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# Nothing Less than the Dignity of Man: Evolving Standards, Botched Executions and Utah's Controversial Use of the Firing Squad

Christopher Q. Cutler

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NOTHING LESS THAN THE DIGNITY OF MAN: EVOLVING  
STANDARDS, BOTCHED EXECUTIONS AND UTAH’S  
CONTROVERSIAL USE OF THE FIRING SQUAD

CHRISTOPHER Q. CUTLER<sup>1</sup>

Human justice is sadly lacking in consolation; it can only shed blood for blood. But we mustn’t ask that it do more than it can.<sup>2</sup>

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<sup>2</sup>ALEXANDRE DUMAS, THE COUNT OF MONTE CRISTO 115 (Bantan Books ed. 1981) (1846).

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#### I. INTRODUCTION

No trip to London would be complete without paying a visit to Madame Tussaud's Wax Museum. After purchasing tickets, the visitors are ushered into an elevator that ascends to the top floor. There, they are greeted by hundreds of life-like reproductions of the famous and the infamous, the celebrated and condemned. At Madame Tussaud's, history finds itself enveloped in wax. Descending from the top floor, a veritable history lesson unfolds, with the people who defined world history enshrined in cold reproduction. Finally, one arrives at the museum's basement. There, suitably, is the chamber of horrors.

Entering the chamber of horrors, the squeamish are given fair warning. And such warning is clearly understated. The chamber is a shrine to the macabre. Relics from the French Revolution spark the imagination—repulsion grows in the pit of the stomach when staring at the blade that sliced through Marie Antoinette's neck. The cold steel of the guillotine is joined by bloody recreations of Jack the Ripper's nightly adventures and Charles Manson's family outings. There, among the grizzly and the damned, is a reenactment of an execution so influential as to warrant a place in horror's hall of fame. Thousands of spectators each year watch as the wax likeness of Gary Gilmore is shot in the heart.

In 1978, four shots in Utah were heard "round the world." After a decade-long silence, Utah ushered in the modern death penalty era by firing squad. The resumption of executions garnered considerable international attention. Gilmore's execution became a world sideshow attraction, not only for its distinction as the first execution in the United States in over a decade, but several other factors also made the execution notorious. Aside from its significance as the first post-*Furman* execution, the method of Gilmore's death fascinated the world. Madame Tussaud and the world obsessed with Gilmore's killing because the State of Utah tore into his flesh with bullets, spilling his blood on the ground.

In the history of this nation, the tools placed before the executioner have rarely been so uniform. Due to statutory revision and public outcry, the predominant—nearly exclusive—manner of killing is that referred to by the condemned as the

“ultimate high.”<sup>3</sup> Lethal injection has become the modern guillotine, accepted by the populace as the “humane” manner by which the State may lawfully extinguish life. Today potassium chloride lubricates the death machine. Despite an increasingly successful movement, particularly in the southern “death-belt” states,<sup>4</sup> to curtail the use of the electric chair and the gas chamber, some states still maintain an alternative to lethal injection, though most remain unused. While not predominant in controversy, Utah’s use of the firing squad continues to incite commotion.

In 1608, the first recorded execution in the American colonies occurred. George Kendall, one of the original councillors of the Virginia colony, became the nation’s first firing-squad victim for plotting to betray the colony to Spain. Since then, 143 people have been killed by American firing squads.<sup>5</sup> Many firing squad executions arose during colonial days or during periods of territorial governance. Currently, three States allow for execution by firing squad: Utah,<sup>6</sup> Idaho,<sup>7</sup> and Oklahoma.<sup>8</sup> Idaho and Oklahoma maintain the firing squad option as an alternative if lethal injection were ruled unconstitutional or became impracticable.<sup>9</sup> Utah is the only State that actively executes by firing squad.

<sup>3</sup>See JAMES A. INCIARDI, *CRIMINAL JUSTICE* 503 (3d ed. 1990).

<sup>4</sup>Of the 711 executions in the United States between 1976 and 2001, 579 occurred in the South. See Nancy Benac, *A Profile of the Nation’s Executed: Poor, White Southern Dropouts*, *HOUSTON CHRONICLE* May 8, 2001, at A4. Of those executed in the South, 246 of the executions occurred in Texas. See *id.* In 2001, 79% of all executions occurred in the South. See Death Penalty Information Center, *available at* [www.deathpenaltyinfo.org/YearEndReport2001.pdf](http://www.deathpenaltyinfo.org/YearEndReport2001.pdf) (last visited Oct. 8, 2003).

<sup>5</sup>See M. WATT ESPY AND JOHN ORTIZ SMYKLA, *EXECUTIONS IN THE UNITED STATES: 1608-1987* (1987) (hereinafter “Espy file”). The Espy file data counts those firing squad executions in the Colonies, the territories, and the States. Since the creation of the Espy file, Utah executed John Albert Taylor by firing squad. There have also been many military firing squads in our Nation’s history that are not included in the Espy file data. For instance, at least 185 men were executed by firing squad during the Civil War.

<sup>6</sup>See UTAH CODE ANN. § 77-18-5.5 (West 1999).

<sup>7</sup>See IDAHO CODE § 19-2716 (Michie 1982).

<sup>8</sup>See OKLA. STAT. ANN. Tit. 22 § 1014. Also, any federal death sentence under the Federal Death Penalty Act of 1994 could result in an execution by firing squad if prosecuted in a jurisdiction allowing for that method. See Christopher Q. Cutler, *Death Resurrected: The Reimplementation of the Federal Death Penalty*, 23 *SEATTLE U. L. REV.* 1189, 1214 (2000).

<sup>9</sup>Idaho law provides that the death penalty will be carried out by lethal injection except in any case where the director finds it to be impractical to carry out the punishment of death by administration of the required lethal substance or substances for the reason that it is not reasonably possible to obtain expert technical assistance, should such be necessary to assure the infliction of death without unnecessary suffering, the sentence of death may be carried out by firing squad, the number of members of which shall be determined by the director.

IDAHO CODE § 19-2716. In 1980, the American Medical Association affirmed a resolution to end physician-aided executions. Doctors still assist in the execution process. However, Idaho law guards against the functional end of the death penalty due to an inability to receive medical assistance for lethal injections. Oklahoma inflicts lethal injection unless that method “is held unconstitutional by an appellate court of competent jurisdiction, then the sentence of death shall be carried out by firing squad.” OKLA. STATE. ANN. tit. 22 § 1014.

Recent years have seen an increased public awareness of capital punishment and advanced concern for the administration of death. The death penalty finds itself under attack from all sides—actual innocence, juvenile executions, racial disparity in capital sentencing, the execution of the mentally retarded or impaired—all topics which grab the headlines and preoccupy the courts. In some jurisdictions, particularly those still using the electric chair, discussion and debate revolves around the method by which a State extinguishes a murderer's life. For over a century, the United States Supreme Court has remained aloof from considering the dignity of a particular mode of execution. Individual states, whether judicially or politically, responded to national concern and moved towards more humane methods of death.

Recent events in Utah highlight the increased national concern over the death penalty. In the summer of 2003, Utah planned to execute two men by firing squad on consecutive nights. Both men had given up their right to judicial review, but reinstated their legal proceedings and the State did not kill them. But news of the reactivation of Utah's firing squad created an intense public maelstrom, with the nation's eyes turned to that violent method of death. In its wake, the Utah Sentencing Commission recently announced that it will support legislation to put an end to the firing squad.<sup>10</sup>

While outrage boils to the surface when Utah uses its firing squad option, there is little substantive legal development concerning the firing squad's use.<sup>11</sup> Few cases have challenged the firing squad's constitutionality. This article discusses the legal and political implications of the firing squad. Using the Supreme Court's ever-developing Eighth Amendment jurisprudence as a guide, this article discusses whether the firing squad, both historically and in its present application, passes constitutional muster. Beyond those factors that trigger constitutional protection, this article discusses those elements of the firing squad's use which define society's humanity and demonstrate our dignity. In the end, those factors are framed and fashioned by each individual's view of decency and dignity.

## II. HISTORICAL USE OF UTAH'S FIRING SQUAD

There has been a lot of loose talk about Utah justice. I don't know whether Utah justice is any different from justice in other places. . . . Justice is a complicated maneuver. It takes a hundred different kinds of men doing a hundred different things, and any of them can be wrong. But you can't throw it out or blow it up because of the chance or error, or even because of some particular error. . . . You have to go ahead and do the

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<sup>10</sup>Stephen Hunt, *End to Firing Squads Sought*, S.L. TRIB., Aug. 7, 2003, at A1; Jennifer Dobner, *Firing Squad is Under Fire*, DESERET NEWS, Aug. 7, 2003, at B01.

<sup>11</sup>The last serious and substantial legal article to deal with the constitutionality of the firing squad was published in 1979. Then, that author focused on the religious implications of Utah's firing squad. See Martin R. Gardner, *Illicit Legislative Motivation as a Sufficient Condition for Unconstitutionality Under the Establishment Clause—A Case for Consideration: The Utah Firing Squad*, 1979 WASH. U. L. Q. 451 (1979). Other articles have touched on the topic, but only in a cursory fashion. The author hopes that this work will fill a void in legal scholarship.

best you know how, doing your own part of the job, or there's no security for anyone anywhere.<sup>12</sup>

Utah has a vibrant and colorful history. Utah, truly the "Crossroads of the West," finds itself at the historical intersection of the wild, wild west and the contemporary international community. Utah is perpetually in transition, continually fluctuating between an infusion of new ideas, customs, and people, and its rich and entrenched pioneer heritage. The recent Winter Olympic games punctuated Utah's paradoxical hold on the past while it grasps wildly for the future. Utah's firing squad is an area in which western justice and modern jurisprudence collide, often clashing and crashing in their assimilation.

People like to read about murder. Something of the "imp of the perverse" draws our attention to fictional killers and the stranger-than-fiction reality of true crime. This often results in a sensational, almost tabloid, understanding of justice. Nevertheless, it is indispensable in any discussion of the firing squad to understand its past use, to comprehend its historical effectiveness, and to witness its lamentable limitations. This article will attempt to walk the fine line between the melodramatic and the historically necessary in reviewing the century-and-a-half history of the firing squad in Utah. Emphasis will be placed on execution details, not in an effort to titillate and tantalize, but because full comprehension of the minutia of an execution exposes its constitutionality, or lack thereof. In attempting to chronicle this history, the author asks forgiveness for the recitation of historical details that captivate the imagination, but may not contribute to the legal analysis. History can be blindingly captivating.

#### A. *The Firing Squad from Wilderness to Statehood*

In 1847, Brigham Young, known as an "American Moses," led a group of religious refugees to an area then governed by Mexico.<sup>13</sup> Mob violence and governmental apathy drove the Mormons westward, craving the independence the frontier afforded. Fleeing violent religious persecution, the industrious members of the Church of Jesus Christ of Latter-day Saints sought solace and solitude in their new mountain home.<sup>14</sup> Soon after their arrival in the Salt Lake valley, the area officially became part of the United States through the Treaty of Guadalupe Hidalgo.<sup>15</sup> With great ambition, this self-labeled "peculiar people"<sup>16</sup> sought to form a

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<sup>12</sup>WALLACE STEGNER, *JOE HILL: A BIOGRAPHICAL NOVEL* 310 (1950).

<sup>13</sup>*See generally*, LEONARD ARRINGTON, *BRIGHAM YOUNG: AMERICAN MOSES* 130-52 (1986).

<sup>14</sup>The Latter-day Saints' thirst for freedom was best captured by one pioneer, William Clayton, who penned the epic hymn memorializing their trek, *Come, Come, Ye Saints*. Clayton wrote:

We'll find the place which God for us prepared,  
Far away in the West.  
Where none shall come to hurt or make afraid,  
There the Saints will be blessed.

*HYMNS OF THE CHURCH FOR JESUS CHRIST OF LATTER-DAY SAINTS* 30 (1985).

<sup>15</sup>*See* NELS ANDERSON, *DESERET SAINTS: THE MORMON FRONTIER IN UTAH* 87 (1966).

government that, while protecting the independence and self-government of the populace, would one day gain admittance as a State.

Understandably, the extreme isolation of the mostly-homogeneous Latter-day Saints in the first years of settling the Salt Lake valley created a political society unlike any other in nineteenth-century America. Church members' intense devotion supported an environment where ecclesiastical influence colored many aspects of civil and political life. Such a religious environment produced laws, traditions, and mores differing from the rest of the United States. An example of this may be found in territorial Utah's first attempt at crafting a capital punishment statute.

While awaiting the disposition of their first of many applications for statehood, citizens of Utah created a legislative body. Designating their land the State of Deseret,<sup>17</sup> the legislators began forming law.<sup>18</sup> On January 16, 1851, the General Assembly of the State of Deseret passed its first statute authorizing capital punishment: "Be it further ordained, that when a person shall be found guilty of murder . . . and sented [sic] to die, he, she, or they shall suffer death by being shot, hung, or beheaded."<sup>19</sup> The putative State of Deseret inserted two uncommon, and arguably sanguine, methods of execution: beheading and firing squad.<sup>20</sup>

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<sup>16</sup>This biblically-based designation separates the righteous from the "world." See, e.g., *Deuteronomy* 14:2 (King James Version) ("Thou art a holy people unto the Lord thy God, and the Lord hath chosen thee to be a peculiar people unto himself, above all nations that are upon the earth."); 1 *Peter* 2:9 (King James Version) ("But ye are a chosen generation, a royal priesthood, a peculiar people; that ye should shew forth the praises of him who hath called you out of darkness into his marvelous light.").

<sup>17</sup>The name "Deseret" comes from a Book of Mormon term for the industrious honeybee. See *THE BOOK OF MORMON*, Book of Ether 2:3. The envisioned State of Deseret covered a great deal of the American West, including portions of Nevada, California, Colorado, Arizona, New Mexico, Idaho, and Wyoming. See JEAN BICKMORE WHITE, *CHARTER FOR STATEHOOD: THE STORY OF UTAH'S STATE CONSTITUTION*, 128 n.17 (1996). The creation of other territories and states slowly whittled away the proposed size of Utah over the years.

<sup>18</sup>See JOSEPH FIELDING SMITH, *ESSENTIALS IN CHURCH HISTORY* 391-93 (1979).

<sup>19</sup>*CRIMINAL LAWS OF THE STATE OF DESERET*, Sec. 10 (1852).

<sup>20</sup>*Id.* Utah's controversial use of the firing squad, both throughout history and at the present time, is occasionally attributed to a belief in "blood atonement;" that is, some sins are so grievous that the actor must begin making his eternal payment for those sins here on earth by spilling his blood on the ground. While some support can be found for the proposition that theological doctrine influenced the original enactment of the firing squad, no evidence suggests a religious basis for the *modern* use of the firing squad. Claims that Utah's modern use of the firing squad is based on blood atonement are often found in sensationalistic writing such as Mikal Gilmore's *Shot to the Heart*, but occasionally filter into academic writing as well. In the end, the complex historical and theological implications of blood atonement are beyond the scope of this article. Several factors, however, should detract from any continued and perfunctory attempt to link the modern firing squad and any blood atonement theory: (1) no man has ever been improperly forced to die by firing squad and religion apparently plays no part in the prisoner's selection of execution method; (2) the Mormon church currently disavows any blood atonement theory; (3) blood atonement is neither popularly discussed or commonly understood by most Utahns; and (4) there is no evidence that the reintroduction of the firing squad after the Supreme Court case of *Furman* is attributable to theological influence. Importantly, the Utah Sentencing Commission recently sought the Latter-day Saint

Utah failed in its petition for statehood and would remain under territorial governance for over four decades.<sup>21</sup> The use of the firing squad, however, would continue throughout Utah's history. In 1852, the officially-created territorial legislature of Utah enacted a criminal code adopting the provisions enacted by the General Assembly of the State of Deseret.<sup>22</sup> At the time the legislative body drafted that statute, execution by hanging was the preferred method in the United States. Utah sporadically hung offenders. In 1854, the first officially-sanctioned execution took place. Two Native Americans named "Long Hair" and "Antelope," aggrieved for perceived wrongdoings, attacked, killed, mutilated, and scalped two young boys.<sup>23</sup> With the help of friendly Native Americans, the murderers were apprehended. The first judicially-sanctioned execution in Utah was effectuated by a double hanging from the Jordan River Bridge in Salt Lake County.<sup>24</sup>

In 1859, the territory of Utah hanged Thomas H. Ferguson, a man who "preach[ed] his own funeral sermon."<sup>25</sup> While standing at the gallows, the loquacious Ferguson delivered his last words in a speech which accounts chronicle as between one and eight hours in length.<sup>26</sup> Complaining about the sentencing judge, Ferguson said that

I was tried by the statutes of Utah which gives a man the privilege of choosing whether he'll be hanged, beheaded, or shot. Was I given the

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Church's opinion of their recent decision to support the elimination of the firing squad. The church's spokesman delivered the following single-sentence statement: "The Church of Jesus Christ of Latter-day Saints has no objection to the elimination of the firing squad in Utah." Linda Thompson, *Church Not Against a Firing Squad Ban*, DESERET NEWS, Sep. 4, 2003, at A01; Stephen Hunt, *Church Rules on Firing Squad*, S. L. TRIB., Sep. 5, 2003, at B1. Until reputable scholarship adequately addresses the issue, attributing the modern use of the firing squad to blood atonement is inappropriate.

<sup>21</sup>L. KAY GILLESPIE, *THE UNFORGIVEN: UTAH'S EXECUTED MEN* (1997). For an account of Utah's long transition to statehood, see generally White, *supra* note 17, at 18-87; J. ALLEN & G. LEONARD, *THE STORY OF THE LATTER-DAY SAINTS* (1992); Anderson, *supra* note 15, at 83-139, 307-55; ERNEST H. TAVES, *BRIGHAM YOUNG AND THE NEW ZION*, 99-131 (1991).

<sup>22</sup>On March 6, 1852, the Territory of Utah approved the following two provisions of the criminal code: (1) "Murder of the first degree . . . shall be punished with death." Sec. 7, Criminal Laws of the Territory of Utah; and (2) ". . . said persons shall suffer death by being shot, hung, or beheaded as the Court may direct, or the person so condemned shall have his option as to the manner of his execution." Sec. 175, Criminal Laws of the Territory of Utah. See also Gardner, *supra* note 11, at 451.

<sup>23</sup>GILLESPIE, *supra* note 21, at 35-37.

<sup>24</sup>GILLESPIE, *supra* note 21, at 37. Gillespie's work is the most comprehensive and detailed work exploring Utah's capital punishment history. This article relies heavily on Gillespie's excellent work; the author is greatly in debt to Gillespie's research. The author encourages any interested in Utah's death penalty to read Gillespie's book.

<sup>25</sup>Ezra J. Poulson, *Utah's First Hanging*, DESERET NEWS MAGAZINE (Aug. 5, 1951). Ferguson's execution is sometimes referred to as Utah's first hanging. The hanging of Long Hair and Antelope, done pursuant to judicial decree, predate that execution.

<sup>26</sup>See Harold Schindler, *Lengthy Gallows Soliloquy Impedes Swift Justice*, S. L. TRIB., June 27, 1993, at E1; GILLESPIE, *supra* note 21, at 37.

choice? No, I was not. All Judge Sinclair wanted was to hang a man, then he was willing to leave the territory. And he had too much whiskey in his head to know that the day he sentenced me to be executed would be Sunday. The people laughed at him, so he had to change the date.<sup>27</sup>

Presumably, Ferguson wished to be the first to die by firing squad. The territory hanged him, though he stated "I have a good heart in me. I never thought I would be executed for a crime."<sup>28</sup> Hangings, however, would be infrequent in Utah. Despite its inclusion as a method of execution, Utah never beheaded anyone.<sup>29</sup> The firing squad would soon prove to be the State's predominant execution method.

Whether by choice or by default, the firing squad became the most common method of execution in Utah. In 1861, the State carried out its first firing squad execution. The facts surrounding the underlying murder were not an uncommon occurrence in the arid west. William Cockroft resolved a dispute over irrigation water with a shotgun. The adjudication of Cockroft's case proceeded quickly, as did most early capital cases. Cockroft committed the murder on July 31, 1861. A jury found him guilty of first degree murder September 13 and the State executed him eight days later. As noted by Gillespie, Cockroft "was executed within the court house enclosure 'to the disappointment of a few hundred persons who were anxiously waiting in the street for the prisoner to be brought out and taken to some place outside the city, where it was supposed he would be executed in a public manner.'"<sup>30</sup>

Between Cockroft's execution in 1861 and Utah becoming a state in 1896, Utah executed 11 men.<sup>31</sup> A firing squad carried out all but the first three of these

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<sup>27</sup>See Poulson, *supra* note 25. Ferguson's umbrage at being denied the choice of execution method defies a newspaper editorial of the nineteenth century. In 1876, a California newspaper examining Utah's capital punishment laws commented that "in capital convictions the culprit has the right to select the manner of the three methods . . . although this favor is granted to criminals, they seldom take advantage of the statutory right, because in that solemn extremity human nature cares little for such preferences." Schindler, *supra* note 26. In the end, this article will show that some men care a great deal about which method extinguishes their life

<sup>28</sup>Poulson, *supra* note 25.

<sup>29</sup>Utah dropped beheading as an option in 1888. See GILLESPIE, *supra* note 21 at 13; 2 COMP. L. UTAH § 5131 (1888).

<sup>30</sup>GILLESPIE, *supra* note 21, at 40 (quoting a contemporary newspaper article describing Cockroft's execution).

<sup>31</sup>The following men were executed before 1896:

1. "Long Hair" - hanged for the murder of two young boys in 1854.
2. "Antelope" - hanged for the murder of two young boys in 1854.
3. Thomas Ferguson - hanged for the murder of his employer while intoxicated on Sept. 17, 1859.
4. William Cockroft - first individual executed by firing squad for the murder of a man over water rights on September 21, 1861.
5. Jason R. Luce - executed by firing squad for murder on January 12, 1864.
6. Robert Sutton - executed by firing squad only eight days after committing murder on October 10, 1866.

executions. During this time period, execution quickly followed the murder.<sup>32</sup> The executions, for the most part, were carried out in the county of conviction. Utah's early use of the firing squad, while not strictly governed by administrative regulation as in modern time, generally followed a predictable pattern. One county sheriff's recollection of Robert Sutton's execution demonstrates an oft-repeated pattern:

Early in the morning, I pitched a small tent up on the bench, and had five men with rifles, four of them loaded with bullets and one loaded with powder, neither of the men knew who had the blank gun. I called out a company of calvary to keep back the crowd of people, from all over the country. I set the prisoner on a chair about sixty yards from the mouth of the tent and covered his face and opened the front of the tent, and gave the word of command, and he was shot dead we had his grave dug and buried him right there, and moved the tent and the men that night so that no one knew who did the shooting.<sup>33</sup>

Of course, each execution was unique. For instance, Chauncey Millard, the youngest man executed in Utah at age eighteen, agreed to sell his corpse to a surgeon. The agreed upon price was a pound of candy. Millard ate the candy as the firing squad shot him dead.<sup>34</sup> Another murderer, Frederick Hopt, braved the firing

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7. Chauncey W. Millard - the youngest person executed in Utah at age eighteen by firing squad for murder on January 29, 1869.

8. John D. Lee - executed by firing squad for his participation in the Mountain Meadows Massacre on March 23, 1877.

9. Wallace Wilkerson - executed by firing squad for a saloon fight ending in murder on May 16, 1879.

10. Frederick Hopt - executed by firing squad for murdering a sheriff's son in revenge on August 11, 1887.

11. Enoch Davis - executed by firing squad for murdering his wife and burying her in a potato hole on September 14, 1894.

See GILLESPIE, *supra* note 21, at 60-147; Jane Ann Walters, A Study of Executions in Utah, 20-52 (1973); RAY HAUETER, AND MAY GOD HAVE MERCY ON YOU, THE UTAH PEACE OFFICER, vol. 58, Issue 4 Winter 1981, available at <http://www.upoa.org/archives/HAUETERS/MercyonSoul.htm> (last visited Oct. 8, 2003). Prison records also mention the execution by firing squad in the Salt Lake County jail yard of an unnamed man in 1862. See James B. Hill, History of the Utah State Prison at 7 (unpublished Master's Thesis on file with Brigham Young University's Harold B. Lee Library Special Collections). None of the newspapers of the time chronicle this event; therefore, the veracity of the event is questionable. See GILLESPIE, *supra* note 21, at 3-60; Walters, *supra* note 31, at 72.

<sup>32</sup>Before 1896, in only two instances did the time between the commission of the crime and the execution exceed two years. In one case, the State tried the capital defendant four times before conviction. In the other instance, the State tried the murderer nineteen years after the commission of the offense, yet ultimately executed him within a year of his conviction. Generally, most individuals were executed well within a year. Two individuals were executed within eight days of the commission of the crime. See GILLESPIE, *supra* note 21, at 42, 44-47, 52.

<sup>33</sup>GILLESPIE, *supra* note 21, at 42 (quoting a journal entry from his great-grandfather, the Sheriff of Tooele County).

<sup>34</sup>*Id.* at 43; HAROLD SCHINDLER, ORRIN PORTER ROCKWELL: MAN OF GOD, SON OF THUNDER 353 (1993).

squad without a blindfold. Facing the convicted gunmen, Hopt exclaimed “Gentlemen, I have come to meet my fate. . . . I have no ill-will toward any man living, and am prepared and ready to meet my God.”<sup>35</sup> While manacled to the firing squad chair, Jason R. Luce “confessed all his sins and asked God for forgiveness . . . requested his brother to take care of a woman he had impregnated . . . and bid the people goodbye.”<sup>36</sup>

Another execution during that time period has long been remembered in the Beehive State. In 1876, Utah executed John D. Lee for his involvement in the Mountain Meadows Massacre, a notorious event in which several settlers in Southern Utah, in conjunction with a group of Native Americans, killed a wagon train of immigrants.<sup>37</sup> For years, the identities of those responsible remained hidden in a cloak of silence. Finally, the State tried and convicted Lee for his participation, and possible leadership role, in the murders.<sup>38</sup> No other individuals were ever brought to justice. Because Lee’s execution is unusual in many ways, the following lengthy, but well-written, narrative of his execution is compelling:

The morning was cool, the breeze sharp enough to call for an overcoat and muffler, for even though he was soon to be shot, he might as well be comfortable while he lived. Bringing him to the Meadows was either a publicity stunt or a sadistic attempt to break his morale. They could have as well have stood him against the prison wall at Beaver; he would have died as quickly, but this made better news copy.

The photographer, ironically enough, was James Fennimore of whom Lee and his family had become so fond while he lived with them at Lonely Dell. He set up his tripod and took pictures of the wagons, the officers, the general train. Lee obligingly posed for him sitting on the edge of his coffin.

The phase, “Nothing in his life became him like the leaving of it,” certainly seemed to apply here. Lee remained calm and resigned. He had written a farewell message to his wives and children the night before and when given a last chance to speak declared his innocence in a clear, strong voice, faltering only at mention of his wives and children.

“I have but little to say this morning. Of course I feel that I am on the brink of eternity, and the solemnities of eternity should rest upon my mind at the present,” he began, and after declaring that he had tried to save the

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<sup>35</sup>*Id.* at 52 (quoting Salt Lake Tribune, 12 Aug. 1887). Hopt “seemed to live a charmed life, for he ha[d] been tried four times, each time convicted of murder in the first degree and sentenced to death, and three times he ha[d] been granted new trials.” *People v. Hopt*, 9 P. 407 (Utah 1886). Apparently, the fourth time was the charm. The facts of Hopt’s case can be found at *Territory v. Hopt*, 4 P. 250 (Utah 1884).

<sup>36</sup>HOPE A. HILTON, “WILD BILL” HICKMAN AND THE MORMON FRONTIER 108 (1988).

<sup>37</sup>*See generally* JUANITA BROOKS, *THE MOUNTAIN MEADOWS MASSACRE* (1950).

<sup>38</sup>*See id.* at 188-89.

emigrants and that he was being sacrificed in a cowardly, dastardly manner, continued, "I am ready to die. I trust in God. I have no fear. Death has no terror." Finally, he closed with the words, "Having said this, I feel resigned. I ask the Lord, my God, if my labors are done, to receive my spirit."

He shook hands with those around him, removed his overcoat, hat, and muffler and handed them to his friends. Only one favor he asked of the guards, that they center his heart and not mutilate his body.<sup>39</sup> He was blindfolded, but at his request his hands remained free. At the signal "Ready! Aim! Fire!" five shots rang out, and John D. Lee fell back into his coffin without a moan or cry or a tremor of the body except for a convulsive twitching of the fingers of his left hand.<sup>40</sup>

The near dignity of Lee's execution contrasts sharply with that of Enoch Davis, sentenced to die for killing his wife and burying her in a potato hole.<sup>41</sup> As he was led to the place of execution "he called out asking if there weren't 'some prostitutes on the ranch.'"<sup>42</sup> Unsympathetically, none of the firing squad members fired a blank.<sup>43</sup>

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<sup>39</sup>History records Lee's request as "Center on my heart boys. Don't mangle my body." JUANITA BROOKS, *THE MOUNTAIN MEADOWS MASSACRE* 210 (1950). Lee's words echo those of Harry "The Breaker" Morant, who, prior to his execution by firing squad, declared "Shoot straight, you bastards, don't make a mess of it." 50 of America's Best, *FORBES*, Apr. 30, 2001, available at [www.forbes.com/fyi/2001/0403/058\\_print.html](http://www.forbes.com/fyi/2001/0403/058_print.html) (last visited Oct. 8, 2003) (hereinafter *FORBES*).

<sup>40</sup>JUANITA BROOKS, *JOHN D. LEE: ZEALOT, PIONEER BUILDER, SCAPEGOAT* 366-67. For other accounts of the Mountain Meadows Massacre and Lee's execution, see ORSON F. WHITNEY, *HISTORY OF UTAH*, Vol. II 827-29 (1893); SMITH, *supra* note 18, at 418-22; GILLESPIE, *supra* note 21, at 44-47; ALLEN, *supra* note 21, at 311-13; NEGLEY TEETERS, *HANG BY THE NECK: THE LEGAL USE OF SCAFFOLD AND NOOSE, GIBBET, STAKE, AND FIRING SQUAD FROM COLONIAL TIMES TO THE PRESENT*, 339-42 (1967). Teeter's account records a one-verse ballad of Lee's execution:

See Lee kneel upon his coffin, sure his death can do no good;  
Oh, see, they've shot him see his bosom stream with blood.

See TEETERS, *supra* note 40, at 342.

<sup>41</sup>A local paper described how Davis would be executed:

Enoch Davis will not be shot at Provo. Tents will be erected at some convenient place along one of the railways on Utah county and [the men] placed in them the night before the execution. Davis will then be brought down from the Penitentiary, placed out before the tents, and shot until he is dead.

None but officers of the law, a physician, and a couple of ministers will be permitted to witness the execution. Possibly two or three newspaper representatives will be present as Deputy Marshals.

*How Davis Will Be Shot*, *VERNAL EXPRESS*, Sep. 13, 1894, at 1. For the facts of Davis' crime, see *Enoch Davis Must Die*, *VERNAL EXPRESS*, June 21, 1894, at 1; *Davis Will Swing*, *VERNAL EXPRESS*, Nov. 3, 1892, at 1.

<sup>42</sup>GILLESPIE, *supra* note 21, at 53.

<sup>43</sup>Harold Schindler, *Taylor's Death Was Quick . . . But Some Weren't So Lucky*, *S. L. TRIB.*, Jan. 28, 1996 at A1.

A newspaper reported that “[t]he deep blush of shame fell upon the whole party. What little sympathy, if any, had been for the old man, was then and there lost, and many turned away in disgust.”<sup>44</sup> His behavior prompted an editorial reading, “Enoch Davis is dead. He died like a dog; in fact, the most despicable, mangy canine whelp that ever met an ignominious fate could not have whined itself out of existence in a more deplorable, decency-sickening state than was Enoch Davis’ last hour.”<sup>45</sup>

Most germane to a discussion of the constitutionality of the firing squad is the execution of Wallace Wilkerson in 1877.<sup>46</sup> Wallace Wilkerson and William Baxter were in continual friction in the small mining town of Eureka, Utah.<sup>47</sup> Their contention started with braggadocio on the dance floor and ended in a charged game of cribbage.<sup>48</sup> Both Wilkerson and Baxter accused each other of cheating; Wilkerson ultimately won the game by shooting Baxter.<sup>49</sup> After discharging once, Wilkerson seized Baxter and shot him a second time in the side of the head.<sup>50</sup>

Wilkerson was convicted and sentenced to die by firing squad. Wilkerson appealed his death sentence to the United States Supreme Court.<sup>51</sup> There, the Supreme Court first addressed the constitutionality of a method of execution. The legal basis for the decision will be discussed later. It is worth noting, however, that Wilkerson’s actual execution is laden with irony. Wilkerson himself, if he could have posthumously, would have scoffed at the Supreme Court’s implicit finding that “terror, pain, or disgrace” did not accompany a death by firing squad.<sup>52</sup>

On the day of his execution, Wilkerson left his cell smoking a cigar, which he carried until the end.<sup>53</sup> Some witnesses later reported that “he exhibited the unmistakable effects of liquor.”<sup>54</sup> Wilkerson refused to be blindfolded and would not submit to being tied in the chair.<sup>55</sup> He said, “I give you my word. I intend to die like a man, looking my executioners right in the eye.”<sup>56</sup> Gillespie described his May 16, 1878, execution as follows:

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<sup>44</sup>GILLESPIE, *supra* note 21, at 53.

<sup>45</sup>*Id.* at 53. Another account of the execution can be found in *Davis the Wife Murderer Shot*, VERNAL EXPRESS, Sep.20, 1894, at 1.

<sup>46</sup>The review of the facts of Wilkerson’s case is taken from Gillespie’s book: THE UNFORGIVEN. See GILLESPIE, *supra* note 21, at 47-49.

<sup>47</sup>*See id.*

<sup>48</sup>*See id.*

<sup>49</sup>*See id.*

<sup>50</sup>*See id.*

<sup>51</sup>*See id.*

<sup>52</sup>*Wilkerson v. Utah*, 99 U.S. 130, 135 (1878).

<sup>53</sup>*See Schindler, supra* note 43, at A1.

<sup>54</sup>Schindler, *supra* note 26, at E1.

<sup>55</sup>*See id.* After Wilkerson’s execution, later requests not to be tied to the chair were rejected. See *Bullets End Life of Frank Rose*, THE MANTI-MESSENGER, Apr. 28, 1904, at 3

<sup>56</sup>Schindler, *supra* note 26, at E1.

[A]round twelve he was taken to the jail yard and a paper target was pinned to his heart. . . . The instant the bullets struck him, he raised on his feet, turned partially to the south, and as he was pitching forward, took two steps and fell on his left side on the ground. On the instant of striking the ground he turned on his face, exclaiming “My God! My God! they’ve missed it.” Apparently at the command to fire, Wilkerson drew his shoulders back, and raised the paper target pinned to his jacket.<sup>57</sup> Three bullet holes were found in the target, but they were an inch above his heart. The fourth bullet hit Wilkerson’s left arm, six inches above his heart. Wilkerson lay on the ground fifteen minutes before he died, and officials briefly feared they would have to shoot him again.<sup>58</sup>

Wilkerson’s last moments were filled with the terror, pain and disgrace condemned by the Supreme Court.<sup>59</sup> Wilkerson’s botched execution, however, is an anomaly. The executions during Utah’s territorial period were generally swift and devoid of major problems. The next century would be marked by a consistent, and nearly routine, use of the firing squad.

### B. From Statehood to Furman

In 1896, Utah finally became a state. That year, a proposal was introduced before the Utah state legislature to completely abolish the death penalty.<sup>60</sup> This proposal, while ultimately unsuccessful, was the first vigorous blanket attack on capital punishment in Utah. This effort and its equally unsuccessful renewal the subsequent year represent the first vocal tremors of death-penalty dissent in Utah.<sup>61</sup> These abolitionist efforts reflected a nationwide concern about the use of the death

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<sup>57</sup>“By straightening in his chair, he had raised the target and the shooters were misdirected. Three slugs touched the target, but were well above the vital spot; the fourth bullet struck six inches from the others and shattered Wilkerson’s left arm.” *Id.*

<sup>58</sup>GILLESPIE, *supra* note 21, at 48-49. Some accounts state that it took Wilkerson twenty-seven minutes to die. See SCHINDLER, *supra* note 43, at A1.

<sup>59</sup>*Id.* at 48-49 (citations and quotations omitted). This execution prompted a local paper to call for the abolition of the firing squad:

The execution of Wallace Wilkerson at Provo yesterday affords another illustration of the brutal exhibitions of inquisitorial torture that have of late disgraced . . . the country and which have in some States so shocked the natural sensibilities of the people that extreme punishment has been abrogated from pure disgust excited by the sickening spectacles of rotten ropes, ignorantly or carelessly adjusted nooses or inexperienced marksmen. These disgusting scenes are invariably ascribed to accidental causes, but they have become so horrifyingly frequent that some other method of judicial murder should be adopted. The French guillotine never fails. The swift falling knife flashes in the light, and a dull thud is heard and all is over. It is eminently more merciful to the victim than our bungling atrocities, and the ends of justice are as fully secured.

*Id.* at 13-14.

<sup>60</sup>ROBERT E. ASHPOLE & JOSEPH E. SCOTT, CAPITAL PUNISHMENT: THE UTAH EXPERIENCE, 6 (1966).

<sup>61</sup>*Id.*

penalty that eventually led to the discontinuance of capital punishment in some jurisdictions.<sup>62</sup> The abolition movement in Utah, however, did not silence the guns.

In 1898, Utah passed its first capital punishment statute as a state.<sup>63</sup> Mirroring its territorial provision, that statute declared: “The punishment of death must be inflicted by hanging the defendant by the neck until he is dead, or by shooting him, at his election. If the defendant rejects or refuses to make election, the court at the time of rendering the sentence must declare the mode and enter the same as part of its judgment.”<sup>64</sup>

Between 1896 and 1972, Utah executed thirty-three men.<sup>65</sup> The State executed all but three of those men by firing squad.

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<sup>62</sup>For a discussion of the historical abolitionist efforts nationwide during this time period see Cutler, *supra* note 8, at 1194-96; Jeffery L. Kirchmeier, *Another Place Beyond Here, The Death Penalty Moratorium Movement in the United States*, U. COLO. L. REV. 1 (2002).

<sup>63</sup>UTAH CODE ANN § 4939 (1898).

<sup>64</sup>*Id.*

<sup>65</sup>Those executed between 1896 and 1972 were:

1. Charles Thiede - hanged for slitting his wife's throat in the first execution after statehood on August 7, 1896.
2. Patrick Coughlin - executed by firing squad for killing law enforcement officers in a shoot-out on December 18, 1896.
3. Peter Mortensen - executed by firing squad for the robbery and murder of a business acquaintance on November 20, 1903.
4. Frank Rose - executed by firing squad for murdering his wife on April 22, 1904.
5. J.J. Morris (a pseudonym, he never gave his real name to protect his parents from knowing about his death) - hung for a murder during a robbery on April 30, 1912.
6. Jules C. E. Szirmay - executed by firing squad in a botched burglary attempt ending in murder to obtain money for “scientific books” on May 22, 1912.
7. Harry Thorne - executed by firing squad for a robbery-murder committed with Thomas Riley on September 26, 1912.
8. Thomas Riley - executed by firing squad for being an accomplice to murder on October 24, 1912.
9. Frank Romeo - executed by firing squad for a robbery-murder on February 20, 1913.
10. Joe Hill - famous International Workers of the World songwriter executed by firing squad for murder on November 19, 1915.
11. Howard DeWeese- executed by firing squad for murdering his wife on May 24, 1918.
12. John Borich - executed by firing squad for murdering a woman for insurance money on January 20, 1919.
13. Steve Maslich - executed by firing squad for a murder with Nick Oblizalo on January 29, 1922.
14. Nick Oblizalo - executed by firing squad for a murder with Steve Maslich on June 9, 1922.
15. George H. Gardner - executed by firing squad for murdering two law enforcement officers on August 31, 1923.
16. Omer R. Woods - an former attorney who was executed by firing squad for the murder of his wife on January 18, 1924.
17. Henry C. Hett (also known as George Allen) - executed by firing squad for murdering a police officer on February 20, 1925.
18. Pedro Cano - executed by firing squad for murder on May 19, 1925.

Of the three men who chose not to be executed by the firing squad during this time period, their personal reasons for choosing to forgo the bullet did not focus on a fear of a violent death. J.J. Morris, apparently chose hanging because he had killed his victim with a gun. Morris stated that "I do not want to meet [the victim] on the way. He dies by bullets so I don't want to die that way. That's why I chose hanging instead of shooting."<sup>66</sup> When Kay Kirkham was to be executed, it had been forty-six years since the State of Utah had used the gallows. Kirkham stated "I chose hanging instead of the firing squad because of the publicity . . . the novelty . . . to put the state to more inconvenience."<sup>67</sup> Kirkham had also heard that the firing squad members got to keep the rifles they used. He chose to hang because "they're not getting anything free from me."<sup>68</sup>

The wisdom of their election to avoid a firing squad, however, is not readily apparent. Hanging can be a tortuous and disturbing spectacle. For example, in Thiede's case the State tried a new method of hanging in which the victim would be

19. Ralph Seyboldt - executed by firing squad for the murder of a police officer on January 15, 1926.

20. Edward McGowan - executed by firing squad for the murder of a man and the rape of his wife and two daughters on February 5, 1926.

21. Delbert Green - executed by firing squad for the murder of his wife and mother-in-law on July 10, 1936.

22. John W. Deering - executed by firing squad for murder on October 31, 1938.

23. Donald Condit - executed by firing squad for the murder while hitchhiking on July 30, 1942.

24. Walter Robert Avery - executed by firing squad for a murder-robbery on February 5, 1943.

25. Austin Cox, Jr. - executed by firing squad for killing a judge on June 19, 1944.

26. James Joseph Roedl - executed by firing squad for the murder of a hitchhiker on July 13, 1945.

27. Eliseo Mares - executed by firing squad for murder on September 10, 1951.

28. Ray Dempsey Gardner - executed by firing squad for murder on July 29, 1951.

29. Don Jesse Neal - executed by firing squad for the murder of a police officer on July 1, 1955.

30. Verne Alfred Braasch - executed by firing squad for the murder of a gas station attendant with his co-murderer Melvin LeRoy Sullivan on May 11, 1956.

31. Melvin LeRoy Sullivan - executed by firing squad for the murder of a gas station attendant with his co-murderer Verne Alfred Braasch on May 11, 1956.

32. Barton Kay Kirkham - executed by hanging for the murder of several individuals, allegedly in revenge to hurt his parents for not paying him enough attention due to their extensive church service on July 7, 1958.

33. James W. Rodgers - executed by firing squad for the murder of a co-worker on March 30, 1960.

See GILLESPIE, *supra* note 21, at 60-147; WALTERS, *supra* note 31, at 20-52; HAUTER, *supra* note 31.

<sup>66</sup>GILLESPIE, *supra* note 21, at 69. A newspaper reported of Morris' execution that "there was nothing of the gruesome nature ordinarily associated with the paying of the supreme penalty of the law." *J. J. Morris Hanged for Salt Lake Murder*, CARBON COUNTY NEWS, May 2, 1912, at 1.

<sup>67</sup>*Id.*

<sup>68</sup>See Schindler, *supra* note 26, at E1.

suddenly jerked upwards by a counterweight.<sup>69</sup> When the counterweight dropped, the force was not sufficient to break Thiede's neck. After fourteen minutes of strangulation, Thiede was pronounced dead.<sup>70</sup> These were the last three Utahns executed by hanging. Utah removed hanging as a method of execution in 1980.<sup>71</sup>

Utah's first execution by firing squad as a state occurred in 1896. Patrick Coughlin was sentenced to die for killing two police officers, thus ending a crime spree that began with stealing some berries.<sup>72</sup> When asked which method of execution he preferred, he answered "I'll take lead."<sup>73</sup> The firing squad shot Coughlin with the murder weapon.<sup>74</sup>

One execution during this period brought international attention to Utah's use of the firing squad. In 1914, a jury convicted Joe Hillstrom, commonly known as Joe Hill, for robbing a grocery store.<sup>75</sup> Before the proprietor was killed, he shot one of his assailants. The police arrested Hill the next day when he sought help for a gunshot wound. Hill claimed that he received the injury in an argument over a woman. However, he refused to give the police the name of the woman "lest her reputation be ruined."<sup>76</sup> Representing himself for much the trial, he was found guilty of murder and sentenced to die.<sup>77</sup> When asked by the judge which method of

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<sup>69</sup>A remarkably unemotional account of Thiede's execution can be found in *Thiede Pays the Penalty*, THE WASATCH WAVE, Aug. 14, 1895, at 1. GILLESPIE, *supra* note 21, at 55. Other attempts at using this "clumsy" method in other states similarly failed. See TEETERS, *supra* note 40, at 173-74. The facts of Thiede's case can be found in *People v. Thiede*, 39 P. 837 (Utah 1895).

<sup>70</sup>See GILLESPIE, *supra* note 21, at 55.

<sup>71</sup>Currently, only three states use hanging as a method of execution: Delaware, New Hampshire, and Washington. Each also uses lethal injection. See Death Penalty Information Center, *Methods of Execution*, available at [www.deathpenaltyinfo.org/methods.html](http://www.deathpenaltyinfo.org/methods.html) (last visited Oct. 8, 2003).

<sup>72</sup>The facts of Coughlin's crime can be found at *People v. Coughlin*, 44 P. 94 (1896).

<sup>73</sup>GILLESPIE, *supra* note 21, at 60.

<sup>74</sup>Rather poetically, a newspaper reported his execution as follows:

No birds sang in the branches of the leafless trees; no hum of insects droned a farewell; no soft breezes fanned the condemned man's cheek or whispered him a word of hope from the waving shrubbery as might have been in the summertime. On the contrary, the landscape never looked more drear and the crunching now sounded harsh under the foot. The cold, raw and gusty wind seemed to shriek in glee as the soul of the dead mounted on the echoes of the rifle shots and winded its way to the eternal judge.

GILLESPIE, *supra* note 21, at 60.

<sup>75</sup>The facts of Hill's crime are recorded in the Utah State Supreme Court's rejection of his appeal. See *State v. Hillstrom*, 150 P. 935 (Utah 1915).

<sup>76</sup>GILLESPIE, *supra* note 21, at 80.

<sup>77</sup>At trial, Hill dismissed his counsel by stating "I have three prosecuting attorneys here, and I intend to get rid of two of them." *Hillstrom*, 150 P. at 943.

execution he preferred, Hill responded “I’ll take shooting. I’m used to that. I have been shot a few times in the past and I guess I can stand it again.”<sup>78</sup>

Hill’s case drew international attention for two reasons: his claim of innocence, and, more importantly, his politics. Hill was an ardent supporter of the Industrial Workers of the World (IWW), a group also known as the “Wobblies.”<sup>79</sup> The Wobblies were a socialist workers organization which “represented the very dissidence of the dissent, the rebelliousness of rebellion, and it lived an increasingly violent life, battered at by all the power of industry and industry’s local law.”<sup>80</sup> The IWW used music to enlist members and educate about their cause.<sup>81</sup> Hill was the Wobblies’ most influential songwriter. Hill’s strong ties to the IWW provided fodder for allegations that politics motivated his execution.<sup>82</sup> Those allegations allowed Hill to feel like he was dying a martyr’s death, not a murderer’s.<sup>83</sup>

As Hill’s execution approached, Utah faced an avalanche of pleas for clemency from such high-profile individuals as President Woodrow Wilson and Helen Keller.<sup>84</sup> In the end, Hill could not dodge the firing squad’s bullet.<sup>85</sup> Pulitzer-prize winning writer Wallace Stegner recorded Hill’s final moments as follows:

They removed the handcuffs from Joe Hill’s wrists and put him in the armchair. Not a sound came from them. . . . [T]he white-haired doctor bent forward with his stethoscope to his ears to examine the heart of Joe

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<sup>78</sup>GIBBS M. SMITH, JOE HILL 102 (1984).

<sup>79</sup>*See id.* at 115.

<sup>80</sup>*See* STEGNER, *supra* note 12, at 344-45. Stegner’s work, a blend of history and fiction, has long been used in discussing Joe Hill’s case. Its fictional embellishments have been criticized, especially when relied upon to prove Hill’s innocence. *See* Markman & Cassell, *Protecting the Innocent, A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121, 138 (1988). The author is aware of that criticism and only relies on Stegner’s statements for their descriptive and literary value. A more detailed look at the IWW’s activities, especially in Utah, is found in *Smith, supra* note 78, at 1-14, 115-134.

<sup>81</sup>*See Smith, supra* note 78, at 9.

<sup>82</sup>*See id.* at 142-48.

<sup>83</sup>A prominent Utah defense attorney who teaches a university course on Joe Hill’s case remarks “Hill wasn’t much of a laborer, he was a troubadour. Hill fell in love with the idea of being a martyr. Many of his songs are parodies of Christian belief in the hereafter. He saw himself as a Christ figure.” Martin Reuzhofer, *Joe Hill: Murderer or Martyr to A Radical Union*, S. L. TRIB. Nov. 20, 1998, at B1.

<sup>84</sup>President Wilson’s efforts are laden with irony as Hill had often called him “Woodhead Wilson” in his writings. *See Smith, supra* note 78, at 154

<sup>85</sup>Joe Hill, however, maintained his wit until the end, as shown by the following narrative: On the day of the execution, November 9, 1915, the prison physician said to Hill: ‘You have a pretty stiff ordeal ahead of you . . . How about a slug of whiskey?’ Hill answered: ‘I don’t want no whiskey. I ain’t never drunk the stuff and I don’t intend to start now.’ Remarked the doctor wryly: ‘Perhaps you’re right. It might be habit forming.’

TEETERS, *supra* note 40, at 185.

Hill, workman and singer and rebel, hero now in a hundred IWW halls, either a martyr to law's blindness or a double murderer . . . The doctor pinned a heart shaped target on Joe Hill's right breast . . . "I die with a clear conscious!" Joe said suddenly, loudly. "I die fighting, not like a coward. But mark my words, the day of my vindication is coming!" Beyond the execution platform the sheriff stepped out one step and raised his hand. His face was graven with deep, anguished lines. "Aim!" the deep preacher-voice said. Joe struggled against the straps that held him. His fury pulled him to a strained half crouch, and he screamed toward the curtained doorway, "Yes, aim! Let her go! Fire!"<sup>86</sup>

Hill gave the command for his own death. A newspaper account recorded that "[b]efore the sound of the officer's voice had died, there were five reports, almost in unison, puffs of white smoke came from the curtained window and Hillstrom's chest sank in as though he had been hit with a mighty weight."<sup>87</sup> One of the firing squad members described his feelings:

It seemed like shooting an animal. How my thoughts wandered! It seemed an age waiting for the command to fire. And then, when it came from Hillstrom himself, I almost fell to my knees. We fired. I wanted to close my eyes, but they stared at the white paper heart, scorched and torn by four lead balls. Four blackened circles began to turn crimson, then a spurt and the paper heart was red.<sup>88</sup>

The bullets went directly into Hill's heart. He died quickly.<sup>89</sup>

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<sup>86</sup>Again, the author recognizes the fictional nature of Stegner's work. However, his exceptional writing bears repetition. The facts of this execution are corroborated by academic writing as well. See *Smith, supra* note 78, at 177, GILLESPIE, *supra* note 21, at 83.

<sup>87</sup>*Smith, supra* note 78, at 177 (quoting the SALT LAKE HERALD-REPORTER, November 20, 1915).

<sup>88</sup>*Id.* (quoting the NEW YORK TRIBUNE, November 20, 1915).

<sup>89</sup>While tangential to the discussion above, Hill's personal will should be reprinted here, if nothing more than to show his individuality and wit. It read:

My Last Will  
 My will is easy to decide  
 For there is nothing to divide.  
 My kin doesn't need to fuss and moan  
 "Moss does not cling to a rolling stone."  
 My body—Oh!—If I could choose  
 I would to ashes it reduce  
 And let the merry breezes blow  
 My dust to where some flowers grow.  
 Perhaps some fading flower then  
 Would come to life and bloom again.  
 This is my Last and Final Will.  
 Good luck to All of you  
 Joe Hill

*Smith, supra* note 78, at 174. In a last letter to the secretary of the IWW, Hill asked "Could you arrange to have my body hauled to the State line to be buried? I don't want to be

Hill's death has long been remembered in books, poems, television, and music.<sup>90</sup> His request, "Don't waste any time mourning—Organize!" has become an oft-repeated mantra in the picket line.<sup>91</sup> But aside from the political furor surrounding his execution, society will long remember Joe Hill as one who claimed innocence. Experts still question his guilt.<sup>92</sup> These attempts have been sharply criticized.<sup>93</sup> Either way, Utah's firing-squad execution of Joe Hill will long be remembered.

Execution by firing squad became routine during this time period. Utah eventually moved the place of execution from the county of conviction to the Utah State Prison, first at the old Sugarhouse facility and now at Point-of-the-Mountain, thus standardizing the execution experience. The executions during this period provide insight into the general use of the firing squad. For example, each execution during this period cost Utah between two- and six-hundred-and fifty-three dollars.<sup>94</sup> In one case, the State paid each member of the firing squad forty dollars for their

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found dead in Utah." *Id.* at 172. After cremation, Hill's ashes were first held by the Bureau of Investigation (now the F.B.I.) and later given to the National Archives. *Id.* In 1988, the ashes were given to the IWW which distributed them to a chapter in each state. His last ashes were spread across a field in Washington in 1992. *See Joe Hill's Ashes Mark Veteran's Day Massacre*, S. L. TRIB., Nov. 15, 1992, at A14. True to his request, his ashes have been spread throughout the United States—except in Utah. Hill cannot be found dead in the Beehive State. *Id.*

<sup>90</sup>For an account of tributes to Hill *see Smith, supra* note 78, at 83.

<sup>91</sup>Newspaper accounts of the period foresaw the martyr status Hill would assume: "[P]resumably there will grow up in the revolutionary group of which he was a prominent member a more or less sincere conviction that he died a hero as well as a martyr . . . This is the regrettable feature of the episode, for it may make Hillstrom dead much more dangerous to social stability than he was when alive." *Smith, supra* note 78, at 179 (quoting NEW YORK TIMES, November 20, 1915).

<sup>92</sup>Smith noted that

"[t]he question of Joe Hill's guilt or innocence is no more certain today than it was in 1915. After reviewing all available records, however, there is considerable reason to believe that Hill was denied justice in the courts of Utah, and that there was still reasonable doubt as to his guilt after the district court and the supreme court had consigned him to the firing squad."

*Smith supra* note 77, at 113; *see also* Bedeau and Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 126 (1987).

<sup>93</sup>*See* Markman & Cassel, *supra* note 80, at 138.

<sup>94</sup>*See* GILLESPIE, *supra* note 21, at 95, 124. George H. Gardner's execution cost two-hundred dollars, Omer R. Wood's execution cost three-hundred-and fifty dollars, and Austin Cox's cost six-hundred dollars. *See id.* at 95, 97, 124. In Gary Gilmore's execution in 1978, the State paid the firing squad foreman \$125 and each firing squad member \$100. *See* JOHN D. BRESSLER, *DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA* 168 (1997). By way of contrast, the two executioners in William Andrew's lethal injection were each paid \$300. *See id.* at 149. Lethal injection generally costs a state several thousand dollars in total. *See* The Florida State Committee on Criminal Justice, *A Monitor: Methods of Execution and Execution Protocols*, Appendix D (available on-line at [www.fcc.state.fl.us/fcc/reports/monitor/appdmon.html](http://www.fcc.state.fl.us/fcc/reports/monitor/appdmon.html) (last visited Oct. 8, 2003)).

effort.<sup>95</sup> John W. Deering, a man who rejected his right to counsel and pleaded guilty because he wanted to die, allowed a physician to monitor his heart with an electrocardiogram as he faced the firing squad.<sup>96</sup> His heart raced to one-hundred-and-eighty beats per minute; had he not been shot he would have died from the accelerated heart rate.<sup>97</sup> Deering's heart stopped beating fifteen seconds after the command to fire.<sup>98</sup> Other inmates were similarly declared dead within seconds.<sup>99</sup> In one case, Utah conducted a double firing squad. Verne Alfred Braasch and Melvin Leroy Sullivan killed a service station attendant during a robbery.<sup>100</sup> Two separate firing squads killed the two prisoners simultaneously; they were both pronounced dead within one minute.<sup>101</sup>

Individual idiosyncracies also played into each execution. Several prisoners were occupied with "dying like a man."<sup>102</sup> One prisoner did not want to die with his boots on.<sup>103</sup> Another dreamed of his execution three times. He had to be forcibly removed from his cell, being dragged to the chair after he collapsed.<sup>104</sup> Pedro Cano found a redemptive meaning to his death. He stated "Is it not better to die and start a new life with an opportunity to accomplish something than to be imprisoned for life behind the cold grey bars and accomplish nothing?"<sup>105</sup> Before the men shot Delbert Green, he muttered "My God! Have mercy on me." After he was shot a small crucifix fell from his dead hand.<sup>106</sup> Before Robert Avery's execution, fellow prisoners placed signs behind the firing-squad chair which read "The Last Mile" and "Crime Never

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<sup>95</sup>*Id.* at 95.

<sup>96</sup>*See id.* at 117.

<sup>97</sup>*See id.*

<sup>98</sup>*See id.*

<sup>99</sup>For example, Omer R. Woods died "within seconds" and Edward McGowan died within sixty-two seconds. *See* GILLESPIE, *supra* note 21, at 97, 107.

<sup>100</sup>*See* GILLESPIE, *supra* note 21, at 139.

<sup>101</sup>*See* GILLESPIE, *supra* note 21, at 139. For an intriguing exploration into the eleven men involved in that firing squad, *see* GINA BERRIAULT, THE LAST FIRING SQUAD, *ESQUIRE* June (1966) 88-91. The facts of the underlying murder are found in *State v. Braasch*, 229 P.2d 289 (Utah 1951).

<sup>102</sup>Particularly, one of the youngest men to be executed in Utah seemed unduly concerned with dying like a man. When two fellow death row inmates were executed before him, he asked, "[w]ell did he die like a man?" GILLESPIE, *supra* note 21, at 76-77.

<sup>103</sup>*See* GILLESPIE, *supra* note 21, at 107. The facts of Edward McGowan's crime can be found at *State v. McGowan*, 241 P. 314 (Utah 1925).

<sup>104</sup>*See id.* at 78. Frank Romeo's crime is detailed at *State v. Romeo*, 128 P. 530 (Utah 1912).

<sup>105</sup>*Id.* at 101. The facts of Cano's crime can be found at *State v. Cano*, 228 P. 563 (Utah 1924).

<sup>106</sup>*Id.* at 115. Green's appeal to the Utah Supreme Court can be found at *State v. Green*, 55 P.2d 1324 (Utah 1936); *State v. Green*, 40 P.2d 961 (Utah 1935); and *State v. Green*, 6 P.2d 177 (Utah 1931).

Pays.”<sup>107</sup> Ray Dempsey Gardner’s last words were “I’m ready to go. No one will miss me. My life is worthless.”<sup>108</sup>

Even facing death, other inmates found room for humor. When asked if he had a last request, James Rogers reportedly exclaimed “Yes—a bulletproof vest.”<sup>109</sup> Steve Maslich had a superstitious belief that he could not be killed if he took a white handkerchief to his execution. When they took him to the chair, he said “Everyday is better. You fellows are only fooling.” He soon found out otherwise.<sup>110</sup> On the other hand Henry C. Hett understood his dire circumstances. As he sat in the chair waiting for the command to fire, he repeatedly muttered “I’m sorry, I’m sorry, I’m sorry.”<sup>111</sup>

Many executions during this period were uneventful, but the circumstances of the underlying murders were by no means usual. One murderer’s trial showcased testimony from the victim’s father-in-law detailing a vision in which God showed him a trail of blood leading to the murderer’s house.<sup>112</sup> Another shot his wife in bed, then allowed her to hold her baby as she slowly bled to death.<sup>113</sup>

<sup>107</sup>*See id.* at 122. Before his death, Avery wrote an autobiography in which he stated Death to me is simply the cashing in of a stack of chips all of us receive at birth and while I have lost heavily in the game of life, I intend to face the cashier as a good loser. I have played my cards as I found them . . . But when I reached the place where all my marked cards were recognized . . . the game was practically over for me. This time I’ve been called and I’m going to shove the rest of my chips with a smile.

GILLESPIE, *supra* note 21, at 120. The facts of Avery’s case can be found at *State v. Avery*, 125 P.803 (Utah 1942),

<sup>108</sup>GILLESPIE, *supra* note 21, at 129. Gardner’s case is chronicled at *State v. Gardner*, 230 P.2d 559 (Utah 1951).

<sup>109</sup>Rogers was not the only prisoner who maintained his humor before his death. J.J. Morris spent the night before his hanging telling jokes, including one about two men about to be hung from a bridge: “The first man slipped from the noose when he was swung off the bridge and fell into the water. He swam to the shore and escaped. When they started to swing the other fellow, he said: ‘Now be sure to tie the knot tight, for I can’t swim.’” GILLESPIE, *supra* note 21, at 70.

<sup>110</sup>The facts of Steve Maslich’s crime can be found at *State v. Maslich*, 202 P. 6 (Utah 1921).

<sup>111</sup>GILLESPIE, *supra* note 21, at 100. The reason for Hett’s remorse can be found at *State v. Hett*, 231 P. 838 (Utah 1924).

<sup>112</sup>*See id.* at 60-61; UTAH’S LAWLESS FRINGE: STORIES OF TRUE CRIME 88-107 (Stanford J. Layton ed. 2001). Mortensen’s appeal in this strange case can be found in *State v. Mortensen*, 74 P.120 (Utah 1903) and *State v. Mortensen*, 73 P.562 (Utah 1903).

<sup>113</sup>*See id.* at 66. The circumstances of this heinous crime are so heart wrenching that they bear repeating in full. Gillespie’s well-written account of the tragic events is as follows:

While lying in bed with his wife in Salt Lake City at 48 West Third South, Frank Rose had been talking about her “sporting around” and how it should be stopped. According to the Salt Lake Tribune (28 Dec. 1903), Rose said, “Well, there’s only one way to stop it, and that is for me to kill you.” “All right!,” she said, “I’m perfectly willing you should. I’m perfectly satisfied to die and quit this life. It’s the only way I can stop it.” Rose then took out his pistol, placed it behind her right ear, and pulled the trigger.

At least one execution during this time period was less than routine. In 1951, Utah executed Eliseo J. Mares for a murder he committed at eighteen years of age while AWOL from the Army.<sup>114</sup> Mares' execution would be the first at Utah's new Point-of-the-Mountain facility. When the guns became silent, it was obvious that a grave error had occurred. Mares had not been shot in the heart. "The firing squad and witnesses watched in horror as Mares bled to death."<sup>115</sup>

Newspapers contained few details of Mares' execution—information from the botched execution did not surface for twenty-five years.<sup>116</sup> Accounts vary, but apparently it took a second volley of bullets to kill Mares.<sup>117</sup> Some accounts have the first round of bullets striking his stomach and hip.<sup>118</sup> Others have him struck on the wrong side of the chest.<sup>119</sup> Accounts also differ concerning the reason the gunmen missed. One author imputes a vengeful and cruel spirit to the members of the firing squad.<sup>120</sup> Others paint a more sympathetic, and unusual, scenario. Apparently Mares was popular with the prisoners and prison staff. No member of the firing squad wished to be the one firing the lethal shot. Accordingly, each aimed away from the

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She remained conscious for more than an hour. Rose later said they talked together: "She asked me to put a wet towel around her head and rub the place where the bullet had entered. I did as she asked. Then she asked me to kiss her and I did so." The *Deseret News* (26 December 1903) goes on to report that she put her arm around her husband's neck and begged him to bring the baby to her. Blood was flowing freely from the wound and the sands of life were running rapidly. The hardened man placed the little one in his mother's arms. She kissed the baby while the latter patted her head affectionately. She asked Rose to leave the baby in her arms and the man lay down beside his wife and calmly watched her die.

Rose then left, went on a drinking binge, and two days later told the police he had killed his wife. He directed them to the apartment where they found two-year-old baby Elmer next to the body of his dead mother. The child had been there the entire time. As they entered, the baby said, "Mamma won't wake up; I can't make her."

GILLESPIE, *supra* note 21, at 65-66.

<sup>114</sup>Apparently, Mares went AWOL to see his spouse and new baby. See GILLESPIE, *supra* note 21, at 127. The facts of Mares' crime are found in *Mares v. Hill*, 192 P.2d 861 (Utah 1948) and *Mares v. Hill*, 222 P.2d 811 (Utah 1950).

<sup>115</sup>STEPHEN TROMBLEY, EXECUTION PROTOCOL 11 (1992).

<sup>116</sup>See Schindler, *supra* note 26, at E1.

<sup>117</sup>See GILLESPIE, *supra* note 21, at 127.

<sup>118</sup>See *id.*

<sup>119</sup>See Martin R. Gardner, *Executions and Indignities: An Eighth Amendment Assessment of the Methods of Inflicting Capital Punishment*, 39 OHIO ST. L. J. 101, 124 (1978); TROMBLEY, *supra* note 114, at 176-77; Amy Donaldson, *Execution By Bullet Once Wasn't Rare*, *DESERET NEWS*, Jan. 25, 1996, at A16 [hereinafter Donaldson, *Execution by Bullet*].

<sup>120</sup>See Deborah W. Denno, *Is Electrocutation An Unconstitutional Method of Execution? The Engineering of Death Over the Century*, 35 WM. & MARY L. REV. 551, 689 (1994).

target.<sup>121</sup> History is inconclusive as to the gunmen's motive. If the shots were fired in malice, they reached their target. Any shots fired in mercy went wildly astray. In the end, why the firing squad missed probably meant little to Mares. "Although no one will know absolutely whether the shots blotted out consciousness earlier, it was several minutes before [Mares] was pronounced dead."<sup>122</sup>

On March 30, 1960, Utah would execute its last inmate for seventeen years. James W. Rogers shot and killed a co-worker. Roger's defense was that he was insane at the time of the murder due to a case of syphilis.<sup>123</sup> Roger's death sentence did not trouble him; he figured he would die from syphilis before the State could execute him.<sup>124</sup> He died by firing squad.

No executions occurred between 1960 and when the Supreme Court decided *Furman v. Georgia*<sup>125</sup> in 1972. In *Furman*, the Supreme Court found the nation's death penalty laws, as then administered, to be arbitrary and capricious. In a flurry, the States revised their statutory schemes. In 1976, the Supreme Court reopened the floodgates in *Gregg v. Georgia*, allowing executions to proceed anew. The first execution occurred in Utah.

#### 1. Gary Gilmore to the Present Death Row Crowd

On January 17, 1977, Gary Gilmore faced a firing squad and became the first individual in a decade to be executed in the United States. Gilmore, who was responsible for the death of a gas station attendant and a motel clerk, decided to forgo the possible lengthy appeals and allow Utah to execute him.<sup>126</sup>

Gilmore's execution became an international media sensation. The world will not soon forget the shots that opened the modern death penalty era. Even now, years later, it is rare to find a law review article addressing the modern death penalty that does not at least mention Gilmore or his final declaration "Let's do it!"<sup>127</sup> His is

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<sup>121</sup>See TROMBLEY, *supra* note 115, at 11; Donaldson, *Execution by Bullet*, *supra* note 119. This theory, however, is difficult to understand because no prison officer has ever served on a firing squad in Utah. See HAUTER, *supra* note 31.

<sup>122</sup>GILLESPIE, *supra* note 21, at 129 (quoting SALT LAKE TRIBUNE, July 18, 1976). One newspaper declared that Mares died "silently and horribly." See Schindler, *supra* note 26. Some accounts indicate that one of Utah's executed men had to be shot a second time in the head after the firing squad sought more ammunition. See Gardner, *supra* note 119, at 124. The author is not sure if this refers to Mares, another firing-squad victim, or is a mistake.

<sup>123</sup>See GILLESPIE, *supra* note 21, at 142. Roger's insanity claim is discussed in *State v. Rogers*, 329 P.2d 1075 (Utah 1958).

<sup>124</sup>See *id.*

<sup>125</sup>408 U.S. 238 (1972).

<sup>126</sup>Interestingly, the murder weapon used by Gilmore recently came up for sale. Because the gun had been stolen from a gun dealer, it was returned after Gilmore's execution. The gun's current owner believes that it is the first murder weapon to be on the market in a century. He reportedly has turned down a \$500,000 offer for the murder weapon, hoping to make more money. See Geoffrey Fattah, *Gilmore Gun Offered For Sale*, DESERET NEWS, Jan. 17, 2002, at B01.

<sup>127</sup>*Id.*

arguably the most famous modern execution—an undesirable distinction. The events leading to Gilmore’s execution were true real-life drama—the books, movies, and television programs that have risen from the ashes of his death captivated the nation. The intimate details of Gilmore’s story, while provocative, are too detailed to be properly addressed in this article.<sup>128</sup>

Gilmore chose to die by firing squad.<sup>129</sup> Gilmore also elected not to pursue an appeal in his case.<sup>130</sup> In a letter to the Utah Supreme Court he clarified the reason for hastening his death:

Any and all efforts made by any group of people including particularly the ACLU or any other organization of person or persons . . . designed to stall or delay my forthcoming legal execution set for November 15, 1976, are to be considered null and void. It is my opinion that they seek nothing but personal publicity. Whatever their reasons, they do not represent me and are acting contrary to Utah law. Utah law is clear: appeal is not mandatory on death sentence.<sup>131</sup> I have been sentenced to die November 15, 1976, at 8:00 a.m. This thing involves nobody except the sentencing court, myself and the firing squad. Don’t the people of Utah have the courage of their convictions? You sentence a man to die—me—and when I

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<sup>128</sup>The author would recommend any wishing to learn more about Gilmore’s life read Norman Mailer’s Pulitzer Prize winning novel *The Executioner’s Song*. NORMAN MAILER, *THE EXECUTIONER’S SONG* (1979) A compelling summary of the State’s post-conviction efforts to bring about Gilmore’s execution can also be found in a manuscript prepared by the assistant attorney general who supervised the Gilmore case. See Earl F. Dorius, Personal Recollections of My Involvement and the Involvement of the Attorney’s General’s Office Staff with the Gary Gilmore Case Between November 1, 1976 and January 17, 1997 (manuscript, on file with J. Reuben Clark Law School and Brigham Young University).

<sup>129</sup>See MAILER, *supra* note 128, at 442. When asked by the sentencing judge, Gilmore simply replied “I prefer to be shot.” *Id.*

<sup>130</sup>See Fattah, *supra* note 126, at B01. Gilmore’s choice to forgo the lengthy appeals process was challenged by several individuals. The United States Supreme Court, however, ruled Gilmore made a knowledgeable waiver of his right to appeal. In a decision that would hint at the future Supreme Court action in choice-of-execution cases, the Supreme Court upheld Gilmore’s choice to accept his execution:

After carefully examining the materials submitted by the State of Utah, the Court is convinced that Gary Mark Gilmore made a knowing and intelligent waiver of any and all federal rights he might have asserted after the Utah trial court’s sentence was imposed, and, specifically, that the State’s determinations of his competence knowingly and intelligently to waive any and all such rights were firmly grounded. *Gilmore v. Utah*, 429 U.S. 1012, 1013 (1976). Interestingly, of the six men who have been executed in Utah during the modern death penalty era, four of them have been “volunteers”—they have waived their remaining challenges and submitted to the State’s judgment. *Id.*

<sup>131</sup>The law has since changed. Utah law now provides an automatic, nonwaivable direct appeal to the Utah Supreme Court. UTAH CODE ANN. § 76-3-206(2)(a) (2002) (“The judgment of conviction and sentence of death is subject to automatic review by the Utah State Supreme Court within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Utah State Supreme Court for good cause shown.”).

accept this most extreme punishment with grace and dignity, you, the people of Utah want to back down and argue with me about it. You're silly. Look, I am sane, rational and more intelligent than the average person. I have been sentenced to die. I accept that. Let's do it and to hell with all the bullshit.<sup>132</sup>

In spite of (or maybe because of) the media circus surrounding the impending execution, 71 percent of Americans favored Gilmore's death by firing squad.<sup>133</sup> Notwithstanding the commotion of media and demonstrators outside the prison walls, Gilmore died quickly and quietly. After Gilmore sat in the firing-squad chair, the warden asked if he had anything to say. Gilmore uttered his famous response, "Let's do it."<sup>134</sup> A priest delivered Gilmore his last rites, then three men placed a hood over his head. They secured Gilmore's body to the chair with thick straps. A doctor located Gilmore's heart and pinned a white circle to his clothing. Silence reigned. Finally, from behind the firing-squad blind, a whispered cadence of "one, two, three"—shots tore through the silence and into Gilmore.<sup>135</sup> He "never raised a finger. Didn't quiver at all."<sup>136</sup> Blood flowed through his shirt and dripped to the floor.<sup>137</sup> Gilmore lifted his hand slightly. Twenty seconds later, he was dead.<sup>138</sup>

Since Utah ushered in the new capital punishment era, the State has executed six men,<sup>139</sup> bringing the total executions in Utah to 50. Of those, four have died by lethal

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<sup>132</sup>Dorius, *supra* note 128, at 7-8. Gilmore further explained his decision to face death to his brother:

But I am serious about this, and I don't want you or anybody else to interfere. It's totally my affair. I killed two men, the court sentenced me to die, and now I'm accepting that sentence. I don't want to spend the rest of my life on trial or in prison. I've lost my freedom. I lost it a long time ago. Now I'm jury going to make them finish the job they started twenty years ago.

MIKAL GILMORE, SHOT IN THE HEART 328 (1994). These kinds of statements by death row inmates are not uncommon. For example, a member of the "Texas Seven" recently pleaded for a death sentence: "What you call the death penalty, I call freedom. I can finally be free. I'm telling you right now I don't want another life sentence." *Jail Break Leader Gets Death Penalty*, L.A. TIMES, Aug. 30, 2001, at A21.

<sup>133</sup>Ray Boran, *Silent Majority No Longer Silent*, DESERET NEWS, Jan. 17, 1977; MAILER, *supra* note 128, at 979-80.

<sup>134</sup>MAILER, *supra* note 128, at 955.

<sup>135</sup>Customarily five shots are fired, one being a blank. Gilmore's brother, now in possession of the clothing Gilmore wore, says that there are five bullet holes in his shirt. See GILMORE, *supra* note 132, at 390. Utah did not take any chances with Gary Gilmore. See *id.*

<sup>136</sup>MAILER, *supra* note 128, at 958.

<sup>137</sup>*See id.*

<sup>138</sup>*See id.*

<sup>139</sup>Those executed after 1976 are:

1. Gary Gilmore - executed by firing squad for two murders on January 17, 1977.
2. Pierre Dale Selby - executed by lethal injection for his participation in the "Hi-Fi murders" on August 28, 1987.

injection.<sup>140</sup> Interestingly, Utah has hanged more men than it has killed by lethal injection. Nonetheless, and mostly due to the nation's predominant use of lethal injection, Utah's lethal injections are called "routine."<sup>141</sup> Lethal injection draws little attention. The almost-mechanical medical procedure involves few unforeseen circumstances.<sup>142</sup> Utah's use of lethal injection blends into the national mosaic of death, without significant distinction. This caused some to predict the end of the firing squad.<sup>143</sup> John Albert Taylor's 1996 execution by firing squad squelched any belief that the State had shot its last man.

John Albert Taylor raped and killed a girl the day before her twelfth birthday.<sup>144</sup> At his sentencing, Taylor chose to die by the firing squad.<sup>145</sup> Taylor would provide several reasons for his choice: he did not want to face death laying down,<sup>146</sup> he wished to make it "hard on the State" by choosing a more "gruesome" method,<sup>147</sup> and he did not "want to go flipping around like a fish out of water on that table."<sup>148</sup> Taylor also wished to draw attention to his death. He felt that "people will notice . . . when four or five bullets hit his chest . . . his life will virtually be ripped from him.

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3. Arthur Gary Bishop - executed on June 10, 1988, by lethal injection for the sexual assault/murder of five young boys.

4. William Andrews - executed by lethal injection for his participation on the "Hi-Fi murders" on July 29, 1992.

5. John Albert Taylor - executed by firing squad for child rape and murder on January 16, 1996.

6. Joseph Mitchell Parsons - pleaded guilty to the multiple stabbing murder and robbery of a driver who picked him up while hitchhiking. Parsons was executed by lethal injection on October 15, 1999.

<sup>140</sup>Utah adopted lethal injection as an execution method in 1983. See UTAH CODE ANN. § 77-18-5.5 (1983). In 1987, Utah first executed a prisoner by that method. See GILLESPIE, *supra* note 21, at 153-54. Pierre Dale Selby died by lethal injection for his involvement in what has been known as the "Hi-Fi" or "Drano" murders. See *id.* at 151-56.

<sup>141</sup>See Michael Vigh, *Parson's Execution 'Routine' Because of Choice of Lethal Injection*, S. L. TRIB. Oct. 15, 1999, at A14.

<sup>142</sup>There are, of course, occasional problems with the use of lethal injection. Mainly, problems stem from difficulty finding a vein and a delayed death. "Botched" lethal injections are chronicled at [www.deathpenaltyinfo.org/botched.html](http://www.deathpenaltyinfo.org/botched.html) (last revisited Oct. 8, 2003).

<sup>143</sup>See, e.g., GILMORE, *supra* note 132, at 351.

<sup>144</sup>The facts of Taylor's crime are detailed at *State v. Taylor*, 818 P.2d 1030 (Utah 1991).

<sup>145</sup>See GILLESPIE, *supra* note 21, at 167.

<sup>146</sup>Amy Donaldson, *Killer Gives Interview to Two Teens*, DESERET NEWS, Jan. 26, 1996, at A5 [hereinafter Donaldson, *Killer Gives Interview*].

<sup>147</sup>Amy Donaldson, *Death Wish Puts Utah in Spotlight*, DESERET NEWS, Dec. 15, 1995, at B1.

<sup>148</sup>Beverly Devoy, *11-Year-Old's Killer Picks Death By Firing Squad*, DESERET NEWS, Dec. 9, 1995 at B2; John Hiscock, *Citizens Queue to Join Firing Squad*, DAILY TELEGRAPH, Jan. 7, 1996, at 22; GILLESPIE, *supra* note 21, at 168.

... [T]his is murder.”<sup>149</sup> Like many other inmates, Taylor saw the firing squad as a way to maintain his masculinity and dignity.<sup>150</sup>

As Taylor’s execution approached, an erroneous news report stated that Utah was having difficulty finding people to participate in the firing squad.<sup>151</sup> Utah’s Department of Corrections found itself inundated with volunteers.<sup>152</sup> An entire military unit from Fort Bragg North Carolina volunteered to participate.<sup>153</sup> Utah procedure provides that only law enforcement officers may participate in the execution.<sup>154</sup> Understandably, their identity is kept secret.<sup>155</sup>

After finishing his last meal of a pizza and a Coke, Taylor entered into the execution chamber.<sup>156</sup> In light of past experience, the prison officials made modifications of the firing-squad procedure. For instance, the chair had been altered with holes in the bottom like a strainer, allowing the blood to flow into a pan under the seat.<sup>157</sup> A witness described the actual execution as follows:

As the curtains opened, Taylor was already strapped to the chair and was looking directly at us. He continued to look at us as he was blindfolded. He sat motionless as he was asked if he had any final words. He expressed love to his family and friends, as the poem was written, ‘Remember me, but let me go.’ I next heard a voice say, ‘Ready–Aim–1–2–3,’ followed by one loud bang, four live rounds and one blank.<sup>158</sup> The

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<sup>149</sup>Donaldson, *Killer Gives Interview*, *supra* note 146; GILLESPIE, *supra* note 21, at 168.

<sup>150</sup>See GILLESPIE, *supra* note 21, at 171.

<sup>151</sup>Bob Greene, *Will Olympic Judges Soon Be Firing Blanks?*, CHICAGO TRIBUNE, Feb. 25, 2002, at 1.

<sup>152</sup>Donaldson, *Execution by Bullet*, *supra* note 119. One prison official reported “my telephone has been ringing non-stop. Hundreds of people have volunteered . . . we had calls coming in from everywhere.” Hiscock, *supra* note 148.

<sup>153</sup>See Donaldson, *Execution by Bullet*, *supra* note 119.

<sup>154</sup>One correction official stated “We let the agencies choose the men because we wanted the most reliable, dependant, and well-adjusted individuals possible. If we left it up to volunteers, some might have a ghoulish desire to inflict damage rather than execute the man.” Louis Sahagun, *Utah is Under Fire Over Firing Squads*, L. A. TIMES, 1/22/1996, at 1.

<sup>155</sup>See Amy Donaldson, *McCotter Knows the Drill, Goes by the Book*, DESERET NEWS, Jan. 7, 1996, at A1.

<sup>156</sup>See GILLESPIE, *supra* note 21 at 171

<sup>157</sup>Corrections officials apparently added the pan because prison custodians refused to clean up after Gary Gilmore’s execution. See David K. Kaplan & Daniel Glick, *Ready, Aim . . . Fire*, NEWSWEEK, Jan. 29, 1996, at 54.

<sup>158</sup>The members of the firing squad practice extensively to shoot simultaneously. One former corrections official noted “You don’t want to hear bangety-bang-bang-bang-bang.” See *id.*

white target pinned to his dark blue jumpsuit flew off his chest.<sup>159</sup> His body lurched, his hands clenched and unclenched twice, and he was still. I looked for blood but could see none. Others said that they saw a dark discoloration on his jumpsuit where the bullets entered. From start to finish it had taken four minutes to execute John Albert Taylor.<sup>160</sup>

Taylor was dead “before witnesses could bring themselves to breathe again.”<sup>161</sup> One corrections official with execution experience in Texas opined that Taylor’s death “was carried out in as dignified a manner as I’ve ever witnessed.”<sup>162</sup>

Taylor considered his death murder; the medical examiner agreed.<sup>163</sup> Since his death fit the legal definition, Taylor’s death certificate records the cause of death as “homicide” by “multiple gunshots.”<sup>164</sup>

Today, eleven men sit on Utah’s death row.<sup>165</sup> They have predominantly chosen to die by lethal injection. Yet the fact that a minority still elect to die by firing squad

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<sup>159</sup>One witness described how “[t]he target flew off in an arc and landed a good four or five feet in front of him. It didn’t flutter, it was propelled.” Brian Maffly, *Dead Calm to the End, A Tranquil Taylor Showed No Remorse*, S. L. TRIB., Jan. 27, 1996, at A1.

<sup>160</sup>GILLESPIE, *supra* note 21, at 171. Another witness recorded the white target that had been velcroed to his blue jumpsuit disappeared. His chest heaved upward, his left hand tightened into a fist, released slightly, tightened again and then gradually loosened as his body succumbed to death. His head fell back . . . with latex gloved hands, the doctor climbed onto the podium where the chair was mounted and lifted the black hood. He felt Taylor’s neck for a pulse. He then took a pair of scissors out of his front pocket and cut two holes in the hood. He used a pen light to look into Taylor’s eyes. Taylor, 36, was pronounced death at 12:07 a.m. Amy Donaldson, *Firing Squad Carries Out Execution*, DESERET NEWS, Jan. 26, 1996, at A1.

<sup>161</sup>Schindler, *supra* note 26.

<sup>162</sup>Mike Carter, *Bill Voiding Firing-Squad Option Dropped*, S. L. TRIB., Feb. 10, 1996, at E3.

<sup>163</sup>Chip Parkensen, *Execution Will Be Listed As a Homicide*, DESERET NEWS, Feb. 1, 1996, at B1. The firing squad members are, of course, exempt from prosecution due to the legal justification for the homicide. *Id.*

<sup>164</sup>*Id.*

<sup>165</sup>Those who currently await execution (in order of time spent on death row as of 2003) are:

1. Elroy Tillman - sentenced to death for bludgeoning his ex-girlfriend’s boyfriend while he slept and then setting fire to the mattress. Tillman was sentenced on January 20, 1983, and will be executed by lethal injection.
2. Ronnie Lee Gardner - Gardener was sentenced to death for killing an attorney during an infamous court-house escape attempt before a hearing. Gardner was sentenced on October 25, 1985. Gardner also received a second death sentence for an aggravated assault in prison, but the Utah Supreme Court later found the statute he had been convicted under to be unconstitutional. Gardner hopes to die by firing squad, but has chosen lethal injection.
3. Douglas Carter - sentenced to death for stabbing and shooting a 57-year old woman to death in a burglary. Carter was sentenced on December 18, 1985 (due to procedural errors in his first trial, he was re-sentenced on January 27, 1992). Carter will die by lethal injection.

ensures that method will not disappear due to disuse.<sup>166</sup> The demise of the firing squad will only come through judicial or political intervention. The constitutionality of the firing squad depends on the judicially-imposed intricacies of the Eighth Amendment.

## 2. Modern Firing Squad Procedure

Unlike the historical use of the firing squad that took place in the county of conviction without a standardized procedure, Utah has now codified elements of its firing-squad procedure. Following tradition, the modern firing squad is composed of five men, all peace officers.<sup>167</sup> Now, statutory law provides that the execution will take place at a "secure correctional facility."<sup>168</sup> Executions are conducted in a special room in the Utah State Prison. Executions generally occur at midnight.

Administrative procedures provide intricate details concerning the procedure to be used in all firing squads. Administrative policy authorizes the Executive Director of the Department of Corrections and the Warden to select the members of the firing

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4. Ralph Leroy Menzies - sentenced to die for slitting the throat of a gas station attendant during a robbery/kidnaping. Menzies was sentenced on March 23, 1988 and has chosen to die by firing squad.

5. Michael Anthony Archuleta - sentenced to death for the kidnaping torture/murder of a college student. Archuleta was sentenced on December 19, 1989 and will die by lethal injection.

6. Von Lester Taylor - pleaded guilty to the murder of an elderly woman and her daughter in their cabin near Oakley, Utah and was sentenced to die on May 24, 1991. Taylor will die by lethal injection.

7. Douglas Anderson Lovell- pleaded guilty to murdering a victim in a sexual assault case who was to testify against him in a pending trial. Lovell was sentenced on August 5, 1993 and will die by lethal injection.

8. Ronald Lafferty - sentenced in 1985 for the double murder of his brother's wife and her 19-month-old baby, allegedly under the direction of deity. After the Tenth Circuit overturned his conviction, he was retried and sentenced to death again on April 23, 1996. Lafferty will die by lethal injection.

9. Troy Michael Kell - sentenced to die for stabbing a fellow inmate over 67 times while the victim was handcuffed and shackled. Kell was sentenced on August 14, 1996 and chose to die by firing squad.

10. Roberto V. Arguelles - sentenced to die on June 20, 1997, for kidnaping, sexually abusing, and murdering four women. Arguelles chose to die by firing squad.

11. Dave Taberone Honi, sentenced to die on May 20, 1999, for slashing the throat of his ex-girlfriend's mother and then stabbing her genital area. Honi will die by lethal injection.

<sup>166</sup>Robert Arguelles and Troy Kell had execution dates set for this summer, but they both chose to seek judicial relief, thus postponing their deaths. Ralph Menzies is set to die on November 10, 2003, by firing squad. See Ashley Broughton, *Condemned Killer will be Kept in Suspense*, S. L. TRIB., Oct. 2, 2003, at C3. However, at the time of writing, a state district judge is considering a motion that may stay his execution. See *id.* Interestingly, Arguelles has requested that he be shot without wearing a hood. The Utah Supreme Court has approved his request. See Kevin Cantera, *Firing Squad Death OK'd*, S. L. TRIB., Oct. 26, 2002, at B1

<sup>167</sup>UTAH CODE ANN. § 77-19-10(2).

<sup>168</sup>UTAH CODE ANN. § 77-19-10(1).

squad.<sup>169</sup> A team leader and an alternative gunman, in case one member cannot fulfill the duties, are chosen.<sup>170</sup> Utah recently purchased two Winchester lever-action rifles to be used in the unrealized executions planned for Summer, 2003.<sup>171</sup> Guidelines allow nine members of the media to be present at an execution, with strict instructions for their admittance and conduct.<sup>172</sup> The execution chamber is arranged so the witnesses can view the actual execution, but cannot see the firing squad members.<sup>173</sup>

Administrative procedures also clarify such minutia as where demonstrations may take place and where visitors may park.<sup>174</sup> Any prison demonstrations are also limited. Demonstrators cannot block or interfere with traffic, cannot erect any structure, and cannot leave behind any “object, substance, or material.”<sup>175</sup> To avoid any First Amendment concerns, the prison officials will not separate groups according to their view regarding capital punishment.<sup>176</sup> Salt Lake City police officers provide crowd control, and the ability to demonstrate at executions will be revoked in the case of a riot or disturbance that “jeopardizes the security, peace, order, or any function of the prison.”<sup>177</sup>

Utah’s execution chamber serves for both lethal injections and firing squads: the room houses a gurney and a chair. The chair is set against one wall, surrounded by absorbent sandbags. The opposite wall, around twenty feet away, contains a canvas-covered opening through which the firing-squad members penetrate their high-powered rifles. The condemned is led into the room and bound to the chair with thick leather straps. A doctor locates the inmate’s heart and pins a circular white cloth target to the chest. The team leader counts the cadence. Five shots ring out as one. A pan collects the dripping blood. A doctor pronounces death. The room is cleaned, and waits vacantly for its next victim.

As evinced by the discussion above, Utah’s use of the firing squad has produced a vibrant and colorful history. Executions have varied from painlessly quick to tortuously drawn-out. Each execution has differed, and each firing squad death contributes to a greater overall understanding of the method’s inherent dignity (or

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<sup>169</sup>UTAH ADMIN. R. R251-107-4(3). Correction officials want to have “reliable, stable, and well-adjusted people” on the firing squad.” Amy Donaldson, *Death Wish Puts Utah in Spotlight*, DESERET NEWS, Dec. 15, 1995, at B1.

<sup>170</sup>UTAH ADMIN. R. R251-107-4(3)(a).

<sup>171</sup>Jennifer Dobner, *State Buys Rifles for 2 Executions Set for June*, DESERET NEWS, May 29, 2003, at B01.

<sup>172</sup>UTAH ADMIN. R. R251-107-7. Nearly 200 media representatives requested a seat at John Albert Taylor’s execution. See Michael Vigh, *Parson’s Execution Routine Because of Choice of Lethal Injection*, S. L. TRIB. 10/15/1999, at A14.

<sup>173</sup>UTAH ADMIN. R. R251-107-7(6)(e).

<sup>174</sup>UTAH ADMIN. R. R251-107-5 and -6.

<sup>175</sup>UTAH ADMIN. R. R251-107-5(10)-(12).

<sup>176</sup>UTAH ADMIN. R. R251-105-5(8).

<sup>177</sup>UTAH ADMIN. R. R251-105-5(8).

lack thereof). An understanding of the constitutional implications of Utah's firing squad is only complete after comprehending, and correlating, the firing squad's history in light of the Eighth Amendment's historical and current application.

### III. EIGHTH AMENDMENT JURISPRUDENCE

Words mean more than we mean to express when we use them; so a whole book ought to mean a great deal more than the writer meant.<sup>178</sup>

The clause seems to express a great deal of humanity, on which account I have no objection to it; but, as it seems to have no meaning in it, I do not think it necessary.<sup>179</sup>

The text of our Eighth Amendment is concise: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."<sup>180</sup> Its brevity belies its influence; its simplicity disguises its interpretation. The hermeneutical treatment given this provision has shaped and formed modern criminal law. And no area of law has been so transformed as capital jurisprudence. In the personal eschatology of the condemned, a successful Eighth Amendment challenge is the holy grail of constitutional claims.

The Eighth Amendment's legal history is compelling: arising from the dust created by years of neglect, the modern Supreme Court treats this provision as a mirror, now reflecting those progressive standards that characterize a civilized society. The Supreme Court's modern pondering on the Amendment creates a lively legal landscape where the preferences and prejudices of the populace may become enshrined in constitutional precedent. Yet the forward-looking Amendment still maintains one foot squarely on historical understanding. A review of the historical

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<sup>178</sup>LEWIS CARROL, *THE HUNTING OF THE SNARK*, 28 (Martin Gardner ed. 1995).

<sup>179</sup>Statement of Mr. Samuel Livermore during the debates surrounding the adoption of the Bill of Rights, as quoted in *Weems v. United States*, 217 U.S. 349, 369 (1910) and *Furman v. Georgia*, 408 U.S. 238, 244 (1972) (Douglas, J. concurring). Mr. Livermore's entire quote is as follows:

The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.

*Id.*

<sup>180</sup>U.S. CONST. amend. VIII.

basis and evolution of the Eighth Amendment is indispensable to comprehend its modern application to the execution methods.<sup>181</sup>

#### A. *A History of Pain*

The language and meaning of the Eighth Amendment find textual roots in the English Bill of Rights of 1689.<sup>182</sup> Earlier sources, including the Magna Carta<sup>183</sup> and biblical understanding, influenced the meaning behind the words.<sup>184</sup> The English proscription that “excessive Baile ought not to be required not excessive Fines imposed not cruell and unusuall Punishments inflicted”<sup>185</sup> generally “was concerned with selective or irregular application of harsh penalties . . . [whose] aim was to

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<sup>181</sup>The author recognizes that a review of the Eighth Amendment’s history and current application may be found in many other sources. The treatment found in the text that follows above, however, lays a bedrock foundation for the later discussion of the firing squad’s constitutionality.

<sup>182</sup>See *Harmelin v. Michigan*, 501 U.S. 957, 966 (1991) (examining the background of the Eighth Amendment).

<sup>183</sup>The Magna Carta, however, served more to restrain the lawmakers and law enforcers than to create individual rights, as anticipated by the Bill of Rights. See *McGautha v. California*, 402 U.S. 183, 244 (Douglas, J., concurring).

<sup>184</sup>See *Furman*, 408 U.S. at 242. One author described the historical underpinnings of the Eighth Amendment as follows:

Following the Norman conquest of England in 1066, the old system of penalties, which ensured equality between crime and punishment, suddenly disappeared. By the time systematic judicial records were kept, its demise was almost complete. With the exception of certain grave crimes for which the punishment was death or outlawry, the arbitrary fine was replaced by a discretionary amercement. Although amercement’s discretionary character allowed the circumstances of each case to be taken into account and the level of cash penalties to be decreased or increased accordingly, the amercement presented an opportunity for excessive or oppressive fines. The problem of excessive amercements became so prevalent that three chapters of the Magna Carta were devoted to their regulation. Maitland said of Chapter 14 that ‘very likely there was no clause in the Magna Carta more grateful to the mass of the people.’ Chapter 14 clearly stipulated as fundamental law a prohibition of excessiveness in punishments: “A free man shall not be amerced for a trivial offense, except in accordance with the degree of the offence; and for a serious offence he shall be amerced according to its gravity, saving his livelihood; and a merchant likewise, saving his merchandise; in the same way a villein shall be amerced saving his wainage; if they fall into our mercy. And none of the aforesaid amercements shall be imposed except by the testimony of reputable men of the neighborhood.”

Anthony F. Granucci, ‘*Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*,’ 57 CALIF. L. REV. 839, 845-46 (1969). Additionally, “[h]istorians have viewed the English provision as a reaction to either the ‘Bloody Assizer,’ the treason trials conducted by Chief Justice Jeffereys in 1685 after the abortive rebellion of the Duke of Manmouth, or to the prosecution of Titus Oats in the same year.” *Ingraham v. Wright*, 430 U.S. 651 (1977). For a comparison between the Eighth Amendment’s protections and Talmudic principles, see the amicus brief of the National Jewish Commission on Law and Public Affairs and International Association of Jewish Lawyers and Jurists in *Bryan v. Moore* available at 1999 WL 1249428 (Dec. 20, 1999).

<sup>185</sup>*Harmelin*, 501 U.S. at 966 (quoting the English Bill of Rights of 1689).

forbid arbitrary and discriminatory penalties of a severe nature.”<sup>186</sup> While the American colonies initially only enforced “a rude, untechnical popular law,” gradually the protections of English law curbed government infringement of individual rights.<sup>187</sup> The protection against cruel and unusual punishments eventually became commonly adopted on this side of the Atlantic.

Several States included a prohibition against cruel and unusual punishments in their own constitutions when the Bill of Rights was adopted.<sup>188</sup> Notwithstanding the general acceptance of similar provisions, there is little to suggest the Founders’ intent in proscribing such punishments.<sup>189</sup> Due to its background in English law, the prevalence of similar provisions in state constitutions, and its early inactivity, the Eighth Amendment could have been considered mere “constitutional boilerplate” language.<sup>190</sup> Whatever gaps may exist in our understanding of the Framers’ intent, it is clear that they meant the Eighth Amendment to afford at least the same protections

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<sup>186</sup>*Furman*, 408 U.S. at 242 (Douglas, J., concurring). The Supreme Court has also noted that the English Bill of Right’s phrase “appears to have been directed against punishments authorized by statute and beyond the jurisdiction of the sentencing court, as well as those disproportionate to the offense involved.” *Gregg v. Georgia*, 428 U.S. 153, 169 (1976) (joint opinion of Stewart, Powell, and Stevens, J.J.).

<sup>187</sup>ROBERT ALLEN RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS 1776-1791* 12 (University of North Carolina Press 1955).

<sup>188</sup>*See Furman*, 408 U.S. at 244 (Douglas, J. concurring). The Northwest Ordinance also contained a similar protection. *See id.*; *THE COMPLETE BILL OF RIGHTS* 617 (Neil H. Cogan ed. 1997).

<sup>189</sup>There is little in history to suggest the intent of Congress in adding the Cruel and Unusual Punishment Clause. During Congressional debate, however, some concern was expressed that the Eighth Amendment would deter such common punishments as hanging, whipping, and ear-cropping. *See Ingraham*, 430 U.S. at 666; *Furman*, 408 U.S. at 242 (Douglas, J., concurring).

<sup>190</sup>*See* Jeffery D. Bukowski, *The Eighth Amendment and Original Intent: Applying the Prohibition Against Cruel and Unusual Punishments to Prison Deprivation Cases is Not Beyond the Bounds of History and Precedent*, 99 *DICK. L. REV.* 419, 429 (1995). One newspaper of the time noted

Many of these articles of the Bill of Rights in England, without due attention to the difference of the cases, were largely adopted when our Constitutions were formed, the minds of men then being so warmed with their exertions in the cause of liberty, as to lean too much perhaps towards a jealousy of power to repose a proper confidence in their own government. From these articles in State Constitutions, many things were attempted to be transplanted into our new Constitution, which would either have been nugatory or improper: This is one of them. The expression “unusual and severe” or “cruel and unusual” surely would have been too vague to have been of any consequence, since they admit of no clean and precise signification . . . Thus, when we enter into particulars, we must be convinced that the proposition of such a restriction would have led to nothing useful, or to something dangerous, and therefore that its omission is not chargeable as a fault in the new Constitution.

*THE COMPLETE BILL OF RIGHTS* 622 (Neil H. Cogan ed. 1997).

as the analogous English guarantee.<sup>191</sup> At the most basic level, the Framers' seemed to prohibit governmental endorsement of "tortures," "inhumane," or "barbarous" methods of punishment, and "the most cruel and unheard-of punishments."<sup>192</sup> Due to the dearth of information regarding the Framers' intent, they apparently left the interpretation of this provision to the judiciary.<sup>193</sup>

### B. Early Supreme Court Cases

Before the later portion of the nineteenth century, the Eighth Amendment only received the briefest attention by the Supreme Court. To that point, the Supreme Court only declared that the amendment did not apply to the states, but made no attempt to delineate its contours.<sup>194</sup> The Supreme Court barely hinted at its interpretation of cruelty or unusualness.<sup>195</sup>

The Supreme Court targeted its first foray into the depths of the Eighth Amendment in two method-of-execution cases: *Wilkerson v. Utah*<sup>196</sup> and *In re*

<sup>191</sup>See *Ford v. Wainwright*, 477 U.S. 399, 405 (1986) ("Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill is convincing proof that they intended to provide at least the same protection."); *Solem v. Helm*, 462 U.S. 277 (1983) (same).

<sup>192</sup>See *Estelle v. Gamble*, 429 U.S. 97, 103 (1976); *Gregg*, 428 U.S. at 169 (joint opinion); *Furman*, 408 U.S. at 260 (Brennan, J., concurring), *Furman*, 408 U.S. at 391-92 (Burger, C.J., concurring).

<sup>193</sup>The committee report for the House during the drafting of the Eighth Amendment noted that "the truth is, matters of this kind must be left to the discretion of those who have the administration of the laws." GAZETTE OF THE U.S., August 22, 1789, at 249, col. 3. The modern court has interpreted the Framers' silence as a mandate for judicial definition of the phrase "cruel and unusual." See *Thompson v. Oklahoma*, 487 U.S. 815, 821 (1988) ("The authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments, but they made no attempt to define the contours of that category. They delegated that task to future generations of judges . . .").

<sup>194</sup>In *Pervear v. Commonwealth*, 72 U.S. 475, 479-80 (1866), the Supreme Court held that the Eighth Amendment was a federal restraint and did not apply to the states. In *Pervear*, the defendant was found guilty of keeping a tenement for the sale of liquors without a licence, sentenced to three months confinement, and ordered to pay a fine of fifty dollars. The Supreme Court only declared that the Eighth Amendment did not apply to the States, but did not further elaborate on that Amendment. *Id.*

<sup>195</sup>*Id.* at 480.

<sup>196</sup>99 U.S. 130 (1878). Interestingly enough, *Wilkerson* rose out of Utah's use of the firing squad. *Wilkerson* was convicted of murder in the first degree, for which the Territory mandated that he would "suffer death." The convicting court sentenced *Wilkerson* as follows:

That you be taken from hence to some place in this Territory, where you shall be safely kept until Friday, the fourteenth day of December next; that between the hours of ten o'clock in the forenoon and three o'clock in the afternoon of the last-named day you be taken from your place of confinement to some place within this district, and that you there be publicly shot until you are dead.

*Id.* at 130-31.

Unfortunately, when the territorial legislature revised the criminal code in 1876, it failed to provide for a designated method of execution. *Wilkerson* sought reversal of

*Kemmler*.<sup>197</sup> Two factors limited the Supreme Court from plenary consideration of the Eighth Amendment in those early cases. First, the Eighth Amendment at that time remained shackled to federal constraint, its principles had not yet been liberated to govern the States.<sup>198</sup> Second, constitutional thought focused more on the opinions of the dead Founding Fathers than on the Constitution as a living document. Constitutional interpretation did not transcend the Framers' opinions. *Wilkerson* and *Kemmler*, therefore, provide little more than a snapshot of those punishments that eighteenth-century society tolerated. Yet this view allows us to understand at least the most basic concern expressed by the Eighth Amendment.

The *Wilkerson* Court prophetically noted that “[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted . . . .”<sup>199</sup> According to the *Wilkerson* and *Kemmler* Courts, the most basic concern expressed by the Amendment is a freedom from “terror, pain, or disgrace.”<sup>200</sup> The Supreme Court deemed it safe to say that punishments of torture, and all others of similar cruelty, violate the Constitution. The *Kemmler* Court remarked that “[p]unishments 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 life.”<sup>201</sup>

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his sentence, claiming that the statutory silence deprived the court of jurisdiction to sentencing him to die by the firing squad. The Supreme Court rejected *Wilkerson*'s jurisdictional claim. The narrow holding of *Wilkerson* was that the lower court had the authority to designate the firing squad as the method of his demise. The Supreme Court reached this conclusion by virtue of the previous statutory scheme's approbation of the firing squad and its general use in Utah and other areas.

*See id.* at 130-37.

<sup>197</sup>136 U.S. 436 (1890).

<sup>198</sup>In 1962 the Supreme Court held that the Eighth Amendment applies to the States. *See Robinson v. California*, 370 U.S. 660 (1962).

<sup>199</sup>*Wilkerson*, 99 U.S. at 135-36.

<sup>200</sup>*Id.* at 134. The *Wilkerson* Court reviewed punishments traditionally considered to be cruel and unusual, recognizing

That in very atrocious crimes other circumstances of *terror, pain, or disgrace* were sometimes superadded. Cases mentioned by [one author] are, where the prisoner was drawn or dragged to the place of execution, in treason; or where he was embowelled alive, beheaded, and quartered, in high treason. Mention is also made of public dissection in murder, and burning alive in treason committed by a female. History confirms the truth of these atrocities, but the commentator states that the humanity of the nation by tacit consent allowed the mitigation of such parts of those judgments as savored of torture or cruelty, and he states that they were seldom strictly carried into effect.

*Id.* For a detailed account of horrific executions in early American history *see* TEETERS, *supra* note 40, at 95-110.

<sup>201</sup>*Kemmler*, 136 U.S. at 446 (emphasis added).

The *Wilkerson* Court, however, made one pronouncement that will influence the later discussion of the firing squad. After referring to traditional uses of the firing squad, mainly by the military, the Supreme Court stated that

Cruel and unusual punishments are forbidden by the Constitution, but . . . 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, within the meaning of the Eighth Amendment.<sup>202</sup>

Notwithstanding the Supreme Court's finding in *Kemmler* and *Wilkerson* that the electric chair and the firing squad do not violate the Constitution, the actual executions in those cases are laden with irony. *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. His tortuous death was sadly echoed in *Kemmler's* death.

*Kemmler* challenged the use of the newly-invented electric chair.<sup>203</sup> *Kemmler*, the first slated to be executed by the new apparatus, did not appreciate his role as the electric chair's guinea pig.<sup>204</sup> The Supreme Court, however, seemed impressed with

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<sup>202</sup>*Wilkerson*, 99 U.S. at 134 (emphasis added). The Supreme Court's review of the firing squad included an interesting comparison between those military crimes which merited the firing squad and those more egregious cases requiring hanging. Presumably, some aspect of hanging made it a more proper method of execution for more egregious crimes. *Id.*

<sup>203</sup>Modern society's concern for the relative humanity of an execution method are not of recent origin. In 1886, New York's governor appointed a commission to recommend a better method than the excruciatingly unpredictable use of hanging. One member of the commission had once seen an inebriated man die from accidentally touching an electrical wire. From this experience, he reasoned that electricity could kill a murderer as easily as it could a drunk. This led to the nation's first experiment with executions by electricity. New York's adoption of the electric chair prompted a fascinating battling, pitting Thomas Edison and his direct current (DC) against George Westinghouse's alternating current (AC). Attempting to create a fear of his competitor's electrical current, Edison campaigned for the use of AC with the electric chair, claiming that the "dangerous" current would kill instantly. In an attempt to disassociate AC with such deadly results, Westinghouse contributed \$ 100,000 to *Kemmler's* appeals. See Dawn Macready, *The "Shocking" Truth About the Electric Chair: An Analysis of the Unconstitutionality of Electrocutation*, 26 Ohio N.U. L. REV. 781 (2000); Deborah W. Denno, *Adieu to Electrocutation*, 26 OHIO N.U. L. REV. 665, 670 n.38 (2000).

<sup>204</sup>One newspaper noted that

A great deal is said about the electrical execution of *Kemmler* being an experiment. Undoubtedly it will be. So is every other execution an experiment, and many of them are complete failures. When a man is to be hanged, no one seems able to guarantee beforehand, at least in this country, when the drop will fall or that the rope will not break or stretch or slip into such a position as to prolong the victim's agony . . . . With all that is known of the deadly effect of the electric current, the chances are infinitely greater in favor of an immediate killing upon its first application . . . . No method of execution seems absolutely trustworthy except some which Anglo-Saxon nations hesitate about accepting. But as between hanging and the electric current the chances ought to be a hundred to one in favor of the certainty and prompt efficiency of the later.

CRAIG BRANDON, *THE ELECTRIC CHAIR: AN UNNATURAL AMERICAN HISTORY 176-78* (1999) (quoting NEW YORK TRIBUNE, August 9, 1889).

the fact that the New York legislature adopted the electric chair “in the effort to devise a more humane method.”<sup>205</sup> Motive aside, Kemmler, like Wilkerson, died a tortuous death. When they missed their target, the executioners in Wilkerson thought that they may have to try killing him again. In Kemmler’s case, they had to. The first volt of electricity did not kill Kemmler. Unprepared for the chance that the first volt would not be fatal, the dynamo took two minutes to charge a second time. Kemmler struggled to breathe, groaning as a frothy liquid dripped from his lips. Kemmler’s head was burned severely, so much so that his brain measured ninety-seven degrees three hours after his death. In all, Kemmler suffered a gruesome death, finally succumbing after a second electrical charge.<sup>206</sup> He died in a sickening

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<sup>205</sup>*Kemmler*, 136 U.S. at 447.

<sup>206</sup>One author vividly described the disturbing facts of Kemmler’s execution:

Within the room, Davis sent the two-bell signal to the dynamo room. The voltage was increased, lighting the lamps on the control panel. Then Davis pulled down the switch that placed the electric chair into the circuit. The switch made a noise that could be heard in the execution chamber. Kemmler stiffened in the chair. The plan had been to leave the current on for a full 20 seconds.

Dr. Spitzka, who had stationed himself next to Kemmler in the room, watched Kemmler’s face and hands. At first they turned deadly pale but quickly changed to a dark red color. The fingers of the hand seemed to grasp the chair. The index finger of Kemmler’s right hand doubled up with such strength that the nail cut through the palm. There was a sudden convulsion as Kemmler strained against the straps and his face twitched slightly, but there was no sound from Kemmler’s lips.

...

“He’s dead,” said Spitzka to [Warden] Durston as the witnesses who surrounded the chair congratulated each other.

“Oh, he’s dead,” echoed Dr. MacDonald, as the other witnesses nodded in agreement. Spitzka asked the other doctors to note the condition of Kemmler’s nose, which had changed to a bright red color. He then asked the attendants to loosen the face harness so he could examine the nose more closely. He then ordered that the body be taken to the hospital.

“There is the culmination of ten years’ work and study,” exclaimed Southwick. “We live in a higher civilization for this day!”

Durston, however, insisted that the body was not to be moved until the doctors signed the certificate of death.

Dr. Balch, who was bending over the body looking at the skin, noticed a rupture on the right index finger of Kemmler’s right hand, where it had bent back into the base of his thumb, causing a small cut, which was dripping blood.

“Dr. MacDonald,” said Balch, “see that rupture?”

Spitzka then gave the order, “Turn on the current! Turn on the current, instantly. This man is not dead!”

Faces turned white, and the doctors fell back from the chair. Durston, who had been next to the chair, sprang back to the doorway and echoed Spitzka’s order to “turn on the current.”

“Keep it on! Keep it on!” Durston ordered Davis.

manner. The Supreme Court's first two efforts at addressing the Eighth Amendment resulted in nauseating and tortuous deaths.<sup>207</sup>

It is not uncommon for commentators to synthesize the Supreme Court's approach in those cases into a "historical interpretation" test.<sup>208</sup> These early Supreme Court cases disapproved of "the wanton infliction of physical pain" based on historical standards, but by no means created a "pragmatic analysis of punishments approved by legislatures."<sup>209</sup> To the extent that *Wilkerson* and *Kemmler* established

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This was not as easy as it might have been. When he had been given the stop order, Davis had sent the message to the control room to turn off the dynamo. The voltmeter on the control panel was almost back to zero. Davis sent the two-bell signal to the dynamo room and waited for the current to build up again.

The group of witnesses stood by horror-stricken, their eyes focused on Kemmler, as a frothy liquid began to drip from his mouth. Then his chest began to heave and a heavy sound like a groan came from his lips. Witnesses described it as "a heavy sound," as if Kemmler was struggling to breathe. It continued as a regular interval, a wheezing sound that escaped Kemmler's tightly clenched lips.

...

Then, just two minutes after it had been turned off, the dynamo was up to full speed again. The voltmeter read 2,000 volts, and Davis switched the chair back into the circuit. It was a repeat of the first shock, with Kemmler's body straining against the straps. The moaning sound ended immediately as the body became rigid, but the frothy foam continued to drip down from his mouth onto his grey vest.

The estimates of how long the current was on this second time vary from witness to witness. Some estimated it to be as long as four and a half minutes. Others said it was more like two. The official report was that it stayed on for 70 seconds. No one was anxious to give the order to stop this time. Smoke was seen coming from the top of Kemmler's head, and the room was filled with the stench of burning flesh. There was a sizzling sound. The reason for this was that the electrode that was attached to Kemmler's head had been loosened at Spitzkas order after the first application of power. It was therefore not in close contact with Kemmler's skin and had created a spark that had burned his head.

...

Dr. Fell turned to G.G. Bain, the United Press reporter who was next to him, and said, "Well, there is no doubt about one thing. The man never suffered an iota of pain."

The other physicians in the room were quick to agree . . . .

See BRANDON, *supra* note 204, at 176-78.

<sup>207</sup>As the Supreme Court decided *Kemmler's* case before any State killed by the electric chair, and before we understood the inherent pain involved in an execution, some have questioned *Kemmler's* precedential value with respect to its holding that the electric chair does not violate the Eighth Amendment. See *Poyner v. Murray*, 508 U.S. 931, 933 (Souter, J. dissenting from denial of certiorari). The same cannot be said of *Wilkerson's* holding with respect to the traditional use of the firing squad. The potential for a painful firing squad death was well known and considered by the *Wilkerson* Court. See *Wilkerson*, 99 U.S. at 135-37. However, this article presupposes that *Wilkerson's* holding must be reconsidered in light of modern Eighth Amendment principles.

<sup>208</sup>See, e.g., Roberta M. Harding, *The Gallows and the Gurney: Analyzing the (Un)constitutionality of the Methods of Execution*, 6 B.U. PUB., INT. L. J. 153, 158 (1996).

<sup>209</sup>*Furman*, 408 U.S. at 392-93 (Burger, C.J., dissenting).

any comprehensive Eighth Amendment review, they “compar[ed] challenged methods of execution to concededly inhuman techniques of punishment.”<sup>210</sup>

Even while focusing on the historical prohibition against tortuous physical pain, the *Wilkerson* and *Kemmler* Courts hinted that the Eighth Amendment addressed more than a constitutionally-enforced ceiling on the amount of physical pain inflicted in punishment. Those cases acknowledged the unconstitutionality of painless, yet undignified, post-mortem events such as drawing and quartering, public display of a corpse, and mutilation.<sup>211</sup> *Kemmler*’s condemnation of inhumane executions implicitly recognizes that cruel and unusual punishments are offensive in a way that transcends individual pain. By recognizing that the Framers sought to avoid disgrace in executions, the Supreme Court implicitly recognized that something about ignoble executions can diminish the worth of men in the eyes of society. The intimations of these cases, however, were limited by their simple rejection of archaic punishments long deplored by society.

### C. *Evolving Standards of Decency and the Dignity of Man*

In later cases, the Supreme Court would plant the seeds of its modern cruel and unusual punishment clause jurisprudence. Subsequent Supreme Court cases not only shifted the constitutional focus beyond a myopic view of the eighteenth century, they

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<sup>210</sup>*Estelle v. Gamble*, 429 U.S. 97 (1976); *see also Wilkerson*, 99 U.S. at 136 (“[I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty are forbidden by that amendment . . . .”); *Kemmler*, 136 U.S. at 447 (“Punishments are cruel when they involve torture or a lingering death . . . .”). This focus is also illustrated by *Louisiana ex rel Francis v. Resweber*, 329 U.S. 459 (1946). In that case, the Supreme Court considered Louisiana’s ability to attempt killing an inmate after botching his first electrocution. The Supreme Court reviewed the influence of the Eighth Amendment as follows:

Petitioner’s suggestion is that because he once underwent the psychological strain of preparation for electrocution, now to require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment. Even the fact that petitioner has already been subjected to a current of electricity does not make his subsequent execution any more cruel in the constitutional sense than any other execution. The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution. The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block. We cannot agree that the hardship imposed upon the petitioner rises to that level of hardship denounced as denial of due process because of cruelty.

*Wilkerson*, 99 U.S. at 464. One justice’s dissent in *O’Neil v. Vermont*, 144 U.S. 323 (1892), however, suggested that the Supreme Court would consider the cruelty and usualness of punishments not involving pain. *See id.* at 339-40.

<sup>211</sup>*See Campbell v. Wood*, 511 U.S. 1119 (1994) (Blackmun, J., dissenting from denial of certiorari).

qualitatively reconsidered the nature of a cruel or unusual punishment. The Supreme Court first began establishing its methodological schema for the evaluation of punishments in *Weems v. United States*.<sup>212</sup>

In *Weems*, the Supreme Court addressed an Eighth Amendment challenge rising out of federal jurisdiction for the first time, providing an opportunity for substantive review of the Cruel and Unusual Punishment Clause. The *Weems* Court recognized the tentative nature of its earlier expeditions into the Cruel and Unusual Punishment Clause when noting that “what constitutes a cruel and unusual punishment has not been decided.”<sup>213</sup> Yet even in its review the *Weems* Court would not fully define the scope of the Eighth Amendment.<sup>214</sup> If anything, *Weems* stands for the proposition that the Eighth Amendment cannot be contained in a simplistic and inflexible definition.

The *Weems* decision involved two important departures from earlier cases: first, *Weems* eschewed any limited reliance on an Eighth Amendment tied solely to the tolerance of the Founding Fathers. In expanding the Amendment’s prohibition beyond those punishments considered cruel and unusual by the Framers, the Court stated that

Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily tied to the form that evil has theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, “designed to approach immortality as nearly as human institutions can approach it.” The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made.<sup>215</sup>

*Weems*’ legacy thus can be summarized in one sentence: “[T]he words of the Amendment are not precise . . . their scope is not static.”<sup>216</sup> The Eighth Amendment’s focus “cannot be of what has been, but of what may be.”<sup>217</sup> While not dispensing completely with the historical focus of *Wilkerson* and *Kemmler*, the *Weems* Court allowed the judiciary to consider modern interpretations of cruelty and unusualness.<sup>218</sup>

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<sup>212</sup>217 U.S. 349 (1910).

<sup>213</sup>*Id.* at 368.

<sup>214</sup>*See Trop v. Dulles*, 356 U.S. 86, 99 (“The exact scope of the constitutional phrase ‘cruel and unusual’ has not been detailed by this Court.”) (plurality decision).

<sup>215</sup>*Weems*, 217 U.S. at 373.

<sup>216</sup>*Trop*, 356 U.S. at 100-01.

<sup>217</sup>*Weems*, 212 U.S. at 373.

<sup>218</sup>One Supreme Court justice noted that, had the logic in *Kemmler* and *Wilkerson* remained the law without consideration of contemporary standards, “the Clause would have been effectively read out of the Bill of Rights.” *Furman*, 408 U.S. at 265 (Brennan, J.).

Second, *Weems* suggested a pragmatic approach to reviewing punishments. Turning to the punishment in question, the *Weems* Court compared the gradation of punishment with the corresponding prohibited behavior. In the words of the lone dissenter in the case, the *Weems* court interpreted “the inhibition against cruel and unusual punishment as imposing upon Congress the duty of proportioning punishment according to the nature and the crime . . . .”<sup>219</sup> Drawing a sharp distinction between the unrestrained power of the State and restrained justice as imposed under constitutional limitations, the *Weems* Court empowered the judiciary to evaluate the harshness of society’s punishments. The judiciary thereby adopted the duty “of determining whether punishments have been properly apportioned in a particular statute and if not, to decline to enforce it.”<sup>220</sup> In sum, *Weems* recognized the evolving nature of the Eighth Amendment and entrusted to the judiciary the guardianship of its standards.

The theoretical underpinnings in *Weems* would be further developed in *Trop v. Dulles*.<sup>221</sup> In *Trop*, the Supreme Court considered a statute divesting the citizenship of those dishonorably discharged from military service. The *Trop* Court reaffirmed that no exact definition of the Eighth Amendment’s language would be appropriate.<sup>222</sup> Refining the approach hinted at in *Weems*, and avoiding creating a constitutional definition to govern cruel and unusual punishment claims, *Trop* outlined an approach that would guide later Eighth Amendment cases.<sup>223</sup>

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concurring). Indeed, “the provision ‘would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct.’” *Weems*, 217 U.S. at 371. The *Weems* decision added vitality and meaning to a provision that would otherwise be a rubberstamp of modern legislative enactments.

<sup>219</sup>*Weems*, 217 U.S. at 385.

<sup>220</sup>*Id.*

<sup>221</sup>356 U.S. 86 (1957).

<sup>222</sup>The Supreme Court noted its “failure to give precise content to the Eighth Amendment . . . is not surprising” because we live in “an enlightened democracy.” *Id.* at 100. From this statement, one must question whether the flood of cases examining the amendment after the *Trop* decision demonstrates a greater or lesser enlightenment in our current society. *Id.*

<sup>223</sup>As a preliminary matter, the Supreme Court also explained that the death penalty would not be “an index of the constitutional limit on punishment.” *Trop*, 356 U.S. at 99. Specifically, the Supreme Court stated

At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment--and they are forceful--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. But it is equally plain that the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination.

*Id.* In other words, “the existence of the death penalty is not a licence to the Government to devise any punishment short of death within the limit of its imagination.” *Id.*

First, the Supreme Court identified the premise that undergirds the Eighth Amendment: “The basic principle underlying the Eighth Amendment is nothing less than the dignity of man.”<sup>224</sup> This principle serves to focus judicial review of punishment. All punishment must be considered in light of “the limits of civilized standards.”<sup>225</sup> This pronouncement shifted the focus of the Amendment from a subjective measurement of pain to an objective inquiry into those values held in common by society. Dignity, a word that connotes a state of honor, worth, or esteem,<sup>226</sup> reflects a relationship between an individual’s self-worth and society at large. The Court no longer would measure only whether an amount of pain reached the level of “tortuous,” but rather whether the punishment degraded our dignity. The Supreme Court thereby came to evaluate man’s dignity from several vantage points. The Court considered the punishment’s multifaceted affect on the punished, the society, and the “international community of democracies.”<sup>227</sup>

Second, the *Trop* Court emphasized *Weems*’ progressive approach to the Amendment. *Trop* interpreted *Weems* as establishing that the “words of the Amendment are not precise; their scope is not static.”<sup>228</sup> On that basis, *Trop* delivered the mantra that would henceforth govern all Eighth Amendment jurisprudence: “The Amendment must draw its meaning from *the evolving standards of decency that mark the progress of a maturing society.*”<sup>229</sup> Here, the Supreme Court endorsed man’s ability to become more humane, more refined, more dignified. As men become better than before, they must also progress in their treatment of those who fall short of society’s expectations. Man’s level of decency only rises to the level of its treatment of the most indecent. Therefore, the *Trop* Court’s decision allows for more humane treatment where social norms progress. Justice Benjamin N. Cardozo captured the essence of society’s evolving tolerance in punishment as follows:

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<sup>224</sup>*Id.*

<sup>225</sup>*Id.* at 100.

<sup>226</sup>MIRRIAM-WEBSTER’S COLLEGIATE DICTIONARY 325 (10th ed. 1993). This article will reserve a more comprehensive discussion of dignity for later.

<sup>227</sup>*Trop*, 356 U.S. at 102. The focus of the *Trop* decision was recently a source of contention in the Supreme Court’s consideration of the execution of mentally-retarded defendants. See *Atkins v. Virginia*, 536 U.S. 304 (2002). While the Supreme Court subsequent to *Trop* clarified that the evolving standards should focus on the opinion of the American society, see *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989), the *Atkins* majority, albeit in a footnote, considered the world community’s opposition to the execution of the mentally retarded. See *Atkins*, 536 U.S. at 316. The dissent strongly criticized this review. See *id.* at 347 (Scalia, J., dissenting).

<sup>228</sup>*Trop*, 356 U.S. at 100-01. The Supreme Court states that

The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation. They are the rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules. If we do not, the words of the Constitution become little more than good advice.

*Id.* at 103-04.

<sup>229</sup>*Id.* at 101 (emphasis added).

I have faith . . . that a century or less from now, our descendants will look back upon the penal system of today with the same surprise and horror that fill our own minds when we are told that only about a century ago 160 crimes were visited under English law with the punishment of death, and that in 1801 a child of 13 was hanged at Tyburn for the larceny of a spoon. Dark chapters are these in our history of law. We think of them with a shudder, and say to ourselves that we have risen to heights of mercy and of reason far removed from such enormities. The future may judge us less leniently than we choose to judge ourselves.<sup>230</sup>

In sum, *Trop* clarified that the Cruel and Unusual Punishment Clause needed no definition, especially one tied only to historical standards. The standards enshrined in the amendment would thereby develop with enlightened society's maturing standards of decency and dignity.

Applying the twin concerns of dignity and decency, the Supreme Court considered the punishment of denationalization against its approach in *Kemmler* and *Wilkerson*. The Court recognized that *Trop*'s punishment involved "no physical mistreatment, no primitive torture" as condemned by its earliest cases.<sup>231</sup> Yet the Court recognized that some punishments, though non-physical, may be "more primitive than torture."<sup>232</sup> The inherently amorphous concerns of dignity and decency could not be quantified by tangible pain alone. The Supreme Court thus moved past any consideration focusing exclusively on the amount or nature of the pain inflicted.<sup>233</sup> Instead, the Supreme Court considered intangible factors that detract from one's dignity such as fear, distress, and apprehension of threat. Concerns of dignity and decency thereby superceded any constitutionally-tolerated threshold of pain.

#### D. Current Eighth Amendment Methodology

*Weems* and *Trop* marked a turning point in the Supreme Court's Eighth Amendment jurisprudence, which directs the Court's modern Eighth Amendment analysis.<sup>234</sup> Nevertheless, these cases did not yield a precise formula to be followed

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<sup>230</sup>B. N. CARDOZO, WHAT MEDICINE CAN DO FOR LAW, IN SELECTED WRITINGS 381 (M. E. Hall ed. 1947).

<sup>231</sup>*Trop*, 356 U.S. at 101.

<sup>232</sup>*Id.*

<sup>233</sup>To clarify, the Supreme Court "never held that pain is the exclusive consideration under the Eighth Amendment." *Campbell v. Wood*, 511 U.S. 1119 (Blackmun, J., dissenting from denial of certiorari). But the *Wilkerson* and *Kemmler* Courts did not focus on the non-corporeal aspects of cruel and unusual punishment.

<sup>234</sup>However, as the first major Eighth Amendment case after *Trop*, and an amazingly important case in death penalty jurisprudence, *Furman v. Georgia*, does not conclusively follow the same pattern as other modern cases. In *Furman*, each member of the Supreme Court wrote a separate opinion. Each opinion reflects a separate approach to the Eighth Amendment. While similarities exist between those approaches and modern review, the disjointed *Furman* decision defies any attempt to provide longstanding guidance. *Furman*'s opinions may stand for the general proposition that a death sentence may not be imposed arbitrarily or freakishly, but provides little guidance by way of creating a uniform method of

in considering an Eight Amendment claim. No “static test” guides the evaluation of punishment.<sup>235</sup> However, when the Supreme Court “cast loose from the historical moorings consisting of the original application of the Eighth Amendment, it did not embark rudderless upon a wide-open sea.”<sup>236</sup> Using the *Weems* and *Trop* decisions, often in conjunction with the historical scrutinizing of pain from *Wilkinson* and *Kemmler*, a review of the Supreme Court’s modern cases reveals an approach generally, although not always completely, followed in Eighth Amendment cases.

The twin concerns of decency and dignity guide modern Eighth Amendment jurisprudence. The most obvious consideration by a court is whether the “evolving standards of decency” prohibit the use of a particular punishment. Here, the Supreme Court may first review the history of the Eighth Amendment and analogous punishments, presumably because a punishment would be found unconstitutional if prohibited as cruel and unusual in the eighteenth century.<sup>237</sup> The modern thrust of the “evolving standards of decency” analysis questions whether a “national consensus” has emerged with regard to a particular punishment. The Supreme Court derives a national consensus from objective indicia such as nationwide legislation and the activities of jurors in this evaluation. In some cases, other factors, such as the views of professional organizations, may influence a review of contemporary standards.<sup>238</sup> In the end the Supreme Court may look beyond the objective indicia of

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review. *Gregg v. Georgia*, the case upholding the use of the death penalty, on the other hand, clarifies the Supreme Court’s modern approach.

<sup>235</sup>*Rhodes*, 452 U.S. at 346.

<sup>236</sup>*Stanford*, 492 U.S. at 379.

<sup>237</sup>Recently, Justice Scalia recognized that the Supreme Court’s Eighth Amendment jurisprudence finds punishments to be cruel and unusual if they fall within one of two categories: (1) those punishments considered cruel and unusual at the enactment of the Bill of Rights and (2) those punishments offending the “evolving standards of decency.” *Atkins*, 526 U.S. at 339 (Scalia, J., dissenting); see also *Ford*, 477 U.S. at 405-06 (stating that a court must look at both historical common law and evolving standards of decency). As recognized above, the Supreme Court cases often encompass these two inquiries. First, the Supreme Court looks at the historical background, second it contemplates the contemporary standards.

<sup>238</sup>Some effort has been made to distinguish between the Supreme Court’s review in its pre-*Weems* cases, calling them a “methodology” review, and the modern case law, terming that a “proportionality” review. This effort treats method-of-execution cases as “methodology” cases that would not be governed by modern “proportionality” analysis. The clearest example of this effort can be found in the Ninth Circuit cases of *Campbell v. Woods*, 18 F.3d 662 (9th Cir. 1994) and *Fierro v. Gomez*, 88 F.3d 301 (9th Cir. 1996). Because “methodology review focuses more heavily on objective indicia of the pain involved in the challenged method,” *Campbell*, 18 F.3d at 682, it is “not necessary to analyze legislative trends,” *Fierro*, 77 F.3d at 307, or the other objective indicia. There is no basis for the Ninth Circuit’s abandonment of modern Eighth Amendment principles in method-of-execution cases. In drawing a distinction between “methodology” and the modern review, the Ninth Circuit referred to Justice Brennan’s dissent from denial of certiorari in *Glass v. Louisiana*, 471 U.S. 1080 (1985), where he stated that “[f]irst and foremost, the Eighth Amendment prohibits ‘the unnecessary and wanton infliction of pain.’” *Glass*, 471 U.S. at 1084. Justice Brennan, however, did not advocate a method-of-execution analysis limited only to a quantification of pain. Justice Brennan clearly stated that “[t]he Eight Amendment protection of the dignity of man extends beyond profiling the unnecessary infliction of pain when

decency, concentrating on the overriding concern for dignity which ultimately shapes any Eighth Amendment analysis.

### 1. Evolving Standards of Decency

The touchstone of Eighth Amendment jurisprudence is now the “evolving standards of decency” analysis. The Supreme Court has refused to transform this analysis into a constitutional “test.” Instead, the phrase becomes a framework by which the Court evaluates the Eighth Amendment’s evolving reflection of modern society. In ascertaining the “contemporary values concerning the infliction of a challenged sanction,” the Court “look[s] to the objective indicia that reflect the public attitude toward a given sanction.”<sup>239</sup> The Supreme Court explicitly clarified that this review is objective; the subjective views of the judges should not appear to influence the evolving-standards review.<sup>240</sup> The Supreme Court cautions that “the phrase *cruel and unusual* punishments limits the evolving standards appropriate for our consideration to those entertained by the society rather than those dictated by our personal consciences.”<sup>241</sup>

This oft-repeated admonition, however, does not hamper dissenting justices from labeling the majority’s evolving standard review as nothing more than an example of subjective bias. For example, in the recent case of *Atkins v. Virginia*,<sup>242</sup> in which the Court found that society had evolved beyond executing the mentally retarded, two dissenters labeled the majority’s opinion “a *post hoc* rationalization for the

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extinguishing life.” See *Glass*, 407 U.S. at 1080. *Trop v. Dulles*, 356 U.S. at 100 (plurality opinion) Justice Brennan did not mention the objective indicia or “evolving standards,” but did not expressly limit method-of-execution cases to the *Wilkerson/Kemmler* line of cases. Justice Blackmun’s dissent from the denial of certiorari in *Campbell* most pointedly discussed the error in the Ninth Circuit’s analysis: “The Ninth Circuit’s analysis is surprising given that this Court never has held that pain is the exclusive consideration under the Eighth Amendment, nor distinguished between challenges to the proportionality and the method of punishment.” *Campbell*, 511 U.S. at 1119 (1994). Obviously, the Supreme Court never has applied more than a consideration of pain to a method-of-execution case—the Supreme Court has not considered such a case since deciding that the Eighth Amendment transcends a consideration of pain. A consideration of the inhumane techniques of punishment is still a consideration, but not the *only* consideration. “Methodology” review is not a distinct and separate analysis, but a historical antecedent to the modern review. The overriding concerns of dignity and decency ultimately govern the Eighth Amendment. There is no reason to support that the Supreme Court would abandon its modern review in method-of-execution cases. Other authorities assume that the Supreme Court will apply its modern case law to method-of-execution cases. See, e.g., Deborah W. Denno, *Adieu to Execution*, 26 OHIO N. U. L. REV. 665, 669-79 (2000). This Article, therefore, will review the Supreme Court’s comprehensive Eighth Amendment analysis.

<sup>239</sup>*Gregg*, 428 U.S. at 173.

<sup>240</sup>Indeed, “it has never been thought that [the evolving standards of decency inquiry] was a shorthand reference to the preferences of a majority of [the Supreme Court].” *Stanford*, 492 U.S. at 379; see also *Rhodes v. Chapman*, 452 U.S. 337, 345 (1981); *Rummel v. Estelle*, 445 U.S. 263, 275 (1980); *Coker*, 433 U.S. at 592; *Gregg*, 428 U.S. at 173.

<sup>241</sup>*Thompson*, 487 U.S. at 873 (O’Connor, J. concurring).

<sup>242</sup>536 U.S. 304 (2002).

majority's subjectively preferred result rather than an objective effort to ascertain the content of an evolving standard of decency"<sup>243</sup> and commented that "[s]eldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members."<sup>244</sup> These caustic accusations are not uncommon.

To avoid the improper intrusion of subjective beliefs into the Court's review, the Supreme Court generally agreed upon three objective factors that bolster its "evolving standards" review: (1) historical evidence; (2) legislative action; and (3) jury response. The Court vigorously debated the inclusion of other factors in this analysis. For a functional understanding of how the Supreme Court approaches an "evolving standards" question, each factor will be reviewed.

#### *a. Historical Review*

Generally, when considering whether a given punishment violates the Eighth Amendment, the Supreme Court at least perfunctorily looks at the punishments tolerated by society at the enactment of the Bill of Rights.<sup>245</sup> The Supreme Court begins with this review because "[t]here is now little room for doubt that the Eighth Amendment's ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted."<sup>246</sup> This analysis tends to be brief, and rightfully so. A testament to the "evolving standards of decency," our society moved beyond the punishments considered "barbaric" during the eighteenth century. It is not likely that a modern legislature would tolerate in any form those punishments abhorred by the Founding Fathers. The whipping post and the pillory are not to return. *Wilkerson* and *Kemmler*'s legacy remains intact, but society generally moved beyond the fear or torture implicit in those cases.<sup>247</sup> Accordingly, the Supreme Court's use

<sup>243</sup>*Atkins*, 536 U.S. at 322 (Rehnquist, C.J., dissenting). It should be noted that Chief Justice Rehnquist did not *respectfully* dissent in that case.

<sup>244</sup>*Atkins*, 536 U.S. 338 (Scalia, J., dissenting).

<sup>245</sup>*See, e.g.*, *Penry v. Lynaugh*, 492 U.S. 302, 330-33 (1989); *Stanford v. Kentucky*, 492 U.S. 361, 368 (1989) (plurality decision); *Ford v. Wainwright*, 477 U.S. 399, 405-06 (1986); *Solem v. Helm*, 463 U.S. 277, 284-86 (1983); *Rhodes v. Chapman*, 452 U.S. 337, 345-46 (1981); *Ingraham*, 430 U.S. at 664-67; *Gregg*, 428 U.S. at 176-77; *Woodson v. North Carolina*, 428 U.S. 280, 288-91 (1976); *Estelle v. Gamble*, 429 U.S. 97, 101-04 (1969).

<sup>246</sup>*Ford*, 477 U.S. at 405; *see also Penry*, 492 U.S. at 330. On the basis of this argument, the review of the historical treatment of a given punishment may either form a discrete portion of the "evolving standard" inquiry or serve as an independent judgment that, contemporary society aside, the framers would have found the punishment to be cruel and unusual. Practically, given the comparatively-humane nature of punishment administered today, the second use is without teeth. Generally, a reviewing court will consider history as a portion of its "evolving standards" inquiry.

<sup>247</sup>Commentators generally disparage and distinguish the *Wilkerson* and *Kemmler* approach. This criticism also finds its way into some Supreme Court cases. *See Furman*, 408 U.S. at 263-70. The Supreme Court, however, regularly relies on those cases in its analysis, at least as a transitional argument to focus its inquiry on modern societal values. Also, as discussed further in the text that follows below, courts use those cases by way of comparison in evaluating the evolving standards. While not the sole basis for judicial review, *Wilkerson* and *Kemmler* still influence Eighth Amendment jurisprudence.

of a historical review rarely decides the case, but instead provides a background for contemporary values review.<sup>248</sup>

*b. Legislation*

“First among the objective indicia that reflect the public attitude toward a given sanction are statutes passed by society’s elected representatives.”<sup>249</sup> The Supreme Court’s approach requires a survey of legislative action.<sup>250</sup> Often, this inquiry looks at the legislative response to evolving legal standards, such as the States’ response to *Furman v. Georgia*, where the Supreme Court found that the States arbitrarily and capriciously administered the death penalty at that time.<sup>251</sup> This inquiry may also reflect historical trends, mapping a legislative maturation of a century or more.<sup>252</sup> Overall, the Supreme Court looks at legislation as a codification of society’s modern humanity. “Of course, the recognition of a right under state law does not translate automatically into the existence of federal constitutional protection.”<sup>253</sup> The Supreme Court is mindful that “[t]he fact that a majority of jurisdictions have adopted a different practice, however, does not establish that contemporary standards of decency are offended.” by that State’s peculiar practices.<sup>254</sup> Even taking into account a State’s latitude in administering justice in the way it sees fit, a national consensus on an issue may provide insight into the requirements of the federal Constitution.

A recent Supreme Court case, *Atkins v. Virginia*,<sup>255</sup> raises questions concerning how to interpret evidence of legislative action.<sup>256</sup> *Atkins*, as will be seen, may mark a milestone in how the Supreme Court looks at Eighth Amendment cases and which factors influence its objective review. In *Atkins*, the Supreme Court reviewed those

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<sup>248</sup>The extent of any historical review may depend on the particular philosophy of the writing judge. For instance, Justice Scalia and Chief Justice Rehnquist are more likely to review history than Justice Stevens. Compare *Stanford*, 492 U.S. at 368 (Scalia, J.), *Thompson*, 487 U.S. at 864-65 (Scalia J., dissenting) *Roberts*, 431 U.S. at 645 n.1 (Rehnquist, J., dissenting) with *Atkins*, 536 U.S. at 311-12 (Stevens, J.), *Thompson*, 487 U.S. at 821-22.

<sup>249</sup>*Stanford*, 492 U.S. at 370 (citing *McKlesky v. Kemp*).

<sup>250</sup>The following cases provide a helpful insight into the Supreme Court’s use of legislative indicators: *Atkins*, 536 U.S. at 314-15; *Stanford*, 492 U.S. at 370-73; *Thompson*, 487 U.S. at 826-29; *McClesky*, 481 U.S. at 300; *Edmund*, 458 U.S. at 789-94; *Coker*, 433 U.S. at 593-97; *Woodson*, 428 U.S. at 291-94; *Gregg*, 428 U.S. at 179-82.

<sup>251</sup>See, e.g., *Gregg*, 428 U.S. at 179; *Coker*, 433 U.S. at 594; *Edmund*, 458 U.S. at 3372.

<sup>252</sup>See, e.g., *Atkins*, 536 U.S. at 314-15; *Woodson*, 428 U.S. at 291; *Coker*, 433 U.S. at 593.

<sup>253</sup>*Sawyer v. Smith*, 497 U.S. 227, 250 (1990) (Marshall, J., dissenting).

<sup>254</sup>*Spaziano*, 468 U.S. at 464.

<sup>255</sup>536 U.S. 304 (2002).

<sup>256</sup>*Atkins*, however, is not the first time that legislative review has been a source of debate. In *Woodson*, the dissent sharply criticized the majority’s review, stating that its interpretation of the available information “seems . . . more an instance of its desire to save the people from themselves than a conscientious effort to ascertain the context of any ‘evolving standards of decency.’” *Woodson*, 428 U.S. at 313 (Rehnquist, J., dissenting).

state statutes that prevented the execution of mentally-retarded defendants. Yet the Supreme Court not only noted those States enacting legislation to prevent their execution, it noted jurisdictions where such legislation had passed, but failed to achieve gubernatorial approval.<sup>257</sup> The majority opinion also observed that “[t]he evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition.”<sup>258</sup> Labeling the movement a “procession,” the majority commented that “[i]t is not so much the number of these States that is significant, but the consistency of the direction of change.”<sup>259</sup> The *Atkins* majority treated legislative review as less a mathematical operation, but more an attempt to identify trends and movements possibly not reflected in mere codification.

Justice Scalia, joined by Justice Thomas and Chief Justice Rehnquist,<sup>260</sup> delivered a characteristically stinging dissent, challenging the use of any information other than codification. Justice Scalia argued that the majority’s numbers did not show a national consensus at all. At best, according to Justice Scalia, the majority could only cite to eighteen States actually barring the execution of the mentally retarded.<sup>261</sup> Justice Scalia challenged a broad inquiry into legislative action, especially calling “absurd” the reliance on the voting record in those States abolishing the execution of the mentally retarded.<sup>262</sup> In the end, Justice Scalia essentially accused the majority of using an intellectual subterfuge to mask the operation of its own bias.<sup>263</sup>

The *Atkins* approach toward finding a national consensus may or may not have a lasting impact on the evaluation of legislative review. The nuances of its analysis may be replicated in the future. One thing is clear from the majority’s opinion: legislative review is not a matter of mathematical precision. It is an attempt to discern societal trends. Understandably, it may be difficult to ascertain society’s predilections through what is “on the books.” But *Atkins*’ approach generally focuses on the opinions of society, while accounting for counter-majoritarian concerns. *Atkins*’ review allows a vocal minority’s opinion to influence constitutional law.

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<sup>257</sup>See *Atkins*, 536 U.S. at 315 n.16.

<sup>258</sup>*Atkins*, 536 U.S. at 316.

<sup>259</sup>See *Atkins*, 536 U.S. at 315.

<sup>260</sup>Chief Justice Rehnquist delivered a separate dissenting opinion, mainly criticizing the majority from relying on factors besides legislative action and jury decisions. The substance of his dissent will be discussed later.

<sup>261</sup>*Atkins*, 536 U.S. at 344 (Scalia, J., dissenting).

<sup>262</sup>*Id.* at 346.

<sup>263</sup>Again, Justice Scalia harshly begins his dissent by stating:

Today’s decision is the pinnacle of our Eighth Amendment death-is-different jurisprudence. Not only does it, like all of that jurisprudence, find no support in the text or history of the Eighth Amendment; it does not even have support in current social attitudes regarding the conditions that render an otherwise just death penalty inappropriate. Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members.

*Id.* at 337-38.

*Atkins*' approach in this area also highlights concern over the permanency of Supreme Court fiat. *Atkins* accents the manner in which the Eighth Amendment allows those enactments in the independent "laboratories of the states"<sup>264</sup> to become nearly immutable constitutional law.<sup>265</sup> The Supreme Court's approach to the Eighth Amendment acts as a mirror, reflecting the concerns of the States. But that mirror's image, once cast, cannot be removed lightly, and reflects regressive legislative movement only with great difficulty. Indeed, the Supreme Court's actions may more appropriately be characterized as the indelible photograph. Nonetheless, the Supreme Court's use of legislative action as an objective indicator in this regard intuitively makes sense. The successful repetition of an experiment suggests its universal applicability. Generalizations may certainly be made from independently reoccurring phenomena.

While encompassing an important piece of the "evolving standards" puzzle, legislative enactment alone does not define the contours of the Eighth Amendment. Legislative enactment only fills in one portion of a larger mosaic.

*c. Juries*

Another objective factor endorsed by the Supreme Court to gauge social decency is the decision made by juries. A jury's direct contact with society itself and the

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<sup>264</sup>This phrase originated in Justice Brandeis' dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932):

It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country . . . novelty itself is not a vice. These novel experiments, of course, must comply with the United States Constitution; but their mere novelty should not be a strike against them.

*Id.*

<sup>265</sup>Justice Scalia's comments during oral arguments in *Atkins* voice some of the reason for concern when relying on legislative enactments as an indicator of societal views:

[Y]ou must agree that--that we have to be very careful about finding new consensus, don't you? Because we can't go back. I mean, if we find a consensus here that it is indeed unconstitutional to execute the mentally retarded and then it turns out that there are a lot of problems, that indeed in every case, every capital case, there's going to be a claim of mental retardation and people come to believe that in many of these cases you get expert witnesses—you can easily get them on—on both sides— people become dissatisfied with that. We won't be able to go back, will we? Because the evidence of the consensus is supposed to be legislation, and once we've decided that you cannot legislate the execution of the mentally retarded, there can't be any legislation that enables us to go back. So, we better be very careful about the national consensus before we come to such a judgment, don't you think?

Oral Arguments in *Atkins v. Virginia*, 2002 WL 341765, at \*8-9. The wisdom behind using these enactments, however, also was identified in oral arguments:

I think must recognize the premise that one of the great facts of life in American Government is legislative inertia. Legislatures don't act unless they're prompted to do so. And a legislature is not going to just sit down and say, oh, I think it's a good time for us to pass a—a bill on—against executing the mentally retarded if there's no such person on death row. Legislatures just don't operate that way.

*Id.* at \* 38.

criminal justice system makes its actions a reliable barometer of public opinion. Indeed,

one of the most important functions any jury can perform in making a [punishment] selection is to maintain a link between contemporary community values and the penal link without which the determination of punishment would hardly reflect “the evolving standards of decency that mark the progress of a maturing society.”<sup>266</sup>

By looking at jury action, the Supreme Court divides the shared beliefs of common society.<sup>267</sup> An example of the Supreme Court’s review of jury action is found in *Furman*, where the Supreme Court found that the “infrequent and haphazard handing out of death sentences was a prime factor” in ruling that “the death penalty, as then administered in unguided fashion, was unconstitutional.”<sup>268</sup> In *Furman*, the Court treated the jury’s infrequent imposition of the death penalty not as an objection to capital punishment *per se*, but as “reflect[ing] the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases.”<sup>269</sup>

Notwithstanding its accepted use, problems exist in relying on the jury’s decision to discern society’s standards. The Supreme Court has recognized that “the jury’s

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<sup>266</sup>*Witherspoon v. Illinois*, 391 U.S. at 521 n. 15 (quoting *Trop*, 356 U.S. at 11; *see also Woodson*, 428 U.S. at 294. Justice Stevens has written that “[t]hus the lesson history teaches is that the jury—and in particular jury sentencing—has played a critical role in ensuring that capital punishment is imposed in a manner consistent with evolving standards of decency. This is a lesson of constitutional magnitude.” *Spaziano*, 468 U.S. at 484 (Stevens, J., concurring/dissenting opinion).

<sup>267</sup>Justice Stevens has noted that:

That the jury provides a better link to community values than does a single judge is supported not only by our cases, but also by common sense. Juries—comprised as they are of a fair cross section of the community—are more representative institutions than is the judiciary; they reflect more accurately the composition and experiences of the community as a whole, and inevitably make decisions based on community values more reliably, than can that segment of the community that is selected for service on the bench. Indeed, as the preceding discussion demonstrates, the belief that juries more accurately reflect the conscience of the community than can a single judge is the central reason that the jury right has been recognized at the guilt stage in our jurisprudence. This same belief firmly supports the use of juries in capital sentencing, in order to address the Eighth Amendment’s concern that capital punishment be administered consistently with community values. In fact, the available empirical evidence indicates that judges and juries do make sentencing decisions in capital cases in significantly different ways, thus supporting the conclusion that entrusting the capital decision to a single judge creates an unacceptable risk that the decision will not be consistent with community values.

*Spaziano*, 468 U.S. at 486-89 (Stevens, J., dissenting).

<sup>268</sup>*Thompson*, 487 U.S. at 831. Justices Douglas, Brennan, and White’s concurring opinions in *Furman* especially focused on jury action. *See Furman*, 408 U.S. at 249 (Douglas, J., concurring); *id.* at 274-77 (Brennan, J., concurring); *id.* at 312-13 (White, J., concurring).

<sup>269</sup>*Gregg*, 428 U.S. at 182.

role in the criminal process is essentially unreviewable and not always rational.<sup>270</sup> The irrationality of a particular jury's response to a discrete criminal action may or may not reflect broad community judgments. This may be especially true in jurisdictions that bring few capital prosecutions, unlike in southern "death-belt" states. A sparsity of capital cases creates too small a data pool to draw universal conclusions.

Also, it may be difficult to correlate a jury's unwillingness to impose a death sentence to any narrow constitutional argument. It is nearly impossible to tell if a jury refused to impose a death sentence because of a general distrust of the current system, the failure to afford some personal liberty to the defendant, the individual characteristics of the defendant, or on the particular facts of the crime.<sup>271</sup> Despite the individual idiosyncrasies of juries in some cases and jurisdictions, the Supreme Court considers jury behavior to reliably expose modern society's values. Generally, the Supreme Court reviews statistical analysis to evaluate jury behavior.<sup>272</sup>

#### d. Other Indicia

The Supreme Court officially endorsed only the use of historical inquiry, legislative action, and jury decisionmaking in the "evolving standards" inquiry. The justices, however, vigorously debate the use of other indicia of society's decency. In the past, some members of the Court have looked at the views of professional and religious organizations,<sup>273</sup> the consensus of the international community,<sup>274</sup> the exercise of prosecutorial discretion,<sup>275</sup> and public opinion polls<sup>276</sup> as other objective indicia of contemporary standards. In *Stanford*, however, a majority of the court criticized the use of such information. When presented with public opinion polls, the views of interest groups, and the position of professional organizations, the plurality "decline[d] the invitation to rest constitutional law on such uncertain foundation. A

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<sup>270</sup>*Spaziano*, 468 U.S. at 455.

<sup>271</sup>Also, the decisions of juries are limited to the cases presented before them. A prosecutorial filter may hamper the ability to ascertain society's standards from juries. Consider a possible scenario: a state enacts a law allowing for the execution of offenders committing a violent and horrendous, yet non-homicidal, crime such as the aggravated sexual assault of a child. Based on the Supreme Court's *Coker* decision, prosecutors may be wary of enforcing that law, even when the jury would be willing to impose a death sentence. Prosecutorial discretion may color the impact of the jury as an objective indicator.

<sup>272</sup>For an example of the Supreme Court's use of statistical jury analysis, see *Stanford*, 492 U.S. at 373; *Thompson*, 487 U.S. at 832-33; *Enmund*, 458 U.S. at 794; *Woodson*, 428 U.S. at 294; *Gregg*, 428 U.S. at 181-82. The use of statistics, however, may lead to debate concerning the Court's interpretation of those numbers. See, e.g., *Enmund*, 458 U.S. at 818-19.

<sup>273</sup>See, e.g., *Atkins*, 536 U.S. at 316 n.21; *Penry*, 492 U.S. at 336-37 (O'Connor, J., opinion); *Stanford*, 492 U.S. at 384 (Brennan, J., dissenting); *Thompson*, 487 U.S. at 830-31.

<sup>274</sup>See, e.g., *Atkins*, 536 U.S. at 316 n.21; *Stanford*, 492 U.S. at 384 (Brennan, J., dissenting); *Thompson*, 487 U.S. at 830-31; *Enmund*, 458 U.S. at 796 n.22; *Coker*, 433 U.S. at 596 n.10; *Trop*, 356 U.S. at 107.

<sup>275</sup>See, e.g., *Enmund*, 458 U.S. at 797.

<sup>276</sup>See, e.g., *Woodson*, 428 U.S. at 299 n.34.

revised national consensus so broad, so clear, and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved."<sup>277</sup> The same opinion eschewed any influence stemming from an international consensus.<sup>278</sup> Notwithstanding *Stanford's* language, other factors frequently play into the Supreme Court's "evolving standards" inquiry, though often relegated to a footnote.

*Atkins v. Virginia*<sup>279</sup> provides a recent example of the Supreme Court's internal debate over the use of other supporting factors. In *Atkins*, the majority, albeit in its twenty-first footnote, looked at the views of professional organizations and the world community in finding that the execution of the mentally retarded violated the Constitution.<sup>280</sup> The majority's reliance on international data echoed *Trop's* use of such information in discerning the contemporary values of society.<sup>281</sup>

The dissent, however, resisted footnote twenty-one's broadening of the factors used in the objective review. Relying on *Stanford's* pronouncement that the Eighth Amendment inquiry should focus only *American* society,<sup>282</sup> Chief Justice Rehnquist's dissent argued that legislation and juries should be the "sole indicators by which courts ascertain the contemporary American conceptions of decency for the purposes of the Eighth Amendment."<sup>283</sup> Chief Justice Rehnquist rejected *Trop's* use of international opinion because it "represent[ed] the view of only a minority of the Court."<sup>284</sup>

The interplay between the majority and the dissent over *Atkins'* footnote 21 emphasizes the sharp division over evidence may be marshaled to reach a national consensus. Only time will tell whether footnote 21 actually legitimatizes a broad inquiry into objective data. It is likely that consideration of other factors may continue in the margins, with relegation to a footnote belying the factors' true influence. While the extent to which other factors may influence the Supreme Court's "evolving standards" inquiry is not yet settled, it is evident that some justices will consider a broad range of information in making that evaluation. At least some judges consider the views of the international community,<sup>285</sup> professional organizations, and other groups to indicate society's standard of decency.

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<sup>277</sup>*Stanford*, 492 U.S. at 378.

<sup>278</sup>*See Stanford*, 492 U.S. at 369.

<sup>279</sup>536 U.S. 304 (2002).

<sup>280</sup>*See Atkins*, 536 U.S. at 316.

<sup>281</sup>The *Trop* court emphasized that it partially based its decision on the opinion of the "civilized nations of the world." *Trop*, 356 U.S. at 102.

<sup>282</sup>*See Stanford*, 492 U.S. at 369-70 and n.1 (plurality opinion).

<sup>283</sup>*Id.* (Rehnquist, C.J., dissenting).

<sup>284</sup>*Id.* (Rehnquist, C.J., dissenting).

<sup>285</sup>While based on Fourteenth Amendment due process principles, the Supreme Court recently overturned Texas' sodomy statute, basing its reasoning in part on the consensus of the international community. *See Lawrence v. Texas*, 123 S. Ct. 2472, 2480-81 (2003). *Atkins*

## 2. The Dignity of Man

While the Supreme Court's review of the objective indicia provides important insights into society's evolving standards, that inquiry alone does not define the parameters of the Eighth Amendment. The fact that contemporary society has evolved to a level of decency in which it considers a given punishment repugnant is still insufficient to create a new constitutional principle. The challenged punishment must strike at the core of the Cruel and Unusual Punishment Clause—the punishment must offend the basic dignity of man.<sup>286</sup>

The “dignity of man” is apparently not a concept easily reduced to a simple definition. Without full elaboration, the Supreme Court clarified some factors that may contribute to the dignity of a punishment. First, at a bare minimum, a punishment must not be “excessive.”<sup>287</sup> For a punishment to be considered excessive, it must involve the “unnecessary and wanton infliction of pain”<sup>288</sup> or be “grossly out of proportion to the severity of the crime.”<sup>289</sup> An analysis of dignity, therefore, harkens in some ways back to the *Wilkerson/Kemmler* jurisprudence.

“Pain, certainly, may be a factor in the judgment.”<sup>290</sup> But it is important to note the adjectives used in describing the consideration of pain in the excessiveness evaluation. The pain must be “unnecessary and wanton”<sup>291</sup> or “gratuitous”<sup>292</sup> in a manner that offends the dignity of man. Indeed, the true significance of prohibited punishment is that it “treat[s] members of the human race as nonhumans, as objects to be toyed with and discarded.”<sup>293</sup> It would be difficult to conceive of an execution method that did not inflict some degree of pain, however infinitesimal.<sup>294</sup> In its

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and *Lawrence* may signal a new international emphasis in the interpretation of American constitutional law.

<sup>286</sup>The Supreme Court cases “make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty also must accord with ‘the dignity of man’ which is the ‘basic concept underlying the Eighth Amendment.’” *Gregg*, 428 U.S. at 173.

<sup>287</sup>*Id.*

<sup>288</sup>*Id.*; see also *Weems*, 217 U.S. at 381; *Wilkerson*, 99 U.S. at 136.

<sup>289</sup>*Gregg*, 428 U.S. at 173; see also *Trop*, 356 U.S. at 100; *Weems*, 217 U.S. at 367.

<sup>290</sup>*Furman*, 408 U.S. at 271 (Brennan, J., concurring).

<sup>291</sup>*Furman*, 408 U.S. at 271 (Brennan, J., concurring).

<sup>292</sup>*Gregg*, 428 U.S. at 183.

<sup>293</sup>*Furman*, 408 U.S. at 272 (Brennan, J., concurring).

<sup>294</sup>Viewed objectively, though, many who oppose a particular method of execution, or the death penalty in general (or most likely both—the demise of an execution method is used as a means to an end, or rather, the end of the death penalty—even though many will rarely admit that goal) seem to think that an execution must be entirely painless. For that reason, we read accounts detailing every grimace, every groan, every wince made by the condemned. If a lethal injection spans ten minutes, it is “botched.” Any cough or cowering is viewed as a constitutional offense. Undeniably, there are horrific events that occur during executions. The electric chair, for example, has a history of undignified mutilation and inhumane error. But to compare electrocution's failure to the generally-humane lethal injection lessens the credibility

review, the Supreme Court will not invalidate a punishment merely because the State could use a less severe method.<sup>295</sup> The punishment itself must offend man's essential dignity. The focus seems to be on whether the pain, physical or mental, offends those basic attributes that make us human.

Second, the dignity of man analysis may entail a search for a nexus between the judicially-recognized purposes for the death penalty and the use of a given sanction. The Supreme Court acknowledges two societal purposes for the death penalty: retribution and deterrence.<sup>296</sup> Unless the death penalty contributes to one of these two primary purposes, "it 'is nothing more than the purposeless and needless imposition of pain and suffering' and hence an unconstitutional punishment."<sup>297</sup> Constitutionally-recognized dignity finds its expression in those punishments which benefit a larger, and recognized, societal aim. An unnecessary punishment is unconstitutional.

Finally, "the Constitution contemplates that in the end [the Supreme Court's] own judgment will be brought to bear on the question of the acceptability" of a given punishment.<sup>298</sup> The Supreme Court repeatedly suggests that its review of a particular punishment is an objective review.<sup>299</sup> While other objective factors "weigh heavily in the balance,"<sup>300</sup> the Supreme Court is the ultimate arbitrator of what punishment violates the Constitution. The Supreme Court cautioned that their review is not "a shorthand reference to the preferences of a majority of" that Court.<sup>301</sup> The Court

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of the abolition movement. Further, it misconstrues Eighth Amendment precedent. Some pain is anticipated in execution. Otherwise, lethal injection's needle prick, no more tortuous than that experienced by the millions of citizens who give blood each year, would have to violate the core dignity of society. In the public eye, lethal injection is acceptable. Death penalty opponents have valid, meritorious, and convincing reasons for seeking the extinction of capital punishment. Yet, the credibility of those arguments is lessened by an approach that makes victims out of the humanely-killed victimizers. Continued attack on lethal injection may not turn the public entirely away from the death penalty, but galvanize the populace against potentially disingenuous arguments that camouflage pure abolitionist aims.

<sup>295</sup>*Gregg*, 428 U.S. at 183; *Furman*, 408 U.S. at 451, (Blackmun, J., concurring).

<sup>296</sup>*See Atkins*, 536 U.S. at 318-21; *Gregg*, 428 U.S. at 183. *Gregg* also recognized in a footnote that incapacitation ("individual deterrence") is another important justification for the death penalty. *See Gregg*, 428 U.S. at 183 n.28.

<sup>297</sup>*Enmund*, 458 U.S. at 798 (quoting *Coker*, 433 U.S. at 592); *see also Atkins*, 536 U.S. at 319.

<sup>298</sup>*See Coker*, 433 U.S. at 597. *See also Atkins*, 536 U.S. at 321; *Thompson*, 487 U.S. at 833; *Spaziano*, 468 U.S. at 462; *Enmund*, 458 U.S. at 797; *Rhodes*, 452 U.S. at 346. To require that the ultimate decision be based on objective factors "to the maximum possible extent," *Rummel*, 445 U.S. at 274-75; *see also Rhodes*, 452 U.S. at 346; *Coker*, 433 U.S. at 592, implicitly recognizes that some subjective opinion will influence the ultimate determination.

<sup>299</sup>*See Stanford*, 492 U.S. at 379; *Rhodes*, 452 U.S. at 345; *Rummel*, 445 U.S. at 275; *Coker*, 433 U.S. at 592; *Gregg*, 428 U.S. at 173.

<sup>300</sup>*Enmund*, 458 U.S. at 797.

<sup>301</sup>*Stanford*, 492 U.S. at 379.

does not intend to “replace judges of the law with a committee of philosopher-kings.”<sup>302</sup> Nonetheless, the Supreme Court’s judgment in this area parallels that sentiment captured in Justice Frankfurter’s classic quote: “there comes a time when this court should not be ignorant as judges of what we know as men.”<sup>303</sup> It is apparent from the vigorous debates between the justices that their personal views play some role in the analysis. Commonsense dictates that justices’ personal view will play a part. It is ultimately for the Supreme Court to judge whether the Eighth Amendment permits the imposition of a particular punishment.<sup>304</sup>

#### *E. Choice-of-Execution Statutes*

Lest any review of the Eighth Amendment jurisprudence outlined above begins tilting windmills, serious preliminary hurdles face any challenge to the constitutionality of the firing squad. Preeminent among these is the fact that Utah employs a choice-of-execution statute.<sup>305</sup> Under Utah law,

When a person is convicted of a capital felony and the judgment of death has been imposed, the defendant is entitled to select, at the time of sentencing, either a firing squad or a lethal intravenous injection as the method of execution. If the defendant does not indicate a preference at that time to the court, the judgment of death shall be executed by lethal intravenous injection.<sup>306</sup>

Any inmate facing the firing squad in Utah chose his fate.<sup>307</sup> In fact, Utah has allowed the condemned to choose his own death for over a century and a half. After receiving his death sentence, a capital prisoner elects whether to face bullets or poison. Anyone with standing to challenge the use of the firing squad must have selected that fate. Supreme Court precedent transforms Utah’s choice-of-execution statute into a waiver provision, forcing a prisoner to relinquish any method-of-execution challenges.

In *Stewart v. Walter LaGrand*,<sup>308</sup> the Supreme Court considered the effect a State’s choice-of-execution statute would have on a challenge to the elected method of execution. Walter LaGrand, a German national sentenced to death for a murder committed during a failed bank robbery with his brother, chose to be executed in

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<sup>302</sup>*Id.*

<sup>303</sup>*Watts v. Indiana*, 338 U.S. 49, 52.

<sup>304</sup>*Thompson*, 487 U.S. at 833.

<sup>305</sup>UTAH CODE ANN. §77-18-5.5 (2002).

<sup>306</sup>*Id.*

<sup>307</sup>*Id.*

<sup>308</sup>526 U.S. 115 (1999). To avoid confusion with his brother Karl, who similarly challenged the use of lethal injection, the author will include the first name of the petitioner when referring to this case. For more developed discussion of the Walter LaGrand case and choice-of-execution statutes in general see Jeffery L. Kirchmeier, *Let’s Make a Deal: Waiving the Eighth Amendment by Selecting a Cruel and Unusual Punishment*, 32 CONN. L. REV. 615 (2000).

Arizona's gas chamber.<sup>309</sup> At the time of his sentencing, Arizona only executed by lethal gas.<sup>310</sup> Subsequent changes in the law, however, allowed Arizona capital inmates to choose between lethal gas and lethal injection, with the injection being the default method.<sup>311</sup> When given a choice, LaGrand selected the gas chamber.<sup>312</sup> Even when Arizona's governor again allowed LaGrand to alter his decision, he maintained his wish to be executed by gas.<sup>313</sup>

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<sup>309</sup>The facts of LaGrand's case can be found at *State v. LaGrand*, 733 P.2d 1066 (Ariz. 1987). For a treatment of the international legal issues springing from the *LaGrand* case; see Howard S. Schiffman, *The LaGrand Decision: The Evolving Legal Landscape of the Vienna Convention on Consular Relations in U.S. Death Penalty Cases*, 42 SANTA CLARA L. REV. 1099 (2002).

<sup>310</sup>ARIZ. REV. STAT ANN. § 13-704 (amended 1980).

<sup>311</sup>The Arizona choice-of-method statute reads as follows:

A. The penalty of death shall be inflicted by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, under the supervision of the state department of corrections.

B. A defendant who is sentenced to death for an offense committed before November 23, 1992 shall choose either lethal injection or lethal gas at least twenty days before the execution date. If the defendant fails to choose either lethal injection or lethal gas, the penalty of death shall be inflicted by lethal injection.

ARIZ. REV. STAT. ANN. § 13-704 (West 1998).

<sup>312</sup>*LaGrand v. Stewart*, 173 F.3d 1145 (Ariz. 1987).

<sup>313</sup>In 1999, LaGrand's brother, Karl, filed a successive state application for post-conviction relief arguing that execution in the gas chamber constituted cruel and unusual punishment. Due to his failure to raise the issue in his previous proceedings, the trial court procedurally barred the claim. The Arizona Supreme Court denied review. When Karl LaGrand raised the issue in a federal habeas petition, the district court reaffirmed the state-imposed procedural bar because he did not overcome that procedural hurdles as required by federal law.

The Ninth Circuit reversed the district court's opinion. Finding that a procedural bar indeed existed, the Ninth Circuit nonetheless considered Karl LaGrand's petition. The Ninth Circuit found that "cause" existed to allow consideration of Karl LaGrand's claim because, at the time of his previous state proceedings, no court or attorney could have anticipated the trends in capital jurisprudence that would support his claim. The Ninth Circuit relied on its earlier choice-of-execution jurisprudence to find "prejudice."

The Ninth Circuit, therefore, enjoined Arizona "from executing Karl Hinz LaGrand, or anyone similarly situated, by means of lethal gas." *LaGrand, v. Stewart*, 173 F.3d 1144, 1149 (9th Cir. 1999). The Supreme Court, however, subsequently granted an application to vacate the stay. See *LaGrand v. Stewart*, 525 U.S. 1173. Karl LaGrand ultimately mooted the issue at the last minute by choosing to be executed by lethal injection. *Id.*

When Walter LaGrand filed his second federal habeas petition, the district court assumed that the Supreme Court's removal of the stay vacated the merits of the Ninth Circuit's opinion, removing questions concerning the constitutionality of lethal gas. On appeal, the Ninth Circuit concluded that the Supreme Court did not vacate its review of the merits, and again enjoined Arizona from using lethal gas. The Supreme Court's subsequent consideration of Walter's petition did not give further light as to its action in Karl's case, other than to explain the ability to waive Eighth Amendment claims.

Prior to the *LaGrand* case, the Supreme Court had not explicitly addressed whether a death row prisoner could waive an Eighth Amendment challenge. In *Gilmore v. Utah*,<sup>314</sup> however, the Supreme Court suggested that such a waiver would be tolerated by the Constitution.<sup>315</sup> As previously discussed, Gary Gilmore hastened his execution by forgoing appellate review. In a short order, the Supreme Court held that Gilmore “made a knowing and intelligent waiver of any and all federal rights he might have asserted after the Utah trial court’s sentence was imposed” by choosing not to appeal.<sup>316</sup> Implicitly, the *Gilmore* Court allowed the waiver of Eighth Amendment claims, failing to draw a distinction in death penalty cases. Other case law, however, explicitly questioned the applicability of such waiver in the capital context.<sup>317</sup> Notably, several dissenting opinions challenged a defendant’s ability to choose a cruel and unusual punishment.<sup>318</sup>

Walter LaGrand faced two hurdles in the federal review of his claims. First, because LaGrand’s challenge to the gas chamber had not been presented to the state courts before filing his first federal proceeding, the district court found that he had procedurally-defaulted his claim.<sup>319</sup> Second, as LaGrand raised the constitutionality

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<sup>314</sup>429 U.S. 1012 (1976).

<sup>315</sup>*Id.*

<sup>316</sup>*Gilmore*, 429 U.S. at 1013.

<sup>317</sup>*See, e.g.*, *Campbell v. Woods*, 18 F.3d 662, 680 (9th Cir. 1994) (en banc) (rejecting “the argument that the government may cloak unconstitutional punishment in the mantle of choice”).

<sup>318</sup>*See Whitmore v. Arkansas*, 495 U.S. 149, 172 (1990)

A defendant’s voluntary submission to a barbaric punishment does not ameliorate the harm that imposing such a punishment causes to our basic societal values and to the integrity of our system of justice. Certainly a defendant’s consent to being drawn and quartered or burned at the stake would not license the State to exact such punishments. Nor could the State knowingly execute an innocent man merely because he refused to present a defense at trial and waived his right to appeal. Similarly, the State may not conduct an execution rendered unconstitutional by the lack of an appeal merely because the defendant agrees to that punishment.

*Id.* (Marshall, J., dissenting); *Lenhard v. Wolff*, 444 U.S. 807, 810 (1979) (“Society’s independent stake in enforcement of the Eighth Amendment’s prohibition against cruel and unusual punishment cannot be overridden by a defendant’s purported waiver.”) (Marshall, J., dissenting); *Gilmore*, 429 U.S. 1018.

Because of Gary Gilmore’s purported waiver of his right to challenge the statute, none of these questions was resolved in the Utah courts. I believe, however, that the consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment.

*Id.* (White, J., dissenting).

<sup>319</sup>“When a state court declines to hear a prisoner’s federal claims because the prisoner failed to fulfill a state procedural requirement, federal habeas is generally barred if the state procedural rule is independent and adequate to support the judgment.” *Sayre v. Anderson*, 238 F.3d 631, 634 (5th Cir. 2001). “This doctrine ensures that federal courts give proper respect to state procedural rules.” *Glover v. Cain*, 128 F.3d 900, 902 (5th Cir. 1997), cert. denied, 523 U.S. 1125 (1998); *see also Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) (finding the procedural default doctrine standard to be “grounded in concerns of comity and

of lethal injection on federal habeas review, he faced the stringent non-retroactivity principle enshrined in *Teague v. Lane*.<sup>320</sup> Under *Teague*, federal habeas relief generally may not be premised on “a new rule” of law if that rule was announced after the petitioner’s conviction became “final,” if the petitioner is seeking to establish a wholly new rule, or to apply a settled precedent in a novel way that would result in the creation of a new rule.<sup>321</sup> The Supreme Court ultimately found federal relief unavailable to LaGrand on both grounds.

Most germane to the current discussion, the Supreme Court first found that *Teague* barred federal relief on LaGrand’s claim.<sup>322</sup> The Supreme Court noted that “[b]y declaring his method of execution, picking lethal gas over the State’s default form of execution—lethal injection—Walter LaGrand has waived any objection he might have to it.”<sup>323</sup> The Supreme Court referred to its line of cases holding that a

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federalism”). When a prisoner defaults his federal claims in state court pursuant to an independent and adequate state procedural rule, “federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). To show a fundamental miscarriage of justice, a petitioner must generally establish his actual innocence. *See Finley v. Johnson*, 243 F.3d 215, 220 (5th Cir. 2001).

<sup>320</sup>489 U.S. 288 (1989).

<sup>321</sup>*See Teague*, 489 U.S. at 310; *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989) (finding *Teague* applicable in the capital context). “In general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal government. . . . To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant’s conviction became final.” *Teague*, 489 U.S. at 301; *see also Graham v. Collins*, 506 U.S. 461, 467 (1993). “[T]here can be no dispute that a decision announces a new rule if it expressly overrules a prior decision . . . .” *Graham*, 506 U.S. at 467. The Supreme Court recognizes two narrow exceptions to the non-retroactivity principle of *Teague*. The first exception applies to rules that would place private conduct beyond the government’s power to proscribe or a class of persons beyond its power to punish. *Id.* at 477-78. Under the second exception for rules implicit in the concept of ordered liberty, *Teague* includes fundamental principles of liberty, justice, and fairness, and procedures insuring factfinding reliability and accuracy of criminal proceedings, i.e., “watershed” rules that are central to truthseeking. *Id.*; *Teague*, 489 U.S. at 312-13. The Fifth Circuit recently recognized a third exception to the rule in *Teague*: “When an alleged constitutional right is susceptible of vindication only on habeas review, application of *Teague* to bar full consideration of the claim would effectively foreclose any opportunity for the right ever to be recognized.” *Jackson v. Johnson*, 217 F.3d 360, 364 (5th Cir. 2000).

<sup>322</sup>As a general rule, “if the State . . . argue[s] that the defendant seeks the benefit of a new rule of constitutional law, the court *must* apply *Teague* before considering the merits of the claim . . . .” *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). Under Supreme Court precedent, however, any “procedural-bar issue should ordinarily be considered” before any *Teague* analysis. *Lambrix v. Singletary*, 520 U.S. 518, 524 (1997). The Supreme Court has also noted that “[j]udicial economy might counsel giving the *Teague* question priority, for example, if it were easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law.” *Id.* at 525. Here, the Court considered the *Teague* question first, although neither issue required complicated analysis.

<sup>323</sup>*LaGrand*, 526 U.S. at 119 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

defendant may waive constitutional claims.<sup>324</sup> On that basis, the Supreme Court concluded that “[t]o hold otherwise, and to hold that the Eighth Amendment protections cannot be waived in the capital context, would create and apply a new procedural rule.”<sup>325</sup> Essentially, the Supreme Court found that the special rules of habeas review prevented carving out an exception to the general rule of waiver for Eighth Amendment claims. In addition, the Supreme Court noted that LaGrand procedurally defaulted his federal claim due to the exhaustion doctrine.<sup>326</sup>

Those courts considering choice-of-method statutes after *LaGrand* have followed its dictates without question.<sup>327</sup> *LaGrand* seriously limits constitutional review of

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<sup>324</sup>*See, e.g., Johnson*, 304 U.S. at 464.

<sup>325</sup>*LaGrand*, 526 U.S. at 119. In a dissent, Justice Stevens criticized this holding by saying “[i]n my opinion the answer to the question whether a capital defendant may consent to be executed by an unacceptably torturous method of execution is by no means clear. I would not decide such an important question without full briefing and argument. I, therefore, respectfully dissent.” *Id.* at 121 (Stevens, J., dissenting).

<sup>326</sup>The Supreme Court recognized that the long history of constitutional challenges to lethal injection prevent any excuse for his failing to appropriately advance that claim. *LaGrand*, 526 U.S. at 119. Specifically, the Supreme Court stated

In addition, Walter LaGrand’s claims are procedurally defaulted, and he has failed to show cause to overcome this bar. *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991). At the time of Walter LaGrand’s direct appeal, there was sufficient debate about the constitutionality of lethal gas executions that Walter LaGrand cannot show cause for his failure to raise this claim. Arguments concerning the constitutionality of lethal gas have existed since its introduction as a method of execution in Nevada in 1921. *See H. BEDAU, THE DEATH PENALTY IN AMERICA* 16 (3d ed. 1982). In the period immediately prior to Walter LaGrand’s direct appeal, a number of States were reconsidering the use of execution by lethal gas, *see Gray v. Lucas*, 710 F.2d 1048, 1059-1061 (5th Cir. 1983) (discussing evidence presented by the defendant and changes in Nevada’s and North Carolina’s methods of execution), and two United States Supreme Court Justices had expressed their views that this method of execution was unconstitutional, *see Gray v. Lucas*, 463 U.S. 1237, 1240-1244 (1983) (Marshall, J., joined by Brennan, J., dissenting from denial of certiorari). In addition, lethal gas executions have been documented since 1937, when San Quentin introduced it as an execution method, and studies of the effect of execution by lethal gas date back to the 1950’s. *See BEDAU, supra* note 326, at 16.

*Id.* at 119-120.

<sup>327</sup>*See Stanford v. Parker*, 266 F.3d 442, 462 (6th Cir. 2001) (“[I]f Stanford chooses electrocution over lethal injection, the constitutionality of which he does not challenge, he will waive any objection to electrocution. Thus, we need not consider whether electrocution is cruel and unusual punishment because, for that issue to be relevant, Stanford would first have to waive it.”); *State v. Bays*, 716 N.E.2d 1126, 1144 (Ohio 1999) (“Moreover, a condemned prisoner may elect to be executed by lethal injection; thus, if Bays objects to electrocution as a mode of execution, he need not submit to it.”), cert. denied, 529 U.S. 1090 (2000); *State v. Morris*, 24 S.W.3d 788, 797 (Tenn. 2000) (finding that because a “defendant who elects a certain means of death such as electrocution waives his constitutional challenges to the manner of executing the sentence,” a defendant who did not waive the default execution by lethal injection could not challenge the constitutionality of electrocution), cert. denied, 531 U.S. 1082 (2001).

Utah's firing squad. Since 1852, Utah has employed a choice-of-execution statute.<sup>328</sup> Utah's choice-of-execution statute causes any defendant electing to die by firing squad to waive his right to challenge its constitutionality.<sup>329</sup>

Presumably, *LaGrand* renders Utah's sentencing hearing into a waiver proceeding where, whether consciously voluntary or not, a defendant abdicates his right to challenge the manner in which he will die. It is, of course, expected that the doctrine of stare decisis would render the *LaGrand* decision nearly inalterable. The choice-of-execution provision shelters Utah's use of lethal injection and the firing squad from judicial intervention. The value of this waiver is heightened by the increasingly frequent challenges to the constitutionality of lethal injection throughout the United States.<sup>330</sup> Several principles nonetheless suggest weaknesses in *LaGrand* and provide hope for those challenging the firing squad.

First, it is important to remember that the Supreme Court considered the *LaGrand* under the special constraints of federal habeas review. If a defendant were to challenge the constitutionality of the firing squad on direct appeal, the Supreme Court would be able to consider whether a defendant could waive a method-of-execution argument. Removed from the strict habeas prohibition against imposing a new constitutional requirement retroactively, direct review would allow the Supreme Court to consider plenary arguments on the issue. While opening the door to consideration, this approach by no means guarantees relief. The Supreme Court repeatedly and regularly endorsed the waiver of constitutional claims, so long as the waiver is "intelligent and knowing." No exception has been made for capital cases in general or methods of execution specifically. Yet, on the other hand, the Supreme Court repeatedly and emphatically cautioned that "death is different."<sup>331</sup> The waiver of the Eighth Amendment challenge to an otherwise cruel and unusual punishment is different in finality and unforgiveness than other waivers. The choice to die by a method that offends the dignity of man differs in magnitude and effect than the

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<sup>328</sup>See *Wilkerson*, 99 U.S. at 132. The first choice-of-execution statute read "... said person shall suffer death by being shot, hung, or beheaded as the Court may direct, or the person so condemned shall have his option as to the manner of his execution." SESS. LAWS UTAH § 125 (amended 1876).

<sup>329</sup>While not employing the Supreme Court's waiver jurisprudence, other constitutional challenges suggest that the *LaGrand* decision would prevent constitutional review of the firing squad. For example, in *Andrews v. Shulsen*, 802 F.2d 1256 (10th Cir. 1986), the Tenth Circuit rejected a challenge to the firing squad based on the Establishment clause and the Eighth Amendment. The Tenth Circuit rejected the Eighth Amendment claim because "Utah now allows defendants who have been sentenced to death to select either a firing squad or a lethal injection as the means of execution and mandates lethal injection if a defendant expressed no preference." *Id.* at 1275 n.16. The Tenth Circuit, at least implicitly, recognized the waiver of challenges to Utah's firing squad. The Supreme Court of Idaho reached a similar conclusion with respect to a challenge to its seldom used statutory provision authorizing the firing squad. See *Sivak v. State*, 731 P.2d 192, 216 (Idaho 1986).

<sup>330</sup>For an example of the recent challenges to Louisiana's use of lethal injection see Gwen Filosa, *Defense Lawyers Say Punishment is Cruel*, THE TIMES-PICAYUNE, Aug. 11, 2003, at 01.

<sup>331</sup>*Gregg*, 428 U.S. at 188.

waiver of, say, the right to a jury trial. If death is different, a wavier ending in an otherwise-impermissible death also is different.

Second, a defendant could challenge the constitutionality of the firing squad on the basis of Utah law alone in state court. Again, he faces the same challenges as under federal law, but may hope for a different outcome by the state courts. While Utah constitutional law frequently mirrors federal precedent, state courts generally consider federal constitutional law to be a floor, not a ceiling. The federal Constitution presents the bare minimum protections a state must afford, and the State is free to augment those protections beyond those principles found in the federal Bill of Rights.<sup>332</sup> The Utah State Supreme Court encouraged attorneys to bring claims under the state constitution.<sup>333</sup> If a prisoner made a strong case for departure from the federal constitution on purely state law grounds, *LaGrand* may not hamper full review.

Finally, the *LaGrand* Court emphasized the fact that the defendant affirmatively elected to die by lethal gas, even when afforded a second opportunity to change his mind. One commentator opined that the Supreme Court probably viewed *LaGrand*'s choice of the gas chamber and subsequent constitutional challenge as a mere delay tactic, thus prompting the Court's terse resolution of the issue.<sup>334</sup> If a capital defendant elected the firing squad and then attempted to change the method of

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<sup>332</sup>The comparable provision in the Utah constitution reads as follows: "Excessive bail shall not be required; excessive fines shall not be imposed; nor shall cruel and unusual punishments be inflicted. Persons arrested or imprisoned shall not be treated with unnecessary rigor." UTAH CONST. article I § 9. Utah's constitutional convention adopted this provision without discussion. *See State v. Gardner*, 947 P.2d 630, 635 (Utah 1997) (opinion of Durham, J.). Nevertheless, "comments by members of the convention suggest an intention to incorporate into article I of the Utah Constitution—the "Declaration of Rights"—the same rights as had been developed throughout the history of the common law and had been preserved in the constitutions of other states." *Id.* There exists a "paucity of guidance offered by decisions of [the Utah Supreme Court] or the court of appeals on the meaning of article I, section 9 of the Utah Constitution." *Id.* at 632 n.2. Some judges on the Utah Supreme Court have opined that "[t]he essence of section 9's prohibition against cruel and unusual punishments is the principle of proportionality." *Id.* at 644 (opinion of Durham, J., joined by Stewart, J.). It appears, at least, that the federal cruel and unusual punishment principles apply "with equal force" to Utah's comparable provision. *State v. Herrera*, 993 P.2d 854, 865 (Utah 1999). One significant area of departure is the Utah Constitution's inclusion of an "unnecessary rigor" provision. The contours of this phrase are not well defined. *See State v. M.L.C.*, 933 P.2d 380, 384-85 (Utah 1997); *State v. Deli*, 861 P.2d 431, 435 (Utah 1993). Utah, however, applies an "unnecessary abuse" standard in evaluating claims brought under the "unnecessary rigor" clause. *See Herrera*, 993 P.2d at 865; *Bott v. Deland*, 922 P.2d 732, 740-41 (Utah 1996). The "unnecessary rigor" provision "makes section 9 broader than its federal counterpart." *State v. Lafferty*, 20 P.3d 342, 365 (Utah 2001) (citing *State v. Bishop*, 717 P.2d 261, 267 (1986)). To show a violation under that provision, a prisoner must show "treatment that is clearly excessive or deficient and unjustified . . ." *Bott*, 922 P.2d at 741. An interesting argument could be made that the firing squad results in an excessively harmful death, the mutilation and pain being "unnecessary abuse," and thus constitutes "unnecessary rigor."

<sup>333</sup>*See generally State v. Bobo*, 803 P.2d 1268, 1272 (Utah 1990).

<sup>334</sup>*See Kirchmeier, supra* note 308, at 651.

execution, and the State of Utah then refused any change, a defendant may argue that he did not truly waive his claim.

This scenario is not as unlikely as one may think. Ronnie Lee Gardner, a notorious resident of Utah's death row, publicly changed his mind several times concerning how he would like to die.<sup>335</sup> Gardner first chose the firing squad, fearing that "lethal injection would leave him flopping on a gurney like a dying fish."<sup>336</sup> Gardner hoped that choice would make his execution more difficult for the State.<sup>337</sup> A few years later, Gardner later decided that he would prefer lethal injection.<sup>338</sup> He explained that his young children would not understand his wanting to be shot to death.<sup>339</sup> A state district court later refused to let him again switch to the firing squad.<sup>340</sup>

Under such a narrow scenario, a defendant's "choice" of the firing squad is qualitatively different than that presented in *LaGrand*. The waiver would not be a mere delay tactic, and the prisoner would not consent to execution by a potentially-unconstitutional method. A different factual scenario may result in a much different result.

In the end, *LaGrand* most likely created a nearly insurmountable hurdle to judicial evaluation of the firing squad. Due to *LaGrand*, it is unlikely that a constitutional challenge to the firing squad would receive substantive consideration. This article, however, does not end here. A discussion of the Eighth Amendment ramifications of the firing squad is not merely academic. *LaGrand* notwithstanding, it is anticipated that legal challenges to the firing squad will arise in the future. Their understanding of the constitutional issues may well impact the Constitution's influence in this area.

After all has been said, the judiciary provides, at best, an ineffectual forum to decide the future of the firing squad. The legal issues are complex; the cards stacked against a judicial extermination of the firing squad. But the courts are not the only bodies which defend our constitutional rights. While the Supreme Court is the final arbitrator of what constitutes cruel and unusual punishment, the elected legislature

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<sup>335</sup>Gardner is an interesting, and extremely violent, character, known to make blunt statements to the press. Gardner has proposed his solution to the death-penalty dilemma: arm the inmates and let them kill one another. He said "What would be the loss? Its not like they would be killing innocent people. There are no innocent people here." David Clifton, *So What? Ronnie Gardner Scoffs*, S. L. TRIB., Nov. 14, 1994, at B2. Gardner, with great bravado, expressed that his future execution is no "big deal" because he is "dead anyway." *Id.*

<sup>336</sup>Brian Maffry, *Corrections Boss: Lethal Injection Far from Perfect*, S. L. TRIB., Feb. 18, 1996 at B2.

<sup>337</sup>*Id.* One department of corrections official has opined that Gardner only wants to go out in a "blaze of glory." See Mike Carter, *Bill Voiding Firing Squad Option Dropped*, S. L. TRIB., Feb. 10, 1996, at E3.

<sup>338</sup>*Gardner May Get Stay for March 8 Execution Date*, S. L. TRIB., Jan. 15, 1996, at D2.

<sup>339</sup>Amy Donaldson, *Inmate Threatens to Sue If State Won't Let Him Die by Firing Squad*, DESERET NEWS, Feb. 9, 1996, at A1.

<sup>340</sup>Mike Carter, *Convict Asks Judge to Drop Appeal So He Can Be Executed*, S. L. TRIB., Apr. 9, 1998, at B3.

and societal-influenced jurors play an important role in defining the scope of the Eighth Amendment. By swearing to uphold the supreme law of the land, legislatures and members of the executive branch take on a duty to ensure the constitutional administration of justice.<sup>341</sup> When considering death penalty legislation, the members of a legislative body should be mindful of constitutional protections. In signing legislation, and especially in the clemency process, the executive branch should consider the protection of constitutional liberties.

True, *LaGrand* may allow capital defendants to waive their Eighth Amendment claim, but that waiver does not extend to the public debate, the political arena, and polemic discussion. Indeed, if the evolving standards of decency language carries any validity, it is those bodies extraneous to the judiciary that will be most responsive and best equipped to adjust to emergent societal concerns.<sup>342</sup> An analysis of the constitutionality of any method of execution, therefore, transcends a prediction of how a court may respond to legal arguments. A national consensus requires national concern and national debate. In that respect, the constitutionality of the firing squad is not academic, but an important societal issue.

#### IV. CONSTITUTIONALITY OF THE FIRING SQUAD

Best State to Be Executed In: Utah. Utah gets it. This is the state that offers its capital criminals the option of going out the old-fashioned way—by firing squad. Electrocutation and lethal injection, the choices in most states, just don't get the job done with the same no-nonsense immediacy as a bunch of guys with rifles.<sup>343</sup>

After an understanding of the historical use of the firing squad, the Eighth Amendment establishes a background for the consideration of society's acceptance of the firing squad. As will be seen, an objective review raises objective questions about the use of the firing squad. These questions, however, are by no means so conclusive or determinative as to render the firing squad blatantly unconstitutional. A review of the evidence will suggest that, more than anything else, subjective factors may decide one's opinion regarding the firing squad's use.

##### A. Decency

The firing squad's modern use echos its historical significance. Each of Utah's firing squads shares a common legacy with some of history's most infamous deaths. It seems unlikely that the cur Gary Gilmore and the coquette Mata Hari would share anything in common—except their death by bullet. Songwriter Joe Hill finds himself

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<sup>341</sup>See Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1814 (1970).

<sup>342</sup>Choice of execution statutes have been criticized because “the ‘choice’ only serves as a vehicle to ease legislators’, jurists’, and society’s mind.” Pamela S. Nagy, *Hang By the Neck Until Dead: The Resurgence of Cruel and Unusual Punishments in the 1990s*, 26 PAC. L. J. 85, 123 (1994). Others, on the other hand, view choice statutes as offering a modicum of dignity to offenders, by respecting their choices on the method of death. *Gardner*, 947 P.2d at 477. What impact the choice statutes may have on the broader debate is difficult to ascertain.

<sup>343</sup>See *Forbes*, *supra* note 39.

in famous company as he died by the same method which nearly killed literary genius Fyodor Dostoevsky. Every execution for a double murder reminds us of Private Eddie Slovik's execution for double desertion in World War II. Granted, institutional policy prevents Utah's condemned from being shot with a cigarette dangling from their lips, but Utah's use of that method reminds us of the firing squad's traditional, nearly romantic, use. The firing squad's historical context, therefore, causes us to reexamine its current use. We must ask ourselves if we progressed as a society in a manner that would require the abolition of this violent, but arguably nostalgic, method of death.

The evolving standards of decency analysis requires us to look beyond the most visceral human response, to transcend our gut feeling. Instead, the analysis asks us to evaluate the gut feeling of the Nation, to determine the collective opinion of which our own opinion plays but a small part. Casting personal emotions aside, the evolving standards inquiry tries to evaluate those quantifiable principles that reflect an amorphous societal sentiment. As will be seen, this objective review provides clues, but few conclusions, about Utah's peculiar method of death.

### 1. History

Utah's use of the firing squad, while important, is not the solitary facet of the nation's firing-squad history. A firing squad carried out the first official execution on American soil in 1608. Before the passage of the Bill of Rights, one source records over thirty firing squad executions on what would become American soil.<sup>344</sup> Many of these executions were carried out in California and Louisiana, areas then governed by foreign nations. The majority of firing squad executions seem to have involved military action; the condemned were shot for treason, espionage, or desertion, and many were soldiers. While information regarding these early firing squads is sparse, the firing squad's use in early American history does not seem to be unusual.

The firing squad's use during that time period contrasts sharply with other gruesome methods of execution. Early American history is tainted by executions by such unusual methods as pressing,<sup>345</sup> gibbeting,<sup>346</sup> breaking on the wheel,<sup>347</sup> burning

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<sup>344</sup>See Espy file, *supra* note 5.

<sup>345</sup>"Pressing" is technically known as *peine forte et dure*. TEETERS, *supra* note 40, at 98. Believing that truth could literally be squeezed out of a person, especially in cases where a person refused to acquiesce to a court's jurisdiction by not pleading guilty or not guilty, large weights were applied until the victim was crushed to death. See TEETERS, *supra* note 40, at 98-99.

<sup>346</sup>"Gibbeting" refers to hanging in chains.

<sup>347</sup>When breaking on the wheel, the victim is spread out on the ground, often naked, with blocks of wood placed under each extremity's joints. A wooden wheel with an iron edge would then smash each of the victim's limbs. The broken limbs were then woven into the wheel and the victim hoisted up to die slowly. One author commented [t]he victim is transformed into a sort of huge screaming puppet writhing in rivulets of blood, a puppet with four tentacles, like a sea monster of raw, slimy and shapeless flesh mixed up with splinters of smashed bones." A. HYATT VERRILL, *THE INQUISITION* 138-48 (1931) (citing an early German newsletter).

at the stake, and bludgeoning. These methods, the progeny of a bloody British past, found some acceptance in the Colonies. Apparently, society reserved the majority of these atrocities for pirates, slaves, and soldiers.

Even the more commonly employed methods such as hanging were accompanied by post-mortem abominations. Dismemberment and public display of the executed's corpse seemed common in the American colonies.<sup>348</sup> Often a condemned's sentence included prescriptions such as having "their heads and quarters set up in several parts of the Country" or having "their heads cut off their bodies and fixed to the chimneys of the court house."<sup>349</sup> The Virginia Colony commonly placed the heads of executed slaves at the crossroads as a warning to others.<sup>350</sup> Often, though, courts imposed sentences of drawing and quartering, but humanity prevented the realization of such a gruesome task.<sup>351</sup>

The post-mortem dismemberment and display of a corpse, however, formed only one part of the ghastly public spectacle of early executions. Public executions, often held in the public square or a designated "Gallows Hill," were the norm.<sup>352</sup> A circus-like atmosphere pervaded many executions. Aside from the harsh spectacle of death alone, the frequency of botched executions in early America heightened the cruelty of executions. Due to the regularity with which the rope broke, a good hangman kept a second noose close at hand. In those cases in which a misplaced knot did not break the condemned's neck, the hangmen "mercifully" beat the victim's chest or hung onto his legs to hasten death.<sup>353</sup> Without any uniform procedure, various complications often enhanced the tortuous quality of the death.<sup>354</sup> As aptly noted by John Stuart Mill, "[t]he men of old cared too little about death, and gave their own lives or took those of others with equal recklessness."<sup>355</sup>

One legacy of *Wilkerson* is its recognition that the historical context of our Nations's founding did not consider the firing squad cruel and unusual. The *Wilkerson* Court suggests that, when compared to a commonly-used method such as hanging, the firing squad maintained some modicum of dignity, reserved by society for less-egregious crimes.<sup>356</sup> *Wilkerson* found that, at a bare minimum, the Drafters

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<sup>348</sup>See TEETERS, *supra* note 40, at 95.

<sup>349</sup>*Id.*

<sup>350</sup>*See id.*

<sup>351</sup>*See id.* at 96-97.

<sup>352</sup>*See id.* at 59.

<sup>353</sup>*See id.*

<sup>354</sup>This is not to say that complications are non-existent in our orderly execution process today. This is only to recognize that a thousand additional variables increased the chance of a "botched" execution in the past.

<sup>355</sup>John Stuart Mill, Speech in favor of Capital Punishment (April 21, 1868). Mill's statements provide a caution for our day: "Our danger is of the opposite kind, lest we should be so much shocked by death, in general and in the abstract, as to care too much about it in individual cases, both those of other people and our own, which call for its being risked." *Id.*

<sup>356</sup>*See Wilkerson*, 99 U.S. at 134. The Manual for Courts-Martial stated "[h]anging is considered more ignominious than shooting and is the usual method, for example, in the case

intended the Eighth Amendment to prohibit torture; whatever that method's shortcomings, *Wilkerson* did not categorize the firing squad as tortuous.<sup>357</sup> In contrast to the tortuous deaths imposed before the Bill of Rights, the firing squad passes any historically-based constitutional inquiry.

The enactment of the Bill of Rights, nonetheless, did not end punishments we would now consider inhumane. History records several burnings at the stake in the nineteenth century, generally subjecting slaves to the flames. The last burning at the stake occurred in South Carolina in 1825. From that time forward, history has left behind the more cruel execution methods. In the name of mercy, society has several times invented a putatively more humane mode of death. Modern executions are carried out by lethal injection, the gas chamber, hanging, electrocution, and the firing squad.

It is worth noting that, aside from Utah's historical use of the firing squad, other shootings have occurred since the passage of the Bill of Rights. Like before, the firing squad's use outside of Utah was confined mostly to the military and those areas under territorial governance. In fact, since 1900 only one firing squad execution occurred outside of Utah.<sup>358</sup> Between 1912 and 1920, Nevada law allowed for execution by firing squad as an alternative to hanging.<sup>359</sup> During that time, Andrija Mirkovitch elected to die by shooting.<sup>360</sup> Nevada, however, had difficulty finding volunteers to perform the execution. To accommodate his requested method, Nevada constructed a "firing squad machine," mounting three rifles on a framework that fired the weapons with the pulling of three strings. The execution apparently went without incident, but Nevada removed the firing squad as a sentencing option in 1920.<sup>361</sup> Nevada ironically chose lethal gas over the firing squad as "a method of inflicting the death penalty in the most humane manner known to modern science."<sup>362</sup>

Having reviewed the national history of the firing squad, it seems clear that the firing squad is not one of those punishments "that had been considered cruel and

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of a person sentenced to death for spying, for murder in connection with mutiny or for a violation of the [Article of War]. Shooting is the usual method in the case of a person sentenced to death for a purely military offense, as sleeping at post." *MANUAL FOR COURTS MARSHAL* 1928, WAR DEPARTMENT 93 ¶ 103(a) (1936). Hanging became the more popular means of military execution, probably because it "was also a symbolic expression of ignobility and disgrace." J. Robert Lilly, *Little Dirty Details: Executing U.S. Soldiers During WWII*, *CRIME & DELINQUENCY*, at 491 (1996).

<sup>357</sup>*Wilkerson's* holding most likely explains both Idaho and Oklahoma's addition of the firing squad as a method of execution in the aftermath of *Furman*.

<sup>358</sup>This excludes military firing squads. Apparently, the military executed at least one serviceman during World War II by firing squad. There were other firing squad executions in the First World War. Most of these executions occurred in Europe or Great Britain. See Espy file, *supra* note 5.

<sup>359</sup>See Deborah W. Denno, *Getting to Death: Are Executions Constitutional?* 82 *IOWA L. REV.* 319, n. 452 (1997).

<sup>360</sup>*See id.*

<sup>361</sup>*See id.*

<sup>362</sup>*State v. Gee*, 211 P. 676, 682 (Nev. 1932).

unusual at the time that the Bill of Rights was adopted.”<sup>363</sup> The *Wilkerson* court, at a minimum, clarified the historical acceptance of the firing squad.

## 2. Legislative Action

The next inquiry in the evolving standards of decency analysis is a review of legislative action. With respect to the current discussion, it must be determined whether a national consensus has emerged over the firing squad’s constitutionality. Following the lead from *Atkins*’ footnote twenty-one, this review requires more than a simple amassing of legislative code. This review focuses on trends and progressions.

It would be fair to say that a national consensus solidified in the last few decades for maintaining dignity and humanity in executions. A reflection of this concern is seen in the move away from electrocution and the gas chamber. Some challenge this national movement as little more than a legislative “cover your back” effort. Sensing unrest in the populace and the judiciary, state legislatures avoided the establishment of legal precedent by enacting choice-of-execution statutes or removing arguably unconstitutional methods. The once commonplace gas chamber, electric chair, and gallows are now irregularly used; lethal injection is the predominant method of execution. Of the 805 executions in the modern death penalty era, 639 were by lethal injection.<sup>364</sup> Since the turn of the new century, only six out of 206 executions were by a method other than lethal injection.<sup>365</sup> All of the sixty-five inmates killed in 2001 were executed by lethal injection.<sup>366</sup>

Whatever the reason for this change, be it a true concern for humanity or an effort to avoid judicial precedent, many jurisdictions have moved to the more-humane lethal injection as the primary method of execution. Of the thirty-eight states that permit the death penalty, thirty-seven execute primarily by lethal injection.<sup>367</sup> In eighteen of these states, lethal injection is the sole method of execution. Ten states still allow the use of the electric chair.<sup>368</sup> Five states still use

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<sup>363</sup>*Ford*, 477 U.S. at 405.

<sup>364</sup>150 executions have been by electrocution, 11 by the gas chamber, 3 by hanging, and 2 by the firing squad. See Death Penalty Information Center, *available at* [www.deathpenaltyinfo.org/methods.html](http://www.deathpenaltyinfo.org/methods.html) (last revisited Apr. 29, 2003). These numbers are current as of October 16, 2002.

<sup>365</sup>*See id.* Those six executions were electrocutions. *Id.*

<sup>366</sup>*Id.*

<sup>367</sup>*See id.* The following states currently authorize the use of capital punishment: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. Only Nebraska does not allow for lethal injection. *Id.*

<sup>368</sup>*Id.* The states using the electric chair are Alabama, Arkansas, Florida, Illinois, Kentucky, Nebraska, Oklahoma, South Carolina, Tennessee, and Virginia. Arkansas,

the gas chamber.<sup>369</sup> Three states use the gallows.<sup>370</sup> As previously discussed, three allow for firing squads.<sup>371</sup> Only in Nebraska are the condemned left with electrocution as the only option. In most jurisdictions allowing an alternative method, lethal injection is still the preferred and default method.

The Nation's move *toward* lethal injection, however, does not necessarily reflect a move *away* from the firing squad. As evinced by the *Atkins* decision, serious questions remain concerning how to evaluate legislative action to ascertain a national consensus. The mere fact that all but one death penalty state allowed for lethal injection does not automatically render all other methods unconstitutional. Significantly, half of all death penalty states retain an alternative method of death on the books, often in case lethal injection itself is declared unconstitutional. The direction of change toward the exclusive use of lethal injection is not constant, and still encumbered by alternative methods. Lethal injection's predominance does not guarantee its exclusivity.

If anything, modern legislative action shows a trend toward accepting the firing squad as a valid execution option. In enacting a capital sentencing statute after *Furman*, the Utah legislature renewed the firing squad. For the first time in their history as a state, Idaho and Oklahoma added the firing squad as an option after *Furman*.<sup>372</sup> Recently, the New Mexico legislature considered a bill that would have added the firing squad, along with hanging, lethal gas, and electrocution, as an option.<sup>373</sup> Currently, New Mexico only allows for lethal injection. The proposed bill would have allowed the prisoner to die by his preferred method, including the firing squad. The bill, however, did not pass.<sup>374</sup>

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Kentucky, and Tennessee only allow the electrocution of those sentenced to die before a statutorily-defined date. Illinois and Oklahoma would only use the electric chair if other methods are found to be unconstitutional. Death Penalty Information Center, *supra* note 364.

<sup>369</sup>The gas chamber is used in Arizona, California, Maryland, Missouri, and Wyoming. In Arizona and Maryland, the gas chamber is only available for those sentenced to die before a statutorily-specified date. In Wyoming, lethal gas would only be used if lethal injection were found to be unconstitutional. *See id.*

<sup>370</sup>Hanging is still an option in Delaware, New Hampshire and Washington. Hanging is only an option in Delaware for those sentenced before 1986. *See id.* In New Hampshire, hanging is only an option if lethal injection is unavailable. *See id.*

<sup>371</sup>Again, Idaho, Oklahoma, and Utah allow for the use of the firing squad.

<sup>372</sup>Firing-squad executions occurred in Oklahoma while it was a territory, but apparently were not sanctioned immediately by the State's criminal code.

<sup>373</sup>*See* H.B. 90, 45th Leg. 2d Reg. Sess. (N.M. 2002).

<sup>374</sup>New Mexico is not the only state to have recently considered alternative methods of execution. In 1996 a state legislator in Georgia proposed a bill allowing for execution by guillotine. The bill proposed the guillotine as a means by which the condemned could donate their organs. The organ-donor bill ultimately failed. Its author described his intention in submitting the bill: "I have a pretty dramatic style. I was pretty sure my bill wasn't going to go anywhere. . . . The guillotine is kind of a dramatic thing. . . . People say that the guillotine is so barbaric. But I say the method of cooking somebody alive [by the electric chair] is not exactly swift and sure." Jon Kerr, *Georgia Guillotine Execution Bill Cut*, WEST'S LEGAL NEWS, Mar. 14, 1996, available at 1996 WL 259071.

Utah's firing squad has not been without legislative challenge. On the eve of John Albert Taylor's execution in 1996, State Representative Sheryl L. Allen, a Republican from Bountiful, introduced a bill that would excise the firing squad option from Utah's capital sentencing statute.<sup>375</sup> Prompted by the negative publicity from Taylor's upcoming execution, Allen stated "I don't think its humane. The firing squad should be eliminated, now and forever."<sup>376</sup> She did not want Utah's image to be one of "brutality."<sup>377</sup>

The bill's introduction caused quite a stir in the Beehive State. Corrections Director Lane McCotter opposed the bill in interviews, stating, "[f]rankly, the firing squad was easier to deal with from a logistical standpoint because you didn't need medical support."<sup>378</sup> McCotter, however, opined that the firing squad choice should not rest in the defendant, but in the courts: "I think [the choice] should belong to the courts. I don't have any problems with any of the options, I just think the court should decide and sentenced the individual. Why should he make those kind of choices? He choose the method of execution for his victims. That's as far as it should go."<sup>379</sup>

In a poll, fifty-nine percent of Utahns wanted to keep the firing squad. Thirty-one percent supported the bill to the remove the firing squad option. Ten percent did not care.<sup>380</sup> Interestingly, the bill found opposition from at least one death row inmate. Ronnie Lee Gardner stated that "I'm going to fight for [the firing squad]. We have no other decisions on our own, basically, and that's one I'd like to keep."<sup>381</sup> Gardner's attorney agreed because "[i]t's form over substance to say that lethal injection--because it is sanitized, hidden and unseen--is more civilized and less barbaric than a firing squad. At the end of the day, the person is just as dead."<sup>382</sup>

However the Governor's office supported the bill. Utah Governor Michael O. Leavitt promised to sign the bill if it passed. Stating that humanity and dignity should govern executions, Leavitt signaled that he was not "crazy about"<sup>383</sup> the firing squad and preferred the "quiet and order" of lethal injection.<sup>384</sup> Specifically,

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<sup>375</sup>See Stephen Hunt, *Utah Aims at Firing Squad, Bill Would Exempt Jan. 26 Execution*, S. L. TRIB., Jan. 6, 1996, at A1 [hereinafter Hunt, *Utah Aims*].

<sup>376</sup>*Id.*

<sup>377</sup>*Id.*

<sup>378</sup>Amy Donaldson, *Officials Breathe New Life into Firing Squad Option*, DESERET NEWS, Feb. 13, 1996, at A1 [hereinafter Donaldson, *Officials Breathe New Life*].

<sup>379</sup>Amy Donaldson, *Taylor Execution May Not Be The Last In Utah*, DESERET NEWS, Jan. 7, 1996, at A6.

<sup>380</sup>Bob Bernick, Jr., *Nearly 60% Want Utah To Retain Firing Squad*, DESERET NEWS, Feb. 9, 1996, at A1.

<sup>381</sup>Donaldson, *Officials Breathe New Life*, *supra* note 378.

<sup>382</sup>Stephen Hunt, *After Taylor, The Guns May Fall Silent In Utah*, S. L. TRIB., Jan. 13, 1996, at A1.

<sup>383</sup>Death Change Backed, *Utah Gov. Supports Firing Squad Ban*, DENVER POST, Jan. 7, 1996, at B03.

<sup>384</sup>Hunt, *Utah Aims*, *supra* note 382.

Governor Leavitt praised the “quiet dignity” of lethal injections.<sup>385</sup> Notwithstanding the Governor’s support, the bill ultimately died.<sup>386</sup>

Signaling a national concern for dignity in death, state legislatures have increasingly moved toward lethal injection as the primary means of extinguishing a murderer’s life. Nevertheless, the embodiment of this concern in lethal injection does not necessarily constitute an across-the-board rejection of the firing squad. Because of its simplicity and unique legal history in the Supreme Court, two states in the last quarter century sanctioned its use. No widely supported effort has been introduced to curtail its use. Legislative action does not clearly define a national consensus regarding the firing squad.

Recent events in Utah, however, signal that a change may soon come. After the media circus surrounding the scheduled executions of Arguelles and Kell, Rep. Allen indicated that she would reintroduce her bill to remove the firing squad as a sentencing option. Her bill now finds support from the Utah Sentencing Commission.<sup>387</sup> The Sentencing Commission has even decided that any legislation enacted to abolish the firing squad would apply retroactively, even though such a decision would surely prompt litigation from the four death-row inmates who have chosen to die by that method.<sup>388</sup> The eyes of the nation will surely be on the Utah legislature in the upcoming session which begins in January 2004.

### 3. Jury

As previously noted, juries provide an important link between public opinion and the administration of justice. However, several factors detract from juries’ helpfulness as an objective factor with respect to the firing squad. First, capital prosecutions in those States allowing for a firing squad are relatively rare. The infrequent jury consideration of a death sentence to be carried out by firing squad makes it difficult to generalize individual juries’ responses. Second, the States endorsing the firing squad shelter the decision to employ that method from the jury. Idaho and Oklahoma only use the firing squad in extraordinary circumstances. Utah leaves the firing decision to the defendant. In each case, the jury may feel less responsible as the firing squad’s use lies beyond their control. Third, unlike issues

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<sup>385</sup>Jerry Spangler, *Leavitt Calls Order, Dignity Paramount*, DESERET NEWS, Jan. 26, 1996, at A4. Governor Leavitt has clarified that he thinks the firing squad “does add some element of notoriety. [But] I’m not on a crusade on either side of this.” Joshua B. Good, *The Debate: Pro or Con, the Firing Squad is a Hot Topic*, S. L. TRIB. Jan. 26, 1996, at A6. In fact, Governor Leavitt recognized that “I am not sure you can reach a level of comfort with any of these methods . . . There is no easy way to do this. It is a hard, difficult and anxiety-filled experience.” See Spangler, *supra* note 385.

<sup>386</sup>Death row inmate Ronnie Lee Gardnder was glad to hear that the firing squad abolition bill failed: “I think its basically an image deal . . . They didn’t want people to say, [T]hese (expletive) Utahns, they’re barbaric. This ain’t the 1800s in the 1990s. I just hope they keep it.” Amy Donaldson, *Inmate Threatens to Sue if State Won’t Let Him Die by Firing Squad*, DESERET NEWS, Feb. 9, 1996, at A1.

<sup>387</sup>Stephen Hunt, *End to Firing Squads Sought*, S.L. TRIB., Aug. 7, 2003, at A1.

<sup>388</sup>Stephen Hunt, *Firing Squad Choices Opposed*, S. L. TRIB., Oct. 2, 2003, at C1; Jennifer Dobner, *Firing Squad Days Numbered?*, DESERET NEWS, Oct. 2, 2003, at B03.

such as mental retardation, execution methods may not receive prominent emphasis at trial. The issue would likely not be debated, and only mentioned tangentially by the parties. Finally, little information exists concerning jury activity in the firing squad states. To the author's best knowledge, no statistics or other objective data have been developed concerning a jury's response to the firing squad option.

Insofar as the ultimate goal of jury action is to ascertain public opinion through generally-reliable data, polling may provide clues to a jury's reaction to the firing squad. In Utah, public support for the firing squad traditionally has been high. Only thirty-one percent of Utahns opposed the firing squad in 1996.<sup>389</sup> While polling data may not rest upon the same precision or integrity as jury verdicts, or even be generally reliable, it does not seem likely that jury action would be inconsistent with the general public support for the firing squad.

#### 4. Other Factors

*Atkins'* footnote twenty-one has raised substantial questions about the influence other objective factors may have on the evolving standards inquiry. Courts have occasionally looked at a consensus of the international community, views of professional and religious organizations, the exercise of prosecutorial discretion, and public opinion polls to gauge a national consensus. These factors may contribute to a more full understanding of the nation's view of the firing squad.

Difficulty attends determining what weight these objective factors bring to the evolving standards discussion. Often, as is the case with jury discretion, it is hard to separate opposition to the firing squad from general abolitionist aims. Opposition to the firing squad may be nothing more than a reflection of general opposition to the death penalty. This does not render the abolitionist opposition insignificant or meritless; it merely lessens the opinion's value as an objective factor. Indeed, such opinions reveal little about humanitarian concerns about the specific use of the firing squad, they merely convey distaste for any execution, however humanely carried out. Looking at the objective factors below, care will be taken to isolate those factors which clarify the constitutionality of the firing squad, rather than the death penalty in general.

##### *a. International Community*

Less than half of the countries in the world actively sanction execution as an appropriate punishment.<sup>390</sup> Execution in those countries vary from the medically-sterile lethal injection to traditional hanging to bloody beheading to archaic stoning. Of all the methods, the firing squad is the predominant means of execution in the world. Of the 115 nations that authorized the death penalty in 1999, 73 of those countries executed by firing squad.<sup>391</sup> Of these nations, the firing squad is the sole

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<sup>389</sup>Bernick, *supra* note 380.

<sup>390</sup>See Amnesty International, *Website Against the Death Penalty*, at [www.web.amnesty.org/rmp/dplibrary.nsf](http://www.web.amnesty.org/rmp/dplibrary.nsf) (last visited Oct. 8, 2003).

<sup>391</sup>See Amnesty International, *Methods of Execution Worldwide*, available at [www.amnestyusa.org/abolish/methww.html](http://www.amnestyusa.org/abolish/methww.html) (last visited Oct. 8, 2003). The nations using the firing squad are Afghanistan, Albania, Algeria, Armenia, Beharain, Bangladesh, Belarus, Benin, Bolivia, Bosnia-Herzegonia, Burkina Faso, Burundi, Central

method of execution in 45 countries.<sup>392</sup> By way of comparison, 58 countries execute by hanging, with 33 nations doing so exclusively. More nations kill by stoning (six) than by lethal injection (five).<sup>393</sup> Only the United States uses lethal gas and electrocution.<sup>394</sup>

The firing squad procedure varies among nations. Vietnam uses a five member firing squad in a manner similar to Utah.<sup>395</sup> In China, the condemned kneels as a single shot is fired into his head.<sup>396</sup> The family of the executed is often expected to reimburse the government for the expense of the bullet.<sup>397</sup> In Thailand, the condemned is strapped to a pole and allowed to hold emblems used in Buddhist prayer.<sup>398</sup> A target is placed over his heart and a lone executioner fires with a machine gun at the condemned through a blue screen.<sup>399</sup> In Yemen, executions have also been carried out in a 50,000 seat sports stadium.<sup>400</sup> In one case, the condemned laid on the ground as he was shot in the heart and head with an AK-47.<sup>401</sup> The corpse was then crucified and placed on public display for three days afterwards.<sup>402</sup>

At first blush, the overwhelming use of the firing squad would appear to show an international consensus supporting its use.<sup>403</sup> Significant developments in the last few years, however, signal international unrest with the firing squad's use. Notably, China, the notorious human-rights violator, is moving away from the firing squad

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African Republic, Chad, Chile, China, Comoros, Congo, Corte'd Ivoire, Cuba, Djouti, Egypt, El Salvador, Equatorial Guinea, Ethiopia, Gabon, Ghana, Guinea, Indonesia, Iran, Iraq, Jordan, Kazakhstan, North Korea, Kuwait, Latvia, Lebanon, Liberia, Libya, Madagascar, Mali, Mauritania, Mongolia, Morocco, Niger, Nigeria, Palestine, Qatar, Russian Federation, Rwanda, Senegal, Sierra Leone, Somalia, Sudan, Suriname, Syria, Taiwan, Tajikistan, Thailand, Togo, Tunisia, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United States of America, Uzbekistan, Vietnam, Yemen, and Yugoslavia. South Korea also authorizes the firing squad for military executions. *Id.*

<sup>392</sup>*See id.*

<sup>393</sup>*See id.*

<sup>394</sup>*See id.*

<sup>395</sup>*See Three Executed in Vietnam Corruption Scandal*, AGENCE FRANCE-PRESSE, Jan. 17, 1998, available at 2000 WL 24715944.

<sup>396</sup>*See Robert Matthews, The Quest for a Painless Exit from Death Row*, THE SUNDAY TELEGRAPH, Apr. 26, 1992, at 10.

<sup>397</sup>*See Yap Su-yin, This Man Killed 55 People. Its His Job.*, STRAITS TIMES, Oct. 5, 2003, available at 2003 WL 61887530.

<sup>398</sup>*See id.*

<sup>399</sup>*See id.*

<sup>400</sup>*See Executions in Yemen* at [www.al-bab.com/Yemen/data/execute.htm](http://www.al-bab.com/Yemen/data/execute.htm) (last visited Oct. 8, 2003).

<sup>401</sup>*See id.*

<sup>402</sup>*See id.*

<sup>403</sup>This, of course, does not take into account those nations that have abolished the death penalty. Their concern is not with the firing squad, but with execution in general.

and toward lethal injection. China has sought a more “civilised, humane, and scientific manner of death.”<sup>404</sup> In support of this effort, Chinese officials cited Confucian principles regarding the treatments of corpses as a reason to find an alternative to the firing squad.<sup>405</sup> The move away from the firing squad is not yet complete. Currently, lethal injections are only being conducted on a trial basis. Interestingly, China has been criticized for its use of lethal injection. Some contend that China only uses lethal injection as a means of harvesting the organs of the executed.<sup>406</sup> Others criticize China’s move as illusory. One human rights activist stated: “It doesn’t really make much difference how you kill someone. The issue is not the method, but the way it is used in an indiscriminate fashion after what are often only summary trials. We feel that this isn’t an improvement. The death penalty should be eliminated.”<sup>407</sup>

Vietnam, another human rights violator, also signaled that it may seek other methods of execution. Calling the firing squad “appalling” and “no longer suitable,” one Communist authority stated that Vietnam would consider other options like lethal injection and electrocution.<sup>408</sup> Vietnam also apparently worries about the mental strain on the gunmen.<sup>409</sup> Thailand also indicates that it will begin using lethal injection in 2003.<sup>410</sup> These efforts mirror Guatemala’s abandonment of the firing squad in 1997. Notwithstanding their rhetoric to the contrary, China, Vietnam, and Thailand continue executing by firing squad.

In sum, a review of those nations that actively employ the firing squad demonstrates an international support for its use, albeit with some reservation. Significant developments portend a shift in world opinion, though. Nations that have long ignored basic human rights have started seeking humanity in executions, targeting the use of the firing squad. Yet even that movement is not so universal as to threaten the firing squad’s predominance.

This international consensus, however, may prove a double-edged sword for Utah. While judicial recognition of the international death penalty community’s tolerance for the firing squad may support its constitutionality, the court of public opinion may not look at such evidence in a positive light. Public opinion may not look so favorably on Utah’s strange bedfellows in the firing squad affair. Little good can come from a comparison to Taliban-controlled Afghanistan, Fidel Castro’s Cuba, and Communist Vietnam. Utah surely does not want to be considered in the same human rights league as China. It may seem a strange anomaly in our

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<sup>404</sup>*Judge Backs Needle For Humane Executions*, S. CHINA MORNING POST, Sept. 15, 2001, at 13. (hereinafter *Judge Backs Needle*).

<sup>405</sup>*See id.*

<sup>406</sup>John Gittings, *Execution Row Centres on Organ Theft*, THE GUARDIAN, Sept. 15, 2001.

<sup>407</sup>*Judge Backs Needle*, *supra* note 416.

<sup>408</sup>Vietnam Considering Reduction in Death Penalties and Alternative to Firing Squads, N. Y. TIMES, Apr. 13, 2002.

<sup>409</sup>*Stress Strikes Vietnam’s Executions*, FAR EAST ECONOMIC REVIEW, Apr. 4, 2002, at 11.

<sup>410</sup>Anucha Charoenpo, *Lethal Injections from Oct. 19*, BANCOCK POST, Sep. 8, 2003, available at 2003 WL 60730278.

politically-correct world of cultural tolerance, but comparison to North Korea, Bosnia, Iraq, and Iran engenders negative public response. While the international death-penalty community's opinion supports the firing squad's viability, those who constitute that community may detract from the political potency of that consensus.

*b. Professional and Religious Organizations*

Some professional organizations oppose the use of the firing squad. But then, these organizations readily admit that their opposition does not stem from a concern for the firing squad as a means, rather they object to the death penalty as an end. For example, John Albert Taylor's execution drew fire from such groups as Amnesty International, the American Civil Liberties Union, and the Utah Catholic Diocese. The ACLU and Amnesty International, however, ridiculed the firing squad ban introduced at that time. Executive Director William F. Schulz of Amnesty International commented that:

In this country, death by electrocution or lethal injection or even hanging is considered 'acceptable' forms of execution while death by shooting is not. Why is that? The results are exactly the same. . . . The truth is that death by firing squad--bloody, unsanitary, untidy--forces us to come face to face with the sheer brutality of what we judiciously call 'capital punishment.'<sup>411</sup>

Amnesty International's official stance on execution methods mirror that statement: "Amnesty International opposes the death penalty unconditionally, no matter how heinous the crime, and regardless of the method the State chooses to kill the prisoner. Every death sentence is an affront to human dignity, every execution a symptom of a culture of violence rather than a solution to it."<sup>412</sup>

Also, the National Coalition to Abolish the Death Penalty objected to Taylor's execution because of the heightened chance for error. That organization, however, admitted that "[t]he bottom line is, one method of execution is just as brutal and

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<sup>411</sup>Brian Maffly & Dan Harrie, *Firing-Squad Execution Draws International Fire*, S. L. TRIB., Jan. 25, 1996, at A4.

<sup>412</sup>This response is common. A group of Catholic Bishops expressed similar objections to Florida's use of the electric chair: "It is the killing of persons to which we object, thus the means by which it is done will not change our view." Catholic Bishops Legislators; Say No to Death Penalty, Spec. Sess. at [www.flacathconf.org/pressrel/Prsrel99/dpspses.htm](http://www.flacathconf.org/pressrel/Prsrel99/dpspses.htm) (last visited Oct. 8, 2003). The president of the ACLU has stated that "Lethal injection is an attempt to sanitize execution, but in fact it is no less barbaric and no more civilized than the firing squad. Utah and the rest of the nation should end this gruesome search of the 'best method' of killing and simply abolish the death penalty." *Dying the Hard Way? Firing Squads and Hanging still Legal in Some States*, COURT TV, Mar. 30, 2002, available at [www.cnn.com/2002/LAW/03/04/ctv.execution](http://www.cnn.com/2002/LAW/03/04/ctv.execution) (last visited Oct. 8, 2003). The director of the ACLU has commented that "[t]his whole thing makes us seem backwards and draconian." Mike Carter, *The Execution's Song, Second Verse Firing Squad Request Recall the Gilmore Era Execution Sends Prison Scrambling*, S. L. TRIB., Dec. 9, 1995, at E1.

barbaric as the next.”<sup>413</sup> While the locally-influential Church of Jesus Christ of Latter-day Saints refrains from adopting a position on a particular method of execution, it has signaled that it has no objection to the elimination of the firing squad.<sup>414</sup>

Concerns by professional organizations over Utah’s death penalty laws are not new. Recent years have seen national interest in the death penalty, particularly over the possibility that innocent people may be confined on death row and ultimately executed.<sup>415</sup> This national interest spawned unrest, and resulted in governmental accommodation. Illinois, for instance, placed a moratorium on executions and enhanced the availability of clemency. Like an earthquake, these issues shake the very foundations of capital punishment administration—but only small tremors and aftershocks have been felt in Utah. Those most active in condemning Utah’s capital punishment system have chosen their battles well. Rather than seeking small gains and incremental alterations, as curtailing the use of the firing squad, they seek to entirely dismantle all mechanisms of death. This chosen strategy tells us little about the use of the firing squad, but informs us well of broader death penalty concerns. In sum, the position of professional and religious organizations contributes little to the firing squad inquiry.

### c. Prosecutorial Discretion

Little information is available regarding whether prosecutorial discretion influences Utah’s use of the firing squad. Prosecutorial discretion acts as a filter, carefully selecting those defendants whose crimes most merit the death penalty. In Utah, input from the victim’s family strongly contributes to the exercise of prosecutorial discretion.<sup>416</sup> There is no objective data about the influence of the firing squad on the decisions made by the victim’s family or the State.

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<sup>413</sup>Brad Knickerbocker, *Death By Firing Squad Under the Gun Utah Hard Choices that Revolve Around Religion and Execution Methods*, CHRISTIAN SCIENCE MONITOR, Jan. 25, 1996, at 4.

<sup>414</sup>One prominent leader of the Church of Jesus Christ of Latter-day Saints commented that the Church sees “no reason for supposing that it makes the slightest difference how an execution is accomplished.” See *Letter from Bruce R. McConkie to Thomas B. McAfee*, dated October 18, 1978, available at [http://www.shields-research.org/General/blood\\_atonement.htm](http://www.shields-research.org/General/blood_atonement.htm). (last visited Oct. 8, 2003). The official Latter-day Saints stance on the death penalty currently is that it “neither promote[s] nor oppose[s] capital punishment,” leaving the matter “solely [to be decided] by the prescribed processes of civil law.” Jacob Santini, *Utah Death Penalty Foes Remain Steadfast*, S. L. TRIB., June 11, 2001, at A1.

<sup>415</sup>Recent years have brought heightened concern over death penalty fairness. One example of this attention is the interest in actual-innocence claims, often established through the use of DNA testing. The recent fervor over actual innocence is not new. One of the Christian Fathers asked “who will pledge himself . . . that it is always the guilty who are condemned to the beasts, or whatever the punishment, and that it never inflicted on innocence too, though the vindictiveness of the judge it may be, the weakness of the advocate, the severity of the torture.” Tertullian, *quoted* in GEORGE WOLFGANG FORELL, I HISTORY OF CHRISTIAN ETHICS (1979).

<sup>416</sup>See Stephen Hunt, *Death Penalty Often Dropped in Exchange for Peace of Mind*, S. L. TRIB., Sept. 30, 2002, at A1

*d. Polls*

Utahns support the death penalty in general, and the firing squad in particular. Nationally, support for the death penalty fluctuates from year to year, often in response to public awareness of particular issues. In 1965, for example, only 38% of the nation population supported the death penalty.<sup>417</sup> In those years immediately before *Furman*, support for capital punishment could not command a majority of the population.<sup>418</sup> The legislative changes in the wake of *Furman*, however, drove death penalty support to new heights. In the last two decades, national support for the death penalty generally hovered between two-thirds and three-fourths.<sup>419</sup> Statistics, however, can be unreliable. Current numbers show either a recent decrease in support, a slight increase, or an enormous leap. Often “[i]t’s all in how the question is asked.”<sup>420</sup> Most estimates place current death penalty support at around 67%.

Western states generally favor the death penalty more than other geographical areas, often by double-digit margins.<sup>421</sup> Surprisingly, Western states even out rank the execution-happy South. Yet even in the death-penalty-friendly west, Utah stands out as a strong supporter of capital punishment. In 1992, 87% of Utahns favored capital punishment.<sup>422</sup> While only 75% of Utahns supported the death penalty when John Albert Taylor was executed,<sup>423</sup> current support now rests at an all-time high. Recent polls indicate that 90% of all Utahns support the death penalty.<sup>424</sup> This number contrasts sharply with the nation’s leader in executions, Texas, where “only” 73% of its population supports the death penalty.<sup>425</sup>

As previously discussed, support or opposition to the death penalty does not necessarily correlate to an opinion on the firing squad. There are few indications of the nation’s tolerance of the firing squad. 71% of Americans supported Gary Gilmore’s execution by firing squad.<sup>426</sup> In one 1985 poll, only 3% of the national

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<sup>417</sup>See *Sourcebook of Criminal Justice Statistics* at 142 (2000).

<sup>418</sup>See *id.*

<sup>419</sup>“Public opinion in favor of the death penalty for convicted murderers in the United States has remained consistently strong in the last decade, hovering somewhere between sixty and eighty percent, depending on the particular poll and the margin of error.” John P. Cunningham, *The Federal Death Penalty Erupts: High Profile McVeigh Execution Underscores Sanction’s Inherent Resiliency*, 12 GEO. MASON U. CIV. RTS. L. J. 303, 315 (2002).

<sup>420</sup>Joshua Marquis, *Commenting Myths Aside, Death Row Isn’t Filled With Innocents*, L. A. TIMES, Feb. 26, 2002, at B13.

<sup>421</sup>See *Sourcebook of Criminal Justice Statistics supra* note 417, at 144-45.

<sup>422</sup>See Greg Burton, *Feeling Death’s Shadow*, S. L. TRIB. Aug. 30, 1999, at A1.

<sup>423</sup>James Brooke, *Utah to Execute Inmate by Firing Squad*, Jan. 21, 1996, at 10A.

<sup>424</sup>Bob Bernick, Jr., *Death-Penalty Issue Is Political Hot Potato*, DESERET NEWS, Aug 23, 2002, at A09.

<sup>425</sup>Lee Hockstader, *Texas Shrugs Off Debate on Executions*, WASH. POST, Sept. 22, 2002, at A01.

<sup>426</sup>See Boran, *supra* note 133.

population felt that the firing squad was the most humane method in comparison to the other modes of death.<sup>427</sup> By way of comparison, 56% of people considered lethal injection to be the most humane method, followed by the electric chair at 16 percent and the gas chamber at 8 percent.<sup>428</sup> In 1985, lethal injection was a relatively new mechanism of death, only six men died by that method. Undoubtedly, a modern survey would more strongly endorse lethal injection. Apparently, the nation does not consider the firing squad the most humane method. However, this does not mean the population considers its use cruel and unusual.

When a state legislator introduced a bill that would terminate Utah's use of the firing squad in 1996, 59% of Utahns supported the continued use of the firing squad, with 10% expressing some degree of apathy on the issue.<sup>429</sup> While nearly a third of Utahns expressed displeasure with the firing squad's use, the bill lacked the necessary political support to pass, or even substantially progress, in the state legislature. Even the support of the governor could not improve the viability of the 1996 bill. That is not surprising. Utah's strong support for the death penalty resists any change that would not be viewed as "tough on crime." Recent polls, however, show a decrease in support for the firing squad among Utahns. A poll taken in July 2003 showed that 51% of Utahns expressed concern with the continued use of the firing squad. Of those, 35% felt that it definitely should not continue. Only 45% of those polled felt that the firing squad "probably should" or "definitely should" continue.<sup>430</sup> Public support seems to be shifting away from the past overwhelming support for the firing squad, most likely due to the intense scrutiny the State received when planning two firing-squad executions recently.

#### 4. Synthesis of the Evolving Standards

Reviewing those objective standards that aid in discerning a national consensus, it is not clear that the nation opposes the use of the firing squad. America, more now than ever in its history, is concerned with the humane and appropriate use of the death penalty. These concerns resulted in the lethal injection being the predominant choice, if not the only choice, in nearly every executing jurisdiction. But little objective data would suggest that the nation would not tolerate the continued use of the firing squad. Indeed, a broad view of objective indicia would indicate that Utah's firing squad use only mirrors an acceptance of that method in the international death penalty community. Recognizing that such trends may change with public interest and public awareness, there is no evidence of progression away from the firing squad.

The infrequency with which Utah executes by firing squad unquestionably creates a dearth of objective data concerning the nation's collective response. It is anticipated that Utah's continued use of this method will add significant objective information.

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<sup>427</sup>See George Gallup, Jr., *Lots of Support for Death Penalty*, S. F. CHRON., Feb. 4, 1985, at 8.

<sup>428</sup>See *id.*

<sup>429</sup>See Bernick, *supra* note 424, at A09.

<sup>430</sup>Jennifer Dobner, *Firing Squad May Finally Die*, DESERET NEWS, Aug. 6, 2003, at A01.

The objective indicia of evolving standards, however, is not the only inquiry in modern Eighth Amendment jurisprudence. Any review of the firing squad must also address the underlying concern of the Cruel and Unusual Punishment Clause: dignity. As will be seen, it is likely that the amorphous ideas that shape our value judgments in the realm of dignity will by far play a greater role than those palpable and scientifically-ascertainable factors already discussed.

### *B. Dignity*

Death is a dignitary who when he comes announced is to be received with formal manifestations of respect, even by those most familiar with him.<sup>431</sup>

The ultimate inquiry in the Cruel and Unusual Punishment Clause involves that principle that saturates the Eighth Amendment: human dignity. Even though the Eighth Amendment does not explicitly employ the term, the Supreme Court's modern review of that provision focuses on "nothing less than the dignity of man."<sup>432</sup> The dignity of man is a noble sounding phrase, implying philosophical foundations beyond that normally considered in the legal world. By invoking dignity, the Supreme Court entered into a less objective arena full of debate and discussion. The Supreme Court has not defined "dignity" as a specific legal term of art; the Eighth Amendment's enshrinement of that quality has not been precisely explained. The Supreme Court, however, has suggested two important considerations: (1) the excessiveness of the punishment (pain and proportionality); and (2) the purpose of the punishment. Taking these factors account the Supreme Court ultimately allows its own understanding of dignity to color its review.

#### 1. Excessiveness

[W]hen the heart is ripped out by bullets, who can say what passes through the victim's mind? What appears to us a pleasant death, because apparently instantaneous, may be extremely tortuous.<sup>433</sup>

Pain guides an inquiry into the excessiveness of a firing-squad death. Common sense dictates, gunshot wounds hurt. Utah's history confirms that some executions have been tainted with an intolerable amount of pain. Wilkerson's execution stands out for the sheer brutality of the pain involved. Undeniably, the chance of a botched execution is nightmarish. As in the case of China and Vietnam, the chance of a painfully brutal death recently encouraged other nations to consider abandoning the firing squad.

During Great Britain's long transition to abolition, the Royal Commission on Capital Punishment dismissed out of hand the use of the firing squad.<sup>434</sup> The Royal

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<sup>431</sup>AMBROSE BIERCE, *IN THE MIDST OF LIFE*, 10 (Mattick, New York American House 1982) (1909).

<sup>432</sup>*Trop*, 356 U.S. at 100.

<sup>433</sup>JACK KEVORKIAN, *MEDICAL RESEARCH AND THE DEATH PENALTY* 19 (1960).

<sup>434</sup>The Royal Commission on Capital Punishment's mandate was to consider and report whether liability under the criminal law in Great Britain to suffer capital punishment for murder should be limited or modified, and if so, to what

Commission reported “The firing squad is open to obvious objections as a standard method of civil execution: it needs a multiplicity of executioners and does not possess even the first requisite of an efficient method, the certainty of causing immediate death.”<sup>435</sup> The tragedy of error in a firing squad has been seen at least twice in Utah’s history. Wilkerson slowly bled to death. Mare’s execution defies belief. No firing squad in America should even be presented with the need to perform a “coup de grace.”<sup>436</sup>

Yet these incidents are aberrations. The anomalies resulting in excessive pain are, at least partially, mitigated by modern firing squad procedure. The current firing-squad chair’s leather straps prevent the shifting of the target that maimed the unrestrained Wilkerson. Careful selection of the marksmen from the State’s peace officers hopefully replaces the misplaced mercy which tortured Mares. The question is not whether these two incidents have so stained the process as to render it constitutionally excessive. The focus should be on whether a firing squad, performed consistent with established procedure, causes “unnecessary and wanton” pain.

To pass constitutional muster, an execution method must not be designed to inflict unnecessary pain, or have pain be the *raison d’etre* of its existence.<sup>437</sup> Indeed, a punishment is cruel and unusual when it is “inhumane and barbaric” when it involves “something more than the mere extinguishment of life.”<sup>438</sup> No one is sure how painful a firing squad execution may be. History shows these killings to be quick, most lives being extinguished in minutes, if not seconds. While gunshot wounds may be bloody, scientific research indicates that the initial pain felt by the victim may be comparable to being punched in the chest. There is some indication that the pain may also be hampered by an “adrenaline surge.”<sup>439</sup> And if his heart is obliterated completely by four high-caliber bullets, a prisoner dies quickly. Most likely, the sudden loss of blood results in unconsciousness as the blood flow to the brain stops.<sup>440</sup> This unconscious state may reduce the sensation of pain even in the

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extent and by what means, for how long and under what conditions persons who would otherwise have been liable to suffer capital punishment should be detained, and what changes in the existing law and the prison system would be required; and to inquire into and take account of the position in those countries whose experience and practice may throw light on these questions.

Royal Commission on Capital Punishment 1949-53 Report, CMD. No. 8932, at 249 (1949-53). The Royal Commission ultimately found no advantage to using the gas chamber or electric chair instead of hanging. *Id.* The Commission reserved consideration of lethal injection until after advances in its use. *Id.* Great Britain ultimately abolished the death penalty.

<sup>435</sup>*Id.*

<sup>436</sup>Known as “*tiros de gracia*” in Latin American countries, firing squad procedures in some parts of the world require the commander to deliver one final shot to the head with a pistol after the firing squad has already shot the condemned’s heart.

<sup>437</sup>*Resweber*, 329 U.S. at 464.

<sup>438</sup>*Kemmler*, 136 U.S. at 447.

<sup>439</sup>GILLESPIE, *supra* note 21, at 172.

<sup>440</sup>JACOB WEISBERG, *THIS IS YOUR DEATH*, NEW REPUBLIC (1991).

case of a botched execution, as in Mares' death. A properly-executed shooting seems to cause an efficient, nearly painless, death.<sup>441</sup> "It is not certain whether death by firing squad causes physical pain."<sup>442</sup> Yet one newspaper reported after Peter Mortensen's execution that "[h]is life was snuffed out instantly, and physicians say his death was absolutely painless."<sup>443</sup>

But we cannot be entirely sure. Due to the circumstances of a firing-squad death, "there is no language for pain . . . [i]t (more than any other phenomenon) resists verbal objectivity."<sup>444</sup> The hood placed over the condemned's head may mask facial expressions of pain. The thick straps may hold back pain-induced movements. No one knows how painful a firing squad death actually is. Nonetheless, the speed of past executions and the few physical signals given by the condemned suggest that the pain felt after the shots are fired is not wanton or long-lasting.<sup>445</sup>

## 2. Nexus

The Supreme Court's dignity analysis also considers whether a given punishment relates to a recognized and defensible corrective aim. In the case of the death penalty, the Supreme Court recognized two valid reasons to maintain the death penalty: retribution and deterrence.<sup>446</sup> An attempt to legitimize the firing squad on these two theories is uncomfortable, at best. To claim that the firing squad specifically, rather than the death penalty in general, promotes a more stringent shade of retribution is akin to vengeance. To call for the firing squad on that ground presupposes that the firing squad imposes a more repugnant death. Concomitantly, it

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<sup>441</sup>One prominent anesthesiologist and death penalty opponent, for example, has opined that the firing squad is more humane method of death than lethal injection. See *Many Lethal Injection Executions are Bungled*, THE BALTIMORE SUN, May 6, 2001, at 4C.

<sup>442</sup>Gardner, *supra* note 118, at 123.

<sup>443</sup>*Met Death Bravely*, THE WASATCH WAVE, Nov. 27, 1903, at 6.

<sup>444</sup>ELAIN SCARRY, THE BODY IN PAIN 12 (1985).

<sup>445</sup>The Supreme Court's review of pain focuses not only on how much pain is felt, but also on whether the punishment imposed by the pain is proportional to the crime itself. This proportionality review does not readily lend itself to a consideration of execution methods. So long as an execution method otherwise complies with the Constitution, it would be difficult to say that one method of execution is disproportionately painful compared to the offense, rather than in the abstract. The simple fact that death is the end punishment, by whatever means that may be accomplished, provides the general context for a proportionality analysis. Otherwise, we would be faced with the untenable result of providing lethal injection, for example, for the less vile, but still death worthy, crimes. While the past has recognized a difference in the dignity of kinds of death, for instance the preference to shoot soldiers not guilty of espionage or treason, modern constitutional principles would not allow an undignified death to match an equally undignified crime. Three members of the Supreme Court have refused to recognize any "proportionality" principle in the Eighth Amendment that would operate independent from a national consensus. See *Stanford*, 492 U.S. at 379; *but see Atkins*, 536 U.S. at 312 (finding the proportionality rule to be governed by objective factors). At any rate, any effort to match proportionally the method with the crime is stymied by Utah's choice-of-execution statute. An inmate can decide his own method of death, regardless of abstract proportionality.

<sup>446</sup>See *Atkins*, 536 U.S. at 319-20; *Gregg*, 428 U.S. at 183.

recognizes that “[d]eep inside every civilized being there lurks a tiny Stone Age man, dangling a club to rob and rape, and screaming an eye for an eye. But we would rather not have that little fur-clad figure dictate the law of the land.”<sup>447</sup> The idea that we should prefer the firing squad over other options because it gives the violent criminal what he deserves arguably injects a measure of vengeance into an otherwise disimpassioned system. Reliance on retribution alone cannot support the firing squad’s use.

Likewise, searching for a deterrent basis for the use of the firing squad’s use is impracticable. To say that the firing squad itself deters more crime than other methods ignores Utah history. Until the last four years, Utah capital convicts overwhelmingly elected to die by bullet, even when now given the seemingly-humane needle as an option.<sup>448</sup> There is little indication that the use of the firing squad instead of lethal injection results in a greater deterrent effect.

The fact that no nexus can be conclusively drawn between the firing squad and a recognized theory of punishment does not condemn its use. Rather, the uncomfortable fit accentuates the fact that such an analysis is better reserved for the broad question of a punishment’s propriety, not a focus on the particular mode of punishment. There exists little evidence to suggest that any method of execution contributes more to a punishment theory than any other. Dignity is best understood in this case as a subjective question.

### 3. Individual View of Dignity

In the end, and after plenary consideration of the carefully-crafted objective indicia, the ultimate destiny of the firing squad may rest on one’s own understanding of human dignity. By focusing on the dignity of man, the Supreme Court opened a conduit through which the predilections of the individual can ultimately shape constitutional law. However precisely structured a review of the objective and calculable factors may be, opinions may most directly influence the end result. This is not necessarily a bad thing; in fact, it is rather honest to admit that we rarely enter into a discourse on such weighty matters as a logically-driven blank slate. But this review also bases constitutional review on ideas which may be difficult to articulate, and even more difficult for others to accept. This section will try to identify those concepts most likely to contribute to the firing squad’s dignity.<sup>449</sup>

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<sup>447</sup>ARTHUR KOESTLER, REFLECTIONS ON HANGING 100 (1997) (quoted in Gardner, *supra* note 118, at 124).

<sup>448</sup>Indeed, those seeking to die by the firing squad in recent years have been those wanting an expedited death. Suicide by firing squad may be an encouragement for the likes of Gary Gilmore and Roberto Arguelles.

<sup>449</sup>As a threshold matter, it is again essential to remember that one’s opinion of the dignity or indignity of the death penalty directly impacts on one’s opinion of the firing squad. If an individual felt that the death penalty strips human dignity from man, we cannot expect the method by which that penalty is imposed to somehow restore it. This does not impute an inability to be impartial, but rather recognizes that distaste for the death penalty would flavor one’s view of the firing squad. Conversely, ardent death penalty supporters would most likely be more inclined to support the firing squad. This only recognizes that the dignity of the firing squad is to a degree intermeshed with the broad question of capital punishment.

What is dignity? A precise definition for human dignity has proven illusive to all. The Constitution does not explicitly mention the concept, yet the principle of dignity seems to permeate the document.<sup>450</sup> Indeed, “[t]he basic value in the United States Constitution, broadly considered, has become a concern for human dignity.”<sup>451</sup> The Supreme Court’s recognition of this inherent value can be seen in many areas, most notably in free speech, cruel and unusual punishment, and civil rights cases. Yet in acknowledging the role of human dignity, the Supreme Court made no effort to define that concept’s parameters. A testament to the indistinct nature of dignity, the Supreme Court has left nearly invisible dignity’s gravitational hold that both binds the Constitution together and regulates the operation of its individual components.

Philosophy grapples with human dignity. Faced with defining the indefinite, philosophers have long debated what constitutes human dignity. Some are content to allow the idea to remain undefined, focusing instead on its effect on the mind and hearts of men. For example, one author recently challenged: “It is difficult to define what human dignity is. It is not an organ to be discovered in our body; it is not an empirical notion, but without it we would be unable to answer the simple question: what is wrong with slavery?”<sup>452</sup> Others, discontent with such vagaries, have attempted to create a workable definition. These are deep waters; a comprehensive review of the philosophical debate and conclusions are beyond the scope of this article. It is worthwhile, however, to address some prominent ideas on point.

The word dignity comes from the Latin word *dignitas*, its root signifying “worthy of esteem and honor, due a certain respect, of weighty importance”<sup>453</sup> or simply “worthy.”<sup>454</sup> Early use of the term carried no universal application to humanity. Instead, “it referred to an acquired social and political status, implying, generally, important personal achievements in the public sphere and moral integrity. It was a manifestation of personal authority, majesty, greatness, magnanimity, gravity, decorum, and moral qualities.”<sup>455</sup> Cicero first expanded the word beyond an expression of social standing. Rather than myopically defining dignity in terms of man’s place in society, Cicero applied the term to man’s inherent value in the world.<sup>456</sup> Judeo-Christian teaching mirrored this acceptance of man’s inherent

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<sup>450</sup>See generally, Charles Robert Tremper, *Respect for the Human Dignity of Minors: What the Constitution Requires*, 39 SYRACUSE L. REV. 1293, 1301-04 (1988); Fletcher, *Human Dignity as a Constitutional Value*, 22 U.W. ONTARIO L. REV. 171 (1984); Walter Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703 (1980).

<sup>451</sup>Murphy, *supra* note 450, at 745.

<sup>452</sup>Leszek Kolakowski, *What Is Left of Socialism*, FIRST THINGS, Oct. 2002, at 45.

<sup>453</sup>Michael Novak, *The Gift of Dignity*, CHRISTIANITY TODAY, Dec. 06, 1999, at 50.

<sup>454</sup>E. Rae Harcum, et. al, *Popular Versus Skinnerian Views on the Relation Between Human Freedom and Dignity*, THE JOURNAL OF PSYCHOLOGY, 123(3), 258 (1988).

<sup>455</sup>Izhak England, *Human Dignity: From Antiquity to Modern Israel’s Constitutional Framework*, 21 CARDOZO L. REV. 1903, 1904 (2000).

<sup>456</sup>See England, *supra* note 455, at 1905. Cicero stated: “And if we will only bear in mind the superiority and dignity of our nature, we shall realize how wrong it is to abandon ourselves to excess and to live in luxury and voluptuousness, and how right is in thrift, self-denial,

dignity. Creation in God's image imbues man with divine worth.<sup>457</sup> These ideas suggest a definition for dignity that take into account the honored status that all human beings possess.

Many recognize Immanuel Kant's writings on dignity as the most substantial modern contribution to the debate: "Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only."<sup>458</sup> Kant tied this moral statement to the concept of dignity in noting "that which constitutes the condition under which alone something can be an end in itself does not have mere relative worth, i.e., a price, but an intrinsic worth, i.e., dignity."<sup>459</sup> Autonomy is indispensable to Kant's dignity. One commentator sums up Kant's view as follows: "man leads a dignified existence worthy of moral respect because (and only insofar as) he is self-legislating, overcoming natural necessity and willing his own actions."<sup>460</sup>

Kant's philosophy influenced Justice Brennan's views on capital punishment. Justice Brennan objected to the use of the death penalty as a means to treat "members of the human races as nonhumans, as objects to be toyed with and discarded."<sup>461</sup> This duty to treat the condemned as humans not only requires that we not deal with them as objects (or "means"), but that society affirmatively consider their equality an intrinsic dignity. Justice Brennan challenged the death penalty when employed in a manner "inconsistent with the fundamental premise . . . that even the vilest criminal remains a human being possessed of common human dignity."<sup>462</sup> In other words, "[e]ven the most loathsome criminal, justly convicted of a heinous offense by due process of law, has a moral claim upon the society which

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simplicity, and sobriety." *Id.* (quoting Cicero, *De Officiis* pt. I 106, 109 (W. Miller trans. 1956)).

<sup>457</sup>"So God created man in his image, in the image of God created he him, male and female created he them." *Genesis* 1:27 (King James). The belief that God's image is somehow reflected in created man underlies Christ's teachings about man's relationship with man. "Love thy neighbor" recognizes that all men have inherent worth. In other words, Christianity is based, at least partially, on dignifying others because God dignifies man.

<sup>458</sup>IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 39 (Lewis White Beck trans., 2d ed. 1959) (1785). It is interesting to note that Kant supported the death penalty. He reasoned: "The undeserved evil which any one commits on another, is to be regarded as perpetrated on himself. Hence it may be said: "If you slander another, you slander yourself; if you steal from another, you steal from yourself; if you strike another, you strike yourself; *if you kill another, you kill yourself.*" IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 196 (W. Hastie trans., 1887).

<sup>459</sup>IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* 63 (Lewis White Beck trans., 1959) (1785). One author has clarified man's intrinsic dignity as follows: "Human dignity consists in our recognizing that each human being . . . has intrinsic value and is a value in his own right." STERN, *ON VALUE AND HUMAN DIGNITY* 83 (1975) (quoted in Gardner, *supra* note 119, at 107).

<sup>460</sup>Daryl Pullman, *Universalism, Particularism, and the Ethics of Dignity*, *CHRISTIAN BIOETHICS* 333-58 (2001).

<sup>461</sup>*Furman*, 408 U.S. at 273.

<sup>462</sup>*See id.*

has condemned him: his humanity must be respected even while he is being punished. The state must not deny what is undeniable: that this man, though condemned, is still unalienably a man."<sup>463</sup>

Under this construct, dignity inherently separates man from the rest of the universe.<sup>464</sup> Dignity defines our existence in the world, at least in comparison with the rest of nature. These concepts of dignity seem to focus on "a state of mind that can be achieved or lost depending on how I feel about myself."<sup>465</sup> By treating others as a "means" does not rape them of their inherent dignity; rather he who uses others as a means only does so at the diminishment of his own dignity. So, in one sense, "[t]he essence of this conception is not that people have a right to be treated with dignity, but rather that people have rights because they have dignity."<sup>466</sup>

For this reason, when we speak of "death with dignity," we do not consider the external elements that play upon the demise. Dignity has two related, but imprecise, opposites: "undignified" and "indignity."<sup>467</sup> Neither of these words is a perfect antonym of "dignity."<sup>468</sup> But the use of these terms more fully captures the affront that results when a person is treated as a non-human. The dignity of the actor is called into question and the individual treated as a means suffers "death with indignity."<sup>469</sup> The inherent dignity of man can remain intact, even when suffering personal humiliation resulting in an undignified death.

The idea of "death with indignity" seems to encapsulate the more popular concept of dignity than that espoused by philosophers. Popular thought, however, also seems to recognize that dignity is not immutable by others—the actions of others can detract from and diminish that quality we call dignity. In *Wilkerson*, the Supreme Court condemned those executions laden with "terror, pain, or disgrace."<sup>470</sup> In this statement, vestiges of the Latin *dignitas* remain. At least in popular thought, the individuals can be so humiliated or degraded as to lessen the social worth in the perception of others. Societal perception still popularly plays a role in human dignity. This "personal dignity" may be impacted by other's actions. Indeed,

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<sup>463</sup>CAPITAL PUNISHMENT IN THE UNITED STATES, 294 (Hugh Bedau ed. 1975).

<sup>464</sup>Kant's inherent dignity, however, is not universally accepted. B. F. Skinner, for instance, propounded a polar opposite view of dignity. Skinner's dignity admittedly stripped man of his inherent worth—rather than being autonomous, Skinner's man is a biological machine conditioned to respond to stimuli.

<sup>465</sup>John F. Kavanaugh, *Death's Dignity*, AMERICA, March 8, 1997.

<sup>466</sup>Pullman, *supra* note 460, at 342. "Dignity cannot be lost, given up, or taken away. We may talk about offenses against the dignity of a person, or 'indignities' that a person may suffer, but such offenses or indignities do not cause a person to lose dignity; rather, they show an improper lack of respect on the part of the offender for the dignity of another human being." Lois Sheppard, *Dignity And Autonomy After Washington v. Glucksberg: An Essay About Abortion, Death, And Crime* 7 CORNELL J.L. & PUB. POL'Y 431, 456-57 (1998).

<sup>467</sup>Peter Allmark, *Death With Dignity*, J. MED. ETHICS, 2002:28:255-57 (2002).

<sup>468</sup>*See id.*

<sup>469</sup>*See id.*

<sup>470</sup>*Wilkerson*, 99 U.S. at 136.

something in the repulsive nature of a tortuous execution seems to extinguish a portion of the executed's dignity. Simply "[i]t is about how others perceive us."<sup>471</sup>

The author does not provide the discussion above to settle on a concrete definition of dignity. Debate will continue on the subject. No matter what conclusion this article may arrive at, philosophers will not cease to debate the meaning of dignity. The exploration of dignity, however, demonstrates those interests affected by Utah's use of the firing squad. Man is dignified. An inmate's perception of that dignity may change with respect to the circumstances of his death. A State may challenge an inmate's perception of his own dignity through an undignified death or may encumber his death with indignity. By treating the condemned as a means, society's dignity wanes; society bears any stain created by the State. Three interests are at play in considering the dignity of man with respect to an execution method: that of the executed, that of the executioner, and that of the society that enables the execution.

*a. Of the Executed*

Death is the only inescapable, unavoidable, sure thing. We are sentenced to die the day we're born.<sup>472</sup>

The most that human law can do to anyone in the matter of death is to hasten it; the man would have died at any rate; no so much later, and on the average, I fear, with a considerably greater amount of bodily suffering.<sup>473</sup>

The condemned may maintain some modicum of dignity in his execution. But, dignity under such circumstances is difficult. Obviously, most capital prisoners do not wish to die. Their actions may have required that consequence, but few find themselves on death row from suicidal ideation. Assuredly, some must feel like the old Woody Allen joke: "Its not that I'm afraid to die. I just don't want to be there when it happens."<sup>474</sup>

The loss of autonomy that accompanies executions may be the reason that some death row inmates volunteer to forgo judicial review. Faced with little or no ability to control the outcome of their lives, they find autonomy in what some call state-sponsored suicide. By casting aside appeals, the volunteer finds himself about to control his destiny—rejecting being treated as a “means”—and in his own eyes reclaims or reaffirms his human dignity. Gary Gilmore's bravado apparently allowed him to maintain his self-worth, even though society may have found his posturing distasteful.

Utah's statute also preserves the dignity of man by guarding autonomy through its choice-of-execution provision. The inclusion of the firing squad as a sentencing

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<sup>471</sup>Sheppard, *supra* note 466, at 448; *see also* Pullman, *supra* note 460, at 342.

<sup>472</sup>*Encounter with Death Changes Life*, U-WIRE, Mar. 13, 2001, available at 2001 WL 1555362 (quoting Gary Gilmore).

<sup>473</sup>John Stuart Mill, Speech in Favor of Capital Punishment (April 21, 1868).

<sup>474</sup>WOODY ALLEN, "DEATH (A PLAY)", WITHOUT FEATHERS, 106 (1975).

option protects the dignity of the condemned. Ronnie Lee Gardener captured his feeling in opposing a firing-squad ban: “We have no other decisions on our own, basically, and that’s one I’d like to keep.”<sup>475</sup> The choice between two methods of execution is apparently meaningful to many inmates. Kay Kirkham saw his choice of hanging as a way of defying the state. John Albert Taylor explicitly found the firing squad to affirm his masculinity and dignity. Thomas Ferguson complained in his lengthy gallows soliloquy because he had been deprived of his choice. While a spirit of vengeance may argue that such monsters forfeited their right to choose their own death when they summarily chose their victim’s method of death, and the argument is undeniably compelling, in practical reality the preservation of the condemn’s dignity through a choice-of-execution statute validates the dignity of all.

This only punctuates the fact that dignity may often be an uncompromisingly individual consideration. Recent acknowledgment of that can be found in the physician-assisted suicide movement. One active group lobbying for “death, liberty, and the pursuit of happiness” defines “death with dignity” as follows: “A death that is consistent with an individual’s personal values and sense of integrity. This may vary considerably between individuals and clinical circumstances. What is tolerable and meaningful for one individual may be unacceptable to another.”<sup>476</sup> The firing squad may allow some to feel a greater sense of dignity, while lethal injection may do the same for others.

The inherently personal nature of an individual’s choice of execution method can be seen in the motivation in electing a choice of death. One would assume that modern inmates would prefer lethal injection because of the lessened chance of pain or error. Yet several inmates have sharply criticized the surgical-like operation of that method. Fear of “flopping around like a fish” seems common. Gillespie, Utah’s prominent death penalty observer, witnessed executions both by firing squad and lethal injection. His examination of the lethal injection process seems to echo that of the inmates. He comments that lethal injection has become “clinical, distant, sterile, medicalized.”<sup>477</sup> Recognizing that “[t]here is no humane way to punish, but we pretend there is,” Gillespie contends that execution by lethal injection “sounds more like an operation than an execution, more like a surgical procedure than a sentence of the justice system.”<sup>478</sup>

This clinical death apparently does not reflect the personal dignity of some. One strong argument against the firing squad is the method’s violence. Bullets fired, blood spilling, body maimed—violence drives the firing squad. Yet this same

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<sup>475</sup>Donaldson, *Execution by Bullet*, *supra* note 119.

<sup>476</sup>The Death With Dignity National Center supports physician-assisted suicide. *See Death With Dignity*, at [www.deathwithdignity.org/resources/glossary.htm](http://www.deathwithdignity.org/resources/glossary.htm) (last visited Apr. 8, 2003).

<sup>477</sup>GILLSEPIE, *supra* note 21, at 6. Gillespie has commented: “I like the option; it’s like sending a kid out to get the switch to be spanked with. Firing squads keep the punishment in the justice system rather than in the medical field. There has to be some sense of paying for your crime beyond being put to sleep.” Louis Sahagun, *Utah is Under Fire Over Firing Squads*, L. A. TIMES, Jan. 22, 1996, at 1.

<sup>478</sup>*See id.* at 172.

violence seems attractive to some inmates.<sup>479</sup> John Albert Taylor did not want to die “[f]acing murder in a laying down fashion,”<sup>480</sup> instead preferring to “die like a man.” Thus, Roberto Arguelles chose to die without the traditional hood, so he can stare down the barrels of the killing rifles.<sup>481</sup> This bravura led Joe Hill to command his own death. On some level, firing squads have been romanticized. It is a martyr’s death, a revolutionary demise. If not banned by institutional policy, one envisions a cigarette dangling from the condemned’s lips. To some, death by that method reaffirms masculinity and dignity.<sup>482</sup>

Also, as pointed out by Taylor, the firing squad option may be chosen to emphasize the State’s taking of life. Firing squads emphasize the State’s killing in a manner that lethal injection cannot convey. As the ultimate objection to their own execution, some inmates apparently revel in the shock value a firing squad forces on society. As related by Taylor, “people will notice . . . when four or five bullets hit his chest . . . his life will virtually be ripped away from him. . . . [T]his is murder.”<sup>483</sup>

Surely, some inmates find the firing squad an undignified and distasteful death. The firing squad’s mutilation of the human body and heightened chance for human error certainly provides a basis to object to its use. But Utah forces its firing squad on no one. The individual nature of dignity is fully expressed in the individual choice presented to a capital inmate. If an inmate feels that the firing squad violates his dignity, he can choose lethal injection.<sup>484</sup> In sum, Utah’s choice-of-method statute insures that an inmate will not be subjected to an undignified death, or at least that the inmate’s perception will be that his death is dignified.

*b. Of the Executioner*

---O what are these,  
Death’s Ministers, not Men, who thus deal Death  
Inhumanly to men, and multiply  
Ten thousandfold the sin of him who slew  
His Brother, for of who such massacher  
Make they but of thir Brethren, men of men?<sup>485</sup>

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<sup>479</sup>For instance, when Gary Gilmore was asked if he did not find death by firing squad to be “grotesque,” he answered “What’s grotesque is the fact that you have to be strapped in the chair with the hood, and all that horseshit.” Mailer, *supra* note 128, at 844.

<sup>480</sup>Amy Donaldson, *Killer Gives Sole Interview to 2 Teens*, DESERET NEWS, Jan. 26, 1996, at A5.

<sup>481</sup>*See* Cantera, *supra* note 166, at B1.

<sup>482</sup>History affirms that the firing squad has been viewed as a comparatively dignified method of death. For example, the Russians campaigned vigorously for the Nuremberg defendants to be hung, thus preventing them from enjoying the legitimacy of a military death.

<sup>483</sup>Donaldson, *Execution by Bullet*, *supra* note 119.

<sup>484</sup>Granted, this may require an inmate to choose the lesser of two evils. But it is the existence of the choice, not particularly the value of the options, that preserves dignity.

<sup>485</sup>JOHN MILTON, *PARADISE LOST*, Book XI (1674 ed.)

Insofar as the State guarantees an inmate can pick his own poison (metaphorically perhaps), Utah conducts its executions in a dignified manner. After all, one may ask with his tongue firmly planed in cheek, are we not giving the condemned exactly what they asked for? But the State's use of the firing squad, even when requested, raises broader questions about dignity. Even if an inmate begged to be drawn and quartered, the State's involvement in that archaic and tortuous process would blaspheme its institutional dignity. The integrity of the State depends on its treatment of its citizens, however flawed those individuals may be. The collective dignity of the State is impacted by the way in which the State kills.

Utah worries about public image. Especially in light of the recent Olympic games, Utah is concerned about national and international perception of the State. Some have raised concerns that the peculiar use of the firing squad brings negative publicity to Utah. By endorsing an unusual method of death, and, unlike Idaho and Oklahoma, by actively employing that method, Utah opens itself to censure. Each firing squad execution is punctuated by national headlines. The firing squad's violence draws attention to the Beehive State in a way that the "routine" lethal injection never would. As noted by Governor Leavitt, "Utah's image could be hurt if we did not conduct ourselves in an orderly and dignified way, and we will meet that standard."<sup>486</sup>

The attention Utah draws with each firing squad is accompanied by an inherently subjective value judgment. Utah's notoriety as the "best place to be executed" can either be cutting sarcasm or sincere respect. The firing squad either bloodies Utah's hands or satisfies the demands of justice. But one's own thoughts, biases, and opinions shape their perception of Utah's dignity in the manner it carries out its death sentences. In the end, Utah's collective dignity is left to personal opinion.

*c. Of the Enabler*

It must be remembered that after the saber thrust, the withdrawal of the saber still leaves the wound.<sup>487</sup>

The real problem is the criminal you cannot reform: the human mad dog or cobra. The answer is, kill him kindly and apologetically, if possibly without consciousness on his part. Let him go comfortably to bed expecting to wake up in the morning as usual, and not wake up. His general consciousness that this may happen to him should be shared by every citizen as part of his moral civic responsibility.<sup>488</sup>

Society recognizes that "no man is an island, entire of itself; every man is a piece of the continent, a part of the main . . ." <sup>489</sup> If the Supreme Court's "evolving standards of decency that mark the progress of a maturing society" language holds any validity, the actor most responsible for the firing squad's use is not the

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<sup>486</sup>See Spangler, *supra* note 385.

<sup>487</sup>United States v. Rudolph, 403 F.2d 805, 807 (6th Cir. 1968).

<sup>488</sup>George Bernard Shaw, *Capital Punishment*, THE ATLANTIC, June 1948.

<sup>489</sup>JOHN DONNE, DEVOTIONS: XVII MEDITATIONS 108 (Univ of MI Press 1959).

condemned or the State, but society itself. The collective value judgment of the Utah, and American, population ultimately bears strongly on the firing squad's use. If the firing squad bloodies the hands of the State, it is only because society lets it happen. Collectively, we all share in the stain.

Again, this calls into play an individual's own value judgments. We all may differ in our opinion of how dignified a firing squad execution may be. The collective impact of these individual judgments determines the firing squad's use. If a significant portion of the Utah population felt like the firing squad stripped them of dignity, this outrage would find a voice in the legislature or the jury box. From the failure of the firing squad abolition bill in 1996, and the strong public opposition to that bill, it appears that Utah society in the past tolerated the firing squad.<sup>490</sup>

The tide may be turning. From recent polls and public opinion, it seems that Utah society is maturing, and doing so in a direction against the continued use of the firing squad. Future events, most likely during the State's next legislative session, will determine how Utah views the dignity of man. Each of us bears the burden of grappling with the demands of justice. Each of us must decide the role of human dignity. And each of us shares the result of the criminal justice experiment.

#### V. CONCLUSIONS AND REFLECTIONS

The Moving Finger writes and having writ Moves on. Nor all of your  
Piety or Wit shall lure it back to cancel half a Line, Nor all of your Tears  
wash out a Word of it.<sup>491</sup>

Having explored the history, application, controversy, and imminent execution of the firing squad, it seems logical that this article then explore the writer's opinion of the current situation, offering either a stinging critique of the amoral application of such despotic discipline or praising the virtues of such a principled process that exacts a proper punishment.<sup>492</sup> This pattern is an approach replicated in a myriad of contexts. The ultimate result, however, rarely accomplishes more than intellectual narcissism and self-soothing. Often those who have been exposed to such material, and share the same opinion, leave with their conscious placated and opinions cemented further in the firm bedrock from which they originally sprung.<sup>493</sup> Those of

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<sup>490</sup>National tolerance may or may not be otherwise. As previously noted, international opinion seems to favor the use of the firing squad.

<sup>491</sup>THE RUBAIYAT OF OMAR KHAYYAM (Fitzgerald, trans.) Stanza 71.

<sup>492</sup>[L]ong before capital punishment was abolished in [Wisconsin] and in most western democracies save the United States, scholars, journalists, philosophers, playwrights and others began writing about the death penalty, against it or for it, and they continue today. . . . Fundamentally, almost all have written as moralists; a few as statisticians, too. That is unremarkable; capital punishment is a moral question, whatever one's answer.  
*See* Dean A. Strang, *The Rhetoric of Death*, 1998 WIS. L. REV. 841, 841-42 (1998).

<sup>493</sup>As one commentator noted years ago "The voluminous literature on [the death penalty] is devoted to arguments pro and con. The arguments have been essentially the same during the last century and the evidence on one side makes little impression upon the other side."  
EDWIN H. SUTHERLAND, *PRINCIPLES OF CRIMINOLOGY* 562 (4th ed. 1924).

a differing mindset may instead approach the subject seeking further ammunition for a heady assault on the perceived opposition. This does not mean to infer a general inability to maintain objectivity in discussing capital punishment; rather, it recognizes the deep-rooted feelings the topic invokes, and the combative position assumed by the extreme of either side of the argument.

Like all politically-charged legislation, the future of the firing squad is uncertain. Plato reasoned that “arguments derived from probabilities are idle.”<sup>494</sup> Yet there is innate value in the continuing drama the death penalty provides, whether it be on the protest line outside the prison fence at Point-of-the-Mountain, inside the dusty pages of long-cited legal authority, or resounding throughout the legislative chambers. Each of these events, from the execution of a killer to the polling of the common man, cumulatively affects the future of this form of punishment. “The importance of the death penalty lies not so much in the number of persons upon whom it is inflicted as the emotions aroused in those who discuss it.”<sup>495</sup>

The discussion of the firing squad shapes and forms the opinions of the populace. As noted by George Bernard Shaw, the “general consciousness” of capital punishment “should be shared by every citizen as part of his moral civic duty.”<sup>496</sup> The true future of the firing squad does not rest only in the courts, the legislature, or in the executive branch--each heart and mind controls its destiny. Society’s ultimate punishment shirks no responsibility. We all are obliged to arrive at a consensus regarding the firing squad’s use. Until the question is ultimately decided, each firing squad bullet will tear through society, forcing us to grasp for an understanding of what it means to be a maturing society. We each must determine for ourselves whether society will tolerate death by firing squad.

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<sup>494</sup>PLATO, PHAEDO (4th Century B.C.).

<sup>495</sup>SUTHERLAND, *supra* note 493, at 562.

<sup>496</sup>Shaw, *supra* note 488.