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A Shot in the Dark: Why Virginia Should Adopt the Firing Squad as its Primary Method of Execution

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COMMENT

A SHOT IN THE DARK: WHY VIRGINIA SHOULD ADOPT THE FIRING SQUAD AS ITS PRIMARY METHOD OF EXECUTION

INTRODUCTION

On July 23, 2014, Arizona carried out Joseph Rudolph Wood III's death sentence by lethal injection in what was one of the most protracted executions in the history of the United States. Executioners began injecting lethal drugs—midazolam (a sedative) and hydromorphone—into his bloodstream at 1:57 PM and finally pronounced him dead at 3:49 PM, nearly two hours later. Wood’s attorneys had enough time during the execution to file emergency appeals with the Arizona Supreme Court and the United States District Court for the District of Arizona soliciting an injunction to stop the execution. They argued he was still alive and requested an order to resuscitate him as he lay in the

2. Execution List 2014, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/execution-list-2014 (last visited Feb. 27, 2015) [hereinafter Execution List 2014]; see infra note 100 (noting that Wood was given fifteen times the statutory dosage of lethal drugs during his botched execution).
4. Double Murderer’s Botched Execution, supra note 1; Sanburn, supra note 3.
death chamber. Wood died during the hearings on those filings. According to witnesses, he gasped more than 600 times before he succumbed and was compared to “a fish on shore gulping for air” while on the gurney.

Wood’s execution highlights important issues concerning the merits of capital punishment and, in particular, the continued practice of lethal injection. His death is one example of many in a growing trend of botched lethal injections throughout the United States. Death penalty states have been experimenting with varied, untested execution protocols since 2010, when the principal anesthetic for lethal injections, sodium thiopental, became unavailable due to opposition to capital punishment from its European manufacturers. These protocols have featured the use of substitute drugs, with no testing to support their effectiveness in executions prior to their use. Given the growing issues surrounding the death penalty, the American public is poised for a national debate over lethal injection’s continued efficacy as the primary method of execution.

Executions are considered botched when “there is a breakdown in, or departure from, the [protocol] for a particular method of execution.” Reasonable expectations and a state’s promoted effectiveness for a particular method of execution form this “protocol.” Consequently, botched executions are “those involving unanticipated problems or delays that caused, at least arguably, unnecessary agony for the prisoner or that reflect gross incompetence of the executioner.” In addition to Wood’s prolonged death in Arizona, there was also a botched execution in Ohio in 2014, during which the executioner of lethal injection protocols established sufficient access, all of 2014, the drugs began to expire themselves, and not the death of an inmate. Highlight of these recent botches is Virginia’s previously administered lethal injection protocol.

Virginia has a history stretching back to 1607, 200 years, Virginia has a history stretching back to 1607, 200


15. Dennis McGuire died during the execution in July 23. Id. It took McGuire— and, according to witnesses, Ohio has since changed its protocol to include midazolam in favor of the drug that was used in Arizona. CORRS., DRC 1361, at 9 (stating/Ol-COM-11.pdf; R: cnn.com/2015/01/08/us/ohio-execution-death-row); Crair, supra note 1.


17. See id.


19. See id.

20. See infra note 129.

21. Virginia, DEATH
in Arizona, there were botched executions in Oklahoma and Ohio in 2014, during what was called “the worst year in the history of lethal injection.” While previous years have seen several lethal injection procedures where the main problem has been establishing sufficient intravenous (medically abbreviated as “IV”) access, all of 2014’s problematic executions became such only after the drugs began to flow. It is apparent that the drugs themselves, and not their administration, are causing the problem. In light of these recently botched executions and the paucity of previously administered lethal drugs, many states are now contemplating alternative methods of execution. Virginia has a long history of enforcing capital punishment, dating back to 1608. Though the practice has declined in recent years, Virginia has executed more inmates than any other state.

14. On January 9, 2014, Michael Wilson was executed by lethal injection using a three-drug protocol that included pentobarbital and a paralyzing agent. Crair, supra note 1; Charlotte Alter, Oklahoma Convict Who Felt “Body Burning” Executed With Controversial Drug, TIME (Jan. 10, 2014), http://nation.time.com/2014/01/10/oklahoma-convict-who­felt-body-burning-executed-with-controversial-drug/. His final words were, “I feel my whole body burning” shortly after being administered the drugs. Id.; ‘I Feel My Whole Body Burning,’ Says Oklahoma Death Row Inmate During Execution, FOX NEWS (Jan. 10, 2014), http://www.foxnews.com/us/2014/01/10/feel-my-whole-body-burning­says­oklahoma­death­row­inmate­during­execution/. He showed no physical signs of distress. Id. Three months later, on April 29, 2014, Clayton Lockett was administered a new protocol of fatal drugs that included the sedative midazolam by a catheter placed in a vein in his groin. Crair, supra note 1. The drugs filled his tissue but did not enter his bloodstream. Id. Despite efforts to call off the execution, Lockett eventually succumbed to a heart attack. Id.

15. Dennis McGuire was executed on January 16, 2014 using a then untested two-drug protocol of midazolam and hydromorphone. Crair, supra note 1. The same two-drug protocol was used during the execution of Joseph Rudolph Wood III six months later on July 23. Id. It took McGuire twenty-five minutes to die—the longest in Ohio’s recent history—and, according to witnesses, he gasped several times throughout the execution. Id. Ohio has since changed the drugs used in its lethal injections and has ceased its use of midazolam in favor of thiopental sodium and pentobarbital. OHIO DEPT OF REHAB. & CORRS., DRC 1361, at 9 (2011), available at http://www.drc.ohio.gov/web/drc_policies/docu­ments/01-COM-11.pdf; Ralph Ellis, Ohio Changing Execution Drugs, CNN, http://edition.cnn.com/2015/01/08/us/ohio-execution­drugs/index.html (last updated Jan. 9, 2015).


17. See id.


19. See id.

20. See infra note 129.

The Commonwealth's current practice allows prisoners to choose between electrocution and lethal injection, with the latter serving as the default.\textsuperscript{22} Given its historic ties to the issue, Virginia is in a position to act at the forefront of the national debate on whether lethal injection still serves as a viable means for enforcing capital punishment.\textsuperscript{23}

This comment recommends that Virginia cease its use of lethal injection because of its high botch rates and growing impracticality due to drug shortages. Instead, the Commonwealth should use the firing squad as a more effective means of execution, thereby leading the nation in a transition towards a more efficient and reliable method. Part I examines the Eighth Amendment jurisprudence regarding methods of execution. Part II provides a brief history of lethal injection—including Virginia's current three-drug protocol—and death by firing squad. Part II also examines the constitutionality of these methods in light of the Supreme Court's decision in \textit{Baze v. Rees} and discusses recent developments challenging whether states' continued use of untested replacement anesthetics that may not render the inmate unconscious violates the Cruel and Unusual Punishments Clause. Finally, Part III analyzes the policy arguments justifying the use of firing squads—a seemingly archaic, yet effective, means of execution—as both a constitutional and appropriate alternative for Virginia, and why other states should follow suit. This comment concludes that the use of firing squads, as opposed to lethal injection, will appeal to both proponents and opponents of the death penalty in determining the future of capital punishment in this country.

\begin{itemize}
  \item \textsuperscript{22} VA. CODE. ANN. \S{} 53.1-234 (Repl. Vol. 2013) ("The Director ... shall at the time named in the sentence, unless a suspension of execution is ordered, cause the prisoner under sentence of death to be electrocuted or injected with a lethal substance, until he is dead. The method of execution shall be chosen by the prisoner. In the event the prisoner refuses to make a choice at least fifteen days prior to the scheduled execution, the method of execution shall be by lethal injection."). This statute was promulgated according to the Constitution of Virginia, which contains a similar clause to the Eighth Amendment's prohibition of cruel and unusual punishment.
  \item \textsuperscript{23} VA. CONST. art. I, \S{} 9.
\end{itemize}

\textsuperscript{24} U.S. CONST. amend. impos.

The heated debate over the origin from the Eighth Amendment, which provides that the death penalty is subject to two predominant constitutional issues: Proportionality, as having a broader interpretation, and the Cruel and Unusual Punishments Clause.

\begin{itemize}
  \item \textsuperscript{25} Id. at 156 (citing \textit{Gregg v. Georgia}, 428 U.S. 153 (1976)).
  \item \textsuperscript{26} Id. at 156 (citing \textit{In re Kemmler}, 136 U.S. 436 (1890)).
  \item \textsuperscript{27} Roberta M. Harlow, \textit{(Un)constitutionality of the Unconventional Method of Execution}, 102 GEO. L.J. 1331, 1357-58 (2014) ("For over a century, states have closely followed the execution strategies of other states.").
  \item \textsuperscript{28} Id. at 156 (citing \textit{Wilkerson v. Utah}, 127 U.S. 127 (1888)).
  \item \textsuperscript{29} Baze v. Rees, 553 U.S. 389 (2008).
\end{itemize}
prisoners to choose from the latter serving term, Virginia is in a
debate on whether or enforcing capital
punishment in this

I. THE EIGHTH AMENDMENT

The heated debate surrounding capital punishment draws its
origin from the Eighth Amendment of the United States Constitution,
which provides that "cruel and unusual punishments" shall not be inflicted. The Supreme Court has consistently held that the death penalty, when used as a punishment for certain homicides, does not violate this proscription. When raised as a constitutional issue, the Cruel and Unusual Punishments Clause is subject to two primary inquiries: (1) the proportionality of the punishment to the crime; and (2) the method of punishment. Proportionality, applied individually to each case, is meant to guarantee "the absence of a drastic disparity between the severity of the offense and the punishment imposed." The method of punishment component, in contrast, has rarely been invoked as a prescriptive measure for individual cases, and instead is viewed as having a broader, retroactive application. Since the Eighth Amendment's adoption, courts have assumed that "traditional forms of punishment—such as burning alive on the stake, crucifixion . . . disemboweling while alive, drawing and quartering, and public dissection—are manifestly cruel and unusual." But no method of execution employed in the United States has ever been found to violate the Eighth Amendment.

In Wilkerson v. Utah, the first challenge to a method of execution to ever reach the Supreme Court, Justice Clifford, while upholding the constitutionality of the Territory of Utah's use of firing squad, opined that:

24. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). The Supreme Court incorporated the Cruel and Unusual Punishments Clause of the Eighth Amendment against the states in Robinson v. California, 370 U.S. 660 (1962).
28. Id. at 156 (citing Wilkerson v. Utah, 99 U.S. 130, 135 (1878)).
29. Baze v. Rees, 553 U.S. 35, 48 (2008) (plurality opinion) ("This Court has never invalidated a state's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment.").
Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the [E]ighth [A]mendment.\(^\text{30}\)

Chief Justice Fuller further emphasized these principles in In re Kemmler, where the Court rejected an appeal that death by electrocution was cruel and unusual.\(^\text{31}\) The jurist observed 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.”\(^\text{32}\)

Though there were several intermittent challenges, the Court did not review the constitutionality of lethal injection until 2008. In Baze v. Rees, two inmates convicted of double homicide challenged Kentucky’s protocol for lethal injection because “of the risk that the protocol’s terms might not be properly followed, resulting in significant pain.”\(^\text{33}\) Kentucky, like the majority of death penalty states at the time, used a three-drug protocol of sodium thiopental, pancuronium bromide, and potassium chloride.\(^\text{34}\) The inmates did not oppose lethal injection itself, or even the use of the individual drugs in the protocol; rather, their fears rested on the apparent likelihood that the fatal drugs would not be properly administered.\(^\text{35}\) The case, a 7-2 decision, only drew a plurality opinion, but still established a standard for future challenges to methods of execution under the Eighth Amendment.

The plurality correctly began with the principle established in Gregg v. Georgia that capital punishment is constitutional and consequently there must be some means of carrying it out.\(^\text{36}\) Chief Justice Roberts, Alito, opined that any “effectively address[ing] the reality of error—in follow[ing] the protocol is not dispositive.”\(^\text{37}\) The jurist reasoned that “punishments Cl: very likely to cause significant pain...implicate.”\(^\text{38}\) In attempts to address this, the plurality suggested that the practice as “objec[at]ed” when refer but lethal injection

\(^{30}\) 99 U.S. at 134-35. Justice Clifford went on to argue that shooting is inherently distinguishable from other methods of execution, in part, because of its use as the execution method for soldiers convicted of desertion or other capital military offences at the time. Id. at 135.

\(^{31}\) 136 U.S. 436, 448-49 (1890). William Kemmler was the first person in the world to be executed by the electric chair. SARAT, GRUESOME SPECTACLES, supra note 11, at 68.

\(^{32}\) 136 U.S. at 447.

\(^{33}\) Baze, 553 U.S. at 41.

\(^{34}\) Id. at 44 (noting that at least thirty states use the three-drug combination); Denno, supra note 23, at 1333; see also SARAT, GRUESOME SPECTACLES, supra note 11, at 120 (describing how the first drug puts the inmate to sleep, the second drug paralyzes the inmate, and the third drug causes cardiac arrest, potentially implicating serious pain).

\(^{35}\) Baze, 553 U.S. at 49.

\(^{36}\) Id. (citing Gregg v. Georgia, 428 U.S. 153, 177 (1976) (joint opinion)). Gregg reinstated the use of capital punishment by the states, which had been put on hold by the Su-
Justice Roberts, writing for himself and Justices Kennedy and Alito, opined that “[s]ome risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure.” But that risk of error is not dispositive for the constitutionality of the method. The jurist reasoned that, in order to violate the Cruel and Unusual Punishments Clause, petitioners must show the risk is “sure or very likely to cause serious illness and needless suffering’ and give rise to ‘sufficiently imminent dangers.”

Chief Justice Roberts further elaborated this standard when he suggested that alternatives to the protocol used in Kentucky must “effectively address a ‘substantial risk of serious harm’ and, to qualify, the proposed procedure “must be feasible, readily implemented, and ... significantly reduce a substantial risk of severe pain.” In attempting to close the door on lethal injection challenges, the plurality concluded that “it is difficult to regard a practice as ‘objectively intolerable’ when it is in fact widely tolerated” when referring not only to Kentucky’s three-drug protocol, but lethal injection in general.

The Supreme Court’s decision in Furman v. Georgia in 1972. Gregg, 428 U.S. at 207; 408 U.S. 238, 239-40 (1972). The first post-Furman execution occurred in Utah on January 17, 1977. Christopher Q. Cutler, Nothing Less than the Dignity of Man: Evolving Standards, Botched Executions and Utah’s Controversial Use of the Firing Squad, 50 CLEV. ST. L. REV. 335, 357 (2002-03). Gary Gilmore faced a firing squad for killing a gas station attendant and a motel clerk. Id. Before he died, he gave his now infamous final declaration of “Let’s do it!” Id. at 357. The four shots that rang out were heard “round the world” and garnered substantial media attention. Id. at 336.

37. Baze, 553 U.S. at 47.
38. Id.
40. Id. at 52 (quoting Farmer v. Brennan, 511 U.S. 825, 842 (1994)).
41. Id.
42. Id. at 53. Justice Thomas, joined by Justice Scalia, concurred in the judgment, but argued that inmates should be required to show that a lethal injection protocol is “deliberately designed to inflict pain” in order to raise a Cruel and Unusual Punishments Clause claim. Id. at 94 (Thomas, J., concurring). Hence, it follows that Justices Thomas and Scalia would also uphold any proposed method of execution that the plurality found to be constitutional. See id. at 52. Justice Stevens, joined by Justice Ginsberg, concurred because of the Court’s precedents; however, he announced his general opposition to capital punishment. Id. at 78–86 (Stevens, J., concurring) (noting his adherence, which is not acceptance to the death penalty as a “product of habit”). Justice Breyer also concurred in the judgment. Id. at 107–13 (Breyer, J., concurring) (resting his decision not on the lawfulness of the death penalty itself, but rather on the lack of evidence on record indicating a substantial risk of pain).
Therefore, for an inmate to mount a successful challenge against lethal injection, he must show that the protocol in his state poses a substantial risk of serious harm or an objectively intolerable risk of harm. Additionally, the inmate must provide a readily implemented alternative that would significantly reduce a substantial risk of pain. This comparison, however, does not appear to be dependent on a finding that the first element has been satisfied. Rather, if the inmate is able to provide a sufficient alternative that will categorically address the issues present in an existing protocol, such a change may be deemed prudent and constitutional.

Accordingly, it appears that successful Eighth Amendment challenges will arise when inmates stop questioning the state's ability to carry out their statutory protocols and instead focus on the drugs themselves. The four botched executions from 2014 all resulted from complications that arose after the IV line was inserted, releasing the drugs. Indeed, Justice Stevens concluded in his concurring opinion that the question in Baze had not been resolved and would be subject to future challenges on a more complete record. He implied that, if anything, this case would only increase the number of petitions challenging the use of lethal injection and that the only way for states to avoid future litigation was to delay executions or invalidate their protocols.

In the five years after Baze, Justice Stevens' prediction proved to be correct. Between 2008 and 2013, more than three hundred cases cited the decision and states across the country have "modified virtually any aspect of their lethal injection procedures with a frequency that is unprecedented among execution methods in this country's history." Given the Court's view that the face is whether the administration, or a feasible alternative.

II. THE HISTORY

Because capital punishment, the citizens of each state, what circumstances may take the life of a citizen in the United States, the five principle forms of execution in the United States, lethal injection has since been replaced with a more humane form.

The modern quest began in 1890 with Virginia in 1921 before finally those developments in execution in the United States has since been replaced with a more humane form. was also used in 2010.

50. Id.
51. SARAT, GRUESOME SPECTACLES, supra note 11, at 121.
53. Id. at 71, 77.
54. Id. at 31. ("Congr, the army in 1986, and this method.") New Hampshire use. Id.
55. Utah Firing Squad
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lethal injection itself does not qualify as cruel and unusual 
punishment, the question that both lawmakers and the judiciary will 
face is whether the drugs that make up the protocol, and not their 
administration, violate the Eighth Amendment and, if so, whether a feasible alternative is available.

II. The History and Constitutionality of Lethal Injection and Firing Squads

Because capital punishment is not constitutionally mandated, 
the citizens of each state have been allowed to determine under 
what circumstances and by which methods their elected officials 
may take the life of another on their behalf.48 Methods of execution in the United States have varied over time, but have come in five principle forms: hanging, firing squad, electrocution, lethal gas, and lethal injection.49 The driving force behind these evolving iterations has been the desire of the populace to extinguish life in a more humane fashion.50

The modern quest for a humane and efficient execution method began in 1890 with electrocution, and then moved to lethal gas in 1921 before finally settling on lethal injection in 1977.51 Prior to those developments, hanging served as the primary method of execution in the United States and during British colonization,52 but has since been rendered all but extinct.53 Death by firing squad was also used throughout the history of the United States, and as recently as 2010.54 As the technology of death has changed, apart

50. Id.
51. SARAT, GROUSME SPECTACLES, supra note 11, at 7 ("With the invention of new technologies for killing or, more precisely, with each new application of technology to killing, the law has proclaimed its own previous methods barbaric, or simply archaic, and has tried to put an end to the spectacle of botched executions.").
52. Denno, supra note 23, at 1339.
53. SARAT, GROUSME SPECTACLES, supra note 11, at 30 (explaining how the Judge would wear a black cap and indicate sentencing by hanging by writing "Suspendatur per Collum," Latin for "let him be hanged by the neck").
54. Id. at 31. ("Congress rejected it as a punishment for federal crimes in 1937 as did the army in 1986, and the vast majority of states no longer use hanging as an execution method."). New Hampshire and Washington are the only states that continue to permit its use. Id.
55. Utah Firing Squad Executes Convicted Killer, FOX NEWS (June 18, 2010), http://
from the use of firing squads, botch rates have increased with each "humane" iteration. From 1900–2010, the botch rate for all methods of execution was 3.15%, with hanging at 3.12%; electrocution at 1.92%; lethal gassing at 5.4%; lethal injection at 7.12%; and firing squad at 0%.56

With the new standard set forth in Baze,57 the issue now confronting the Supreme Court and the Virginia legislators is not whether the Commonwealth’s pre-2008 drug protocol was constitutional, but rather whether it remains so in light of the recent botched executions and drug shortages.58 Should legislators adopt the use of firing squads, it could help pave a path for a national movement away from lethal injection in order to avoid further constitutional challenges to capital punishment. This section examines the history and constitutionality of the two methods in light of the Baze formulation of the Cruel and Unusual Punishments Clause.

A. A Brief History of Lethal Injection and Whether Virginia’s Current Protocol Poses a “Substantial Risk of Serious Harm”

State legislators in New York debated using lethal injection as a method of execution in 1888.59 But the commission tasked with investigating the method rejected it because “the use of [a hypodermic needle] is so associated with the practice of medicine ... that it is hardly deemed advisable to urge its application for the purposes of legal executions against the almost unanimous pro-

www.foxnews.com/us/2010/06/17/utah-man-facing-firing-squad-execution-early-friday-moved-observation-cell (noting that it was the first time in fourteen years an inmate was executed in this fashion).

56. SARAT, GRUESOME SPECTACLES, supra note 11, at app. A. Though electrocution’s botch rate appears to be low in comparison to other methods of execution; it was a staggering 17.33% between 1980 and 2010. Id.

57. See supra Part I.


59. See N.Y. COMM’N ON CAP. PUNISHMENT, REPORT OF THE COMMISSION TO INVESTIGATE AND REPORT THE MOST HUMAN AND PRACTICAL METHOD OF CARRYING INTO EFFECT THE SENTENCE OF DEATH IN CAPITAL CASES 75 (1888) [hereinafter N.Y. COMM’N ON CAP. PUNISHMENT]. It was the same commission that recommended electrocution as a more suitable form of execution than hanging, leading to New York being the first state to adopt the method. See id.; Death by Electricity: The Substitute Recommended for Hanging. N.Y. TIMES (Jan. 17, 1888), http://query.nytimes.com/mem/archive-ree/pdf?Res=9D07E5D C153FE432A25784C1A967FC94699FD7CF; see also Baze v. Rees, 553 U.S. 35, 42 (2008) (plurality opinion) (citing Glass v. Louisiana, 471 U.S. 1080, 1082 (1985) (Brennan, J., dissenting from denial of certiorari)).

60. N.Y. COMM’N ON CAP. PUNISHMENT, REPORT OF THE COMMISSION TO INVESTIGATE AND REPORT THE MOST HUMAN AND PRACTICAL METHOD OF CARRYING INTO EFFECT THE SENTENCE OF DEATH IN CAPITAL CASES 75 (1888) [hereinafter N.Y. COMM’N ON CAP. PUNISHMENT]. It was the same commission that recommended electrocution as a more suitable form of execution than hanging, leading to New York being the first state to adopt the method. See id.; Death by Electricity: The Substitute Recommended for Hanging. N.Y. TIMES (Jan. 17, 1888), http://query.nytimes.com/mem/archive-ree/pdf?Res=9D07E5D C153FE432A25784C1A967FC94699FD7CF; see also Baze v. Rees, 553 U.S. 35, 42 (2008) (plurality opinion) (citing Glass v. Louisiana, 471 U.S. 1080, 1082 (1985) (Brennan, J., dissenting from denial of certiorari)).
Increased with botch rate for all methods, electrocution at 3.12%; electroinjection at 7.12%.

The issue now concerns is not whether legislators adopt a protocol was constituted of the recent deaths in which legislators adopt death as a path for a national protocol to avoid further botchings. This section explains the two methods in Unusual Punishment Virginia's "Serious Harm"

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60. N.Y. COMM’N ON CAP. PUNISHMENT, supra note 59, at 75; James W. Garner, Infliction of the Death Penalty by Electricity, 1 J. CRIM. L. & CRIMINOLOGY, 626, 626 (1910) (stating that Dr. Spitzza of Philadelphia later argued that "the practice of medicine . . . for the purpose of putting criminals to death would arouse the unanimous protest of the medical profession").

61. State by State Lethal Injection, supra note 48. It was not until December 7, 1982 that the state of Texas first used lethal injection to execute an inmate. Id.

62. SARAT, GRUESOME SPECTACLES, supra note 11, at 118.

63. Denno, supra note 23, at 1342; Baze v. Rees, 553 U.S. 35, 44 (2008) (plurality opinion) (noting that of the thirty-six states that use lethal injection, at least thirty use the same three-drug lethal injection protocols). Dr. Chapman has since stated that it might be time to change the protocol because of the number of issues that can arise from it. Elizabeth Cohen, Lethal Injection Creator: Maybe It’s Time to Change Formula, CNN (Apr. 30, 2007), http://edition.cnn.com/2007/HEALTH/04/30/lethal.injection/. He stated that the simplest means of executing an inmate is the guillotine, and that he is not opposed to bringing it back. Id. This is an interesting change of position coming from the creator of
Supporters hailed lethal injection for its ease of administration and because it “appear[ed] more humane and visually palatable relative to other methods.” The modern death chamber resembled a “hospital room, and executioners [resembled] medical professionals.” The three-drug protocol adhered to by most states—Chapman’s Protocol—killed the condemned in three stages: the first drug, sodium thiopental, anesthetized the inmate and put him to sleep before the lethal drugs were administered; the second drug, pancuronium bromide, a paralytic, stopped the inmate’s breathing and rendered him unable to show pain; and the third drug, potassium chloride, caused cardiac arrest and, ultimately, death.

States used this protocol—the same one challenged in Baze—until 2009 when Hospira Inc., the sole domestic manufacturer of sodium thiopental, “ceased production due to difficulties procuring [the drug’s] active ingredient.” In 2010, the British government announced plans to restrict the export of sodium thiopental for use in executions and, when Hospira announced its intentions to resume production of the drug at its plant in Italy, the Italian government threatened to withdraw its ratification of the death penalty.

Since 2009, death penalty states have tried to fulfill their execution requirements with untested drugs. Some states use compounded drugs in order to avoid a medical prescription requirement.

These compounded drugs are produced for different reasons. First, manufacturers produce these drugs in order to avoid a medical prescription requirement. Second, compounding pharmacies produce these drugs in order to avoid liability. Finally, they try to fulfill their moral opposition to the death penalty.

72. Dominic Casciaro, Business Secretary Vince Cable: 'We are Not Going to Sell Unethical Drugs', Daily Mail (Nov. 29, 2010), http://www.dailymail.co.uk/news/article-2203184/Friendship-Secretary-Vince-Cable-Announces-Drug-Trade tie.html (quoting him as saying, “We are not going to sell unethical drugs to a medical prescription requirement.”). See also Adam Liptak, Critics Say Execution Drug May Hide Suffering, N.Y. Times, Oct. 7, 2003, at A1 (“[T]his method of killing [lethal injection], by common consensus, is as humane as medicine can make it. People who have witnessed injection executions say the deaths appeared hauntingly serene, more evocative of the operating room than of the gallows.”); Dan Oldenburg, Poison Penalty: Bill Wisemen Drafted Law Allowing Lethal Injections, Then Lived to Regret It, WASH. POST, Dec. 7, 2003, at D1 (discussing that it was Bill Wiseman’s, the Oklahoma legislator who asked Dr. Chapman to create a lethal injection protocol, intention to “pull the plug on brutal electrocutions and set a more humane standard for carrying out death sentences nationwide”).

73. Denno, supra note 23, at 1386–89.

74. Compounding Pharmacies, a growing threat to the death penalty. 2015

75. See Denno, supra note 23, at 1386–89.

76. Denno, supra note 23, at 1386–89.

77. See Denno, supra note 23, at 1386–89.

78. Jennifer Gudeman et al., The Future of Execution Methods, in THE FUTURE OF AMERICA’S DEATH PENALTY: AN AGENDA FOR THE NEXT GENERATION OF CAPITAL PUNISHMENT RESEARCH 490 (Charles S. Lanier et al. eds., 2009); see also Adam Liptak, Critics Say Execution Drug May Hide Suffering, N.Y. Times, Oct. 7, 2003, at A1 (“[T]his method of killing [lethal injection], by common consensus, is as humane as medicine can make it. People who have witnessed injection executions say the deaths appeared hauntingly serene, more evocative of the operating room than of the gallows.”); Dan Oldenburg, Poison Penalty: Bill Wisemen Drafted the Law Allowing Lethal Injections, Then Lived to Regret It, WASH. POST, Dec. 7, 2003, at D1 (discussing that it was Bill Wiseman’s, the Oklahoma legislator who asked Dr. Chapman to create a lethal injection protocol, intention to “pull the plug on brutal electrocutions and set a more humane standard for carrying out death sentences nationwide”).

79. Id. at 120.

80. Id. at 119.

81. Id. at 120.

82. Id. at 119.

83. Id. at 118.

84. Id. at 118.

85. Id. at 118.

86. Id. at 118.

87. Id. at 118.

88. Id. at 118.
government threatened legal action. Thus, “Europe’s prohibition of the death penalty . . . bec[a]me an American problem.”

Since 2009, death penalty states have faced a harsh reality as they try to fulfill their existing protocols with diminishing supplies. Some states have put executions on hold while the necessary drugs are in short supply. Others continued by either “seeking help internally from local compounding pharmacies for the production of lethal injection drugs,” or experimenting with new, untested drugs such as midazolam.

These compounding pharmacies are problematic for a number of reasons. First, their traditional role has been to produce compounded drugs in small batches for individual patients pursuant to a medical prescription, not in large quantities for varied recipients. Second, compounding pharmacies are not regulated by the FDA and, instead, fall under state regulation. In fact, when doctors consider whether they should prescribe compounded pharmaceuticals to their patients, they “are often advised to weigh the risk of liability, which is exacerbated by the fact that medical


74. Denno, supra note 23, id. at 1336.

75. Id.; Sack, supra note 73 (discussing, in part, how Illinois repealed its death penalty law after the drug shortages began); Erik Eckholm & Katie Zezima, States Face Shortage of Key Lethal Injection Drug, N.Y. TIMES (Jan. 21, 2011), http://www.nytimes.com/2011/01/22/us/22lethal.html (detailing the impact of drug shortages in California, Arizona, Oklahoma, and Texas).


77. See Denno, supra note 23, at 1367.

malpractice insurance typically excludes coverage for claims involving medications and procedures not approved by the FDA.\textsuperscript{79} Finally, there have been allegations of "subpar conditions and contaminated drugs" in compounding pharmacies.\textsuperscript{80}

Just a few months after the Supreme Court decided \textit{Baze}, the Fourth Circuit ruled on an appeal from Virginia challenging the Commonwealth's method for lethal injection.\textsuperscript{81} At the time, Virginia's protocol mirrored Kentucky's in its use of sodium thiopental, pancuronium bromide, and potassium chloride.\textsuperscript{82} The court found the protocol virtually indistinguishable from the one employed in \textit{Baze} and, thus, held it to be constitutional.\textsuperscript{83} However, Virginia's protocol has changed substantially since 2008. In 2011, the Commonwealth began using pentobarbital as its first drug due to its inability to obtain sodium thiopental, and in 2012 announced a switch from pancuronium bromide to rocuronium bromide as the second drug in its three-drug protocol.\textsuperscript{84} In February 2014, the General Assembly authorized midazolam as an alternative first drug due to increasing shortages of pentobarbital.\textsuperscript{85} These new drugs, pentobarbital and midazolam in particular, are problematic since pentobarbital was used in the 2014 botched execution of Michael Wilson and midazolam was used in the botched executions of Dennis McGuire, Clayton Lockett, and Joseph Rudolph Wood III.\textsuperscript{86}

\textsuperscript{79} Denno, \textit{supra} note 23, at 1368.
\textsuperscript{80} \textit{Id.} at 1366. This "risk" caused a number of states to enact secrecy statutes to protect compounding pharmacies from any danger of liability should the execution go wrong. \textit{See id.}
\textsuperscript{81} Emmett v. Johnson, 532 F.3d 291, 292 (4th Cir. 2008).
\textsuperscript{82} \textit{Id.} at 294; \textit{see supra} note 70 and accompanying text.
\textsuperscript{83} Emmett, 532 F.3d at 300 ("Emmett ... failed ... to demonstrate a substantial or objectively intolerable risk that he will receive an inadequate dose of thiopental, particularly in light of the training and safeguards implemented by Virginia prior to and during the execution.").
\textsuperscript{85} Press Release, Va. Dep't Corrs., Virginia Department of Corrections Adds Alternative Lethal Injection Chemical (Feb. 20, 2014), \textit{available at} https://vadoc.virginia.gov/news/press-releases/14feb20_finalLidrugsrelease.shtml (detailing that the reason for the switch was a "critical shortage of drugs to carry out executions").
\textsuperscript{86} \textit{Execution List 2014, supra} note 2; \textit{see supra} notes 1–7, 14–15.
Between 2008 and 2013 there were twenty-seven petitions across the country challenging the various drugs used in lethal injection procedures, with nineteen contesting the use of pentobarbital as a replacement for sodium thiopental in a state’s one- or three-drug protocol. Through 2013, courts consistently upheld the use of pentobarbital, despite the drug’s limited testing and use in lethal injection procedures. Midazolam, the other problematic drug in Virginia’s new protocol, has also faced opposition for its use in executions. Further, the risk inherent to both drugs is compounded by the fact that they are followed by rocuronium bromide, a paralytic. Should either pentobarbital or midazolam fail to have its intended effect, rocuronium bromide will make the prisoner appear “tranquil and comfortable” while they suffer the torture of being suffocated, thus allowing witnesses to continue to believe the executions are humane.

But 2014, along with its botched executions, brought with it a more troubling record against pentobarbital and midazolam. Botched lethal injections involving the two drugs accounted for over 11% of all executions in 2014. This number is almost four times the overall botch rate for all executions between 1900 and 2010, and it is one-and-one-half times the botch rate for lethal injections between 1982 and 2010.
In addition, pentobarbital and midazolam are ripe for challenge. Both drugs are intended to replace sodium pentobarbital and serve in the anesthetic role of Virginia's three-drug protocol, ideally rendering the inmate unconscious and, theoretically, ensuring that he does not physically suffer from the effects of paralysis and cardiac arrest. Should either drug fail to place the inmate in a coma, he may feel excruciating pain from the subsequent two drugs and be incapable of showing any signs of distress. The inmate would be at least partially aware of his surroundings, feeling his muscles paralyze as the immense pain of cardiac arrest takes effect.

It is no wonder that Michael Wilson cried out that he felt his "whole body burning" as he died on the gurney; the pentobarbital did not have its intended effect. Midazolam poses more significant risks. The drug is weaker than barbiturates like pentobarbital because it "requires the co-presence and assistance of a neurotransmitter to help it inhibit neuron activity," thus allowing prisoners to experience "persistent and prolonged respiratory activity." Moreover, midazolam is subject to a "ceiling effect," meaning that no matter the dosage it reaches a point of saturation where it cannot keep someone unconscious. Finally, since midazolam is not an FDA approved general anesthetic and instead is intended as "an anti-seizure medication and for the correct dosage.

B. Recent Developments

Oklahoma executed Glossip using the same three-drug protocol as Virginia. On his death, a sharp tug on his neck, his sharp intake of breath, and a sharp loud cry of "My body is burning!" contributed to the end of an execution in a 5-justice Sotomayor, who felt that the Supreme Court should not intervene. The District Court's evidentiary hearing was held in accordance with the Fifth Amendment. When executioners declared him unconscious and began to administer the other two drugs, he said, "My body is burning!" Witnesses said they saw him struggle with his neck about three times. The witnesses said they saw him twitching as he died. The 5-justice Sotomayor, who felt that the Supreme Court should not intervene, agreed that the execution was therefore invalid.

On January 23, 2015, the Supreme Court granted a stay of the execution of Kelly Gissendaner, the only woman on Georgia's death row. She is serving a life sentence for the brutal murder of her husband.
are ripe for challenge. The pentobarbital three-drug protocol, theoretically, enables one to place the individual in a state of profound unconsciousness, removing any signs of awareness of his surroundings and immense pain of dying. But Michael Wilson was aware of his suffering as he died on the way. Midazolam’s troubled history worried Justice Sotomayor, who felt that the Court need not give deference to the District Court’s evidentiary analysis affirming the drug’s usage. When executioners began pushing midazolam into Warner’s IV, he said, “My body is on fire,” but showed no obvious signs of distress. Witnesses claim they saw “slight twitching in [Warner’s] neck about three minutes after the lethal injection began. The twitching lasted about seven minutes until he stopped breathing.”

On January 23, 2015, the Supreme Court granted certiorari in Glossip v. Gross, a case originally brought by Warner and three other inmates on death row, to determine whether Oklahoma’s continued use of midazolam in its lethal injection protocol violates medicinal and for sedation,” states have had difficulty configuring the correct dosages for lethal-injection procedures.\textsuperscript{103}

**B. Recent Developments**

Oklahoma executed Charles Warner on January 15, 2015, using the same three-drug protocol employed by Virginia.\textsuperscript{104} Before his death, a sharply divided Court denied his petition for a stay of execution in a 5-4 decision that drew a strong dissent from Justice Sotomayor, who was joined by Justices Ginsburg, Kagan, and Breyer.\textsuperscript{105} Midazolam’s troubled history worried Justice Sotomayor, who felt that the Court need not give deference to the District Court’s evidentiary analysis affirming the drug’s usage.\textsuperscript{106} When executioners began pushing midazolam into Warner’s IV, he said, “My body is on fire,” but showed no obvious signs of distress.\textsuperscript{107} Witnesses claim they saw “slight twitching in Warner’s neck about three minutes after the lethal injection began. The twitching lasted about seven minutes until he stopped breathing.”\textsuperscript{108}

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\textsuperscript{105} Warner, 574 U.S. at ___ (Sotomayor, J., dissenting from denial on application for stay).

\textsuperscript{106} Id.

\textsuperscript{107} Wolf & Zoroya, *supra* note 103. This description paints a similar scene to Michael Wilson’s execution. See *supra* note 14.

\textsuperscript{108} Wolf & Zoroya, *supra* note 103. A few weeks later on March 2, 2015, Georgia was set to execute Kelly Gissendaner until her execution was postponed due to a cloudy appearance in the pentobarbital that was to be used in her lethal injection. *Execution of Kelly Gissendaner Postponed Again*, 11ALIVE.COM (Mar. 4, 2015), http://www.11alive.com/story/news/local/2015/03/02/kelly-gissendaner-execution/24255189/. Gissendaner, who is the only woman on Georgia’s death row, was sentenced to death for conspiring in the brutal murder of her husband. Id.
the Eighth Amendment. In their petition, the condemned inmates asked the Court to “revisit Baze v. Rees because the lethal injection landscape has changed significantly in the past seven years.” Considering the four members of Justice Sotomayor’s dissent and the remaining members of the Baze Court, Glossip is likely to be a close decision with far-reaching implications.

There are multiple paths the Court can take in determining the issue, each with substantial ramifications. Following its decision in Baze, the Justices could adhere to the District Court’s evidentiary hearing and uphold the constitutionality of lethal injection in all forms, since it can hardly be shown by a handful of botched executions that midazolam, or any of the lethal drugs, rises to the level of posing a substantial risk of serious harm. Any attempt to reason otherwise would ignore Justice Frankfurter’s warning in Louisiana ex rel. Francis v. Resweber that “[o]ne must be on guard against finding in personal disapproval a reflection of more or less prevailing condemnation.” A majority of the Court could also analogize this case to a condemned inmate facing the electric chair who argues that the local power company might not be able to produce a sufficient current to painlessly and expeditiously kill him. Such an argument would be devoid of constitutional merit and, hence, the Court could side with the State and its continued use of the drug. Either approach would affirmatively shut the door on constitutional objections to lethal injection and finish the work of Baze.

Should the Justices of the Baze Court, by an 8–4 vote narrowly by prohibiting or more broadly by invalidating midazolam, or any of the lethal drugs, the Court would have made a decision in the aggregate, and not in the aggregate. Both the Ninth, and the Third, and the Fourth, and the Eleventh Circuits, as well as the District Court, have all held that a majority of the Justices would have made a decision in the aggregate, and not in the aggregate. Both the Ninth, and the Third, and the Fourth, and the Eleventh Circuits, as well as the District Court, have all held that a majority of the Justices would have made a decision in the aggregate, and not in the aggregate.

Regardless of the ultimate result, the petition in Glossip is likely to be a close decision with far-reaching implications. There are multiple paths the Court can take in determining the issue, each with substantial ramifications. Following its decision in Baze, the Justices could adhere to the District Court’s evidentiary hearing and uphold the constitutionality of lethal injection in all forms, since it can hardly be shown by a handful of botched executions that midazolam, or any of the lethal drugs, rises to the level of posing a substantial risk of serious harm. Any attempt to reason otherwise would ignore Justice Frankfurter’s warning in Louisiana ex rel. Francis v. Resweber that “[o]ne must be on guard against finding in personal disapproval a reflection of more or less prevailing condemnation.” A majority of the Court could also analogize this case to a condemned inmate facing the electric chair who argues that the local power company might not be able to produce a sufficient current to painlessly and expeditiously kill him. Such an argument would be devoid of constitutional merit and, hence, the Court could side with the State and its continued use of the drug. Either approach would affirmatively shut the door on constitutional objections to lethal injection and finish the work of Baze.

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C. A Brief History of Lethal Injection

Serving as a personal disapproval a reflection of more or less prevailing condemnation.

On February 23, 2015, the Utah Governor announced its plans to amend the state’s capital punishment statute to obtain the lethal-injection protocol being developed by the Florida Department of Corrections. The decision to use a firing squad is unusual because the inmate dies before 2004. At public hearings, Paul Ray, argued that the firing squad is “an effective, efficient, humane, and rational method of execution.”

109. de Vogue, supra note 104. The three questions the court is considering, paraphrased, are:

Is a three-drug execution protocol unconstitutional under the Eighth Amendment if the first drug cannot reliably put the inmate into deep unconsciousness and he may therefore suffer real pain while dying from the other two drugs’ effects? Will the Supreme Court keep intact its declaration in . . . Baze v. Rees restricting postponement of lethal-drug executions unless there is a clear risk of severe pain when compared to what would result by using an alternative protocol? Must a death-row inmate, seeking to challenge a state’s lethal-injection protocol, prove that a better alternative protocol is available, even if the existing procedure violates the Eighth Amendment?


110. de Vogue, supra note 104.

111. See Baze v. Rees, 553 U.S. 35, 50 (2008) (plurality opinion). Based on the record, midazolam certainly does not rise to Justice Thomas’ “intentional” standard seeing as it has been used without error in ten previous executions in Florida. Wolf & Zoroya, supra note 103.

112. 329 U.S. 459, 471 (1947) (Frankfurter, J., concurring).

113. See supra note 110.

114. It is possible 5 Breyer to rule against a death-row inmate, seeking to challenge a state’s lethal-injection protocol, prove that a better alternative protocol is available, even if the existing procedure violates the Eighth Amendment?


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Regardless of the outcome, Virginia’s General Assembly will
likely have to respond in some fashion, either to the decision itself
or to resulting public outcry against its continued use of midazo­
This is why the Commonwealth must start evaluating alter­
motivating f u r s i g h a d

C. A Brief History of Firing Squads and Their Capability of
Serving as a Constitutional Alternative to Lethal Injection

On February 13, 2015, Utah made national headlines by reviv­
ing its plans to use the firing squad in cases where it could not
obtain the lethal injection drugs for its current protocol thirty
days before a scheduled execution. The bill’s proponent, State Representative
Paul Ray, argued that firing squads are the most “humane way to execute someone

113. See supra note 42 and accompanying text.
114. It is possible that the deeper record against midazolam may persuade Justice Breyer to rule against its constitutionality, which is what he seemed to be waiting for when the Court decided Baze. See supra note 42 and accompanying text.
116. Utah Admin. Code r. 77-18-5.5 (2004); Mark Blunden, Live by the Gun, Die by the Gun: US Killer Executed by Firing Squad, LONDON EVENING STANDARD (June 18, 2010),
row have requested to die by firing squad. The bill passed in the House of Representatives by a narrow majority of 39-34, and will now head to the GOP-controlled Senate, which will determine its ultimate fate. The day before, on February 12, 2015, the Wyoming House of Representatives voted affirmatively on an amendment to a Senate Bill making firing squads an alternative form of execution in the state. In what appears to be a hybrid approach with lethal injection, the amendment requires that inmates be administered anesthesia and rendered unconscious before being shot. Regardless of whether these measures are ultimately enacted in their respective states, the national attention surrounding these decisions to revive a now rarely used method of execution warrants analysis. In questioning why lawmakers would consider such a seemingly radical proposal, compare John D. Lee’s 1876 execution to that of Joseph Rudolph Wood III.

The Territory of Utah executed Lee for his role in the Mountain Meadows Massacre of 1857, an event in which he, along with several others, killed a number of persons traveling in an immigrant wagon train. On the day of his death, he shook hands with those around him, removed his overcoat, hat, and muffler and handed them to his friends. He was blindfolded, but at his request his hands remained free. At the signal “Ready! Aim! Fire!” five shots rang out, and John D. Lee fell back into his coffin without a moan or twitching of the body. This account, although in possession of firing squad statements. Though used firing squad executions. Though used firing squad executions. Though used firing squad executions. Though used firing squad executions. Though used firing squad executions.


119. Laura Hancock, Wyoming House Passes Firing Squads Execution Bill, CASPER STAR TRIB. (Feb. 13, 2015), http://trib.com/news/state-and-regional/govt-and-politics/wyoming-house-passes-firing-squads-execution-bill/article_1c77fac5-32f5-5f00-8569-34ba66b0572d.html. This resolution is less significant than Utah’s bill as there are currently no inmates on death row in Wyoming. Id.


121. See supra text accompanying notes 1–7.

122. Cutler, supra note 36, at 344.
This account, along with many others, makes clear that death by firing squad stands in stark contrast to recent botched lethal injections. Though several states, and the United States military, used firing squads in the past, none have done so more than Utah. Hence, Utah's framework should guide other states debating the implementation of this method.

The modern firing squad is composed of five peace officers selected by the executive director of the Department of Corrections. Guidelines allow nine members of the media to be present, and why lawmakers compare John Wood III.

Virginia has a history of executing inmates by firing squad, and given the relative ease with which it could transition away from lethal injection, this method certainly meets the Court's re-
requirement of "feasibility." Instead of having to procure potentially dangerous drugs from compounding or foreign pharmacies, Virginia would simply need to assemble five qualified volunteers, arm them with appropriate and readily available weapons and ammunition, and carry out the execution in a suitable location. The execution could take place either in a public space or in a death chamber, as in Utah.

Though it is difficult to predict, based on precedent it is unlikely that Virginia would face difficulty identifying volunteers to participate in the firing squad. Utah’s Department of Corrections was inundated with volunteers in 1996 to serve as marksmen for the execution of John Albert Taylor, despite erroneous news reports stating the contrary. “An entire military unit from Fort Bragg[,] North Carolina[,] volunteered to participate.” There is broad public support for capital punishment in the Commonwealth, as exemplified by the Department of Corrections’ rotating list of about twenty to thirty volunteers to serve as witnesses for executions. While there is no necessary correlation between those willing to serve as witnesses and those same individuals desiring to participate in an actual execution, given the fact that Utah has not faced a lack of volunteers in recent history, it is unlikely that Virginia would be confronted with this issue.

Further, death by firing squad would nearly eliminate all risk of pain to the inmate, assuming that he or she was properly restrained and not able to flinch when the shots rang out. The

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130. See infra notes 155–55 and accompanying text for a discussion on the efficacy of public executions.
131. See Cutler, supra note 36, at 361.
132. Id.
134. This is what happened to Wallace Wilkerson—the inmate whose case challenging the constitutionality of the firing squad reached the Supreme Court—in 1877 when, after refusing to be blindfolded and tied in the chair, he flinched as soon as the shots were fired and the marksmen missed their target. Cutler, supra note 36, at 346–47. Wilkerson’s botched execution is an anomaly. These problems are easily avoidable by following Utah’s
procure potentially n pharmacies, Vir- nalified volunteers, lable weapons and a suitable location. blic space or in a cedent it is unlikelyy volunteers to aent of Corrections e as marksmen for erroneous news re- uiry unit from Fort cipate.” There is in the Common- ections’ rotating re as witnesses for rrelation between same individuals given the fact that it history, it is un- is issue. eliminate all risk e was properly re- s rang out. The inmate would be rendered unconscious almost immediately due to shock, organ damage, and blood loss; exsanguination would likely follow soon thereafter.

When compared to the gruesome deaths suffered during the four botched lethal injections of 2014, execution by firing squad is both more reliable and “humane.” Therefore, in light of the Supreme Court’s grant of certiorari to determine the constitutionality of midazolam and other untested anesthetics, the Commonwealth could easily circumvent Eighth Amendment issues by adopting firing squads, which would also satisfy Baze’s requirement for a sufficient alternative.

III. POLICY JUSTIFICATIONS FOR USING THE FIRING SQUAD

If firing squads are determined to be a valid, alternative method of execution, a question remains: If Virginia can switch, should it do so in order to avoid waiting on the Supreme Court’s decision regarding its current protocol and preempt future legal challenges to lethal injection? Before his death by lethal injection, Joseph Rudolph Wood III petitioned the Ninth Circuit for a stay of his execution. When the court denied his petition for a rehearing en banc, Chief Judge Kozinski wrote a strong dissent in which he critiqued the methodology of lethal injection and blamed its current procedure.

135. See Descriptions of Execution Methods, DEATH PENALTY INFO. Ctr., http://www.deathpenaltyinfo.org/descriptions-execution-methods#firing (last visited Feb. 27, 2015); see also Veljko Strajina et al., Forensic Issues in Suicidal Single Gunshot Injuries to the Chest, 33 AM. J. FORENSIC MED. PATHOLOGY 373, 374 (Dec. 2012) (citing exsanguination as the most common cause of death in gunshots to the chest).

136. See supra text accompanying notes 1-7, 14–15.

137. The inmate will also have to demonstrate that electrocution, the other statutorily authorized method of execution in Virginia, also fails as an acceptable alternative. This should not be difficult as the botch rate for electrocutions was 17.33% between 1980 and 2010, and Virginia itself has a troubling history of botched executions in the electric chair. See SARAT, GRUESOME SPECTACLES, supra note 11, at apps. A, B. In light of the looming drug shortages, Virginia lawmakers planned to vote on whether to make the electric chair the default method of execution when lethal injection drugs were not available. Mark Berman Recent History, supra note 18. Given the troubled history and high botch rate with the electric chair, it should come as no surprise that lawmakers shied away from such a controversial vote. Firing squads, though likely to raise national attention, resolve the botch issues inherent with electrocution and thus could be more likely to garner support in the General Assembly.

138. See supra notes 1–7 and accompanying text.

139. Emergency Motion for Stay of Execution at 2, Wood v. Ryan, 759 F.3d 1076 (9th Cir. 2014) (No. 14-16310).
troubled history for the increasing number of attacks on its constitutionality. Judge Kozinski noted, "The enterprise is flawed. Using drugs meant for individuals with medical needs to carry out executions is a misguided effort to mask the brutality of executions by making them look serene and peaceful—like something any one of us might experience in our final moments." The jurist continued:

But executions are, in fact, nothing like that. They are brutal, savage events, and nothing the state tries to do can mask that reality. Nor should it. If we as a society want to carry out executions, we should be willing to face the fact that the state is committing a horrendous brutality on our behalf.

After suggesting that the states and the federal government turn away from lethal injection and revert back to more "primitive—and foolproof—methods of execution," Judge Kozinski concluded that "[i]f we, as a society, cannot stomach the splatter from an execution carried out by firing squad, then we shouldn't be carrying out executions at all." In light of the growing problems facing modern lethal injection protocols, this sentiment serves as a foundation for why both proponents and opponents of the death penalty should support a return of the firing squad. The following sections rationalize its use for both perspectives.

A. Proponents of the Death Penalty

Proponents of the death penalty should favor firing squads over lethal injection for two reasons. First, firing squads are a better method for satisfying the remaining justification for the continued practice of capital punishment: retribution. As Justice Stevens noted in Baze:

140. Ryan, 759 F.3d at 1102–03 (Kozinski, C.J., dissenting from the denial of rehearing en banc).
141. Id.
142. Id.
143. Id.
144. Deterrence, the other cited justification for capital punishment, is practically nonexistent as evidenced by the fact that the murder rate was higher in death penalty states when compared to non-death penalty states every year between 1991 and 2011. Deterrance: States Without the Death Penalty Have Had Consistently Lower Murder Rates, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/deterrence-states-without-death-penalty-have-had-consistently-lower-murder-rates (last visited Feb. 27, 2015).
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146. One account describing victims’ relatives who witnessed executions by lethal injection stated, “[A]ll is not resolved. They feel better. A little. Not much. It’s not the better they thought they would feel. They can hardly explain why. They exit the room with most of the ache they carried in.” David Montgomery, For Murder Victims’ Families, Witnessing Execution Offers Hollow Satisfaction, WASH. POST (Nov. 10, 2009), http://www.washing
147. Double Murderer’s Botched Execution, supra note 1. Similarly, a mother of a mur-
der victim when shown the planned death by lethal injection of her child’s killer remarked, “Do they feel anything? Do they hurt? Is there any pain? Very humane compared to what they’ve done to our children. The torture they’ve put our kids through. I think sometimes it’s too easy. They ought to feel something. If it’s fire burning all the way through their body or whatever. There ought to be a little sense of pain to it.” AUSTIN SARAT, WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION 60 (2001).
149. See Callins v. Collins, 510 U.S. 1141, 1142–43 (1994) (Scalia, J., concurring in de-
nial of certiorari). In Callins, the defendant shot the victim “suddenly and unexpectedly ... and left [him] to bleed to death on the floor of a tavern.” Id. at 1142.

In an attempt to bring executions in line with our evolving standards of decency, we have adopted increasingly less painful methods of execution, and then declared previous methods barbaric and archaic. But by requiring that an execution be relatively painless, we necessarily protect the inmate from enduring any punishment that is comparable to the suffering inflicted on his victim.  

By losing the retributive nature inherent in capital punishment, lethal injection does little to provide closure, even during a botched execution. Richard Brown, the brother-in-law of Debbie Dietz, one of Wood’s victims, reportedly stated after witnessing the botched execution, “This man conducted a horrific murder and you guys are going, let’s worry about the drugs.... Why didn’t they give him a bullet?”

Death by firing squad would better satisfy this retributive desire. Take, for example, Utah’s execution of Patrick Coughlin in 1896: “Coughlin was sentenced to die for killing two police officers.... When asked which method of execution he preferred, he answered ‘I’ll take lead.’ The firing squad shot Coughlin with the murder weapon.” Though it is unlikely that any state would adopt an execution protocol where inmates were killed with their own murder weapon, Coughlin’s death represents the retributive quality inherent in capital punishment at its purest. Inmates executed by firing squad meet a visually appalling, albeit immediate, demise that is much more comparable to the fates that their victims met than a painless, bureaucratic death brought on by lethal injection.  

As Justice Scalia wrote, death-by-injection is “de-
sirable" and "enviable" when compared to the brutal crimes for which the condemned were sentenced. 150

There is also a possibility that the use of firing squads would reinvigorate the other, long defunct, justification for capital punishment: deterrence. 151 Should Virginia return to using the firing squad, it is possible that such a visually gruesome death might have a stronger deterrent effect in keeping others from committing similar crimes. This effect would be even greater if the Commonwealth chose to execute the condemned in public, a more feasible proposition with firing squads than lethal injection. 152

In the past, executions were always public affairs because "[w]ithout a public audience[,] state killing would have been meaningless." 153 Historically, capital punishment was purely about the right of the state to kill, and executions were "designed to make the state's dealing in death majestically visible to all." 154 As Michel Foucault said, "Not only must people know, they must see with their own eyes. Because they must be made to be afraid; but also because they must be the witnesses, the guarantors, of the punishment, and because they must to a certain extent take part in it." 155 If people witness public executions, they, in theory, will become less likely to commit the same crimes that led to the inmate's demise. However, public executions are unlikely to find favor in Virginia's General Assembly and in other states, given the fraught political climate surrounding capital punishment. Furthermore, the argument would boil down to whether the probative value of any deterrent effect would outweigh opposition.

The second rationale supporting the use of firing squads is that, amid the plethora of challenges to lethal injection and the widespread drug shortages, firing squads would provide an efficient solution as a functional alternative. However, the potential for erroneous executions questioning the death penalty's prudential merit. But more importantly, as evidenced by the Commonwealth of Virginia.

As the rate of capital punishment declines amid a sea of challenges to the tools of death penalty administration, one should argue for keeping the public in execution. One need only look at the history of executions across the states across the nation.

Since the drug that had executed one prisoner died, the other, and has executed one prisoner since the tools of death punishment, it seems that, as long as they are executed, the public confidence in the morality and the death penalty. From this, it seems, they would virtually be the same as those that arise with the execution of a capital punishment. If there is little reason to doubt the value of capital punishment.

B. Opponents of Firing Squads

Opponents of the firing squad argue that firing squads for the conversation of our use of capital punishment.

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150. Id. at 1142–43.
151. See supra note 144.
152. It would alleviate the necessity of a sterile medical environment for executions and, as reported by Ronnie Lee Gardner's execution noted, "[t]here was no blood spattered across the white wall at the Utah State Prison" when he was executed by firing squad. Jennifer Dobner, Eyewitness: Ronnie Lee Gardner Execution, TELEGRAPH (June 18, 2010), http://www.telegraph.co.uk/news/worldnews/northamerica/usa/7837976/Eyewitness-Ronnie-Lee-Gardner-execution.html. Hence, it would be feasible to perform a public execution through the use of a firing squad while maintaining sanitary conditions for the citizens who witnessed it.
153. SARAT, GRUESOME SPECTACLES, supra note 11, at 8–9.
154. Id. at 8.
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widespread drug shortages, capital punishment is losing its position as a functional element of American society. In the past, petitions questioning existing methods of execution were often devoid of merit. But now these challenges are gaining teeth, as evidenced by the Court’s decision to hear Glossip v. Gross.156

As the rate of botched lethal injections continues to climb amidst a sea of logistical and administrative issues in procuring the tools of death, those who are in favor of the death penalty should argue for a simpler, cleaner, and more efficient means of execution. One needs look no further than Virginia’s own recent history of executing condemned inmates, which is similar to other states across the country.

Since the drug shortages began in 2009, Virginia has only executed one prisoner under the new drug protocol using pentobarbital, and has executed two prisoners by electrocution.157 The number of executions per year in Virginia is dwindling alongside public confidence in its preferred method of execution. Proponents of the death penalty should press for the use of firing squads as they would virtually eliminate all of the potential botch issues that arise with lethal injection and reinvigorate the deterrence element of capital punishment. Apart from using a new method, there is little reason to believe the current trend will change and capital punishment will soon cease to be utilized in Virginia.

B. Opponents of the Death Penalty

Opponents of the death penalty should also approve a switch to firing squads for one primary reason: It brings back into the open the conversation of whether we, as a “civilized” nation, should retain our use of capital punishment. The recent botched execution


of Clayton Lockett in Oklahoma serves as a primer for this position.158

On April 29, 2014, twelve reporters arrived at the Oklahoma State Penitentiary to watch Lockett die by lethal injection.159 His execution drew considerable interest from the media because it was the first time that Oklahoma used midazolam in its protocol, and the secrecy surrounding the drug had caused significant debate in the courts.160 The reporters, along with the other witnesses, were lead into a viewing room where they waited for the curtains separating them from the execution chamber to rise.161 The execution was delayed twenty-three minutes due to the technician's difficulties in finding a usable vein to establish the IV line.162 But the blinds were lifted at 6:23 PM and the execution began.163

The first drug, midazolam, was administered and, ten minutes later, Lockett was declared unconscious.164 Three minutes later, Lockett's foot began to kick.165 "Then his body bucked, he clenched his jaw and began rolling his head from side to side, trying to lift his head up."166 He was overheard saying "Something is wrong," and "The drugs aren't working."167 According to witnesses, he looked as though he was in pain and, after a prison official checked the IV line, the blinds were again lowered.168 They were never raised.169 The reporters were ordered to leave and it was only after they returned to the media center on the penitentiary's grounds that they learned Lockett had suffered a heart attack and died.

Much like the execution, the blinds were lifted in the States with regard for executing people out of sight, in a handful of states, if it is botched or if it is not. [The] harshness about the harshness about the blinds."172

Opponents of archaic forms of killings out of the eye, in small rooms, of a handful of souls, if it is botched or if it is not. [The] harshness about the harshness about the blinds."

170. Id. An official failed to properly insert finding that a lack of success point. An anesthetize midazolam in Lockett's person unconscious.- Warner, 574 U.S. at —

171. Berman, Oklahoma Execution, supra note 133.

172. Gibson & Lain, juridi-co-political sovereignty is ritual, great rituals in which the superiority is must be an emphasis, this superiority is the sovereign beats, Foucault, supra note 171.}

173. As society has be-
grounds that they were informed that Lockett had succumbed to a heart attack at 7:06 PM.

Much like the reporters who witnessed Lockett’s botched execution, the blinds have been lowered on the citizens of the United States with regard to capital punishment. “[T]he actual act of executing people occurs far away from the population and the public eye, in small rooms and guarded facilities and witnessed by only a handful of souls.” An execution makes national headlines only if it is botched or if it is carried out by a method other than lethal injection. “[T]he public can no longer afford to remain in the dark about the harsh reality of capital punishment. It’s time to open the blinds.”

Opponents of the death penalty should seek a return to more archaic forms of execution. It will bring these state-sanctioned killings out of the “death houses” and into public view. Only when people have the opportunity to see death and the blood of the condemned will they make an informed decision as to whether the practice should continue. Opponents of the death penalty should stop focusing on how the method of execution impacts the inmates, and should instead focus on how the prisoner’s death impacts society. Instead of fighting for a more “visually palatable”

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170. Id. An official investigation ultimately concluded that the execution team had failed to properly insert an IV line, finding that a large quantity of the drugs that should have been introduced into Lockett’s bloodstream had instead pooled in the tissue near the IV access point. An autopsy did determine, however, that the concentration of midazolam in Lockett’s blood was higher than necessary to render an average person unconscious.


171. Berman, Oklahoma Execution, supra note 133.

172. Gibson & Lain, supra note 8. Michel Foucault noted that executions hold a juridico-political function. It is a ceremonial by which a momentarily injured sovereignty is re-constituted. It restores that sovereignty by manifesting it at its most spectacular. The public execution . . . belongs to a whole series of great rituals in which power is eclipsed and restored (coronation, entry of the king into a conquered city, the submission of rebellious subjects). . . . [T]here must be an emphatic affirmation of power and its intrinsic superiority. And this superiority is not simply that of right, but that of the physical strength of the sovereign beating down upon the body of his adversary and mastering it. Foucault, supra note 155, at 48-49.

173. As society has become more “civilized,” executions have moved away from the public forum to “cool, bureaucratic operation[s],” taking place in the back rooms of death houses. Sarat, Gruesome Spectacles, supra note 11, at 9. This transition has desensitized the public, which continues to “[s]upport[] the death penalty in theory, but is largely unaware of the unholy mess it has become in practice.” Gibson & Lain, supra note 8.
method of death,\textsuperscript{174} opponents of the death penalty should seek an execution method that will force the populace into discourse over the continued utility of capital punishment.

It is evident the courts are not going to end capital punishment, nor should they.\textsuperscript{175} Throughout its long and relatively sparse history, the Court time and again has reaffirmed both the right of states to execute convicted murderers and the states’ ability to use practically any method they see fit.\textsuperscript{176} Opponents of the death penalty should therefore cease making their arguments in courthouses, and instead should move to the court of public opinion.

Virginia’s implementation of death by firing squad would do just that and, given its historic ties to capital punishment, could help shift the tide in the national debate. The populace, whose majority still favors the death penalty, would see the blood of the condemned and be able to trace it back to their own hands. Firing squads satisfy the driving force behind the evolution of execution methods—the desire for a quick and relatively painless death—while removing the false veil of peace that accompanies lethal injection. Executions were never meant to be peaceful, and attempts to make them so through lethal injection offend both their original intent and the humanity of the condemned.\textsuperscript{177}

CONCLUSION

Based on precedent, it is unlikely the courts will deem any method of execution to violate the Eighth Amendment, though the Court’s decision in \textit{Glossip v. Gross} may change that. This comment suggests a viable alternative in firing squads to the increasingly problematic and dangerous method of lethal injection.

\begin{footnotesize}
\begin{enumerate}
\item 174. \textit{Sarat, Gruesome Spectacles, supra note 11, at 118} (quoting Deborah Denno, \textit{The Future of Execution Methods, in The Future of America’s Death Penalty: An Agenda for the Next Generation of Capital Punishment Research} 490 (Charles S. Lanier et al. eds., 2009)).
\item 176. \textit{Baze}, 553 U.S. at 61.
\item 177. \textit{See Wood v. Ryan}, 759 F.3d 1076, 1102 (9th Cir. 2014) (Kozinski, J., dissenting from the denial of rehearing en banc).
\end{enumerate}
\end{footnotesize}
Across the country, citizens on both sides of the debate should advocate for this change based on their desire to either perpetuate or abolish capital punishment. Something must be done to end the stalemate in which the states currently find themselves and resolve this critical issue. This is an opportunity for Virginia to serve as a leader in the national debate, and the most efficient and constitutionally viable means for it to do so is by replacing lethal injection with death by firing squad as its primary method for execution.

P. Thomas DiStanislao, III *