GLOSSIP V. GROSS: The Insurmountable Burden of Proof in Eighth Amendment Method-of-Execution Claims

Michael T. Maerowitz

I. INTRODUCTION

On the morning of his execution, a team of correctional officers found Clayton Lockett hiding under his covers.[1] He had already attempted to execute himself.[2] Using a blade from a razor, Clayton Lockett had made multiple cuts on his wrist and had swallowed a handful of pills that he had been hoarding.[3] Later that night, after a medical examination, a shower, and eight hours in a holding cell, the execution team brought Clayton Lockett into the death chamber.[4] The room was small.[5] Inside sat a gurney and a hanging microphone for Lockett's last words.[6] IV lines ran from the adjacent chemical room where they passed through baseball-sized holes in the wall so as to reach the death chamber.[7]

There was no doubt Lockett was guilty. Fifteen years earlier, Lockett had killed a nineteen-year-old girl whom he was fearful would report him for beating and raping two of the girl's friends.[8] Days later, Lockett confessed to his crime, seemingly showing very little remorse.[9] Now, it was just under an hour before his execution.[10] Lockett was strapped to the gurney in the middle of the room.[11] He could expect to be injected with lethal drugs soon.[12]

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1. Jeffery E. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, ATLANTIC (June 2015), http://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*

Specifically, Lockett would be executed by a three-drug protocol, which replaced electrocution as the favored method of execution in the mid-1980s.[13] The first drug in the three-drug protocol is an anesthetic, intended to render the prisoner unconscious.[14] The second is a paralytic, inhibiting muscular movements.[15] The third is generally potassium chloride, which stops the heart.[16] Due to the unavailability of the two most commonly used anesthetics at this time—namely, sodium thiopental and pentobarbital—Oklahoma decided to execute Lockett using a sedative called midazolam.[17] In October 2013, Florida had previously executed a prisoner using midazolam.[18] Some experts argue, however, that this drug does not guarantee that the prisoner will not experience pain.[19]

Half an hour before the execution, the paramedic arrived.[20] The paramedic told investigators that she had no experience using midazolam in an execution.[21] After three failed attempts to find a vein in Lockett's arm, the paramedic asked for the assistance of a doctor.[22] Nine additional failed attempts ensued before the doctor requested the use of an IO-infusion needle, which does not require finding a vein.[23] The doctor was finally successful in finding Lockett's femoral vein.[24] A sheet was draped over Lockett and the execution began.[25]

In the chemical room, one of the executioners pushed the plunger on a syringe full of midazolam.[26] Unfortunately, not all of the midazolam entered Lockett's bloodstream.[27] The IV had dislodged and, as a result, some of the midazolam entered Lockett's tissue instead of his vein.[28] After seven minutes,

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13. *Id.*; *see First Execution by Lethal Injection*, HISTORY, http://www.history.com/this-day-in-history/first-execution-by-lethal-injection (last visited Mar. 19, 2017).

14. *Lethal Injection*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/lethal-injection (last visited Mar. 19, 2017).

15. *Id.*

16. *Id.*

17. Stern, *supra* note 1.

18. *Id.*; *State by State Lethal Injection*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/state-lethal-injection (last visited Mar. 19, 2017).

19. Stern, *supra* note 1; Emanuella Grinberg, *Why Experts Say There's No Such Thing as 'Humane' Execution*, CNN (Aug. 15, 2015), http://www.cnn.com/2015/08/13/health/death-row-stories-execution-methods/.

20. Stern, *supra* note 1.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

the doctor determined Lockett was unconscious.[29] Lockett was then injected with the second drug in the protocol, the paralytic.[30] Shortly after, potassium chloride was administered.[31]

All three drugs had been administered, but Lockett was not dead.[32] Lockett began writhing violently and twisting his body.[33] He raised his head.[34] His heart rate was still at twenty beats per minute.[35] Then, Lockett managed to speak. "*Man*," he cried.[36] Lockett began to writhe against his restraints, saying, "[t]his s*** is f***ing with my mind," "something is wrong," and "[t]he drugs aren't working."[37] The doctor attempted to insert another IV into Lockett.[38] Witnessing the scene, the Warden asked if Lockett could be resuscitated.[39] The doctor explained that CPR could save him, but Lockett would need to be transferred to an emergency room immediately.[40] The Warden yelled to stop the execution.[41] The execution ceased.[42] Ten minutes later, and over forty minutes since being injected with midazolam, Clayton Lockett was pronounced dead.[43]

Clayton Lockett's story is not entirely anomalous. Months later, in July 2014, Arizona used midazolam in the execution of a prisoner.[44] The prisoner took almost two hours to die.[45] In January 15, 2015, Oklahoma executed another prisoner, Charles Warner.[46] During the execution, shortly after the midazolam was administered, Warner exclaimed, "my body is on fire."[47] The

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29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. Glossip v. Gross, 135 S. Ct. 2726, 2782 (2015) (Sotomayor, J., dissenting).
38. Stern, *supra* note 1.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id*
43. *Id.*
44. Mark Berman, *Arizona Execution Lasts Nearly Two Hours*, WASH. POST (July 23, 2014), https://www.washingtonpost.com/news/post-nation/wp/2014/07/23/arizona-supreme-court-stays-planned-execution/?utm_term=.246497a8e7d4.
45. *Id.*
46. Dana Ford, *Oklahoma Executes Charles Warner*, CNN http://www.cnn.com/2015/01/15/us/oklahoma-execution-charles-frederick-warner/ (last updated Jan. 16, 2015 6:13 AM).
47. *Id.*; *see also* Peter Sergo, *How Does Lethal Injection Work?*, SCIENCELINE (Nov. 12, 2007), http://scienceline.org/2007/11/ask-sergo-deathpenalty/.

execution lasted eighteen minutes—ten minutes longer than the average.[48] A week later, the Supreme Court finally granted Warner's attorney's request to review Oklahoma's lethal-injection method.[49] The Supreme Court's decision in this highly anticipated case, *Glossip v. Gross*, would be released in June 2015.[50]

Beginning in 1878 with *Wilkerson v. Utah*,[51] the Supreme Court has heard over forty cases where plaintiffs alleged that a method of execution violated the Eighth Amendment's ban on cruel and unusual punishment.[52] Though methods of execution have drastically changed over the years, the Supreme Court has never once held that a state's chosen procedure for executing a prisoner constituted cruel and unusual punishment in violation of the Eighth Amendment.[53] This statistic is particularly alarming in light of the fact that The Death Penalty Information Center shows there are over forty-eight well-known "seriously" botched executions.[54]

The Supreme Court continued its trend of upholding the constitutionality of a state's chosen method of execution with their decision in *Glossip v. Gross*. In *Glossip*, prisoners sentenced to death in Oklahoma filed a 42 U.S.C. § 1983[55] action contending that midazolam, which was the first drug used in the state's three drug protocol, did not render a person insensate to pain.[56] In a 5-4 decision, the Court held that this method of execution did not violate the Eighth Amendment.[57] The Court first reasoned that "the prisoners failed to identify a known and available alternative method of execution that entails a lesser risk of pain, a requirement of all Eighth Amendment method-of-execution claims."[58] Second, the Court reasoned that the district court did not

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48. Sergo, *supra* note 47; Stern, *supra* note 1.

49. Stern, *supra* note 1.

50. *Id.*

51. Wilkerson v. Utah, 99 U.S. 130, 137 (1878).

52. Lyle Denniston, *Constitution Check: What is the Supreme Court's Role Under the Eighth Amendment?*, CONST. DAILY (Apr. 30, 2015), http://blog.constitutioncenter.org/2015/04/constitution-check-what-is-the-supreme-courts-role-under-the-eighth-amendment/.

53. John Herrman, *Supreme Court Inspirations*, AWL (June 29, 2015), http://www.theawl.com/2015/06/the-most-inspiring-quotes-from-todays-supreme-court-ruling.

54. Michael L. Radelet, *Examples of Post*-Furman *Botched Executions*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions (last updated Feb. 4, 2016).

55. Section 1983 is part of a statute passed by Congress that permits a person to bring a civil suit against state actors for violating a person's constitutional rights. Ian D. Forsythe, *A Guide to Civil Rights Liability Under 42 U.S.C. § 1983: An Overview of Supreme Court and Eleventh Circuit Precedent*, CONST. SOC'Y, http://www.constitution.org/brief/forsythe_42-1983.htm (last visited Mar. 19, 2017).

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

57. *Id.*

58. *Id.*

err when it found that the use of a massive dose of midazolam does not entail a substantial risk of severe pain.[59] Accordingly, to the dismay of many, the Supreme Court reaffirmed and strengthened its prior decisions, which placed the burden of proof on the prisoner bringing the action to prove a better alternative to the method of execution used by the state.[60]

This Note will argue that, following *Glossip v. Gross*, the burden of proof for method-of-execution claims alleging a violation of the Eighth Amendment has become overwhelmingly heavy so as to circumvent the alleged safeguards of the Eighth Amendment. Accordingly, this Note will propose that for a state's chosen method of execution to be deemed constitutional under the Eighth Amendment, the state should have the burden of proving by a preponderance of evidence that the chosen method of execution does not pose a substantial risk of harm when compared with known and readily available alternatives.

In support of this proposal, this Note will proceed as follows. Part II will begin by describing the historical imposition of the death penalty as well the various methods of execution that states have used in imposing the death penalty. This Part will then turn to a discussion of Eighth Amendment method of execution jurisprudence; and it will conclude by providing a detailed description of the recent Supreme Court decision in *Glossip v. Gross*. Part III investigates the negative effects of this decision on Eighth Amendment method-of-execution claims in light of the rationale for placing burdens of proof on litigants. Part IV supports the conclusion that a burden shift is necessary in order to avoid the unjust result of *Glossip*. Part V concludes.

II. BACKGROUND

A. Imposing "Death" as a Penalty—The History

When establishing a Union in 1787, the Framers gave little attention to the concept of imposing death as a penalty.[61] In fact, the constitution does not

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59. *Id.*

60. *See* Baze v. Rees, 553 U.S. 35, 52 (2008) (explaining that for a prisoner to succeed on an Eighth Amendment method-of-execution claim, the prisoner must establish an alternative procedure that is "feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain").

61. *See* Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 360 (1999); *see also An Act for the Punishment of Crimes*, WALL ST. J. (July 22, 2011, 10:39 PM), http://www.wsj.com/articles/SB10001424053111903461104576462471530874138.

mention the death penalty. Nonetheless, death as a penalty was common in the eighteenth century.[62] The death penalty was not codified, however, until the Second Session of the First Congress in 1790.[63] The First Congress enacted the "Act for the Punishment of Certain Crimes Against the United States."[64] This Act set the penalty of death for a dozen federal offenses, including treason, willful murder, piracy, and forgery.[65]

In the first thirty-six years after federal capital crimes were defined by the First Congress, there were 138 federal capital trials, which yielded 118 convictions.[66] Ultimately, forty-two offenders were executed, while sixty-four had been pardoned.[67] By the 1890s, likely in response to the perceived harshness of the death penalty, a number of states had made the death penalty discretionary even upon conviction of capital offenses.[68] In 1897, Congress also enacted a bill entitled "An Act To Reduce The Cases In Which The Death Penalty May Be Inflicted."[69] The Act got rid of the death penalty for all but five offenses—retaining rape and willful murder.[70] Moreover, the Act expressly authorized the jury in any federal case involving a capital offense to qualify its verdict of conviction by adding the words "without capital punishment," thereby making the death penalty completely discretionary.[71] With this, mandatory federal death penalties were, at least for a time, practically eliminated in 1897.[72]

Following the 1897 Act, federal executions were fairly infrequent.[73] From 1927 through 1963, only twenty-four executions were carried out.[74] In response to a number of high profile offenses—such as kidnappings, bombings, and hijackings—over time Congress expanded the 1897 list and statutorily imposed death as a potential penalty for additional offenses, which included: violent kidnappings, train-wrecks resulting in the death of passengers, providing narcotics to minors, and airplane bombings and hijackings.[75] With these added offenses, in the mid-twentieth century,

62. Little, *supra* note 61.
63. *Id.* at 361.
64. *Id.* at 362.
65. *Id.* at 362–63.
66. *Id.* at 366.
67. *Id.*
68. *See id.*
69 *Id.* at 367.
70. *Id.* at 367 n.97.
71. *Id.* at 367.
72. *Id.* at 368. Moreover, in 1899, the Supreme Court approved the 1897 Act, giving the jury discretion regarding the imposition of the death penalty. *Id.*
73. *Id.* at 370.
74. *Id.*
75. *Id.* at 371.

Congress had authorized the death penalty for a number of offenses that might not necessarily result in the death of victims.[76]

In 1972, in the wake of concerns regarding the disparate imposition of the death penalty on racial minorities, the Supreme Court in *Furman v. Georgia* declared unconstitutional all capital punishment statutes that lodged absolute discretion in juries to decide when the death penalty was to be imposed upon conviction.[77] In response to *Furman*, twenty-two states reverted back to the eighteenth century procedure by adopting statutes that stripped away jury discretion and imposed mandatory death penalties upon the conviction of certain crimes.[78] These statutes, however, were short-lived. In *Woodson v. North Carolina*[79] and *Roberts v. Louisiana*,[80] the Supreme Court declared mandatory death penalty statutes unconstitutional.[81] That same year, however, in *Gregg v. Georgia*,[82] the Supreme Court held that the death penalty was constitutional under the Eighth Amendment.[83]

By 1994, thirty-six states had reinstituted the death penalty and executions were carried out with a degree of frequency.[84] In fact, since the Supreme Court's decision in *Gregg*, states had collectively carried out 226 executions.[85] In that year, Congress passed the Federal Death Penalty Act ("FDPA").[86] In short, the FDPA provided possible death penalties for seventeen preexisting federal offenses and about ten new federal offenses.[87] These new federal offenses included, among others: murder by a federal prisoner, drive-by-shootings, killing persons assisting federal investigations, violence at international airports, and the use of weapons of mass

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76. *Id.*

77. *Id.* at 371–72. In *Furman v. Georgia* the Supreme Court invalidated all death penalty statutes that provided the jury with discretion as to the imposition of the death penalty. Furman v. Georgia, 408 U.S. 238, 256–57 (1972) (Douglas, J., concurring); *id.* at 314 (White, J., concurring).

78. Little, *supra* note 61, at 373; Scott E. Sundby, *The* Lockett *Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1152–53 n.19 (1991) (explaining that twenty-two states implemented mandatory death penalties for certain crimes after the *Furman* decision).

79. Woodson v. North Carolina, 428 U.S. 280, 304–05 (1976).

80. Roberts v. Louisiana, 428 U.S. 325, 335–36 (1976).

81. Little, *supra* note 61, at 374–75.

82. Gregg v. Georgia, 428 U.S. 153, 206–07 (1976).

83. *Arbitrariness*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/arbitrariness (last updated July 16, 2015).

84. Little, *supra* note 61, at 385.

85. Tracy L. Snell, *Prisoners Executed*, BUREAU JUST. STAT. (Dec. 31, 2013), http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2079.

86. Little, *supra* note 61, at 386.

87. *Id.* at 390.

destruction.[88] Shortly after the enactment of the FDPA, the U.S. Attorney General issued the "Death Penalty Protocol."[89] Broadly understood, the Death Penalty Protocol requires prosecutors seeking the death penalty to receive prior written authorization from the Attorney General.[90] Prosecutors should also provide notice of this request to defense counsel.[91]

Today, the FDPA, codified in Title 18 of the United States Code, mostly governs the imposition of the death penalty for federal offenses.[92] Although only thirty-one states have statutes allowing the death penalty, the federal death penalty under the FDPA can be applied in any state.[93] As a result, almost every homicide of the approximately 16,000 committed in the United States each year is now death-penalty eligible.[94] Since 1976, there have been a total of 1445 executions in the United States.[95]

B. Executing the Execution—Methods of Execution Throughout History

At the time the First Congress first imposed a mandatory death penalty for certain offenses in 1790, the method of carrying out such executions was prescribed as, "hanging the person convicted by the neck until dead."[96] Some scholars in this field argue that America favored this initial method of execution "because of its simplicity as well as its role in sending a strong message to the entire community about the consequences of crime."[97] That is, "[h]anging required no central facility and allowed for public punishment

88. *Id.* at 391 n.237. *See generally* 18 U.S.C. §§ 1118–1121 (1994). Though unclear, counts of the estimated death-eligible offenses under the 1994 FDPA range from thirty to sixty. Little, *supra* note 61, at 391 n.242.

89. *Id.* at 407.

90. *Id.* at 407–08.

91. *Id.* at 408.

92 *Federal Laws Providing for the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/federal-laws-providing-death-penalty (last visited Mar. 15, 2017).

93. *Expansion of the Federal Death Penalty*, CAP. PUNISHMENT CONTEXT, http://www.capitalpunishmentincontext.org/issues/expansion (last visited Mar. 25, 2017); *States with and Without the Death Penalty*, DEATH PENALTY INFO. CNTR., http://www.deathpenaltyinfo.org/states-and-without-death-penalty (last updated Mar. 25, 2017).

94. *See* Adam M. Gershowitz, *Imposing a Cap on Capital Punishment*, 72 MO. L. REV. 73, 78–79 n.28 (2007).

95. *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976 (last updated Mar. 25, 2017).

96. Little, *supra* note 61, at 365.

97. Richard C. Dieter, *Methods of Execution and Their Effect on the Use of the Death Penalty in the United States*, 35 FORDHAM URB. L.J. 789, 790 (2008).

in front of the community affected by the crime."[98] These hangings often became popular spectacles and were occasionally attended by tens of thousands of people.[99] The last public hanging in the United States occurred in 1936 in Kentucky when Rainey Bethea was executed for the rape and murder of seventy-year-old Lischa Edwards.[100]

Hanging remained the standard method of execution throughout the eighteenth and early nineteenth century.[101] However, only three executions by firing squad have taken place since the Supreme Court ended the ten-year moratorium and reinstated the death penalty in *Gregg v.Georgia*.[102] Currently the only state that still retains the firing squad as a possible method of execution is Oklahoma.[103]

In 1890, New York radically changed the manner of executions when it became the first state to conduct an execution by electrocution.[104] This new method of execution changed the landscape by bringing executions away from large public crowds to a small confined space under one roof and with few witnesses.[105] Most importantly, unlike most previous methods, the use of the electric chair required sophisticated machinery, advanced knowledge, and careful preparation.[106] Many anticipated that the swiftness of electrocution would provide a more humane method of execution.[107] However, the drawback for anti-death penalty advocates and for prisoners challenging the method of execution was clear: if something went wrong, it would not be on display for the entire public.[108] Still, by 1930, more than half of the states that authorized the death penalty used electrocution as their chosen method of

98. *Id.*

99. *Id.* One of the most famous hangings in the United States was of Mary Surratt, Lewis Powell, David Herold, and George Atzerodt who were executed on July 7, 1865 after being convicted of conspiring to assassinate President Abraham Lincoln. Woody R. Clermont, *Your Lethal Injection Bill: A Fight to the Death Over an Expensive Yellow Jacket*, 24 SAINT THOMAS L. REV. 248, 266 (2012).

100. Clermont, *supra* note 99. The last hanging occurred in 1996. *Id.*

101. *Id.* at 264.

102. *Id.* at 268.

103. *Id.* Though, prior to 2004, Utah had carried out 41 of its 50 executions by firing squad in the last 160 years. *Id.*

104. Dieter, *supra* note 97, at 790–91.

105. *Id.* at 791.

106. *Id.*

107. *Id.* at 792.

108. *Id.*

execution.[109] Electrocution would remain the dominant method of execution until the late 1980s.[110]

From 1924 through 1999, with the hope that the execution would be less painful than the electric chair, some states conducted executions using a gas chamber.[111] Similar to the procedure of electrocution, the prisoner would be strapped to a chair in a small room, which would be filled with cyanide gas.[112] The execution was usually over in ten minutes.[113]

In 1977, Oklahoma became the first state to implement lethal injection as its method of execution.[114] At its commencement, lethal injection was carried out using a three drug protocol, which included sodium thiopental, chloral hydrate, and potassium chloride.[115] Today, while the specific drugs used in the protocol may vary, states have mostly followed Oklahoma's three drug protocol.[116] First, an inmate is injected with a drug to render him unconscious.[117] The most commonly used drug for this purpose is sodium pentothal.[118] Second, the inmate is injected with a drug—most commonly, pacuronium bromide—to stop muscular activity.[119] Third, the inmate is injected with a drug—most commonly, potassium chloride—to stop his heart.[120] While lethal injection remains the primary method of execution, four other methods of execution are legal in at least one state. These other methods are electrocution, firing squad, lethal gas, and hanging.[121]

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109. Clermont, *supra* note 99, at 270.

110. *Id.* Through 2010, more than 4,400 prisoners have been put to death by electrocution. *Id.*

111. *Id.* at 271.

112. *Id.*

113. *Id.*

114. Courtney Butler, Baze v. Rees*: Lethal Injection as a Constitutional Method of Execution*, 86 DENV. U. L. REV. 509, 510 (2009).

115. *Id.* at 510–11.

116. *Id.*

117. Ellen Kreitzberg & David Richter, *But Can It Be Fixed? A Look at Constitutional Challenges to Lethal Injection Executions*, 47 SANTA CLARA L. REV. 445, 458 (2007).

118. *Id.*

119. *Id.*

120. *Id.*

121. Allen Huang, *Hanging, Cyanide Gas, and the Evolving Standards of Decency: The Ninth Circuit's Misapplication of the Cruel and Unusual Clause of the Eighth Amendment*, 74 OR. L. REV. 995, 997–98 (1995).

C. Eighth Amendment Method of Execution Jurisprudence Before Glossip

When the Constitution was ratified, criticism of its failure to expressly provide protection for convicted prisoners provided the impetus for the inclusion of the Eighth Amendment in the Bill of Rights.[122] The Eighth Amendment states in whole: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[123] Over time, courts have interpreted the cruel and unusual punishment clause of the Eighth Amendment to impose limitations on five aspects of criminal punishments: "(1) means of punishment; (2) proportionality; (3) power to criminalize; (4) prison conditions (conditions of confinement); and (5) procedural due process."[124] This Note will focus on the limitations concerning both the (1) means of criminal punishment and (2) the proportionality of criminal punishment. These limitations have provided the grounds for prisoners to challenge a state's chosen method of execution as a violation of the Eighth Amendment.

The first method-of-execution claim the Supreme Court heard was *Wilkerson v. Utah* in 1879.[125] In *Wilkerson*, the Court upheld Utah's execution of a prisoner by firing squad, primarily reasoning that it was a common method of execution used in the military.[126] Eleven years later, the Supreme Court heard its second method-of-execution claim in *In re Kemmler*.[127] The Court held that New York's use of electrocution as a method of execution did not violate the Eighth Amendment because the Eighth Amendment did not apply to states.[128] However, the Court left the door open for future challenges by providing the standard that "[p]unishments are cruel when they involve torture or a lingering death . . . . It implies there something inhuman and barbarous . . . something more than the mere extinguishment of life."[129]

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122. *See* Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 327 (1997).

123. U.S. CONST. amend. VIII.

124. Denno, *supra* note 122, at 329.

125. Wilkerson v. Utah, 99 U.S. 130, 130–31 (1878); Molly E. Grace, Baze v. Rees*: Merging Eighth Amendment Precedents into a New Standard for Method of Execution Challenges*, 68 MD. L. REV. 430, 437 (2009).

126. *Wilkerson*, 99 U.S. at 135; Grace, *supra* note 125.

127. *In re Kemmler*, 136 U.S. 436, 438 (1890); Grace, *supra* note 125.

128. *In re Kemmler*, 136 U.S. at 448.

129. *Id.* at 447.

In 1947, the Supreme Court similarly upheld electrocution as Louisiana's chosen method of execution in *Louisiana ex rel. Francis v. Resweber*.[130] In *Resweber*, the Court considered the constitutionality of a second electrocution attempt, after the first attempt was foiled by a mechanical problem.[131] In support of its holding, the Court reasoned, "[t]he 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."[132] Accordingly, the Court determined that the fact that an unforeseeable accident occurs during the execution, so as to prevent a swift execution, does not add an element of cruelty to the execution.[133]

More recently, in 2004 and 2006, the Supreme Court heard two cases involving the procedural aspects of method-of-execution cases, but did not address the constitutionality of the methods of execution that were involved.[134] Instead, in these cases, the Supreme Court held that challenges to the state's method of execution by lethal injection could be brought under 42 U.S.C. § 1983.[135] Accordingly, at the advent of the twenty-first century, the Supreme Court had not yet established a general rule from its prior method-of-execution decisions.[136] In the absence of Supreme Court guidance, courts in states across the country adopted various standards for determining whether an execution (primarily lethal injections) violated the Eighth Amendment.[137]

Some courts used a "substantial risk" standard.[138] For instance, the United States Court of Appeals for the Eighth Circuit in *Taylor v. Crawford*[139] held that Missouri's lethal injection protocol, utilizing sodium pentothal, pancuronium bromide and potassium chloride, did "not present any substantial foreseeable risk that the inmate will suffer the unnecessary or wanton infliction of pain."[140]

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130. Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463–64 (1947); Grace, *supra* note 125, at 438.

131. Grace, *supra* note 125, at 438.

132. *Resweber*, 329 U.S. at 464.

133. *Id.*

134. Hill v. McDonough, 547 U.S. 573, 576 (2006); Nelson v. Campbell, 541 U.S. 637, 639 (2004); Grace, *supra* note 125, at 439.

135. *Hill*, 547 U.S. at 580; *Nelson*, 541 U.S. at 644–45.

136. Grace, *supra* note 125, at 446.

137. *Id.*

138. *Id.*

139. Taylor v. Crawford, 487 F.3d 1072, 1085 (8th Cir. 2007).

140. *Id.*

Other courts used an "unnecessary risk" standard.[141] For instance, the Ninth Circuit in *Cooper v. Rimmer*[142] held California's lethal injection protocol did not violate the Eighth Amendment because, "[w]hile there can be no guarantee that error will not occur," the inmate did not show "that he is subject to an unnecessary risk of constitutional pain or suffering."[143] The court also noted that the "Eighth Amendment prohibits punishments that involve the unnecessary and wanton inflictions of pain, or that are inconsistent with evolving standards of decency that mark the progress of maturing society."[144]

The Florida Supreme Court consolidated these prior standards into an "inherently cruel with substantial, foreseeable, or unnecessary risk of pain" standard.[145] In *Lightbourne v. McCollum*,[146] the Florida Supreme Court held that the prisoner did not meet his burden of proving Florida's lethal injection protocol constituted cruel and unusual punishment.[147] The court reasoned that the prisoner's "list of horribles that could happen is insufficient" because "[t]he mere possibility of human error or a technical malfunction cannot constitute a sufficient showing to meet this burden."[148]

Finally, in 2008, the Supreme Court heard *Baze v. Rees*,[149] which involved a prisoner's Eighth Amendment Challenge to Kentucky's lethal injection protocol.[150] In upholding the constitutionality of the lethal injection protocol, the Supreme Court adopted the "substantial risk of serious harm" standard.[151] The Court acknowledged that subjecting individuals to a risk of future harm can qualify as cruel and unusual punishment.[152] However, the Court explained that to prevail on such a claim the prisoner must show that the execution method presents "a substantial risk of serious harm."[153] The Court went on to provide: "[s]imply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of objectively intolerable risk of harm that qualifies as cruel and

141. Grace, *supra* note 125, at 447.
142. Cooper v. Rimmer, 379 F.3d 1029, 1033 (9th Cir. 2004).
143. *Id.*
144. *Id.* at 1032.
145. Grace, *supra* note 125, at 448–49.
146. Lightbourne v. McCollum, 969 So. 2d 326, 351 (Fla. 2007).
147. *Id.*
148. *Id.* at 349–50.
149. Baze v. Rees, 553 U.S. 35, 40 (2008).
150. *Id.* at 40–41.
151. *See id.* at 49–50; *see also* Grace, *supra* note 125, at 453–56.
152. *Baze*, 553 U.S at 49.
153. *Id.* at 50 (quoting Farmer v. Brennan, 511 U.S. 825, 842 (1994)).

unusual."[154] In addition, the Court noted that proof of a state's refusal to adopt an alternative method that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain" will satisfy the "substantial risk of serious harm" standard.[155] The Court concluded, however, that proof of a "slightly or marginally safer alternative" is insufficient to meet this standard.[156]

The dissent, written by Justice Ginsburg and joined by Justice Souter, argued instead that Kentucky's three-drug protocol contained insufficient safeguards to ensure the prisoner would not be subjected to cruel and unusual punishment.[157] Justice Ginsburg explained that it "is undisputed that the second and third drugs used in Kentucky's three-drug lethal injection protocol, pancuronium bromide and potassium chloride, would cause a conscious inmate to suffer excruciating pain."[158] Pancuronium bromide paralyzes a person's lung muscles and results in the slow depletion of oxygen from the body.[159] Potassium chloride then "causes burning and intense pain as it circulates throughout the body."[160]

For the dissenters, then, the constitutionality of Kentucky's three-drug protocol turned on whether the inmate was "adequately" rendered unconscious by the first drug in the protocol.[161] The dissent determined that Kentucky's protocol lacked basic safeguards, used by other states, to confirm that an inmate is unconscious before medical personnel injects the second and third drugs.[162] This is because, unlike states that monitor the effectiveness of the first drug using advanced medical equipment or the techniques[163] of expert medical personnel, Kentucky relies only on the visual observations of the warden "to determine whether the inmate 'appears' unconscious."[164] The dissent concluded that simply relying on the visual observations of the medically untrained warden, and omitting other readily available measures to

154. *Id.* at 50 (internal quotation marks and citation omitted).
155. *Id.* at 52.
156. *Id.* at 51.
157. *Id.* at 113–23 (Ginsburg, J., dissenting).
158. *Id.* at 113.
159. *Id.* at 113–14.
160. *Id.* at 114.
161. *Id.*
162. *Id.*
163. Basic techniques of medical personnel, employed in other states, to determine if an inmate is rendered unconscious by the first drug generally include: calling the inmate's name, shaking the inmate, brushing the inmate's eyelashes to test for a reflex, or applying a noxious stimulate to gauge the inmate's response. *Id.* at 118.
164. *Id.* at 117–18.

determine the inmate's state of unconsciousness, constituted cruel and unusual punishment in violation of the Eighth Amendment.[165]

Ultimately, in determining whether a lethal injection protocol constitutes a "substantial risk of harm," the dissent in *Baze* placed a greater emphasis on the usefulness of the procedural safeguards that are employed when administering a drug. This is unlike the majority, which seemed to place the greatest emphasis on the general effectiveness of the particular drug used in achieving its intended purpose. It was the majority's understanding and application of the "substantial risk of harm" standard that the Supreme Court was left with when it decided *Glossip v. Gross* in 2015.

D. Glossip v. Gross

In *Glossip*, four prisoners sentenced to death in Oklahoma filed an action in federal court, under 42 U.S.C. § 1983, contending that the method of execution used by the state violates the Eighth Amendment.[166] As a matter of background, after the Court in *Gregg* reaffirmed that the death penalty does not violate the Constitution, a number of states looked for a more humane way to carry out executions.[167] Oklahoma adopted lethal injection in 1977, and eventually settled on the following three-drug protocol: (1) sodium thiopental; (2) a paralytic agent; and (3) potassium chloride.[168] It was this precise three-drug protocol that the Supreme Court held to be constitutional just years earlier in *Baze*.[169] However, after *Baze*, due to anti-death penalty advocates pressuring pharmaceutical companies to cease the production of sodium thiopental, Oklahoma was in need of a replacement drug to be used as the first drug in its protocol.[170]

In 2010, Oklahoma settled on pentobarbital (another barbiturate) as a replacement and became the first state to execute an inmate using this drug.[171] The execution occurred without incident, which prompted states to uniformly switch to pentobarbital as a replacement to sodium thiopental.[172] Soon, however, the Danish manufacturer of pentobarbital was also pressured by

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165. *See id.* at 119 ("A consciousness check supplementing the warden's visual observation before injection of the second drug is easily implemented and can reduce a risk of dreadful pain.").

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

167. *Id.* at 2732.

168. *Id.*

169. *Id.* at 2733.

170. *Id.*

171. *Id.*

172. *Id.* All forty-three executions carried out in 2012 used pentobarbital as the first drug in the three-drug protocol. *Execution List 2012*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/execution-list-2012 (last visited Mar. 25, 2017).

anti-death penalty advocates to cease production of pentobarbital.[173] As a result, the district court concluded that both sodium thiopental and pentobarbital were unavailable in Oklahoma.[174]

Seeking another replacement drug to induce unconsciousness, some states turned to midazolam.[175] In October 2013, Florida became the first state to conduct a lethal injection using midazolam.[176] Following Florida's lead, in April 2014 Oklahoma chose to execute Clayton Lockett using 100 milligrams of midazolam.[177] After the botched execution of Clayton Lockett, Oklahoma adopted a new protocol with an effective date of September 30, 2014.[178] The new protocol required the use of 500 milligrams of midazolam (increased from 100 milligrams) followed by a paralytic agent and potassium chloride.[179]

Soon after Lockett's botched execution, in June 2014, four Oklahoma prisoners (Richard Glossip, Benjamin Cole, John Grant, and Charles Warner), who were to be executed using the aforementioned three-drug protocol, filed this action.[180] In November 2014, the four plaintiffs filed a motion for a preliminary injunction, seeking to prevent Oklahoma's use of its three-drug protocol in their execution.[181] After hearing expert testimony from numerous doctors concerning the effectiveness of midazolam in rendering a person unconscious, the district court denied the motion.[182] Notably, the district court found that a 500-milligram dose of midazolam would, by itself, cause death by respiratory arrest within thirty minutes or an hour.[183] The Court of Appeals for the Tenth Circuit affirmed.[184] Following the precedent established in *Baze*, the court reasoned that, because the prisoners did not identify alternatives, they failed to prove that the use of 500 milligrams of midazolam was substantial "when compared to the known and available alternatives."[185] The court then went on to state that this holding was not outcome-determinative because the prisoners also failed to prove that midazolam creates a substantial risk of severe pain.[186] After this ruling, on

173. *Glossip*, 135 S. Ct. at 2733.
174. *Id.* at 2733–34.
175. *Id.* at 2734.
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.* at 2735.
181. *Id.*
182. *Id.* at 2735–36.
183. *Id.* at 2736.
184. *Id.*
185. *Id.*
186. *Id.*

January 15, 2015, Oklahoma executed Warner—one of the four plaintiff prisoners.[187] Then, the Supreme Court stayed the executions of Glossip, Cole, and Grant pending the resolution of *Glossip v. Gross*, which was now taken on appeal.[188]

On June 29, 2015, Justice Alito, writing for a majority of the Justices, held that Oklahoma's method of execution did not violate the Eighth Amendment.[189] The Court explained that *Baze* outlined two requirements for a prisoner to succeed on an Eighth Amendment method-of-execution claim.[190] First, the prisoner must establish that the state's chosen method of execution presents a "substantial risk of serious harm."[191] Second, prisoners must identify an alternative that is "feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain."[192] Under this framework, the Court in *Glossip* determined first that the prisoners "ha[d] not proved that any risk posed by midazolam is substantial when compared to known and available alternative methods of execution."[193] Second, the Court determined that the prisoners "failed to establish that the District Court committed clear error when it found that the use of midazolam will not result in severe pain and suffering."[194]

As to the need to establish alternatives, the plaintiffs argued that Oklahoma could use sodium thiopental, rather than midazolam.[195] They also argued that Oklahoma could instead use pentobarbital, as had been used in years prior.[196] However, the Supreme Court agreed with the Tenth Circuit that the District Court did not err when it found that Oklahoma was unable to obtain both sodium thiopental and pentobarbital.[197] The Court also rejected the prisoners' argument that they did not need to establish a readily available alternative in order to prove a violation of the Eighth Amendment, because such an argument "is inconsistent with the controlling opinion in *Baze* . . . which imposed a requirement that the Court now follows."[198]

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187. *Id.*
188. *Id.*
189. *Id.* at 2731.
190. *Id.* at 2737.
191. *Id.* (citation omitted).
192. *Id.* (citation omitted).
193. *Id.* at 2737–38.
194. *Id.* at 2738.
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* The Court went on to explain that *Baze* made "it clear that the Eighth Amendment requires a prisoner to plead and prove a known and available alternative." *Id.* at 2739.

As to the second ground for affirmance, in short, the Court determined that the "District Court did not commit clear error when it found that midazolam is highly likely to render a person unable to feel pain during an execution."[199] The Court explained that the plaintiffs bear the burden of persuasion on this issue and that numerous courts have determined that the use of midazolam, as the first drug in a three-drug protocol, is likely to render a person insensate to any pain that may result from the subsequent injection of the second two drugs.[200]

In a dissent, Justice Breyer argued instead that "the death penalty, in and of itself, now likely constitutes a legally prohibited cruel and unusual punishment."[201] Justice Sotomayor's dissent argued that the District Court erred in finding that the use of 500 milligrams of midazolam did not present an objectively intolerable risk of pain.[202] In support, Justice Sotomayor explained, "none of the State's 'safeguards' for administering these drugs would seem to mitigate the substantial risk that midazolam will not work . . . ."[203]

Importantly, Justice Sotomayor also determined that the majority incorrectly faulted the inmates "for failing to satisfy the wholly novel requirement of proving the availability of an alternative means for their own executions."[204] She explained that the Supreme Court's Eighth Amendment jurisprudence has recognized the general proposition that certain methods of execution are categorically off-limits.[205] Prior cases concerning method-of-execution claims under the Eighth Amendment have made it clear that the cruel and unusual punishment clause "at the very least precludes the imposition of 'barbarous physical punishments.'"[206] And, these "barbarous physical punishments" are precluded under *all* circumstances.[207] Justice Sotomayor concludes, therefore, that the majority indefensibly converted the Eighth Amendment's categorical prohibition against the infliction of cruel and unusual punishments into a conditional prohibition.[208]

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199. *Id.*

200. *Id.* at 2739–40. Among others, the Court cited *Banks v. State*, 150 So. 3d 797 (Fla. 2014); Howell v. State, 133 So. 3d 511 (Fla. 2014); Muhammed v. State, 132 So. 3d 176 (Fla. 2013).

201. *Glossip*, 135 S. Ct. at 2756 (Breyer, J., dissenting) (internal quotation marks omitted).

202. *Id.* at 2785–86 (Sotomayor, J., dissenting).

203. *Id.* at 2791.

204. *Id.* at 2781.

205. *Id.* at 2792.

206. *Id.* at 2793.

207. *Id.*

208. *Id.* ("The Court today, however, would convert this categorical prohibition into a conditional one. A method of execution that is intolerably painful—even to the point of being the

III. THE IMPACT OF *GLOSSIP* ON THE BURDEN OF PROOF FOR EIGHTH AMENDMENT METHOD-OF-EXECUTION CLAIMS

The following discussion will focus exclusively on the implications that stem from the majority's first ground for affirmance, which places the burden on prisoners to prove that the state's chosen method of execution is "substantial when compared to known and available alternative methods." To contextualize the impact of the *Glossip* decision, however, it is first important to consider the role that the burden of proof plays in the courtroom as well as the policy consideration for allocating the burden of proof.

A. The Role of the 'Burden of Proof'

The burden of proof is used to describe the threshold that a party attempting to prove a fact must reach in order to establish that fact.[209] The burden of proof can be broken down into two distinct components: (1) the burden of production, and (2) the burden of persuasion.[210] The burden of production imposes an obligation on the party "to come forward with sufficient evidence to support a particular proposition of fact."[211] Whether a party has satisfied the burden of production is an issue of law.[212] That is, a judge must determine whether a party has met the burden of production such that there is enough evidence on the particular issue to be decided by the trier of fact.[213] Once the party meets the burden of proof, the party must then meet the burden of persuasion. The burden of persuasion requires the party to persuade the trier of fact by a particular degree of belief that a fact is true.[214] In ascending order of strength, the law generally recognizes three levels of

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chemical equivalent of burning alive—will, the Court holds, be unconstitutional *if*, and only if, there is a 'known and available alternative' method of execution.").

209. *Burden of Proof*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/burden_of_proof (last visited Jan. 28, 2017).

210. *Id.*

211. *Burden of Production*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/burden_of_production (last visited Mar. 25, 2017).

212. *Id.*

213. *Id.*

214. *Burden of Persuasion*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/burden_of_persuasion (last visited Mar. 25, 2017).

proof in most hearings and trials: (1) preponderance of evidence;[215] (2) clear and convincing evidence;[216] and (3) beyond a reasonable doubt.[217]

In criminal cases, the burden of persuasion for most issues is placed on the government; the weight of this burden is generally "proof beyond a reasonable doubt."[218] However, because prisoners must bring their Eighth Amendment method-of-execution claims as a civil rights action under Section 1983, the burden placed on plaintiffs in civil actions applies. In most civil cases, the plaintiff has the burden of proving his case by a preponderance of the evidence.[219]

B. Allocating the Burden of Proof

In civil cases, the burdens of production and persuasion are generally allocated between the plaintiff and the defendant on the basis of the following three factors: (1) fairness, (2) respective probabilities, and (3) disfavored contentions.[220] The first fairness factor focuses on whether one party has greater access to evidence than the other party.[221] For efficiency reasons, the burden of proof generally falls on the party who has superior access to evidence that is necessary to resolve the case.[222] The second factor, respective probabilities, considers which party is more likely to be right and which party is more likely to be wrong.[223] The party that is more likely to be wrong is generally allocated the burden of proof. The third disfavored contentions factor, plainly said, concerns whether a party is advancing a judicially disfavored contention.[224] That is, if a party is advancing a contention that

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215. "[P]reponderance of evidence requires at least 50.1% confidence that the facts support the decision." *Standards of Proof*, CAMPUSCLARITY BLOG (Oct. 15, 2013), https://home.campusclarity.com/standards-of-proof/.

216. "[C]lear and convincing evidence requires at least 70–75% confidence that the facts support the decision." *Id.*

217. "[B]eyond a reasonable doubt requires at least 95% confidence that the facts support a guilty verdict." *Id.*

218. Barbara Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1301 (1977).

219. *Burden of Proof*, *supra* note 209.

220. 21B FED. PRAC. & PROC. EVID. § 5142, Westlaw (2d ed. 2005) (database updated Apr. 2016); Richard A. Epstein, *Pleadings and Presumptions*, 40 U. CHI. L. REV. 556, 578 (1973); Marshall S. Sprung, *Taking Sides: The Burden of Proof Switch in* Dolan v. City of Tigard, 71 N.Y.U. L. REV. 1301, 1305 (1996).

221. Sprung, *supra* note 220, at 1307.

222. Epstein, *supra* note 220, at 579.

223. *Id.* at 580.

224. *Id.* at 578.

courts generally disfavor, then, in order to avoid the disfavored result, the party advancing the contention bears the burden of proof.[225]

C. The Negative Effects of Glossip

In *Glossip*, the state of Oklahoma's expert witness testified that properly administering 500 milligrams of midazolam would make it a virtual certainty that an inmate would be rendered unconscious.[226] The prisoners acknowledged that they did not have contrary scientific proof.[227] However, in response, their expert witness testified that "it's not my responsibility or the Food and Drug Administration's responsibility to prove that the drug doesn't work or is not safe."[228] Instead, the expert testified, it is the responsibility of the state of Oklahoma, seeking to use the drug, to show that the drug is safe and effective.[229] The majority concluded, however, that the prisoners' expert witness "confused the standard imposed on a drug manufacturer seeking approval of a therapeutic drug with the standard that must be borne by a party challenging a state's lethal injection protocol."[230] The party contending that a state's authorized method of execution violates the Eighth Amendment "bears the burden of showing that the method creates an unacceptable risk of pain."[231]

In practice, the "burden of showing that the method creates an unacceptable risk of pain" is perhaps even stronger than initially suggested by the Court's language.[232] Recall that, in support of its first ground for affirmance, the Court held that the prisoners "ha[d] not proved that any risk posed by midazolam is substantial when compared to known and available alternative methods of execution."[233] Accordingly, though the Court does not expressly state as much, practically speaking a prisoner must not only prove that the state's chosen method of execution creates a substantial risk of harm; he must also prove that the harm is in fact substantial in comparison to other "known" and "readily available" alternatives.[234] Therefore, the prisoner's

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225. *Id.*
226. Glossip v. Gross, 135 S. Ct. 2726, 2741 (2015).
227. *Id.*
228. *Id.* (internal quotation marks omitted).
229. *Id.*
230. *Id.*
231. *Id.*
232. *See id.*
233. *Id.* at 2737–38.
234. *See id.* at 2741; *see also* Baze v. Rees, 553 U.S. 35, 52 (2008) (explaining that to succeed on an Eighth Amendment method-of-execution claim, the prisoner must proffer alternatives that

burden can be broken down into three hurdles that must be overcome: (1) substantial risk of harm; (2) substantial in comparison to known alternatives; and (3) substantial in comparison to available alternatives.[235]

1. Substantial Risk of Harm

First, the prisoner has the burden of proving that the state's chosen method of execution results in a substantial risk of harm.[236] In the lethal injection context, the prisoner is tasked with the burden of production to come forward with enough scientific evidence to show that a particular drug will cause a substantial risk of harm.[237] Moreover, consistent with civil cases, the prisoner must establish this fact by persuading the judge or jury by a preponderance of evidence.[238] Ultimately, then, this first hurdle serves as a threshold test to all Eighth Amendment method-of-execution claims that a prisoner must overcome before the court is even to consider the further inquiry of whether the execution method is substantial when compared to alternatives.

2. Substantial in Comparison to Known Alternatives

Assuming a prisoner manages to prove that a chosen method of execution creates a substantial risk of harm, the prisoner must then prove that this risk of harm is substantial when compared to "known" alternatives.[239] In the lethal injection context, this burden requires the prisoner to specify particular drugs that reduce pain substantially more than the drug the state has chosen to use.[240] Viewed practically, the prisoner is required to produce scientific evidence showing that another specific drug is substantially preferable to the

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are "feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain").

235. *See generally Glossip*, 135 S. Ct. 2726.

236. *Id.* at 2740; *Baze*, 553 U.S. at 50 ("[T]here must be a substantial risk of serious harm, an objectively intolerable risk of harm that prevents prison officials from pleading that they were subjectively blameless for purposes of the Eight Amendment.") (citation omitted) (internal quotes omitted).

237. *See Glossip*, 135 S. Ct. at 2740 (adopting the substantial risk of harm standard); *see also Burden of Proof*, *supra* note 209 (explaining that the burden of production imposes an obligation on the party to come forward with sufficient evidence to support a particular proposition of fact).

238. *See Burden of Proof*, *supra* note 209.

239. *Glossip*, 135 S. Ct. at 2738.

240. *See Burden of Persuasion*, *supra* note 214; *see also Baze*, 553 U.S. at 52 (discussing the need to proffer feasible and readily implemented alternatives).

drug being used.[241] Of course, this fact is exceedingly difficult for a prisoner to establish when one considers that the prisoner likely does not have the scientific acumen nor the ability to access resources to produce such evidence.[242] Thus, the prisoner can truly only support his claim by noting past execution methods, which the prisoner will hope to show resulted in substantially less harm. It is no wonder then that the prisoners in *Glossip* attempted to meet their burden by listing two drugs that were previously used—sodium thiopental and pentobarbital.[243]

3. Substantial in Comparison to Available Alternatives

Finally, if the prisoner is able to prove that there is a known alternative method that substantially reduces the risk of harm, he must then prove that the alternative method is readily available.[244] The majority in *Glossip* made this burden clear when it explained that both sodium thiopental and pentobarbital were unavailable to Oklahoma.[245] Accordingly, as a final obstacle, the prisoner is required to identify a drug that is also being manufactured and sold to the U.S. so as to become "readily available."[246] Ironically, identifying such a drug is made increasingly difficult in a world where anti-death penalty advocates are lobbying manufacturers to cease the production of drugs that are to be used in lethal injections.[247]

It should also be noted that the majority in *Glossip* recognized the proposition in *Baze* that prisoners "cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative."[248] Therefore, one could argue that unless the prisoner is fortunate enough to bring his claim at a time when scientists have just developed a new drug that can effectively be used in lethal injections, it is almost a virtual

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241. *Glossip*, 135 S. Ct. at 2738 (rejecting the prisoners' claim that, rather than midazolam, the state could have used sodium thiopental or pentobarbital, on the ground that "Oklahoma has been unable to procure those drugs despite a good-faith effort to do so").

242. *See generally Know Your Rights: Access to the Courts*, LAW OFF. S. CTR. FOR HUM. RTS. (Sept. 2010), https://www.schr.org/files/post/ACCESS%20TO%20COURTS.pdf (discussing the resources that a prisoner has access to while in prison).

243. *See Glossip*, 135 S. Ct. at 2738.

244. *See id.* at 2737; *see also Baze*, 553 U.S. at 52.

245. *Glossip*, 135 S. Ct. at 2738.

246. *See Burden of Production*, *supra* note 211.

247. Ironically as an unintended consequence of anti-death penalty advocates lobbying manufacturers to seize the production of drugs to be used in lethal injections, prisoners have a much more difficult time proving that the death penalty violates their Eighth Amendment rights. *E.g.*, *Glossip*, 135 S. Ct. at 2733.

248. *Id.* at 2737 (quoting *Baze*, 553 U.S. at 51).

certainty that the prisoner's claim will fail.[249] And even if this breakthrough drug exists, the drug must be produced by manufacturers that are willing to sell to the U.S. so that it becomes "readily available."[250]

IV. THE PROPOSAL

The following will propose that in order to avoid the negative effects of *Glossip*, a burden shift is needed. In doing so, this Part will begin with an illustration of the particular burden shift that is called for in this Note. The proposal will then be supported by analyzing the traditional policy considerations for allocating the burden of proof. This Part will conclude with a prediction of the potential effects this proposal may have on other Eighth Amendment claims concerning criminal punishment.

A. Shifting the Burden of Proof

The Court's decision in *Glossip* is animated by the proposition that "capital punishment is constitutional."[251] Therefore, "it necessarily follows that there must be a constitutional means of carrying it out."[252] While this proposition is reasonably sound, it appears to be problematic in light of the burden of proof that the Supreme Court has made clear in both *Baze* and *Glossip*. The problem lies in the fact that courts are now required to accept that, at all times, a state's chosen method of execution is constitutional, unless the prisoner overcomes the three abovementioned obstacles imposed by his burden of proof.[253]

Instead, perhaps courts should accept that it is possible for the unavailability of certain drugs to create a moment in time where lethal injection is temporarily unconstitutional. When states are unable to obtain previously known and effective drugs—i.e., when manufacturers are pressured to cease production of the drugs—courts should reject the baseline rule that the state's chosen method of execution is constitutional. Importantly, implementing this proposal does not require the Court to reverse *Gregg*[254] and

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249. *See, e.g.*, *id.* at 2738 (rejecting the prisoners' claim, in part, because "they have not identified any available drug or drugs that could be used in place of those that Oklahoma is now unable to obtain").

250. *See, e.g.*, *Baze*, 553 U.S. at 52.

251. *See Glossip*, 135 S. Ct. at 2732.

252. *Id.* at 2732–33 (quoting *Baze*, 553 U.S. at 47).

253. *See supra* Part III(C).

254. Gregg v. Georgia, 428 U.S. 153 (1976). *Gregg* lifted the ten-year moratorium on the death penalty and once again held it was constitutional.

adopt a per se rule that the death penalty violates the Eighth Amendment. Rather, courts only need to shift the burden of proof away from the prisoner and onto the state. For a state's chosen method of execution to be deemed constitutional under the Eighth Amendment, the state should have the burden of proving by a preponderance of evidence that the chosen method of execution does not pose a substantial risk of harm when compared with known and readily available alternatives. This proposal appears particularly reasonable in light of the policy considerations for allocating the burden of proof.

B. Fairness

As to the fairness factor,[255] it is the state and not the prisoner that has the greatest access to relevant evidence. The state and its relevant agents are responsible for obtaining the drugs to be used in the execution.[256] This connection with drug manufacturers confers greater access to scientific resources. Accordingly, the state can more reasonably bear the burden of proving that the drugs being used in the execution do not pose a substantial risk of harm when compared with alternatives.

C. Respective Probabilities

Concerning the probabilities factor,[257] one could certainly argue that the fact that no prisoner has ever been successful in challenging a state's chosen method of execution demonstrates that the prisoner is the party that is least likely to succeed. This fact, however, is skewed by the Court's imbalanced jurisprudence on Eighth Amendment method-of-execution claims. The insurmountable burden of proof placed on prisoners has universally caused prisoners to be unsuccessful on their method-of-execution claims. Accordingly, the fact that the Supreme Court has never once held a state's chosen method of execution to be unconstitutional should not serve as another justification for allocating the burden of proof to the prisoner.

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255. *See supra* Part III(B).
256. *See State by State Lethal Injection*, *supra* note 18.
257. *See supra* Part III(B).

D. Disfavored Contentions

The disfavored contentions factor[258] seems to provide the greatest resistance to a proposal seeking a burden shift for Eighth Amendment method-of-execution claims. As Justice Sotomayor's dissent in *Glossip* points out, the majority appears to be motivated "by a desire to preserve States' ability to conduct executions in the face of changing circumstances."[259] Therefore, a foreseeable counterargument to this proposal is that shifting the burden of proof onto the state to prove the absence of cruel and unusual punishment will in effect strip away from states the power to conduct executions by lethal injection. As was certainly borne out in the events leading up to *Baze* and *Glossip*, pharmaceutical companies seeking to disassociate themselves from the death penalty can create a shortage of execution drugs.[260] In turn, states often experience severe practical obstacles in obtaining lethal drugs to be used in executions.[261] Through no fault of their own, then, states are forced to scramble and locate new and untested drugs.[262] The counterargument therefore goes: changing circumstances resulting in the unavailability of certain drugs should not prohibit a state from performing executions, particularly when performing executions was held constitutional in *Gregg*.[263]

This argument, however, overlooks the fact that although the Court in *Gregg* held that statutes imposing the death penalty were constitutional, nothing *compels* a state to perform an execution.[264] Consistent with *Gregg*, if a state *chooses* to conduct an execution it must do so subject to the constraints of the Eighth Amendment, which imposes the requirement that the chosen method of execution is not cruel and unusual.[265] Moreover, inmates facing execution should not be the ones to bear the burden of changing circumstances that make it difficult for states to acquire lethal drugs. If a state is unable to acquire drugs that are adequately humane to satisfy the Eighth Amendment, the state should bear the consequence of being unable to prove that the execution method in this instance is *constitutional*. It should not be the inmate who suffers the consequence of being unable to prove that the drugs he is to be executed with are *unconstitutional*.

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258. *See supra* Part III(B).

259. Glossip v. Gross, 135 S. Ct. 2726, 2795–96 (2015) (Sotomayor, J., dissenting).

260. *See, e.g.*, *id.* at 2733.

261. *Id.*

262. *State by State Lethal Injection*, *supra* note 18.

263. *See* Gregg v. Georgia, 428 U.S. 153, 169 (1976).

264. *Id.* (simply holding "that the punishment of death does not invariably violate the Constitution").

265. *See id.*

If the burden of proof remains on the prisoner, it may not matter whether the state intends to use midazolam or another drug which has the practical effect of slowly torturing the inmate. The inmate is still unlikely to fulfill his burden even in a case where a torturous drug, having the effect of essentially burning the prisoner at the stake, makes its way into the three-drug protocol.[266] This is because, if practical obstacles render more humane drugs "unavailable," the prisoner will be unable to prove that his impending torture constitutes cruel and unusual punishment when compared to alternatives.[267] Certainly the Court could not have intended such a result. A burden shift is therefore essential to ensure that when all available means for conducting an execution constitute cruel and unusual punishment, performing the execution will actually result in a violation of the Eighth Amendment.

E. Beyond Method-of-Execution Claims

As illustrated above, the Eighth Amendment generally imposes limitations on five aspects of criminal punishments. Namely, "(1) means of punishment; (2) proportionality; (3) power to criminalize; (4) prison conditions (conditions of confinement); and (5) procedural due process."[268] While this Note focused exclusively on aspects (1) and (2), foreseeably, the burden placed on prisoners in alleging an Eighth Amendment method-of-execution claim will also extend to other claims involving criminal punishments—such as deplorable prison conditions. For instance, a number of prisoners bringing Section 1983 claims challenging prison conditions, or treatment received by medical personnel, will have an exceedingly difficulty time proving an Eighth Amendment violation. If the burdens imposed by *Baze* and *Glossip* are adopted, prisoners will be required to not only prove that the prison conditions pose a substantial risk of harm, but they will also be required to prove that the conditions are substantial when compared to readily available and known alternatives. Shifting the burden of proof away from the prisoner and on to the state in the method of execution context may go a long way in avoiding this ill effect.

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266. *See, e.g.*, *Glossip*, 135 S. Ct. at 2738 (suggesting that even if the prisoners had shown that the risk of pain from midazolam was substantial, the prisoners' claim would still fail because they have not demonstrated an available alternative).

267. *Id.* ("Nor have they shown a risk of pain so great that other acceptable, available methods must be used.").

268. Denno, *supra* note 122, at 329.

V. CONCLUDING REMARKS

There have been over forty documented "seriously botched" executions in American history. Nonetheless, the Supreme Court has never once held that a state's chosen method of execution violated the Eighth Amendment's proscription against cruel and unusual punishment. A look into the Supreme Court's recent decision in *Glossip* sheds light on these seemingly inconsistent facts. The Court in *Glossip* reaffirmed and strengthened the insurmountable burden of proof placed on prisoners in Eighth Amendment method-of-execution claims. To avoid this unjust result, a burden shift is needed. For a state's chosen method of execution to be deemed constitutional under the Eighth Amendment, the state should have the burden of proving by a preponderance of evidence that the chosen method of execution does not pose a substantial risk of harm when compared with known and readily available alternatives. Absent this shift, *Glossip* will continue to stand for the proposition that, even when much safer methods of execution become unavailable, the prisoner will be executed in one way or another and the execution will be deemed per se constitutional unless the prisoner proves otherwise.