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Cruel and Unusual: *State v. Mata*, the Electric Chair, and the Nebraska Supreme Court's Rejection of a Subjective Intent Requirement in Death Penalty Jurisprudence

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Note*

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I. INTRODUCTION

In State v. Mata, the Nebraska Supreme Court held that death by electrocution violates the Nebraska Constitution’s prohibition against cruel and unusual punishment, effectively overruling an established line of Nebraska precedent upholding electrocution as a constitutional means of execution. At the time of the Court’s decision, Nebraska had the dubious distinction of being the only state in the union using electrocution as the state’s sole method of execution. Now, in the aftermath of Mata, Nebraska finds itself in a curious position: capital punishment is statutorily and constitutionally permissible in the state of Nebraska, but there is currently no available method of execution.

In rejecting electrocution as a method of execution, the Court gave considerable attention to the issue of subjective intent in Eighth Amendment method-of-execution challenges. The crux of the issue is whether an inmate challenging a particular method of execution must show that the government officials enacting the method-of-execution statute—or the officials carrying out the execution—acted with the in-

5. Mata, 275 Neb. at 31, 745 N.W.2d at 255–56 ("[T]he death penalty, when properly imposed by a state, does not violate either the eighth or [the] fourteenth amendment [to] the United States Constitution or Neb. Const., art. [I], § 9.") (quoting State v. Anderson and Hochstein, 207 Neb. 51, 71–72, 296 N.W.2d 440, 453 (1980)).
6. In January 2009, the Nebraska Unicameral Legislature responded to the Court’s ruling in Mata by introducing LB 36, a bill which would authorize lethal injection as the sole method of execution in the state of Nebraska. On May 28, 2009, LB 36 passed by a relatively wide margin (34-12) and Governor Dave Heineman signed the bill into law. The bill goes into effect on September 1, 2009. See JoAnne Young, Nebraska Governor Signs Lethal-Injection Bill, Lincoln Journal Star, May 28, 2009.
7. Mata, 275 Neb. at 45–46, 745 N.W.2d at 265.
tent to cause unnecessary pain and suffering. The Court ultimately concluded that a successful Eighth Amendment method-of-execution challenge does not require a showing of subjective intent. This finding, however, is inconsistent with the U.S. Supreme Court’s method-of-execution jurisprudence. Furthermore, the Court’s holding raises concerns about the propriety of rejecting a crucial component of U.S. constitutional and criminal law. This Note addresses the implications of the Court’s rejection of a subjective intent requirement in method-of-execution claims.

Part II discusses the existing U.S. Supreme Court and Nebraska Supreme Court precedent addressing methods of execution generally and electrocution specifically. The Note then gives an overview of the Nebraska Supreme Court’s decision in State v. Mata, explaining the Court’s reasoning and rationale. Part III analyzes the Court’s decision, focusing on the Court’s rejection of a subjective intent requirement in method-of-execution jurisprudence. Specifically, this Note argues that the Court’s rejection of a subjective intent requirement is humane and well-meaning, but ultimately unsupported by U.S. Supreme Court method-of-execution jurisprudence. Further, the Court’s rejection of a subjective intent requirement was unnecessary, as the Court could have found a subjective intent requirement and still reached the same result.

II. BACKGROUND

In Mata, the Nebraska Supreme Court emphasized that the question presented was whether death by electrocution violates the Nebraska Constitution, not whether death by electrocution violates the U.S. Constitution. However, the Court also noted that the state and federal constitutional provisions prohibiting cruel and unusual punishment are coextensive and that “the Nebraska Constitution’s cruel and unusual punishment provision ‘does not require more than does the [Eighth Amendment to the] U.S. Constitution.’” Consequently, the Court relied primarily on U.S. Supreme Court decisions in determining whether electrocution violates the Nebraska Constitution. Because the Nebraska and federal cruel and unusual punishment provisions are coterminous, and because the Nebraska Supreme Court
relied heavily on federal jurisprudence in its analysis, it is necessary to understand both federal and Nebraska death penalty jurisprudence to adequately analyze the Court's decision. Accordingly, before discussing *State v. Mata*, this Note first provides a brief overview of U.S. Supreme Court and Nebraska Supreme Court method-of-execution jurisprudence.

**A. U.S. Supreme Court Method-of-Execution Jurisprudence**

Over the years, the U.S. Supreme Court’s death penalty jurisprudence has been prodigious, addressing a wide variety of issues, ranging from how criminals may be selected for execution to which crimes merit the punishment of death. Notably, however, the Court has seldom addressed the constitutionality of specific methods of execution. Indeed, as one prominent legal scholar observed, “A striking oddity of the American death penalty is the Court’s complete constitutional disregard for how inmates are executed.” The Court’s method-of-execution cases are few in number, and those dealing specifically with electrocution as a means of execution are even fewer.

The U.S. Supreme Court first ruled on the constitutionality of a method of execution in *Wilkerson v. Utah*, in which the Court held that death by firing squad does not violate the Eighth Amendment’s prohibition of cruel and unusual punishment. In reaching its decision, the Court drew on commentary by Blackstone, who noted that, at common law, criminals guilty of particularly atrocious crimes were not merely executed. Rather, “circumstances of terror, pain, or disgrace were sometimes superadded” to their punishment of death. It was thought that death was insufficient punishment for those who committed the worst crimes—only torture would sufficiently punish such criminals. The Court, citing Blackstone, gave examples of such methods of torture, citing cases “where the prisoner was drawn or dragged to the place of execution . . . or where he was emboweled alive, beheaded, and quartered” and where the prisoner was publicly dissected

15. 99 U.S. 130 (1878).
16. Id. at 135.
or burned alive.\textsuperscript{17} The Court admitted that the line between constitutional and unconstitutional punishment is difficult to identify, but noted that torture of the sort documented by Blackstone is clearly forbidden by the Constitution, and that death by firing squad cannot be classed with the garish methods of execution enumerated by Blackstone:

Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by [Blackstone], and all others in the same line of unnecessary cruelty, are forbidden by that amendment [sic] to the Constitution.\textsuperscript{18}

Thus, while the Court acknowledged the difficulty in identifying the exact point at which a punishment becomes unconstitutional, the Court did offer some helpful principles to guide future courts—namely, that in order to constitute cruel and unusual punishment, a punishment must involve torture of the magnitude described by Blackstone, and must involve a method of death where “terror, pain and disgrace” are deliberately incorporated into the method of execution. Through these principles, the Wilkerson Court established a baseline method-of-execution standard that provided a foundation on which subsequent courts would build.

Twelve years later, in 1890, the Court revisited the method-of-execution issue in \textit{In re Kemmler}.\textsuperscript{19} This time the challenged method of execution was electrocution, a newly invented and somewhat untested method of execution.\textsuperscript{20} The electric chair had been introduced by the New York legislature as a method of execution to provide a more humane alternative to hanging.\textsuperscript{21} Nevertheless, the constitutionality of death by electrocution was soon challenged and the U.S. Supreme Court found an opportunity to address the issue in \textit{Kemmler}. The Court analyzed the constitutionality of death by electrocution not only under the Eighth Amendment’s prohibition against cruel and unusual punishment, but also under the Privileges and Immunities Clause and

\begin{flushleft}
\textsuperscript{17} Id.
\textsuperscript{18} Id. at 135–36.
\textsuperscript{19} 136 U.S. 436 (1890).
\textsuperscript{20} Before the advent of the electric chair, the predominant method of execution was hanging. In the latter half of the 19th century, objections were gradually raised to hanging as a method of execution as it was increasingly perceived as a barbarous and inhumane means of execution. \textit{See} \textit{Stuart Banner, The Death Penalty: An American History} 169–77 (Harvard Univ. Press 2002).
\textsuperscript{21} In \textit{Kemmler}, the Court quoted a statement by the governor of New York encouraging the state legislature to switch from hanging to the electric chair as a method of execution. \textit{In re Kemmler}, 136 U.S. 436, 444 (1890). \textit{See also} \textit{Banner, supra} note 20, at 80 (“It was thought that, in contrast to hanging, electrocution would effect a more human death—one that was ‘fast, painless, certain, and clean.’”).
\end{flushleft}
the Due Process Clause of the Fourteenth Amendment.22 Building on the Wilkerson standard, the Court in *Kemmler* explained the constitutional meaning of "cruel," stating 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,— (sic) something more than the mere extinguishment of life."23

The Court ultimately determined that death by electrocution does not violate the Due Process Clause or the Privileges and Immunities Clause of the Fourteenth Amendment.24 Complicating matters, however, is the often-overlooked fact that the Court in *Kemmler* never actually held that death by electrocution does not violate the Eighth Amendment's prohibition against cruel and unusual punishment.25 Rather, the Court held that the decision of a New York court was not re-examinable by the U.S. Supreme Court because the Eighth Amendment had not been incorporated against the states.26 Even though the Court ultimately decided the case under the Fourteenth Amendment, the Court did address the Eighth Amendment's prohibition against cruel and unusual punishment, and in so doing articulated a method-of-execution standard that has proven to have lasting utility and influence. Indeed, subsequent courts have frequently relied on *Kemmler* in holding that death by electrocution does not violate the Eighth Amendment's prohibition against cruel and unusual punishment.27

After *Kemmler*, the Court did not review another method-of-execution case until 1947, when the Court decided *Francis v. Resweber*.28 In *Resweber*, a death row inmate challenged the constitutionality of the state of Louisiana's second attempt at executing him after the first attempt had failed. The petitioner had been convicted of murder, sentenced to death, and strapped into the electric chair, but due to a mechanical failure the petitioner was not killed when the prison offi-

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23. *Id.* at 447.
24. *Id.* at 449 ("We cannot perceive that the state has thereby abridged the privileges and immunities of the petitioner, or deprived him of due process of law.").
25. See *Baze v. Rees*, 128 S.Ct. 1520, 1568 (2008) (Ginsburg, J., dissenting) ("*Kemmler*’s actual holding was that the Eighth Amendment does not apply to the states.").
26. *Kemmler*, 136 U.S. at 442 ("[T]he prohibition therein contained has no reference to punishments inflicted in state courts for crimes against the state, but is addressed solely to the national government, and operates as a restriction on its power."). The Eighth Amendment was eventually incorporated against the states in *Robinson v. California*, 370 U.S. 660 (1962).
27. See, e.g., *Sullivan v. Dugger*, 721 F.2d 719 (11th Cir. 1983) (relying on *Kemmler* in holding that death by electrocution is constitutional); *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978) (same).
cial threw the switch.\textsuperscript{29} In holding that executing the petitioner after the failed attempt did not constitute cruel and unusual punishment, the Court noted that the Eighth Amendment prohibition forbids the wanton and unnecessary infliction of pain,\textsuperscript{30} and that "[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."\textsuperscript{31} In a footnote, the Court cited the standard set forth in \textit{Kemmler}.\textsuperscript{32}

Given the unique facts and circumstances of \textit{Resweber}, the case appears to have limited application—seemingly applying only to those rare cases in which a first attempt at execution is unsuccessful. However, \textit{Resweber} is helpful inasmuch as it reiterates and reinforces the previous method-of-execution standards articulated in \textit{Wilkerson} and \textit{Kemmler}. Furthermore, like \textit{Kemmler}, \textit{Resweber} has been frequently relied on by subsequent courts deciding Eighth Amendment claims.\textsuperscript{33}

Taken together, \textit{Wilkerson}, \textit{Kemmler}, and \textit{Resweber}—the only Supreme Court cases to have directly addressed the constitutionality of methods of execution under the Eighth Amendment—provide the legal standard for evaluating method-of-execution challenges. Running through each of these cases is an emphasis on subjective intent. In \textit{Kemmler}, for example, the Court spent considerable time discussing the origins of New York's method-of-execution statute, pointing out that the statute had been enacted in order to provide a more humane, less barbarous means of execution than hanging.\textsuperscript{34} In \textit{Wilkerson}, the Court was not as explicit in considering subjective intent, but the legal standard articulated by the Court in \textit{Wilkerson} prohibits the kind of torture that almost by definition cannot be carried out without a malicious subjective intent.\textsuperscript{35} Finally, in \textit{Resweber}, the Court once again explicitly addressed the issue of subjective intent. However, unlike the \textit{Kemmler} Court, the Court in \textit{Resweber} did not consider the intent of the legislature enacting a method-of-execution statute, but rather

\begin{itemize}
  \item \textsuperscript{29} \textit{Id.} at 460.
  \item \textsuperscript{30} \textit{Id.} at 463.
  \item \textsuperscript{31} \textit{Id.} at 464.
  \item \textsuperscript{32} \textit{Id.} at 463 n.4.
  \item \textsuperscript{33} \textit{See}, e.g., \textit{Spinkellink v. Wainwright}, 578 F.2d 582, 616 (5th Cir. 1978) (citing \textit{Resweber} in holding that execution by electrocution does not violate the Eighth and Fourteenth Amendments); \textit{Williams v. Hopkins}, 983 F. Supp. 891, 895 (D. Neb. 1997) (relying on \textit{Resweber} in holding that the need to apply electrical current more than once in carrying out an authorized execution "does not violate federal constitutional standards if there is 'no suggestion of malevolence'"), \textit{Hamblen v. Dugger}, 748 F. Supp. 1498, 1503 (M.D. Fla. 1990) (same).
  \item \textsuperscript{34} \textit{In re Kemmler}, 136 U.S. 436, 447 (1890).
  \item \textsuperscript{35} \textit{Wilkerson v. Utah}, 99 U.S. 130, 135 (1878) (stating that the Eighth Amendment's prohibition against cruel and unusual punishment prohibits torturous punishments in which, in addition to death itself, "other circumstances of terror, pain, or disgrace . . . [are] superadded").
\end{itemize}
the intent of the prison officials carrying out an execution. The Court upheld the prisoner's execution, reasoning that there was "no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution."36

In sum, the U.S. Supreme Court has found death by electrocution to be constitutional. Furthermore, the Court's analysis in the method-of-execution line of cases suggests that a state-of-mind inquiry is relevant to a method-of-execution challenge.

**B. Nebraska Supreme Court Electrocution Jurisprudence Before *State v. Mata***

Prior to *Mata*, the Nebraska Supreme Court, relying on the federal precedent cited above, had likewise held death-by-electrocution constitutional. In *State v. Alvarez*,37 a defendant convicted of murder and sentenced to death challenged the constitutionality of the death penalty generally, arguing that "the death penalty is a relic of an uncivilized past, that it is now, in our modern society, a cruel and unusual punishment, that it has no deterrent effect, that public opinion is opposed to it, and that the death penalty is not necessary."38 Although the defendant did not specifically challenge electrocution as a method of execution, the Court nevertheless took it upon itself to address the issue, holding that electrocution "as punishment for crime is not a cruel and unusual punishment within the meaning of the state and federal Constitutions."39 The Court simply cited to *Kemmler* in support of its conclusion, presumably assuming that *Kemmler* foreclosed any possibility of finding death by electrocution unconstitutional. Consequently, the Court summarily rejected the defendant's argument without engaging in an extensive analysis of the issue. For the Nebraska Supreme Court, *Kemmler* was dispositive.

Thus, *Alvarez* provided the state precedent on which subsequent Nebraska decisions could rely in upholding electrocution as a means of execution. In 1995, in *State v. Ryan*,40 the Nebraska Supreme Court relied on *Alvarez* in reaffirming the constitutionality of electrocution as a method of execution. In 2000, in its most recent method-of-execution decision prior to deciding *Mata*, the court relied on *Ryan* and re-

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37. 182 Neb. 358, 154 N.W.2d 746 (1967).
38. Id. at 366, 154 N.W.2d at 751.
39. Id., 154 N.W.2d at 751.
40. 248 Neb. 405, 534 N.W.2d 766 (1995) ("We have held that '[t]he death penalty by electrocution as punishment for crime is not a cruel and unusual punishment within the meaning of the state and federal Constitutions'.") (quoting *State v. Alvarez*, 182 Neb. 358, 154 N.W.2d 746 (1967)). The Court also cited *Harper v. Grammer*, 654 F. Supp 515 (1987), a Nebraska federal district court decision rejecting a constitutional challenge to electrocution as a method of execution.
jected another electric chair challenge. Again, the Court summarily dismissed the defendant's challenge without engaging in a serious review of the issue or an examination of objective evidence. Thus, as recently as 2000, the Nebraska Supreme Court was still summarily dismissing electric chair challenges. Eight years later, however, the Court was finally willing to engage in a serious factual and legal examination of Nebraska's mandatory method of execution. *State v. Mata* presented the Court with the opportunity to do so.

C. *State v. Mata*: The Nebraska Supreme Court Declares Death by Electrocution Unconstitutional

1. Facts and Procedural Posture of State v. Mata

Raymond Mata, Jr. was convicted of the first-degree premeditated murder of Adam Gomez, the three-year-old son of Mata's former girlfriend. A three-judge panel, pursuant to Nebraska's sentencing guidelines, found the existence of aggravating circumstances and accordingly sentenced Mata to death. Mata appealed the decision and, while the appeal was pending, the U.S. Supreme Court decided *Ring v. Arizona*. In *Ring*, the Court held that aggravating circumstances are the "functional equivalent" of elements of a crime and must therefore be determined by a jury. When the Nebraska Supreme Court heard Mata's appeal, it upheld his conviction but vacated his death sentence and remanded the case for resentencing by a jury in accordance with the *Ring* holding. A jury then found the existence of aggravating circumstances and Mata was resentenced to death. Mata then appealed his sentence, arguing, among other things, that death by electrocution violates the prohibition against cruel and unusual punishment as found in the U.S. and the Nebraska Constitutions.

41. State v. Bjorklund, 258 Neb. 432, 489–90, 604 N.W.2d 169, 217 (2000) ("We have previously held that the death penalty by electrocution as punishment for crime is not cruel and unusual punishment within the meaning of the U.S. or Nebraska Constitutions. We reaffirm our holding in *State v. Ryan* . . . and conclude this assignment of error to be without merit.").

42. For a full account of the grisly details of Mata's crime, see *State v. Mata (Mata I)*, 266 Neb. 668, 668 N.W.2d 448 (2003).

43. Neb. Rev. Stat. § 29-2522 (Cum. Supp. 2002) provides that a criminal convicted of a capital crime may be sentenced to death if a three-judge panel finds the existence of one or more aggravating circumstances. In this case, the three-judge panel found that Mata's crime was "especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence."


45. 536 U.S. 584 (2002).

46. Mata I, 266 Neb. at 476, 668 N.W.2d at 698 (quoting *Ring*, 536 U.S. at 609).

47. Mata, 275 Neb. at 6, 745 N.W.2d at 240.

48. Id. at 7, 745 N.W.2d at 240.

49. Id.
2. *The Nebraska Supreme Court Opinion*

The Court began its analysis by clarifying the precise issue before the court, emphasizing that the Court's analysis would not address the constitutionality of the death penalty generally, but rather electrocution as a method of execution.50 The Court then further clarified that the Court was deciding the constitutionality of electrocution under the state constitution, not the federal constitution.51 The Court acknowledged that it had previously held that execution by electrocution does not violate the Eighth Amendment of either the state or federal constitutions, but rejected those decisions as having been made without a factual review of objective evidence relating to the physiological effects of electrocution on a human body.52 A review of a complete factual record, the Court argued, compelled a result different from that reached in its previous decisions.53

Noting that the prohibition against cruel and unusual punishment contained in the Nebraska Constitution mirrors the federal Eighth Amendment,54 the Court went on to liberally rely on federal precedent in its analysis.55 The Court gave an overview of *Kemmler* and *Resweber*,56 emphasizing that those cases relied on the incorrect factual assumption "that when properly carried out, electrocution is an instantaneous and painless method of inflicting death."57 The Court then concluded that, in light of contemporary scientific evidence not considered by the U.S. Supreme Court in deciding its early execution-by-electrocution cases, it could "no longer rely on the factual assumptions implicit in U.S. Supreme Court precedent pertaining to the constitutionality of execution by electrocution."58

While rejecting the factual assumptions underlying the U.S. Supreme Court's early method-of-execution jurisprudence, the Court nevertheless relied on federal precedent in extracting three distinct

50. *Id.* at 31, 745 N.W.2d at 256 ("[T]he issue before us is not whether Mata will be executed, but only whether the current statutory method of execution is constitutional.").
51. *Id.* at 33, 745 N.W.2d at 257.
52. *Id.* at 38–39, 745 N.W.2d at 261.
53. *Id.*
54. *Id.* at 33–34, 745 N.W.2d at 257.
55. This is an odd but necessary move by the Court. It is odd because the Court has already stated that the relevant issue is whether death by electrocution violates the Nebraska Constitution, not whether it violates the federal Constitution. The Court wants to have its cake and eat it too, by purporting to decide the issue under the state constitution while relying on federal precedent. It is a necessary move, however, given the fact that the two constitutions are in fact coterminous. The Nebraska cases dealing with this issue simply cite to federal precedents, so the Court has no alternative but to rely on federal precedent in its analysis.
56. See *supra* Part II.A.
57. *Mata*, 275 Neb. at 38, 745 N.W.2d at 260.
58. *Id.* at 39, 745 N.W.2d at 260.
legal standards defining cruel and unusual punishment from U.S. Supreme Court jurisprudence. Drawing on early U.S. Supreme Court decisions such as Kemmler and Resweber, the Court noted that the baseline standard for defining cruel and unusual punishment is "whether it imposes torture or a lingering death that is unnecessary to the mere extinguishment of life." Under this standard, a method of execution must be nearly instantaneous and painless, and "must not involve the unnecessary and wanton infliction of pain.

After articulating this baseline standard for defining cruel and unusual punishment, the Court stated a second standard for interpreting the Eighth Amendment’s prohibition against cruel and unusual punishment, observing that the U.S. Supreme Court has long held that the "prohibition against cruel and unusual punishment is not a static concept and ‘must draw its meaning from evolving standards of decency that mark the progress of a maturing society’." Evolving standards of decency, the Court noted, are measured "in the light of contemporary human knowledge." Furthermore, the Court observed that the U.S. Supreme Court has frequently looked to laws enacted by state legislatures in determining contemporary standards of decency. Rejecting the state's argument that the evolving-standards-of-decency standard is only applicable to proportionality claims, the Court concluded that this standard is also applicable to method-of-execution claims.

Finally, the Court addressed a third Eighth Amendment standard, pointing out that the Eighth Amendment requires that a method of execution "must accord with the dignity of man which is the basic concept underlying the prohibition against cruel and unusual punishment." Relying on dissenting opinions from a U.S. Supreme Court case and a Florida Supreme Court case, the Court argued that this dignity-of-man standard demands not just (insofar as possible) instantaneous and painless executions, but also executions untainted by

59. Id. at 39, 745 N.W.2d at 261.
60. Id. at 40, 745 N.W.2d at 262 (citing In re Kemmler, 136 U.S. 436 (1890)).
61. Id. (citing Francis v. Resweber, 329 U.S. 459, 463 (1947)).
63. Id. at 41, 745 N.W.2d at 262 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
64. Id. (quoting Robinson v. California, 370 U.S. 660, 666 (1962)) (internal quotation marks omitted).
65. Id. at 39-42, 745 at 262-63.
66. The Court has commonly invoked the evolving-standards-of-decency analysis when addressing "proportionality claims." Proportionality claims are those in which the defendant argues that death is a disproportionate penalty for the crime committed. See, e.g., Coker v. Georgia, 433 U.S. 584 (1977) (holding that a sentence of death for the rape of an adult woman is a disproportionate penalty).
67. Mata, 275 Neb. at 43, 745 N.W.2d at 263.
68. Id. at 44, 745 N.W.2d at 264 (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)).
bodily mutilation.\textsuperscript{69} The Court summarized this standard by stating that "barbarous punishments . . . that mutilate the prisoner's body," even those that do not cause the prisoner pain, "do not comport with the Eighth Amendment's dignity of man standard."\textsuperscript{70}

After discussing the different standards for measuring cruel and unusual punishment, the Court then went into great detail responding to the state's argument that a prisoner, in order to prevail on an Eighth Amendment cruel and unusual punishment claim, must be able to "show that the Legislature intended to inflict unnecessary pain or a lingering death" in enacting a statute authoring a particular method of execution.\textsuperscript{71} In its discussion of subjective intent, the Court rejected the notion that an Eighth Amendment violation requires a showing of subjective intent on the part of a legislature enacting a method-of-execution statute.\textsuperscript{72} Likewise, the Court rejected a subjective intent requirement on the part of prison officials either developing execution protocols or carrying out executions pursuant to a method-of-execution statute.\textsuperscript{73}

The Court based its rejection of a subjective intent requirement on three separate lines of reasoning. First, it distinguished method-of-execution claims from conditions-of-confinement claims (i.e., claims brought by prison inmates alleging that the conditions of their confinement amount to cruel and unusual punishment).\textsuperscript{74} The Court observed that federal courts disagree about whether a "deliberate indifference" state-of-mind inquiry, which is commonly invoked in conditions-of-confinement cases, is applicable to method-of-execution cases.\textsuperscript{75} Noting that the Seventh Circuit\textsuperscript{76} has held that a prisoner challenging a method of execution must show "that prison officials have been deliberately indifferent to [a risk of unnecessary pain] in developing an execution protocol,"\textsuperscript{77} the Court rejected this position and adopted instead the position espoused by the Eighth Circuit, which held that a state-of-mind inquiry is relevant to condition-of-confinement claims, but irrelevant to method-of-execution claims.\textsuperscript{78}

\begin{itemize}
\item \textsuperscript{69} Id. at 44–45, 745 N.W.2d at 264 (citing Glass v. Louisiana, 471 U.S. 1080, 1085 (1985) (Brennan, J., dissenting) and Provenzano v. Moore, 744 So. 2d 413, 428–29 (Fla. 1999) (Shaw, J., dissenting)).
\item \textsuperscript{70} Mata, 275 Neb. at 45, 745 N.W.2d at 264–65.
\item \textsuperscript{71} Id. at 45–46, 745 N.W.2d at 264–65.
\item \textsuperscript{72} Id.
\item \textsuperscript{73} Id. at 45–46, 745 N.W.2d at 265–66.
\item \textsuperscript{74} Id. at 45–46, 745 N.W.2d at 265.
\item \textsuperscript{75} Id.
\item \textsuperscript{76} See, e.g., Lambert v. Buss, 498 F.3d 446 (7th Cir. 2001) (requiring "deliberate indifference" on the part of prison officials developing execution protocols).
\item \textsuperscript{77} Mata, 275 Neb. at 45, 745 N.W.2d at 265.
\item \textsuperscript{78} Id. (citing Taylor v. Crawford, 487 F.3d 1072 (8th Cir. 2007)).
\end{itemize}
While acknowledging the existence of method-of-execution cases requiring a showing of subjective intent, the Court distinguished those cases by pointing out that such cases usually involve prison officials whose conduct was not authorized by statute. Relying on the Eighth Circuit’s reasoning, the Court argued that a state-of-mind inquiry is irrelevant whenever a prison official acts pursuant to a statute because a “prison official’s subjective intent is presumptively shown when the pain inflicted is formally meted out as punishment.” The Court pointed out that “[w]hen the official is carrying out an official penalty [pursuant to a statute or sentencing judge], there is no rationale for requiring the prisoner to show ‘an additional culpable mental state on behalf of any individual state actors.’”

Second, the Court examined the meaning of the term “wanton” as used in the context of the Eighth Amendment standard defining cruel and unusual punishment as the “unnecessary and wanton infliction of pain.” The Court reasoned that the term “wanton,” which ordinarily connotes a malevolent subjective intent, does not, in the context of the “wanton and unnecessary infliction of pain” standard, imply any sort of subjective intent. Rather, the Court reasoned, in the context of death penalty jurisprudence, the term “wanton” simply “means that the method [of execution] is inherently cruel.”

Finally, the Court relied on two U.S. Supreme Court cases—Trop v. Dulles and Francis v. Resweber—in support of its argument that a method-of-execution analysis does not include a consideration of subjective intent. In Trop, the U.S. Supreme Court addressed the constitutionality of a statute punishing war-time deserters with a loss of citizenship, ultimately holding that such a stringent punishment rose to the level of cruel and unusual. The Nebraska Supreme Court noted that the U.S. Supreme Court in Trop was “unconcerned” with whether Congress had intended to inflict cruel and unusual punishment when it enacted the wartime desertion statute. The Nebraska Supreme Court concluded that the U.S. Supreme Court’s refusal to consider legislative intent in its analysis was evidence that such an analysis is irrelevant in method-of-execution claims. After discussing

79. For example, the Court cited to Lambert, 498 F.3d 446, a Seventh Circuit case in which the court required “deliberate indifference” on the part of prison officials developing execution protocols.
80. Mata, 275 Neb. at 46, 745 N.W.2d at 265 (citing Harbison v. Little, 511 F. Supp. 2d 872 (M.D. Tenn. 2007)).
81. Id. at 46, 745 N.W.2d at 265 (citing Harbison, 511 F. Supp. 2d at 894).
82. Id. at 46–47, 745 N.W.2d at 265.
83. Id. (citing Francis v. Resweber, 329 U.S. 459 (1947)).
86. Mata, 275 Neb. at 46–47, 745 N.W.2d at 265.
87. Id. at 47, 745 N.W.2d at 266 (citing Trop v. Dulles, 356 U.S. 86 (1958)).
88. Id., 745 N.W.2d at 266.
Trop, the Court cited Resweber, in which the dissenting justices argued "that state officials' lack of intent to cause pain was irrelevant."

After discussing the issue of subjective intent in Eighth Amendment standards defining cruel and unusual punishment, the Court then went on to apply the standards to the facts of the case at bar, ultimately concluding that electrocution does not comport with these standards and thus violates the Eighth Amendment's prohibition against cruel and unusual punishment. In reaching that conclusion, the Court did what it had not done in prior electric chair challenges: it examined the factual record and considered contemporary scientific evidence relating to the physiological effects of electrocution on the human body. After examining the record, the Court agreed with the district court's conclusion that current scientific evidence seriously undermines the traditional assumption that electrocution results in a nearly instantaneous and painless death. The district court noted that "the State's theory of instantaneous death assumed a substantial amount of current going to the brain, which was impossible to know." Expert testimony established that the human skull is a poor conductor of electricity and that consequently "only 5 to 10 percent of the electric current, and possibly as little as 2 percent of the current, would pass through the skull to the brain." The Court quoted the district court's rejection of the notion that the electric chair causes instantaneous death:

The proposition that judicial electrocutions always result in instantaneous and irreversible brain death with the brain approaching a boiling point is a myth. It is probably the case that some instances of judicial electrocutions do result in instantaneous brain death. It is certainly true that all of them do not.

In support of its finding that the electric chair does not result in instantaneous death, the Court considered evidence that prison officials sometimes have to send a second current of electricity through an inmate's body in order to carry out the execution. The Court heard testimony from expert witnesses who testified that in some cases inmates "show[ed] signs of consciousness during an electrocution," and that the heart was capable of restarting.

89. See supra section II.A.
90. Mata, 275 Neb. at 47, 745 N.W.2d at 266 (citing Francis v. Resweber, 329 U.S. 459 (1947)).
91. Id. at 57, 745 N.W.2d at 272.
92. Id. at 55, 745 N.W.2d at 271.
93. Id. at 60, 745 N.W.2d at 274.
94. Id. at 56, 745 N.W.2d at 272.
95. Id. at 63-64, 745 N.W.2d at 275-76.
96. Id. at 58, 745 N.W.2d at 272-73.
The inevitable consequence of the electric chair's failure to cause instantaneous death, of course, is that a significant number of inmates will experience agonizing pain. The Court observed that "a conscious prisoner would suffer excruciating pain from the electrical burning that is occurring in the body."97 Relying on expert testimony, the Court found that a prisoner who is electrocuted "experiences extreme pain and suffering from electrical stimulation of sensory nerves in the skin and muscles."98

The Court concluded that "electrocution will unquestionably inflict intolerable pain unnecessary to cause death in enough executions so as to present a substantial risk that any prisoner will suffer unnecessary and wanton pain in a judicial execution by electrocution."99 In light of this finding, the Court ultimately held that death by electrocution violates the Nebraska Constitution's prohibition against cruel and unusual punishment.100

III. ANALYSIS

A. Eighth Amendment Standards

One of the most perplexing tasks for any court sorting through the U.S. Supreme Court's death penalty jurisprudence is making sense of the various and somewhat nebulous Eighth Amendment standards articulated by the Court over the years. The difficulty in making sense of Eighth Amendment standards arises because the Eighth Amendment has not been defined by a single, easily applicable standard, but by various standards that have evolved gradually over the years as the Court has struggled to give concrete meaning to the abstract prohibition against "cruel and unusual punishment." In deciding Mata, the Nebraska Supreme Court's first important analytic step was to identify the appropriate standards defining cruel and unusual punishment. Given the complexity of the U.S. Supreme Court's death penalty jurisprudence, this was no small task. While the Court did an admirable job articulating the three applicable standards—i.e. "evolving standards of decency," "dignity of man," and "unnecessary and wanton infliction of pain"101—the Court arguably misinterpreted the U.S. Supreme Court's method-of-execution jurisprudence by holding that a subjective intent inquiry is irrelevant to a method-of-execution challenge.

97. Id. at 64, 745 N.W.2d at 277.
98. Id. at 65, 745 N.W.2d at 277.
99. Id. at 66, 745 N.W.2d at 278.
100. Id. at 67–69, 745 N.W.2d at 278–80.
101. See supra subsection II.C.2.
B. The Requirement of Subjective Intent

The U.S. Supreme Court's method-of-execution jurisprudence raises the difficult question of whether the Eighth Amendment demands a subjective intent requirement. It must initially be noted that the subjective intent at issue is twofold: (1) the intent of the legislature passing a method-of-execution statute, and (2) the intent of prison officials either designing a death penalty protocol or carrying out an execution. A careful analysis of the U.S. Supreme Court's method-of-execution jurisprudence suggests that a method-of-execution analysis requires a consideration of the intent of both legislatures and prison officials. Nevertheless, the Nebraska Supreme Court concluded that an Eighth Amendment violation does not require the presence of subjective intent.\(^{102}\) While this conclusion may be soundly based on humane ideals, it is not based on U.S. Supreme Court jurisprudence. In fact, in the few method-of-execution cases heard by the U.S. Supreme Court, the Court has consistently considered the subjective intent of both prison officials\(^{103}\) and legislatures\(^{104}\).

1. Critique of the Court's Subjective Intent Analysis

As noted in subsection II.C.2, the Court made several arguments in support of its rejection of a subjective intent requirement. First, the Court reasoned that the subjective intent standard employed in the conditions-of-confinement line of cases is inapplicable to method-of-execution cases.\(^{105}\) Second, the Court argued that the meaning of the term "wanton"—as used in the context of Eighth Amendment death penalty jurisprudence—does not connote a subjective state of mind.\(^{106}\) Finally, the Court argued that two U.S. Supreme Court cases—*Trop v. Dulles*\(^{107}\) and *Resweber*\(^{108}\)—support the proposition that a state-of-mind inquiry is irrelevant to the analysis of a method-of-execution claim.\(^{109}\) This Note will analyze each of these arguments in turn.

a. Conditions-of-Confinement Claims Distinguished

In *Mata*, the Nebraska Supreme Court found that the mental state of "deliberate indifference" required in prison-conditions claims is inapplicable to method-of-execution claims.\(^{110}\) However, this finding is undermined by the fact that the "deliberate indifference" standard

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106. *Id. at 46–47*, 745 N.W.2d at 265.
110. *See supra* subsection II.C.2.
and the method-of-execution standards have a common origin. *Estelle v. Gamble*—the first case to employ the "deliberate indifference" standard in a conditions-of-confinement claim—drew heavily on *Resweber* in establishing the standard. In other words, the U.S. Supreme Court in *Estelle* relied on a method-of-execution case (i.e. *Resweber*)—which the Court viewed as requiring subjective intent—in order to establish the "deliberate indifference" standard. Furthermore, the Court in *Estelle* also situated its "deliberate indifference" standard in the context of the "unnecessary and wanton" standard, holding that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain'... proscribed by the Eighth Amendment." The *Estelle* Court's reliance on the "unnecessary and wanton" standard is significant because the standard has its origin in method-of-execution cases, not conditions-of-confinement cases. Consequently, distinguishing conditions-of-confinement claims from method-of-execution claims in order to argue that the former, but not the latter, contain a subjective intent requirement, makes little sense. In fact, the U.S. Supreme Court's reliance on method-of-execution jurisprudence in establishing a subjective intent requirement in the conditions-of-confinement cases seems to foreclose this argument.

The Nebraska Supreme Court additionally found that a subjective intent analysis is inapplicable in method-of-execution claims because *Resweber* dealt with a prison official who, like the prison officials in the prison-conditions cases, was not imposing a punishment pursuant to a statute. However, the Court failed to recognize that the *Resweber* Court did not find that either execution attempt violated the Eighth Amendment. This is significant because the first attempt was clearly authorized by the Louisiana method-of-execution statute. While the U.S. Supreme Court's holding in *Resweber* explicitly addressed the constitutionality of the second execution attempt, the Court clearly assumed that the first execution attempt—which accidentally and unintentionally failed to result in death—did not violate the Eighth Amendment's prohibition against cruel and unusual punishment. Commenting on its own analysis in *Resweber*, the Court has stated, "Because the first attempt had been thwarted by an 'unforeseeable accident,' the officials lacked the culpable state of mind necessary for the punishment to be regarded as 'cruel,' regardless of

111. 429 U.S. 97 (1976).
112. *Id.* at 104 (citation omitted).
113. *See infra* subsection III.B.1.b.
116. *Resweber*, 329 U.S. at 463 ("We find nothing in what took place here [in either execution attempt] which amounts to cruel and unusual punishment in the constitutional sense.").
the actual suffering inflicted." In other words, the first attempted execution may have caused significant pain to the criminal, but the Court did not find the execution attempt unconstitutional because the pain resulted from an "unforeseeable accident," not from the cruel and malicious intentions of prison officials. It is clear that the Court in Resweber found both execution attempts constitutional. The Court's finding that the first execution attempt was constitutional undermines the Nebraska Supreme Court's argument (which focused exclusively on the second attempt) that a state-of-mind inquiry is only relevant when a prison official carries out a punishment that is not authorized by a statute. Such was the case in the second execution attempt, but the first attempt was carried out pursuant to the Louisiana method-of-execution statute.

b. The Meaning of "Wanton" in Death Penalty Jurisprudence

Of the three Eighth Amendment standards identified by the Nebraska Supreme Court, the first standard—whether a method of execution subjects a prisoner to the "unnecessary and wanton infliction of pain"—strongly suggests a subjective intent requirement. This is due to the fact that the term "wanton" typically connotes a state of mind. The court dealt with this suggestion of a subjective intent requirement by arguing, "[W]e do not believe 'wanton' in the context of state sanctioned punishment implies a mental state." Relying on Resweber, the Court stated that "wanton" simply means that "the method itself is inherently cruel." The Court's rejection of the ordinary meaning of wanton was an important and necessary move. In order to legitimately maintain its argument that Eighth Amendment method-of-execution jurisprudence does not contain a subjective intent requirement, the Court necessarily had to deal with the state-of-mind implied by the term "wanton." Redefining "wanton" was the Court's way of dealing with this problem. As Chief Justice Heavican observed in a separate opinion, "[I]n a subtle shift, the majority dropped the words 'and wanton' from its standard so that it speaks only to an unnecessary infliction of pain. The result is that a prisoner

118. See Mata, 275 Neb. at 46, 745 N.W.2d at 265 ("[A]n inquiry into state of mind was necessary in Resweber because the second attempt was outside what the statute authorized.").
120. See supra subsection II.C.2.
121. See, e.g., Wilson, 501 U.S. at 297 (interpreting the term "wanton" in the "unnecessary and wanton" standard as requiring a state of mind).
122. Mata, 275 Neb. at 46, 745 N.W.2d at 265.
123. Id., 745 N.W.2d at 265 (citing Francis v. Resweber, 329 U.S. 459 (1947) (four-justice plurality opinion)).
need not show any culpability on the part of the government to invalidate a method of execution.” 124

The Court's assertion that "wanton" does not imply a mental state is questionable for a number of reasons. First, irrespective of context, "wanton" invariably connotes a state of mind. Black's Law Dictionary, for example, defines wanton as "[u]nreasonably or maliciously risking harm while being utterly indifferent to the consequences." 125 In addition, the entry for wanton states that in the context of criminal law, the term "connotes malice (in the criminal-law sense)." 126 Malice in turn is simply defined as "[t]he intent, without justification or excuse, to commit a wrongful act." 127 Thus, under virtually any definition of "wanton," the term connotes a subjective state of mind.

Second, the term "wanton," in Eighth Amendment jurisprudence, is invariably paired with the term "unnecessary" in the context of the standard defining cruel and unusual punishment as the "unnecessary and wanton infliction of pain." 128 The fact that the Court has repeatedly included the term "wanton" in its articulation of this standard suggests that the term is not superfluous, but rather that the term retains an independent and essential meaning separate from "unnecessary." 129 As Chief Justice Heavican pointed out in his dissent, "[W]hen used independently, the word 'unnecessary' creates 'too much leeway for a court to declare one method of execution unconstitutional merely because it found another was better.'" 130 In other words, the terms "wanton" and "unnecessary" carry separate meanings, and each meaning is an important and indispensable element of the overall standard. By collapsing "wanton" into "unnecessary," the Court distorted the original standard articulated by the U.S. Supreme Court, creating a new variation of the standard that is problematic because, as Chief Justice Heavican pointed out, it gives courts almost limitless latitude to find a method of execution unconstitutional.

Third, the Court relied on Resweber in claiming that "[i]n a method of execution challenge, 'wanton' means that the method itself is inher-

124. Id. at 76, 745 N.W.2d at 284.
126. Id.
127. Id. at 976.
129. See, e.g., State v. Hamik, 262 Neb. 761, 769–70, 635 N.W.2d 123, 130 (2001) ("In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of the court to read anything plain, direct, and unambiguous out of the statute.").
ently cruel,” yet a review of *Resweber* does not support the court’s assertion. At issue here is whether the word “wanton,” as a legal term of art, implies a mental state. The U.S. Supreme Court in *Resweber* mentions the term “wanton” only once, stating simply that the “[p]rohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688.” The context in which the one instance of the term “wanton” appears in *Resweber* does not support the court’s assertion that wanton does not imply a mental state.

Finally, the “unnecessary and wanton infliction of pain” standard can be traced back to *Wilkerson* and *Resweber*—cases in which the U.S. Supreme Court strongly suggested that a subjective-intent inquiry is an important component of a method-of-execution analysis. In articulating the baseline standard for defining cruel and unusual punishment, the *Wilkerson* Court included an observation that the Eighth Amendment prohibits “unnecessary cruelty.” Likewise, the Court in *Resweber* stated that the Eighth Amendment prohibits “the infliction of unnecessary pain.” In *Furman v. Georgia,* the Court reiterated the *Wilkerson* and *Resweber* standard, but added the term “wanton,” noting that the context of *Resweber* clearly indicated that “the Court was disapproving the wanton infliction of physical pain.”

Four years later, in *Gregg v. Georgia,* the Court articulated the final iteration of the standard quoted by the Nebraska Supreme Court. Relying on *Furman* and *Wilkerson*, the Court stated that in order to comport with the Eighth Amendment, a punishment “must not involve the unnecessary and wanton infliction of pain.” Thus, an examination of the “unnecessary and wanton infliction of pain” standard reveals that the standard has its origins in method-of-execution cases that endorsed a subjective-intent inquiry. Consequently, the term “wanton,” as employed in this standard, is arguably intended to convey a sense of subjective intent.

c. The U.S. Supreme Court Method-of-Execution Jurisprudence and Subjective Intent

After arguing that the term “wanton,” as employed in death penalty cases, does not imply a mental state, the *Mata* Court then cited

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131. *Id.* at 46, 745 N.W. at 265 (citing *Francis v. Resweber*, 329 U.S. 459 (1947)).
132. *Resweber*, 329 U.S. at 463. The Court here refers to the English Bill of Rights, a foundational act of British Parliament which included, among other things, a prohibition against cruel and unusual punishment.
133. *See infra* subsection III.B.1.c.
135. *Resweber*, 329 U.S. at 464. *See also supra* section II.A.
137. *Id.* at 392–93 (Burger, C.J., dissenting).
139. *Id.* at 173.
Trop v. Dulles as evidence that "legislative intent to inflict cruel and unusual punishment is not a relevant consideration in a method-of-punishment challenge." In Trop, the U.S. Supreme Court struck down a statute sanctioning wartime deserters with a forfeiture of citizenship, holding that this punishment constituted cruel and unusual punishment. The Mata Court correctly pointed out that the U.S. Supreme Court "was unconcerned whether Congress intended to inflict cruel and unusual punishment." It must be pointed out, however, that Trop is not a death penalty case, much less a method-of-execution case. In determining whether U.S. Supreme Court jurisprudence indicates that a state of mind inquiry is relevant to a method-of-execution challenge, the Mata Court should have looked to the most applicable cases—namely those involving method of execution—not a case dealing with a wartime desertion statute. And, in fact, the Court did cite Resweber, noting that "four justices in Resweber concluded that state officials' lack of intent to cause pain was irrelevant." It is in fact true that four justices in Resweber maintained that subjective intent is irrelevant to an Eighth Amendment method-of-execution analysis. What the Court fails to mention, however, is that those four justices were the dissenting justices in Resweber.

The four justice plurality writing the majority opinion in Resweber adopted a different position. In at least two instances, the Court considered the state of mind of the prison officials who carried out the first execution attempt (which failed) and the second, successful attempt. The Court noted that the failed attempt was "an accident, with no suggestion of malevolence." The Court concluded that executing a prisoner after a failed execution attempt does not constitute cruel and unusual punishment within the meaning of the Eighth Amendment, reasoning that "[t]here [was] no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution."

Admittedly, the breadth of the Court's holding is somewhat unclear. A narrow reading of Resweber would arguably suggest that the Court's analysis—including the Court's state-of-mind inquiry—is applicable only to those rare and idiosyncratic cases involving a failed execution attempt. A broad reading of Resweber, on the other hand, suggests

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142. Id., 745 N.W.2d at 266.
143. Id., 745 N.W.2d at 266.
144. Id., 745 N.W.2d at 266 (citing Francis v. Resweber, 329 U.S. 459 (1947)). In the Resweber dissent, Justice Burton wrote, "Lack of intent that the first application be less than fatal is not material. The intent of the executioner cannot lessen the torture or excuse the result." Resweber, 329 U.S. at 477.
145. Resweber, 329 U.S. at 463.
146. Id. at 464.
that the Court’s analysis is applicable to all method-of-execution cases, not just those involving a failed execution attempt. Arguably, a broad reading of Resweber is preferable, since the Court in Resweber did not find anything constitutionally amiss with either the first or the second execution attempt.\textsuperscript{147} The Court simply assumed the constitutionality of the first attempt and focused on the second attempt. The fact that the Court upheld the second attempt as well suggests a standard susceptible to broad application.

While the applicability of the Court’s analysis in Resweber is arguably unclear, the other method-of-execution cases lend significant support to the argument that a state-of-mind inquiry is relevant to a method-of-execution challenge. The Court in Kemmler, for example, emphasized the benevolent intentions of the New York legislators who enacted the statute authorizing the electric chair as a newfound method of execution. In reviewing the decisions of the New York state courts below, the Court observed, “The determination of the legislature that the use of electricity as an agency for producing death constituted a more humane method of executing the judgment of the court in capital cases was held conclusive.”\textsuperscript{148} The Court then discussed at length the impetus behind the enactment of the New York electric chair statute, noting that the governor of New York—who apparently was dissatisfied with the current method of execution (hanging)—had encouraged the legislature to devise and enact into law a more humane method of execution.\textsuperscript{149} The Court quoted from the governor’s address to the New York legislature:

\begin{quote}
The present mode of executing criminals by hanging has come down to us from the dark ages, and it may well be questioned whether the science of the present day cannot provide a means for taking the life of such as are condemned to die in a less barbarous manner. I commend this suggestion to the consideration of the legislature.\textsuperscript{150}
\end{quote}

The legislature responded to the governor’s invitation by forming a commission to investigate electrocution as a method of execution. The Court noted, “The legislature accordingly appointed a commission to investigate and report ‘the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases.’”\textsuperscript{151}

The other seminal method-of-execution case, Wilkerson v. Utah, did not explicitly incorporate a state-of-mind inquiry into its analysis the way that Resweber and Kemmler did, but it certainly implied a subjective intent requirement in the Eighth Amendment.

\begin{footnotes}
\textsuperscript{147} See supra subsection III.B.1.a.
\textsuperscript{148} In re Kemmler, 136 U.S. 436, 443 (1890).
\textsuperscript{149} Id. at 444.
\textsuperscript{150} Id. (quoting the New York governor).
\textsuperscript{151} Id. (quoting the New York governor).
\end{footnotes}
In the early method-of-execution cases, the Court was clearly concerned with subjective intent. For the Court, the intent of a legislature enacting a method-of-execution statute—or of prison officials carrying out an execution—was a relevant determination in deciding whether a particular method of execution violated the Eighth Amendment's prohibition against cruel and unusual punishment. Recently, Justice Thomas emphasized this point in his concurring opinion in *Baze v. Rees*\(^\text{152}\) where he observed:

> Quite plainly, what defined these punishments was that they were designed to inflict torture as a way of enhancing a death sentence; they were intended to produce a penalty worse than death, to accomplish something “more than the mere extinguishment of life.” The evil the Eighth Amendment targets is intentional infliction of gratuitous pain, and that is the standard our method-of-execution cases have explicitly or implicitly invoked.\(^\text{153}\)

Of course, the *Mata* Court could have distinguished between the U.S. Constitution and the Nebraska Constitution. It could have acknowledged a subjective intent requirement under the federal constitution and rejected that requirement, holding that the Nebraska Constitution, unlike the federal Constitution, contains no such requirement. Instead, the court relied on a necessarily strained reading of federal precedent in its analysis.

2. **The Court Could Have Reached the Same Result by Finding a Subjective Intent Requirement**

As the Nebraska Supreme Court correctly pointed out, early U.S. Supreme Court decisions (and many subsequent lower court decisions) upholding electrocution as a method of execution relied on the incorrect assumption that death by the electric chair is instantaneous.\(^\text{154}\) But while the factual assumptions of early cases like *Kemmler* and *Resweber* may have turned out to be spurious, the general method-of-execution standard articulated in those early cases—i.e., whether a method of execution causes the “wanton and unnecessary infliction of pain”—is still valid.

Arguably, the Nebraska Supreme Court could have applied the “unnecessary and wanton” standard without jettisoning or redefining the term “wanton”—thus preserving an implicit subjective intent requirement—and reached the same result. Acknowledging a subjective intent requirement in the method-of-execution line of cases would not have precluded the Court from holding that death by electrocution vio-

\(^{152}\) 128 S.Ct. 1520 (2008). In *Baze v. Rees*, the Court recently rejected a challenge to the Kentucky Department of Corrections lethal injection protocol. The petitioners alleged, not that lethal injection is per se unconstitutional, but that the Kentucky Department of Corrections lethal injection protocol subjected inmates to an unacceptable risk of significant pain. *Id.* at 1526.

\(^{153}\) *Id.* at 1560.

lates the Nebraska Constitution's prohibition against cruel and unusual punishment.

As the Court observed, modern science provides a more complete understanding of the pain and suffering experienced by those who suffer death by electrocution than was available when the U.S. Supreme court decided *Kemmler* over a century ago.\(^\text{155}\) Even though seminal death-by-electrocution decisions such as *Kemmler* and *Resweber* may have relied on the incorrect factual assumption that death by electrocution is instantaneous and painless, the standards articulated in those decisions are still relevant and valid. Underlying those standards is a clear requirement of subjective intent. Nevertheless, in its analysis, the Court rejected a subjective intent requirement—a move that was not only contrary to U.S. Supreme Court jurisprudence, but also unnecessary.

The Court could have found a subjective intent requirement and still reached the same result. The emergence of current scientific knowledge vis-à-vis the electric chair and its effect on human physiology creates the requisite subjective intent. The Court concluded that "the evidence here shows that electrocution inflicts intense pain and agonizing suffering."\(^\text{156}\) To know that a method of execution causes pain and suffering, and to execute people in that manner despite this knowledge, is to deliberately, wantonly, and unnecessarily inflict pain and suffering on a criminal.\(^\text{157}\) If state legislatures and prison officials now know, in the light of contemporary science, that the electric chair causes intense pain and suffering, then going forward with executions anyway may amount to cruel and unusual punishment.

3. Implications of the Court's Holding

The Court's decision, while imbued with good intentions, raises a number of difficult policy concerns. For example, the Court's rejection of a subjective intent requirement raises concerns about the difficulty of applying a standard that does not include a state-of-mind inquiry. Such an approach would render unconstitutional good faith accidents and mistakes like that which occurred in *Resweber*. Such an approach might also place an administratively onerous burden on prison officials, who would be forced to consider the idiosyncratic and unique physical characteristics of death row inmates. Different inmates may react differently to a particular method of execution. If a particular

\(^{155}\) Id. at 38, 745 N.W.2d at 260.
\(^{156}\) Id. at 66, 745 N.W.2d at 278.
\(^{157}\) In other Eighth Amendment contexts, the U.S. Supreme Court has imputed intent where prison officials know (or should know) that a particular policy or course of action poses a significant danger to inmates, but disregard that known risk and proceed with the policy or course of action anyway. See, e.g., *Estelle v. Gamble*, 429 U.S. 97, 105–06 (1976).
method of execution is particularly painful for one individual but not for others, is the method of execution unconstitutional as to the one inmate but not the others? Should the state be required to perform elaborate investigations to discover how a particular inmate will respond to a method of execution?

Furthermore, the Court's dismissal of a subjective intent requirement runs contrary to established U.S. Supreme Court precedent, as well as established Constitutional law and U.S. criminal law principles. Suppose, for example, that a vindictive and retributive state legislature decided to devise and enact a method of execution intended to cause excruciating pain and suffering on a criminal before killing him. Thus, the intent of the legislature is clearly and unapologetically to torture a criminal to death, as retributive payback for whatever heinous crime the criminal may have committed. Assume, furthermore, that the prison officials carrying out this particular method of execution are on board with the legislature's clear intent to torture death row criminals to death. However, let us also assume under this hypothetical that the method of execution has the unintended effect of actually killing criminals instantaneously. Would the method of execution therefore be constitutional? Arguably, according to the Court's ruling in *Mata*, the method of execution might pass Constitutional muster because it does not subject the criminal to unnecessary pain and suffering.\(^{158}\)

Our criminal law's emphasis on *mens rea* is founded on the principle that culpability is found only where an actor acts with a culpable state of mind. In discussing *mens rea* with respect to state actors in Eighth Amendment claims, a distinction of course must be drawn between the mental state of government officials and that of criminals. Nevertheless, the U.S. Supreme Court has observed that *mens rea* concepts may be imported from criminal law to analyze the mental state of prison officials in Eighth Amendment cases:

To be sure, the reasons for focusing on what a defendant's mental attitude actually was (or is), rather than what it should have been (or should be), differ in the Eighth Amendment context from that of the criminal law. Here, a subjective approach isolates those who inflict punishment; there, it isolates those against whom punishment should be inflicted. But the result is the same: to act recklessly in either setting a person must "consciously disregard[d]" a substantial risk of serious harm.\(^{159}\)

The Nebraska Supreme Court's rejection of a subjective intent requirement holds the Nebraska legislature and Nebraska prison officials to a standard that conceptually is the equivalent of strict

\(^{158}\) Of course, the method of execution might still fail to comport with the "evolving standards of decency" and "dignity of man" standards. However, the hypothetical is framed in terms that illustrate the potential ramifications of the Court's rejection of a subjective intent requirement.

And the U.S. Supreme Court has never rejected a subjective intent requirement in Eighth Amendment jurisprudence. Quite the contrary, the Court has always engaged in a state-of-mind inquiry in its Eighth Amendment analysis. In sum, the Court's decision runs counter to traditional death penalty jurisprudence in addition to well-established principles of criminal law.

IV. CONCLUSION

The Court made clear in Mata that it does not consider a state-of-mind inquiry to be relevant to a method-of-execution challenge. As the Nebraska legislature has recently passed a new statute authorizing lethal injection as a method of execution, it would have been wise to carefully consider the Court's holding. It is now not enough for the legislature to demonstrate benevolent intentions in drafting and enacting the statute. If the legislature enacted a method-of-execution statute with the intention of creating a more humane means of execution, the statute may nevertheless not pass constitutional muster if it is procedurally flawed in a way that subjects an inmate to a significant risk of pain and suffering. The Court will not consider the benign intentions of the legislature enacting the statute, nor will it consider the state of mind of the prison officials who develop the lethal injection protocol and carry out lethal injection executions. In the end, the enactment of a lethal injection statute will no doubt result in a more humane method of execution. The Nebraska Supreme Court was likely correct when it concluded that "'[electrocution] has proven itself to be a dinosaur more befitting the laboratory of Baron Frankenstein than the death chamber' of state prisons." Nevertheless, the Court rejected well-established U.S. Supreme Court precedents in arriving at what was arguably a correct outcome. In the end, for the Nebraska Supreme Court, the ends justified the means.

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160. Strict liability is indeed rare in criminal law, as legislatures are loath to impose strict liability. Driving a vehicle in excess of the speed limit, to take a familiar example, is a strict liability crime for which no mens rea is required.
