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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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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.\textsuperscript{5} Wood died during the hearings on those filings.\textsuperscript{6} 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.\textsuperscript{7}

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.\textsuperscript{8} These protocols have featured the use of substitute drugs, with no testing to support their effectiveness in executions prior to their use.\textsuperscript{9} 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.\textsuperscript{10}

Executions are considered botched when “there is a breakdown in, or departure from, the ‘protocol’ for a particular method of execution.”\textsuperscript{11} Reasonable expectations and a state’s promoted effectiveness for a particular method of execution form this “protocol.”\textsuperscript{12} 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.”\textsuperscript{13} In addition to Wood’s prolonged death

\textsuperscript{5} Sanburn, supra note 3.
\textsuperscript{6} Id.
\textsuperscript{7} Crair, supra note 1.
\textsuperscript{8} James Gibson & Corinna Barrett Lain, Gibson and Lain: Capital Punishment, Illuminated, RICH. TIMES-DISPATCH (May 7, 2014, 10:30 PM), http://www.richmond.com/opinion/their-opinion/guest-columnists/article_0d03f6d-43d7-577b-b20b-b963129d2c7.html; see infra notes 71–73 and accompanying text.
\textsuperscript{9} Gibson & Lain, supra note 8.
\textsuperscript{10} See infra note 67.
\textsuperscript{11} AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA’S DEATH PENALTY 5 (2014) [hereinafter SARAT, GRUESOME SPECTACLES].
\textsuperscript{12} Id.
\textsuperscript{13} Id. (quoting Marián J. Berg & Michael L. Radelet, On Botched Executions, in CAPITAL PUNISHMENT: STRATEGIES FOR ABOLITION 143, 144 (Peter Hodgkinson & William A. Schabas eds., 2004)) (internal quotation marks omitted).
in Arizona, there were botched executions in Oklahoma\textsuperscript{14} and Ohio\textsuperscript{15} in 2014, during what was called “the worst year in the history of lethal injection.”\textsuperscript{16} 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.\textsuperscript{17} 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,\textsuperscript{18} many states are now contemplating alternative methods of execution.\textsuperscript{19}

Virginia has a long history of enforcing capital punishment, dating back to 1608.\textsuperscript{20} Though the practice has declined in recent years, Virginia has executed more inmates than any other state.\textsuperscript{21}

\begin{footnotesize}
\begin{enumerate}
\item 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-who-felt-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-burning-says-oklahoma-death-row-inmate-during-execution/. 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.
\item 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 DEP’T 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-execution-drugs/index.html (last updated Jan. 9, 2015).
\item id.
\item See id.
\item See id.
\item See infra note 129.
\item Virginia, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/virginia-1
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The Commonwealth’s current practice allows prisoners to choose between electrocution and lethal injection, with the latter serving as the default. 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.

This comment recommends that Virginia cease its use of lethal injection because of its high botch rates and growing impracticability 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 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.

(last visited Feb. 27, 2015).

22. VA. CODE. ANN. § 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. VA. CONST. art. I, § 9.

23. Should Virginia implement a new system for executions, it is likely that other states would follow. See Deborah W. Denno, Lethal Injection Chaos Post-Baze, 102 GEO. L.J. 1381, 1357–58 (2014) ("For over a century, states have closely followed the execution strategies of other states.").


27. Id. at 166 (citing Wilkins v. Robison v. California, 352 U.S. 582, 590-91 (1957)).

28. Id. at 166 (citing Wilkins v. Robison v. California, 352 U.S. 582, 590-91 (1957)).


30. The heated debate over whether lethal injection, which provision the Cruel and Unusual Punishment Clause, which states shall not be inflicted in the manner prescribed by law. The Court has interpreted this to mean that death row executions should be performed in a manner that is intended to cause pain and suffering.

31. See, e.g., Dabney v. Maryland, 564 U.S. 196, 207 (2011) ("The Eighth Amendment’s ‘proportionality principle’ is satisfied when the sentence imposed meets the moderate and rational limits that the Constitution requires.").
prisoners to choose from, the latter serving five years. Virginia is in a debate on whether to enforce capital punishment.

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.\footnote{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.\footnote{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.”\footnote{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.”\footnote{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.\footnote{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.\footnote{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.\footnote{36} Chief

\footnote{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.}

\footnote{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.}

\footnote{32. 136 U.S. at 447.}

\footnote{33. Baze, 553 U.S. at 41.}

\footnote{34. Id. at 44 (noting that at least thirty states use the three-drug combination); Dennovo, supra note 23, at 135; 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).}

\footnote{35. Baze, 553 U.S. at 49.}

\footnote{36. Id. (citing Gregg v. Georgia, 428 U.S. 153, 177 (1976) (joint opinion)). Gregg reinvigorated the use of capital punishment by the states, which had been put on hold by the Supreme Court’s decision in Furman v. Georgia, 408 U.S. 238, 259–40 (1972). The Court’s decision in Gregg in 1976 reversed the moratorium on the death penalty imposed by the Supreme Court in 1972.}

\footnote{37. Id. at 49–50 (quoting Justice Harlan’s concurring opinion).}

\footnote{38. Id. at 52 (quoting Justice Harlan’s concurring opinion).}

\footnote{39. Id. at 357. The Court’s decision in Gregg correctly established a standard for the constitutionality of capital punishment which was long overdue. See 1977. Christopher Q. Christopher, Botched Executions and Its Effects on Public Opinion, 96 COLUM. L. REV. 335, 357 (2002–03).}

\footnote{40. Baze, 553 U.S. at 41.}

\footnote{41. Id. at 53. Justice Breyer argued that inmates should be able to challenge and object to the execution methods used by state officials. See id. at 53 (Breyer, J., dissenting).}

\footnote{42. Id. at 53. Justice Breyer wrote that the Court should, in every case, determine whether the execution will be painfull. Id. at 53 (Breyer, J., dissenting).}

\footnote{43. Id. at 53. Justice Breyer wrote that the Court should, in every case, determine whether the execution will be painfull. Id. at 53 (Breyer, J., dissenting).}
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.

preme 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 84 (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

43. SARAT, GRUESOME SPECTACLES, supra note 11, at 121.
44. Id. Baze did not directly overrule Hill v. McDonough. See 547 U.S. 573 (2006) (affirming that a petitioner was not required to plead an “alternative, authorized method of execution”).
45. Crair, supra note 1.
46. Baze, 553 U.S. at 71 (Stevens, J., concurring) (“The question whether a similar three-drug protocol may be used in other States remains open, and may well be answered differently in a future case on the basis of a more complete record.”).
47. Id. at 71, 77.
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lethal injection itself does not qualify as cruel and unusual pun-
ishment, 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, wheth-
er 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.49 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.50 The driving force behind these evolving iterations has been the desire of the populace to extinguish life in a more humane fashion.51

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 1977.52 Prior to those developments, hanging served as the primary method of execution in the United States and during British colonization,53 but has since been rendered all but extinct.54 Death by firing squad was also used throughout the history of the United States, and as recently as 2010.55 As the technology of death has changed, apart

547 U.S. 573 (2006) (af-
re, authorized method of

50. Id.
51. SARAT, GRUESOME 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, GRUESOME 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%.

With the new standard set forth in Baze, 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. 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. 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.


test of the medical profession." It was not until almost one hundred years later that lethal injection was officially implemented as a method of execution in the United States. Its resurgence in popularity centered on a series of horrifyingly botched electrocutions in the preceding years as well as similar concerns about using lethal gas in California.

In 1977, an Oklahoma legislator asked Dr. Jay Chapman, the state's chief medical examiner, to create a lethal injection procedure despite his admitted lack of expertise in fulfilling such a request. Oklahoma authorized Dr. Chapman's protocol and Texas followed suit, adopting the same one the next day. Within a year of the first lethal injection, thirteen states also implemented the new method. By 2009, all death-penalty states switched to lethal injection as either their principal or optional method of execution, and almost all of them using a protocol consisting of the same three drugs that Dr. Chapman recommended in 1977.
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 approval of the death penalty.

Since 2009, deaths have been postponed while states try to fulfill their manufacturing needs. Some states have had to use untested drugs in their executions; these compounded drugs in the absence of an approved drug. In this way, states have obtained help internalizing the production of lethal injection drugs that may not be available elsewhere.

These compounded drugs come about for a variety of reasons. First, there is a reluctance to use compounds that are expensive, especially in light of the new restrictions on the export of sodium thiopental for use in executions. Second, compounded drugs are cheaper than the more expensive FDA-approved drugs. Compounded drugs are also a safer option, according to pharmacists who order them under the direction of medical professionals. Compounded drugs are also subject to regulatory oversight, which helps prevent errors from occurring in the production of the drugs.

72. Dominic Casciaro, "The Disturbing Business of Making Death Penalty Drugs," The Daily News (Nov. 29, 2010), http://www.nycitybiznews.com/index.php?option=com_content&view=article&id=1275%3A-the-disturbing-business-of-making-death-penalty-drugs&catid=38%3Abiz-news&Itemid=531 (discussing the difficulty of finding help internally in the production of lethal injection drugs and the lack of regulatory oversight for compounded drugs); id. (discussing the efforts of the British government to restrict the export of sodium thiopental for use in executions); id. (discussing the Italian government's attempts to withdraw its approval of the death penalty due to the lack of compounded drugs available in Italy); id. (discussing the efforts of Hospira Inc. to resume production of sodium thiopental at its plant in Italy).

73. Denno, supra note 23, at 1360-61.
government threatened legal action. Thus, "Europe's prohibition of the death penalty...become 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. 11, 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. 79  
Finally, there have been allegations of “subpar conditions and contaminated drugs” in compounding pharmacies. 80  

Just a few months after the Supreme Court decided Baze, the Fourth Circuit ruled on an appeal from Virginia challenging the Commonwealth’s method for lethal injection. 81 At the time, Virginia’s protocol mirrored Kentucky’s in its use of sodium thiopental, pancuronium bromide, and potassium chloride. 82 The court found the protocol virtually indistinguishable from the one employed in Baze and, thus, held it to be constitutional. 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. 84 In February 2014, the General Assembly authorized midazolam as an alternative first drug due to increasing shortages of pentobarbital. 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. 86

79. Denno, supra note 23, at 1368.  
80. 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. See id.  
82. Id. at 294; see supra note 70 and accompanying text.  
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.”).  
86. Execution List 2014, supra note 2; 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.

87. Denno, supra note 23, at 1350.
88. Id.
89. According to expert commentary, midazolam "could produce a slow, lingering death with the inmate in a state of confusion, disorientation, and intense psychological anguish and torment." Id. at 1357; see also Cooey v. Strickland, No. 2:04-cv-1156, 2009 U.S. Dist. LEXIS 122025, at *224–26 (S.D. Ohio Dec. 7, 2009) (testimony of Dr. Mark Heath) ([I]n the event that the state employs [midazolam and hydromorphone], it is ‘inevitable’ that one or more inmates will experience a distasteful, disgusting spectacle of an execution," in part because "it will not produce an immediate or fast transition to unconsciousness.").
90. See supra note 84 and accompanying text.
92. See supra notes 1–7, 14–15 and accompanying text.
93. See Execution List 2014, supra note 2 (noting that of the 35 executions in 2014, 4, or 11.4%, were botched).
94. SARAT, GRUESOME SPECTACLES BOTCHED, supra note 11, at app. A.
95. Id.
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. Further, pentobarbital, despite being an anesthetic, is not an analgesic and does not reduce pain. Instead, like other barbiturates, "it is antalgesic, that is, it tends to exaggerate or worsen pain." 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 failing the correct dosing, execution"

B. Recent Developments

Oklahoma executed using the same three-drug protocol as Virginia to his death, a sharp contrast to the execution in a 5-4 Supreme Court ruling in Glossip v. Oklahoma, where Justice Sotomayor, joined by Justice Breyer, ruled that no prisoner should be executed unless "his execution will not serve as a warning to others". When executioners administered the drugs, he said, "My body is twitching," referring to his neck about three inches. "His legs and the twitching lasted about two minutes."

On January 23, 2015, in Glossip v. Gross, the US Supreme Court lifted the stay of the execution of Oklahoma death row inmate Kelly Gissendaner, who was set to execute Kelly Gissendaner, who was the only woman on Georgia's death row. On December 16, 2015, Justice Sotomayor, joined by Justice Breyer, ruled in the case of Glossip v. Gross, where the Supreme Court granted the application for stay. The case involves the execution of Kelly Gissendaner, who is alleged to have been the only woman on Georgia's death row. The case involves issues related to the continued use of midazolam in executions.

97. See Crair, supra note 1.
98. See Bucklew v. Lombardi, 565 F. App'x 562, 567 (8th Cir. 2014) (testimony of Dr. Joel Zivot).
99. See id.
101. See Heath, supra note 91 and accompanying text.
102. Warner v. Gross, 574 U.S. __ (2015) (Sotomayor, J., dissenting from denial on application for stay). This appears to have occurred in the execution of Wood who was given 750 milligrams of midazolam before he died. See supra note 96.
ure ripe for challenge. Pentobarbital is the cornerstone of the three-drug protocol, and theoretically, enacting the effects of paral-
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The drug is weaker “requires the co-
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It paints a similar scene to Michael
See supra note 14.
108. Wolf & Zoroya, supra note 103. A few weeks later on March 2, 2015, Georgia 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.

B. Recent Developments

Oklahoma executed Charles Warner on January 15, 2015, using the same three-drug protocol employed by Virginia. 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. 105 Midazolam’s troubled history worried Justice So-
tomayor, who felt that the Court need not give deference to the District Court’s evidentiary analysis affirming the drug’s usage. 106 When executioners began pushing midazolam into Warner’s IV, he said, “My body is on fire,” but showed no obvious signs of dis-
tress. 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 breath-
ing.” 108

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
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, of public opinion.

Should the Justices narrow their inquiry to the current mode of execution or more broadly consider whether lethal injection would have mass appeal as an execution method? Both options have potential implications for the future of public opinion on the subject.

Regardless of the Court’s decision, it is likely that litigation will continue or to resulting protocols for lethal injection. This is why it is possible that a more modern alternative method of execution is the most favorable option.

C. A Brief History of Capital Punishment

On February 26, 2015, the Utah State Prison was set to obtain the lethally ill-fated firearm as a potential method of execution. A firing squad is the last state method of execution since before 2004. At present, Utah is one of the states considering the possibility of a firing squad, with a proposal introduced by Paul Ray, a key supporter of the option. The proposal has faced criticism for its potential to cause the inmate to die slowly and with pain. The firing squad method is part of a broader debate on the efficacy and morality of capital punishment in contemporary society.

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).
the condemned inmate because the lethal injection protocol has been in the past seven years. Justice Sotomayor's vote in the Glossip case, where she dissented, suggests the Court's decision will have significant implications.

In determining the constitutionality of lethal injection in the District Court's evidentiary hearing, the Eighth Amendment's requirement of a painless execution, raises to the Court. Any attempt to avoid Breyer's warning "[o]ne must be on the lookout for the other part of the Court's decision," is to be on an awareness of the Court's judgment. If the Court finds the use of midazolam's use in executions, the Court could either respond narrowly by prohibiting the drug's place in lethal injection protocols or more broadly by banning all untested drugs. Either result would have massive ramifications for Virginia, and the country as a whole. Both outcomes would demand a strong legislative response, as several states—including Florida, Oklahoma, Alabama, and Virginia—would be left scrambling to come up with new protocols. This would be the first time in this country's history that a method of execution was found unconstitutional and it could either lead to a resurgence in the death penalty's popularity or it could be the end to the practice in the United States.

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 midazolam. This is why the Commonwealth must start evaluating alternative methods of execution under the Baze formulation, with the most favorable being firing squads.

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 reviving 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. Under current Utah law, the firing squad is only available for inmates sentenced to death before 2004. At present, four of the nine inmates on Utah's death row are scheduled for execution by firing squad. See supra note 42 and accompanying text.

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.\textsuperscript{117} 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.\textsuperscript{118} 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.\textsuperscript{119} 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.\textsuperscript{120} 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.\textsuperscript{121}

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.\textsuperscript{122} 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, twitching of the body.

This account, along with firing squad executions. Though used firing squad Utah. Hence, using the implementer.

The modern fired by the execution.\textsuperscript{124} Guidelin sent, and the exh can view the execution is used for both both a gurney and.

The chair is set. The opposite w covered opening their high-po bond to the ch mate’s heart an team leader collects the drip

Death by firing distinguised in minute the initial pain fell in the chest.\textsuperscript{128}

Virginia has a and given the rel from lethal injection.

\begin{verbatim}
\textsuperscript{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_1c77faca-32f5-5f06-8569-34ba66b0572d.html. This resolution is less significant than Utah’s bill as there are currently no inmates on death row in Wyoming. Id.
\textsuperscript{121} See supra text accompanying notes 1-7.
\textsuperscript{122} Cutler, supra note 36, at 344.
\end{verbatim}
without a moan or cry or a tremor of the body except for a convulsive twitching of the fingers of his left hand. 123

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. 124 Guidelines allow nine members of the media to be present, and why lawmakers compare John Wood III. 121

in the Mountain State, along with several others, during an immigrant

The chair is set against one wall, surrounded by absorbent sandbags. The opposite wall, around twenty feet away, contains a canvas-covered opening through which the firing-squad members penetrate their high-powered rifles. The condemned is led into the room and bound to the chair with thick leather straps. A doctor locates the inmate’s heart and pins a circular white cloth target to the chest. The team leader counts the cadence. Five shots ring out as one. A pan collects the dripping blood. A doctor pronounces death. 127

Death by firing squad is a quick process, with most lives extinguished in minutes, if not seconds; and, though it may be bloody, the initial pain felt by the victim is “comparable to being punched in the chest.” 128

Virginia has a history of executing inmates by firing squad, 129 and given the relative ease with which it could transition away from lethal injection, this method certainly meets the Court’s re-

123. Id. at 345.
124. UTAH CODE ANN. r. § 77-19-10(3) (2014). Those sentenced after 2004 are executed by lethal injection, which also serves as the state’s default method. Id.
125. Cutler, supra note 36, at 364.
126. Id.
127. Id.
128. Id. at 413.
129. The first execution in the English colonies of North America was that of George Kendall, an original councillor of the Virginia colony, who was killed by firing squad in 1608 for plotting to betray the colony to Spain. Id. at 337. Since Kendall’s death, American firing squads have extended 143 inmates. Id.
quirement 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.

If firing squad execution is both more reliable and less likely to result in botched executions, Virginia could realistically consider adopting firing squad as its default method of execution. If adopting firing squad is unsuccessful, it could explore other methods of execution, such as lethal injection, although it could be more difficult to procure the drugs and properly administer them.

III. POLICY

If firing squad execution is adopted as the default method of execution, it do so in order to improve the reliability of its current procedure. Though support for the death penalty is diminishing, a majority of the country still supported it in 2013. The inmate who was improperly restrained in the chair, he critiqued the current procedure.

130. See infra notes 153-55 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 unlike- ying volunteers to ent of Corrections e as marksmen for erroneous news re-ry unit from Fort criate." There is in the Common- rections' rotating 7e as witnesses for relation between same individuals given the fact that it history, it is un- is issue.
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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.”^141 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.142

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.”^143 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.144 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. Deterrence: 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).
attacks on its con-
terprise is flawed.

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moments." 141

141. See Cutler, supra note 36, at 360.


143. Double Murderer's Botched Execution, supra note 1. Similarly, a mother of a murder 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 some little sense of pain to it." AUSTIN SARAT, WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION 60 (2001).

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. 145

By losing the retributive nature inherent in capital punishment, lethal injection does little to provide closure, even during a botched execution. 146 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?" 147

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." 148 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. 149 As Justice Scalia wrote, death-by-injection is "de-
sirable" and "enviable" when compared to the brutal crimes for which the condemned were sentenced.\footnote{150. \textit{Id.} at 1142-43.}

There is also a possibility that the use of firing squads would reinvigorate the other, long defunct, justification for capital punishment: deterrence.\footnote{151. See \textit{supra} note 144.} 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.\footnote{152. It would alleviate the necessity of a sterile medical environment for executions and, as reports of 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, \textit{Eyewitness: Ronnie Lee Gardner Execution}, \textit{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.}

In the past, executions were always public affairs because "[w]ithout a public audience[,] state killing would have been meaningless."\footnote{153. SARAT, \textit{GRUESOME SPECTACLES}, \textit{supra} note 11, at 8-9.} 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."\footnote{154. \textit{Id.} at 8.} 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."\footnote{155. MICHEL FOUCAULT, \textit{DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON} 58 (1977).} 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, retention of the death penalty as a function of the tools of death is another matter. As arguments questioning the tools of death are put forth, the Commonwealth should argue for the quality of its execution. One cannot overlook the history of executions in other states across the nation.

Since the drug to execute one prisoner was depleted, and has executions slowed to a trickle, as a matter of public confidence, the Commonwealth can argue that of the death penalty, it is the execution that they should虚拟. As it is said that arise with the carrying out of an element of capital punishment, there is little reason to doubt that capital punishment.

\begin{itemize}
  \item \textbf{B. Opponents of Firing Squads for Capital Punishment.}
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Opponents of the use of firing squads for capital punishment have argued that the conversation should be about the death penalty and not our use of capital punishment.

\begin{itemize}
\end{itemize}
brutal crimes for using the firing squad would have been seen as "designed to be visible to all."154 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.\textsuperscript{158}

On April 29, 2014, twelve reporters arrived at the Oklahoma State Penitentiary to watch Lockett die by lethal injection.\textsuperscript{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.\textsuperscript{160} The reporters, along with the other witnesses, were led into a viewing room where they waited for the curtains separating them from the execution chamber to rise.\textsuperscript{161} The execution was delayed twenty-three minutes due to the technician's difficulties in finding a usable vein to establish the IV line.\textsuperscript{162} But the blinds were lifted at 6:23 PM and the execution began.\textsuperscript{163}

The first drug, midazolam, was administered and, ten minutes later, Lockett was declared unconscious.\textsuperscript{164} Three minutes later, Lockett's foot began to kick.\textsuperscript{165} "Then his body bucked, he clenched his jaw and began rolling his head from side to side, trying to lift his head up."\textsuperscript{166} He was overheard saying "Something is wrong," and "The drugs aren't working."\textsuperscript{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.\textsuperscript{168} They were never raised.\textsuperscript{169} The reporters were ordered to leave and it was only after they returned to the media center on the penitentiary's

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\textsuperscript{158} See supra note 14.

\textsuperscript{159} See Berman, Oklahoma Execution, supra note 133. The reporters were searched before being handed spiral stenographer's notebooks and pens. Id. One reporter was told that she was not allowed to bring anything into the viewing room, not even her watch. Id. Oklahoma convicted and sentenced Lockett to death for murdering a teenage woman (whom he also sexually assaulted) by shooting her twice and burying her alive. Id.; Lockett v. State, 53 P.3d 418, 421-22 (Okla. Crim. App. 2002).

\textsuperscript{160} See Berman, Oklahoma Execution, supra note 133.

\textsuperscript{161} See id.

\textsuperscript{162} Id.

\textsuperscript{163} Id.

\textsuperscript{164} Id.

\textsuperscript{165} Id.

\textsuperscript{166} Id.


\textsuperscript{168} Berman, Oklahoma Execution, supra note 133.

\textsuperscript{169} Id.
grounds that they were informed that Lockett had succumbed to a heart attack at 7:06 PM.\footnote{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.}

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.”\footnote{Berman, \textit{Oklahoma Execution}, supra note 133.} 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.”\footnote{Gibson \& Lain, supra note 8.}

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.\footnote{Sarat, \textit{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.} 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”
method of death, 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. 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. 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.

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 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.

174. SARAT, GRUESOME SPECTACLES, supra note 11, at 118 (quoting Deborah Denno, 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)).


176. Baze, 553 U.S. at 61.

177. See Wood v. Ryan, 759 F.3d 1076, 1102 (9th Cir. 2014) (Kozinski, J., dissenting from the denial of rehearing en banc).
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.

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