execution in some states without a single state abandoning the gas chamber in favor of electrocution.⁶⁰ While none of these methods of execution resulted in botched attempts as frequently as lethal injection, demonstrations of inhumanity moved citizens and their legislatures to seek new punishments.⁶¹ A desire for humanity has necessitated changes in execution methods and should continue to do so.

⁵³ Jonathan S. Abernethy, *The Methodology of Death: Reexamining the Deterrence Rationale*, 27 COLUMBIA HUM. RTS. L. REV. 379, 397 (1996).

⁵⁴ *State v. Gee Jon*, 211 P. 676, 682 (Nev. 1923).

⁵⁵ *Baze v. Rees*, 533 U.S. 35, 51 (2008).

⁵⁶ See Melvin F. Wingersky, *Report of the Royal Commission on Capital Punishment (1949-1953): A Review*, J. OF CRIM. L., CRIMINOLOGY, AND POLICE SCI. 695, 713-714 (1954) (stating that the Royal Commission on Capital Punishment evaluated the death penalty as applied in the Western world using "humanity, certainty and decency as yardsticks" for comparing execution methods).

⁵⁷ Abernethy, *supra* note 53, at 397.

⁵⁸ See SARAT, *supra* note 7, at 60.

⁵⁹ See SARAT, *supra* note 7, at 86-89.

⁶⁰ Abernethy, *supra* note 53, at 404 (stating that no state has ever moved from the use of lethal gas to the use of electrocution, while other states have shifted in the reverse direction).

⁶¹ See SARAT, *supra* note 7, at 177.

Despite the lack of a Supreme Court decision invalidating any method of punishment as cruel and unusual, state governments motivated by democratic pressures have shifted between various methods for executing the condemned in search of more humane execution methods. As of the time of publication of this comment in 2016, lethal injection, electrocution, lethal gas, firing squad, and hanging each remains as a legal method of execution in at least one state.⁶² While the perfect method remains elusive, new developments are still being contemplated for the purposes of retribution and deterrence with consideration for humanity.

III. PROPOSALS FOR MORE HUMANE PUNISHMENT

While the majority of the Supreme Court upheld Oklahoma's lethal injection protocol as a constitutional execution method, Justice Steven Breyer authored a dissent in *Glossip* arguing that capital punishment itself is unconstitutional.⁶³ "Rather than try to patch up the death penalty's legal wounds one at a time," he wrote, "I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution."⁶⁴ Breyer argues that the Eighth Amendment may forbid capital punishment in light of the Court's view that death penalty statutes must contain "safeguards sufficient to ensure that the penalty would be applied reliably and not arbitrarily."⁶⁵

Justice Breyer uses three characteristics of capital punishment in the United States to support this argument: (1) the risk of executing innocent people, (2) the arbitrary nature of capital sentencing and (3) procedural delays necessary in ensuring justice is carried out in capital cases.⁶⁶ In Part I of the dissent he points to specific examples of prisoners who were executed and later proven to be innocent of crimes they were charged with.⁶⁷ In Part II he describes the imposition of the death penalty as arbitrary by questioning society's ability to determine egregiousness of crimes and supports this perspective with evidence that which county a crime is committed in often determines whether the accused will be sentenced to death.⁶⁸ In Part III he finds that excessive delays in carrying out death sentences render executions unlikely causes of death for most capital convicts and undermine

⁶² DEATH PENALTY INFO. CTR., *supra* note 2.

⁶³ See *Glossip*, 135 S. Ct. at 2755–2780 (2015) (Breyer, J., dissenting).

⁶⁴ *Glossip*, 135 S. Ct. at 2755.

⁶⁵ *Glossip*, 135 S. Ct. at 2755 (citing *Gregg v. Georgia*, 428 U.S. 153, 187 (1976)).

⁶⁶ *Glossip*, 135 S. Ct. at 2756.

⁶⁷ *Glossip*, 135 S. Ct. at 2756–59.

⁶⁸ *Glossip*, 135 S. Ct. at 2759–64.

the penological purpose of the death penalty.⁶⁹ Finally, Justice Breyer refers to the abandonment of its use in most states as evidence of the constitutional deficiencies of capital punishment.⁷⁰

With the exceptions of Justice Breyer and Justice Ginsburg, who joined in the dissent, the U.S. Supreme Court should be expected to continue upholding the institution of capital punishment and methods of inflicting it in the foreseeable future. In oral arguments at the Supreme Court for *Glossip*, Justice Sonia Sotomayor mentioned that Oklahoma could conceivably use gas chambers or firing squads to execute prisoners.⁷¹ This assertion is consistent with the conclusions reached by many commentators as well as some state legislatures that other methods of execution are preferable to lethal injection.⁷² While only thirty-four executions by firing squad have taken place in the United States since 1900, none of these have been botched according to Austin Sarat's research.⁷³ Lethal gas executions have gone awry less frequently than lethal injections, and death penalty advocates continue to propose gas chambers as an alternative method of punishment.⁷⁴ One scholar who proposed a means of evaluating execution methods in 1995 concluded that executions by guillotine would survive such scrutiny.⁷⁵ Even hangings have been botched at a significantly lower rate than lethal injections.⁷⁶ To propose implementation of the noose or guillotine for humane punishment in the twenty first century would resemble a Swiftian modest proposal more than it would pave the way for reconstructing the gallows, but these methods and numerous others would serve the purposes of capital punishment and survive Eighth Amendment scrutiny with flying colors.⁷⁷

In the words of Sarat, "Painful death might be more just and more effec-

⁶⁹ *Glossip*, 135 S. Ct. at 2764–72.

⁷⁰ *Glossip*, 135 S. Ct. at 2772–76.

⁷¹ Transcript of Oral Argument at 18, *Glossip v. Gross*, 135 S. Ct. 2726 (2015) (No. 14-7955).

⁷² See, e.g., P. Thomas DiStanislao, III, Comment, *A Shot in the Dark: Why Virginia Should Adopt the Firing Squad as its Primary Method of Execution*, 49 U. RICH. L. REV. 779, 802–805 (2015); Robert J. Sech, *Hang 'Em High: A Proposal for Thoroughly Evaluating the Constitutionality of Execution Methods*, 30 VAL. U. L. REV. 381 (1995); UTAH CODE ANN. § 77-18-5.5 (2)-(4) (West 2015) (establishing firing squad as the alternative method of execution); OKLA. STAT. tit. 22, § 1014 (B)-(D) (2015) (setting nitrogen hypoxia, electrocution, and firing squad as alternative methods of execution).

⁷³ SARAT, *supra* note 7, at 177.

⁷⁴ Compare SARAT, *supra* note 7, at 177 with Tom McNichol, *Death by Nitrogen*, SLATE.COM, May 22, 2014, http://www.slate.com/articles/news_and_politics/jurisprudence/2014/05/death_by_nitrogen_gas_will_the_new_method_of_execution_save_the_death_penalty.html.

⁷⁵ See also Robert J. Sech, *Hang 'Em High: A Proposal for Thoroughly Evaluating the Constitutionality of Execution Methods*, 30 VAL. U. L. REV. 381, 417–18 (1995) ("the guillotine's speed, painlessness, and reliability develop a good case for its being held a constitutional method of punishment.").

⁷⁶ SARAT, *supra* note 7, at 177.

⁷⁷ See generally JONATHAN SWIFT, A MODEST PROPOSAL (1789) (suggesting, satirically, that Irish children should be eaten to solve an English hunger crisis).

tive as a deterrent than a death that is quick, quiet and tranquil.”⁷⁸ But while both retributive and deterrent purposes of capital punishment may be served by excessively painful death, we also must consider humanity and the constitutional prohibition on cruel and unusual punishment. The question of how to accomplish the “mere extinguishment of life” has not been answered with a lethal drug cocktail. There are several alternative execution methods available, including firing squads, gas chambers and the guillotine, which would effectively serve the retributive purposes of capital punishment without invoking the Supreme Court’s definition of cruel and unusual punishment.

This comment proposes that lethal injections should be discontinued as an unreliable and flawed means of terminating human life. The search for a new execution method should proceed with consideration for the purposes of capital punishment and limited by humane concerns and narrow Eighth Amendment restrictions. The result of the search for a humane method of execution in the twenty first century may lead to realization that the termination of human life is inherently cruel, violent and inhumane.

⁷⁸ SARAT, *supra* note 7, at 4.