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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.<sup>1</sup> Executioners began injecting lethal drugs—midazolam (a sedative) and hydromorphone<sup>2</sup>—into his blood stream at 1:57 PM and finally pronounced him dead at 3:49 PM, nearly two hours later.<sup>3</sup> 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.<sup>4</sup> They argued he was still alive and requested an order to resuscitate him as he lay in the

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1. Ben Crair, *2014 Is Already the Worst Year in the History of Lethal Injection: Another Day, Another Problematic Execution*, NEW REPUBLIC (July 24, 2014), <http://www.newrepublic.com/article/118833/2014-botched-executions-worst-year-lethal-injection-history>. Arizona convicted and sentenced Wood to death in 1991 for the murder of Debbie and Gene Dietz in cold blood. *Double Murderer's Botched Execution Prompts Arizona Gov to Order Review*, FOX NEWS (July 24, 2014), <http://www.foxnews.com/us/2014/07/24/execution-joseph-rudolph-wood-arizona-inmate-takes-2-hours> [hereinafter *Double Murderer's Botched Execution*].

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).

3. Crair, *supra* note 1. It typically takes inmates between ten and fifteen minutes to succumb to lethal injection. Josh Sanburn, *Inside the Efforts to Halt Arizona's Two-Hour Execution of Joseph Wood*, TIME (July 24, 2014), <http://time.com/3026985/joseph-wood-arizona-lethal-injection-botched/>.

4. *Double Murderer's Botched Execution*, *supra* note 1; Sanburn, *supra* note 3.

death chamber.<sup>5</sup> Wood died during the hearings on those filings.<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup> These protocols have featured the use of substitute drugs, with no testing to support their effectiveness in executions prior to their use.<sup>9</sup> 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.<sup>10</sup>

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

5. Sanburn, *supra* note 3.

6. *Id.*

7. Crair, *supra* note 1.

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\\_0d03fc6d-43d7-577b-b20b-b96f3129d2c7.html](http://www.richmond.com/opinion/their-opinion/guest-columnists/article_0d03fc6d-43d7-577b-b20b-b96f3129d2c7.html); see *infra* notes 71–73 and accompanying text.

9. Gibson & Lain, *supra* note 8.

10. See *infra* note 67.

11. AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA’S DEATH PENALTY 5 (2014) [hereinafter SARAT, GRUESOME SPECTACLES].

12. *Id.*

13. *Id.* (quoting Marian 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, then Ohio<sup>15</sup> in 2014, due to the history of lethal injection and the practice of lethal injection procedures. In establishing sufficient access, all of 2014. After the drugs began to run out, the state itself, and not the courts, took the light of these recent developments. Previously administered, the practice of lethal injection is an alternative

Virginia has a long history of lethal injection, dating back to 1609. In 1981, after 17 years, Virginia had

14. On January 9, 2014, a three-drug protocol that included the use of midazolam was used during the execution of a prisoner; Charlotte Alter, *Oklahoma Executes Prisoner with Lethal Injection*, *TIME* (Jan. 10, 2014), <http://www.foxnews.com/story/2014/01/10/oklahoma-executes-prisoner-with-lethal-injection>; “felt-body-burning-executioner,” *TIME* (Jan. 10, 2014), <http://www.foxnews.com/story/2014/01/10/oklahoma-executes-prisoner-with-lethal-injection>; “Body Burning,” *SAYS OKLAHOMA* (Jan. 10, 2014), <http://www.foxnews.com/story/2014/01/10/oklahoma-executes-prisoner-with-lethal-injection>; “death-row-inmate-during-execution,” *TIME* (Jan. 10, 2014), <http://www.foxnews.com/story/2014/01/10/oklahoma-executes-prisoner-with-lethal-injection>; “drugs that included the use of midazolam,” *TIME* (Jan. 10, 2014), <http://www.foxnews.com/story/2014/01/10/oklahoma-executes-prisoner-with-lethal-injection>; Crair, *supra* note 1. The state’s efforts to call off the dogs were in vain.

15. Dennis McGuire, *McGuire v. Commonwealth of Virginia*, 426 U.S. 9 (1975). The three-drug protocol of midazolam was used during the execution of a prisoner on July 23. *Id.* It took McGuire 15 minutes to die. Crair, *supra* note 1. Ohio has since changed its protocol to include midazolam in favor of the use of sodium thiopental. CORRS., DRC 1361, at 9 (2014), <http://www.ohio.gov/ohioaction/communications/01-COM-11.pdf>; RICH. TIMES-DISPATCH (2015/01/08/us/ohio-executes-prisoner-with-lethal-injection).  
16. Crair, *supra* note 1.  
17. See *id.*

18. Mark Berman, *The Death Penalty: A History of Other Execution Methods*, *THE NEW YORK TIMES* (2014), <http://www.nytimes.com/2014/01/09/us/politics/the-death-penalty-a-history-of-other-execution-methods.html>; and other-execution-methods. The state’s lawmakers discussed the matter and returned to the age-old practice of lethal injection.

19. See *id.*

20. See *infra* note 125.

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in Arizona, there were botched executions in Oklahoma<sup>14</sup> and Ohio<sup>15</sup> in 2014, during what was called “the worst year in the history of lethal injection.”<sup>16</sup> 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.<sup>17</sup> 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,<sup>18</sup> many states are now contemplating alternative methods of execution.<sup>19</sup>

Virginia has a long history of enforcing capital punishment, dating back to 1608.<sup>20</sup> Though the practice has declined in recent years, Virginia has executed more inmates than any other state.<sup>21</sup>

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-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.*

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](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).

16. Crair, *supra* note 1.

17. *See id.*

18. Mark Berman, *The Recent History of States Contemplating Firing Squads and Other Execution Methods*, WASH. POST (May 22, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/05/22/the-recent-history-of-states-contemplating-firing-squads-and-other-execution-methods> [hereinafter Berman, *Recent History*] (noting that Virginia lawmakers discussed making the electric chair the default method and Missouri lawmakers returned to the age-old discussion of using gas chambers).

19. *See id.*

20. *See infra* note 129.

21. Virginia, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/virginia-1>

The Commonwealth's current practice allows prisoners to choose between electrocution and lethal injection, with the latter serving as the default.<sup>22</sup> 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.<sup>23</sup>

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. 1331, 1357-58 (2014) ("For over a century, states have closely followed the execution strategies of other states.").

The heated debate has its origin from the Eighth Amendment, which provides that the death penalty for homicides, does not violate the constitutional issue. It is subject to two principles of punishment to the Proportionality, and a guarantee "the absence of the offense and the punishment component prescriptive measure as having a broader Amendment's adoption forms of punishment fixation . . . disemboweling and public dissection no method of execution been found to violate

In *Wilkinson v. Utah*, the Court's decision to ever reach the holding the constitutionality of firing squads, opined that

24. U.S. CONST. amend. VIII, which provides that the Cruel and Unusual Punishment Clause does not violate the Eighth Amendment.

25. Roberta M. Hanft, *(Un)constitutionality of the Death Penalty*, 428 U.S. 156 (1975). The precedent strongly supports the view that the Eighth Amendment does not violate the Eighth Amendment.

26. *Gregg*, 428 U.S. at 156.

27. *Harding*, *supra* note 26, at 156.

28. *Id.* at 156 (citing *Wilkinson v. Utah*).

29. *Baze v. Rees*, 553 U.S. 382 (2008). The Court validated a state's chosen method of execution as not cruel and unusual punishment.

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## 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.<sup>24</sup> The Supreme Court has consistently held that the death penalty, when used as a punishment for certain homicides, does not violate this proscription.<sup>25</sup> 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.<sup>26</sup> 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."<sup>27</sup> 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."<sup>28</sup> But no method of execution employed in the United States has ever been found to violate the Eighth Amendment.<sup>29</sup>

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 squads, 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).

25. Roberta M. Harding, *The Gallows to the Gurney: Analyzing the (Un)constitutionality of the Methods of Execution*, 6 B.U. PUB. INT. L.J. 153, 153 (1996); see *Gregg v. Georgia*, 428 U.S. 153, 176 (1976) (joint opinion) (reasoning that history and precedent strongly support the argument that a sentence of death for the crime of murder does not violate the Eighth and Fourteenth Amendments).

26. *Gregg*, 428 U.S. at 173; Harding, *supra* note 25, at 156.

27. Harding, *supra* note 25, at 157.

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.<sup>30</sup>

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.<sup>31</sup> 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.”<sup>32</sup>

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.”<sup>33</sup> Kentucky, like the majority of death penalty states at the time, used a three-drug protocol of sodium thiopental, pancuronium bromide, and potassium chloride.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup> Chief

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); *Deno*, *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, Alito, opined that the method of execution—no matter how free of error in following the protocol—is not dispositive. The jurist reasoned that the Court’s Punishments Clause is “very likely” to give rise to “suffi-

Chief Justice Roberts suggested that although “effectively addressed” to qualify, the proposed method, and . . . pain.”<sup>41</sup> In attempting to address the challenges, the plurality argued that the practice as “objectively assessed” when referred to in the Constitution but lethal injection

preme Court’s decision in *Baze*, 238–40 (1972). The Court’s decision in *Baze*, 1977. Christopher Q. Chabot, *Botched Executions and the Eighth Amendment*, 335, 357 (2002–03). Gary B. Siskind, *Death and a Motel Clerk*, *Id.* Baze, 553 U.S. at 357. The following is a substantial media atten-

37. *Baze*, 553 U.S. at 41.

38. *Id.*

39. *Id.* at 49–50 (quoting *Baze*).

40. *Id.* at 52 (quoting *Baze*).

41. *Id.*

42. *Id.* at 53. Justice Roberts argued that inmates should not be deliberately designed to inflict pain. *Id.* at 94 (Thomas, J., dissenting). The Court would also uphold any method of execution that is constitutional. *See id.* at 52. The Court’s precedents; *see also* *Baze*, 553 U.S. at 78–86 (Stevens, J., dissenting). The Court’s decision is to the death penalty and not the death penalty itself. *Id.* at 107–13 (Breyer, J., dissenting). The Court’s decision is to the death penalty itself, not the death penalty itself, but the potential risk of pain).

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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."<sup>37</sup> But that risk of error is not dispositive for the constitutionality of the method.<sup>38</sup> 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."<sup>39</sup>

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'"<sup>40</sup> and, to qualify, the proposed procedure "must be feasible, readily implemented, and . . . significantly reduce a substantial risk of severe pain."<sup>41</sup> 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.<sup>42</sup>

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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.*

39. *Id.* at 49–50 (quoting *Helling v. McKinney*, 509 U.S. 25, 33, 34–35 (1993)).

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 is 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.<sup>43</sup> Additionally, the inmate must provide a readily implemented alternative that would significantly reduce a substantial risk of pain.<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup>

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 "modi[fied] virtually any aspect of their lethal injection procedures with a frequency that is unprecedented among execution methods in this country's history."<sup>48</sup> 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.

48. Denno, *supra* note 23, at 1335; see also *State by State Lethal Injection*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/state-lethal-injection> (last visited Feb. 27, 2015) [hereinafter *State by State Lethal Injection*] (outlining multiple changes in lethal injection protocols throughout the country since 2008).

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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.<sup>49</sup> 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.<sup>50</sup> The driving force behind these evolving iterations has been the desire of the populace to extinguish life in a more humane fashion.<sup>51</sup>

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.<sup>52</sup> Prior to those developments, hanging served as the primary method of execution in the United States and during British colonization,<sup>53</sup> but has since been rendered all but extinct.<sup>54</sup> Death by firing squad was also used throughout the history of the United States, and as recently as 2010.<sup>55</sup> As the technology of death has changed, apart

49. *Methods of Execution: Authorized Methods by State*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/methods-execution?scid=8&did=245> (last visited Feb. 27, 2015) (listing the types of execution each state permits).

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%.<sup>56</sup>

With the new standard set forth in *Baze*,<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> 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](http://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.

58. *See Emmett v. Johnson*, 532 F.3d 291, 292–93 (4th Cir. 2008).

59. *See* N.Y. COMM’N ON CAP. PUNISHMENT, REPORT OF THE COMMISSION TO INVESTIGATE AND REPORT THE MOST HUMANE 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=9D07E5DC153FE432A25754C1A9679C94699FD7CF>; *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)).

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test of the medical profession."<sup>60</sup> It was not until almost one hundred years later that lethal injection was officially implemented as a method of execution in the United States.<sup>61</sup> Its resurgence in popularity centered on a series of horrifically botched electrocutions in the preceding years as well as similar concerns about using lethal gas in California.<sup>62</sup>

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.<sup>63</sup> Oklahoma authorized Dr. Chapman's protocol and Texas followed suit, adopting the same one the next day.<sup>64</sup> Within a year of the first lethal injection, thirteen states also implemented the new method.<sup>65</sup> By 2009, all death-penalty states switched to lethal injection as either their principal or optional method of execution,<sup>66</sup> and almost all of them using a protocol consisting of the same three drugs that Dr. Chapman recommended in 1977.<sup>67</sup>

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. Spitzka 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 1340; see also Josh Sanburn, *Creator of Lethal Injection Method: 'I Don't See Anything That Is More Human'*, TIME (May 15, 2014), <http://time.com/101143/lethal-injection-creator-jay-chapman-botched-executions/>. Dr. Chapman was asked to create the protocol—now sometimes referred to as "Chapman's Protocol"—shortly after the execution of Gary Gilmore (by firing squad). *Id.* He was not a licensed anesthesiologist and was only called after doctors of the Oklahoma Medical Association rejected the request, "cit[ing] their oath to save lives, not take them." Robbie Byrd, *Informal Talks Opened Door to Lethal Injection*, HUNTSVILLE ITEM (Oct. 3, 2007), [http://www.itemonline.com/news/local\\_news/informal-talks-opened-door-to-lethal-injection/article\\_c48882d1-39b2-5613-820c-eda28193d4e0.html](http://www.itemonline.com/news/local_news/informal-talks-opened-door-to-lethal-injection/article_c48882d1-39b2-5613-820c-eda28193d4e0.html).

64. SARAT, GRUESOME SPECTACLES, *supra* note 11, at 117.

65. Denno, *supra* note 23, at 1342.

66. See, e.g., OKLA. STAT. tit. 22, § 1014 (2014); TEX. CODE CRIM. PROC. ANN. art. 43.14 (West 2013); WYO. STAT. ANN. § 7-13-904 (2014).

67. 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.”<sup>68</sup> The modern death chamber resembled a “hospital room, and executioners [resembled] medical professionals.”<sup>69</sup> 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.<sup>70</sup>

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.”<sup>71</sup> 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

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the three-drug protocol because he found the firing squad to be inhumane, despite its comparable effect. *Id.* The guillotine was the official execution method in France from 1792 until its last public use in 1977. Lizzy Davies, *French Guillotine Exhibition Opens 33 Years After the Last Head Fell*, *GUARDIAN* (Mar. 16, 2010), <http://www.theguardian.com/world/2010/mar/16/guillotine-museum-france-paris>. One lawyer described the impact that witnessing public executions, especially one of his clients, by the guillotine had on him and how they turned him into a “hard-core opponent of the death penalty.” *Id.*

68. 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)); 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”).

69. SARAT, GRUESOME SPECTACLES, *supra* note 11, at 119.

70. *Id.* at 120.

71. Denno, *supra* note 23, at 1360–61.

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72. Dominic Casciaro, *UK Bans Lethal Injection Drugs*, *THE NEW YORK TIMES* (Nov. 29, 2010), <http://www.nytimes.com/2010/11/29/us/politics/uk-bans-lethal-injection-drugs.html>; Vincent J. Carosso, *Business Secretary Vince Cable Calls for a Ban on Lethal Injection Drugs*, *GOV.UK* (Apr. 14, 2011), <http://www.gov.uk/government/news/vince-cable-calls-for-a-ban-on-lethal-injection-drugs>; *Announcement: Lethal Injection Drugs to be Banned*, *REGARDING PENTOTHAL™ (SODIUM THIOPENTAL) IN THE UNITED STATES*, <http://phx.corporate-ir.net/phoenix.zhtml?c=111111&id=111111&rid=111111&path=/ir/press-releases/2010/04/14/lethal-injection-drugs-to-be-banned>.

73. Denno, *supra* note 23, at 1360–61 (discussing the case in Georgia).

74. Denno, *supra* note 23, at 1360–61.

75. *Id.*; Sack, *supra* note 23, at 1360–61 (discussing the case in Oklahoma, and Texas).

76. Denno, *supra* note 23, at 1360–61 (discussing the case in Oklahoma).

77. See Denno, *supra* note 23, at 1360–61.

78. *Compounding Pharmaceutical Products for Lethal Injection*, *JENNIFER GUDEMAN ET AL.*, *THE NEW YORK TIMES* (Mar. 2013).

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government threatened legal action.<sup>72</sup> Thus, "Europe's prohibition of the death penalty . . . bec[a]me an American problem."<sup>73</sup>

Since 2009, death penalty states have faced a harsh reality as they try to fulfill their existing protocols with diminishing supplies.<sup>74</sup> Some states have put executions on hold while the necessary drugs are in short supply.<sup>75</sup> 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.<sup>76</sup>

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.<sup>77</sup> Second, compounding pharmacies are not regulated by the FDA and, instead, fall under state regulation.<sup>78</sup> 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

72. Dominic Casciani, *US Lethal Injection Drug Faces UK Export Restrictions*, BBC NEWS (Nov. 29, 2010), <http://www.bbc.co.uk/news/uk-11865881> (outlining United Kingdom Business Secretary Vince Cable's decision to restrict the export of sodium thiopental, and quoting him as saying, "This move underlines this government's and my own personal moral opposition to the death penalty in all circumstances without impacting legitimate trade"); *Announcement: Government Bans Export of Lethal Injection Drugs to the US*, GOV.UK (Apr. 14, 2011), <https://www.gov.uk/government/news/government-bans-export-of-lethal-injection-drugs-to-the-us>; see also Press Release, Hospira, Inc., Hospira Statement Regarding Pentothal™ (Sodium Thiopental) Market Exit (Jan. 21, 2011), available at [http://phx.corporate-ir.net/phoenix.zhtml?c=175550&p=irol-newsArticle\\_print&ID=1518610](http://phx.corporate-ir.net/phoenix.zhtml?c=175550&p=irol-newsArticle_print&ID=1518610).

73. Denno, *supra* note 23, at 1361; see Kevin Sack, *Executions in Doubt in Fallout Over Drug*, N.Y. TIMES (Mar. 16, 2011), [http://www.nytimes.com/2011/03/17/us/17drugs.html?\\_r=0](http://www.nytimes.com/2011/03/17/us/17drugs.html?_r=0) (discussing the difficulties faced by a number of states including Texas, Illinois, and Georgia).

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).

76. Denno, *supra* note 23, at 1366; Adam B. Lerner, *Oklahoma Prepares to Use Controversial Execution Drug*, POLITICO (Jan. 15, 2015), <http://www.politico.com/story/2015/01/oklahoma-execution-death-penalty-114266.html>.

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

78. *Compounding Pharmacies and Lethal Injection*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/compounding-pharmacies> (last visited Feb. 24, 2015); see Jennifer Gudeman et al., *Potential Risks of Pharmacy Compounding*, 13 DRUGS R.D. 1, 1 (Mar. 2013).

malpractice insurance typically excludes coverage for claims involving medications and procedures not approved by the FDA.<sup>79</sup> Finally, there have been allegations of “subpar conditions and contaminated drugs” in compounding pharmacies.<sup>80</sup>

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.<sup>81</sup> At the time, Virginia’s protocol mirrored Kentucky’s in its use of sodium thiopental, pancuronium bromide, and potassium chloride.<sup>82</sup> The court found the protocol virtually indistinguishable from the one employed in *Baze* and, thus, held it to be constitutional.<sup>83</sup> 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.<sup>84</sup> In February 2014, the General Assembly authorized midazolam as an alternative first drug due to increasing shortages of pentobarbital.<sup>85</sup> 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.<sup>86</sup>

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.*

81. *Emmett v. Johnson*, 532 F.3d 291, 292 (4th Cir. 2008).

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.”).

84. Press Release, Va. Dep’t Corrs., Virginia Department of Corrections Adds Alternative Lethal Injection Chemical (May 9, 2011), available at [https://vadoc.virginia.gov/news/press-releases/11may09\\_pentobarbital.shtm](https://vadoc.virginia.gov/news/press-releases/11may09_pentobarbital.shtm); *State by State Lethal Injection*, *supra* note 48.

85. Press Release, Va. Dep’t Corrs., Virginia Department of Corrections Adds Alternative Lethal Injection Chemical (Feb. 20, 2014), available at [https://vadoc.virginia.gov/news/press-releases/14feb20\\_finalIdrugsrelease.shtm](https://vadoc.virginia.gov/news/press-releases/14feb20_finalIdrugsrelease.shtm) (detailing that the reason for the switch was a “critical shortage of drugs to carry out executions”).

86. *Execution List 2014*, *supra* note 2; *see supra* notes 1–7, 14–15.

Between 2010 and 2014, more than 200 executions took place across the country using a three-drug protocol. Between 2010 and 2014, more than 200 executions took place across the country using a three-drug protocol. Between 2010 and 2014, more than 200 executions took place across the country using a three-drug protocol. Between 2010 and 2014, more than 200 executions took place across the country using a three-drug protocol.

But 2014, also a more troubling year, saw more botched lethal injections. In 2014, more than 200 executions took place across the country using a three-drug protocol. Between 2010 and 2014, more than 200 executions took place across the country using a three-drug protocol.

87. Denno, *supra* note 23, at 1368.

88. *Id.*

89. According to Heath, “the use of pentobarbital as a first drug in lethal injection protocols is problematic because of its use in executions. Pentobarbital is compounded in a pharmacy, and it often fails to have its intended effect. In 2010, a prisoner appeared to be in pain during his execution, and it was believed the execution was botched.”

90. *See supra* note 89.

91. Mark Heath, *The Botched Lethal Injections*, GUARDIAN (Jan. 14, 2015), available at <https://www.theguardian.com/world/2015/jan/14/botched-lethal-injections>.

92. *See supra* notes 89–91.

93. *See Execution List 2014*, *supra* note 2 (detailing that 11.4% of executions were botched).

94. SARAT, GRUESOME DEATHS.

95. *Id.*

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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.<sup>87</sup> Through 2013, courts consistently upheld the use of pentobarbital, despite the drug's limited testing and use in lethal injection procedures.<sup>88</sup> Midazolam, the other problematic drug in Virginia's new protocol, has also faced opposition for its use in executions.<sup>89</sup> Further, the risk inherent to both drugs is compounded by the fact that they are followed by rocuronium bromide, a paralytic.<sup>90</sup> 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.<sup>91</sup>

But 2014, along with its botched executions, brought with it a more troubling record against pentobarbital and midazolam.<sup>92</sup> Botched lethal injections involving the two drugs accounted for over 11% of all executions in 2014.<sup>93</sup> This number is almost four times the overall botch rate for *all* executions between 1900 and 2010,<sup>94</sup> and it is one-and-one-half times the botch rate for lethal injections between 1982 and 2010.<sup>95</sup>

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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* Cooley 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.

91. Mark Heath, *The US Must End the Use of Paralytic Drugs When Executing Prisoners*, GUARDIAN (Jan. 14, 2015), <http://www.theguardian.com/commentisfree/2015/jan/14/end-the-use-of-paralytic-drugs-when-executing-prisoners>.

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.<sup>96</sup> 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.<sup>97</sup> Further, pentobarbital, despite being an anesthetic, is *not* an analgesic and does not reduce pain.<sup>98</sup> Instead, like other barbiturates, "it is antalgic, that is, it tends to exaggerate or worsen pain."<sup>99</sup>

Midazolam poses more significant risks.<sup>100</sup> 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."<sup>101</sup> 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.<sup>102</sup> Finally, since midazolam is not an FDA approved general anesthetic and instead is intended as "an anti-seizure

96. Neither has been specifically contested in Virginia since the drug shortages began in 2009. *But see* Lawlor v. Commonwealth, 285 Va. 187, 268–69 (2013) (denying an evidentiary hearing for Virginia's new lethal injection protocol, which included pentobarbital).

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.*

100. As evidenced by the fact that Wood was given 750 milligrams of midazolam, fifteen times the dosage prescribed by the state's official two-drug protocol, during his extended execution before he finally succumbed. Mark Berman, *The Prolonged Arizona Execution Used 15 Doses of Lethal Injection Drugs*, WASH. POST (Aug. 4, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/08/04/the-prolonged-arizona-execution-used-15-doses-of-lethal-injection-drugs>.

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.

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105. *Warner*, 574 U.S.  
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106. *Id.*

107. Wolf & Zoroya, *supra*  
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### B. *Recent Developments*

Oklahoma executed Charles Warner on January 15, 2015, using the same three-drug protocol employed by Virginia.<sup>104</sup> 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.<sup>105</sup> 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.<sup>106</sup> When executioners began pushing midazolam into Warner's IV, he said, "My body is on fire," but showed no obvious signs of distress.<sup>107</sup> 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."<sup>108</sup>

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

103. Richard Wolf & Gregg Zoroya, *Oklahoma Executes Man After Justices Deny Stay*, USA TODAY (Jan. 16, 2015), <http://www.usatoday.com/story/news/nation/2015/01/15/supreme-court-oklahoma-execution-drug/21828129/>; see *Warner*, 574 U.S. \_\_\_ (2015) (Sotomayor, J., dissenting from denial on application for stay) (discussing Oklahoma's changing protocol regarding dosages for midazolam).

104. Ariane de Vogue, *Supreme Court to Review Oklahoma Lethal Injection Procedure*, CNN (Jan. 24, 2015), <http://edition.cnn.com/2015/01/23/politics/supreme-court-oklahoma-execution-review/>.

105. *Warner*, 574 U.S. at \_\_\_ (Sotomayor, J., dissenting from denial on application for stay).

106. *Id.*

107. Wolf & Zoroya, *supra* note 103. This description paints a similar scene to Michael Wilson's execution. See *supra* note 14.

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.<sup>109</sup> 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.”<sup>110</sup> 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.<sup>111</sup> 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.”<sup>112</sup> 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

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?

Lyle Denniston, *Court To Rule on Lethal-Injection Protocol*, SCOTUSBLOG (Jan. 23, 2015), <http://www.scotusblog.com/2015/01/court-to-rule-on-lethal-injection-protocols/>.

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).

work of *Baze*,<sup>113</sup> of public opinion.

Should the Justices uphold midazolam’s use in lethal injection, it would be narrowly by prohibiting the use of more broadly available drugs, or it would have massive implications for the whole. Both approaches would have a response, as several states, including Alabama, and Virginia have adopted new protocols. There is a strong possibility that a method of lethal injection could either lead to a more humane or it could be the

Regardless of the outcome, the Court is likely to have to re-examine the issue or to resulting protocols. This is why the Court’s alternative methods are the most favorable to the

### C. A Brief History of Lethal Injection Serving as a

On February 17, 2015, the Supreme Court announced its plans to review the constitutionality of obtaining the lethal injection protocol. Just days before a scheduled execution, a firing squad is ordered to be used before 2004.<sup>116</sup> At p

113. See *supra* note 104.

114. It is possible that the Court will follow Justice Breyer to rule against the use of midazolam when the Court decides the case.

115. H.R. 11, 2015-1 (2015). Paul Ray, argued that the use of midazolam cause the inmate dies. *Firing Squad*, APNEWSPHOTO.COM/2014/Some-Utah-Execution-Approvals-4

116. UTAH ADMIN. CODE R. 201-1-10. *Gun: US Killer Executes*

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work of *Baze*,<sup>113</sup> thus effectively removing challenges to the court of public opinion, where they belong.

Should the Justices decide against the constitutionality 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.<sup>114</sup> 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.<sup>115</sup> Under current Utah law, the firing squad is only available for inmates sentenced to death before 2004.<sup>116</sup> At present, four of the nine inmates on Utah's death

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.

115. H.R. 11, 2015 Gen. Sess. (Utah 2015). The bill's proponent, State Representative Paul Ray, argued that firing squads are the most "humane way to execute someone because the inmate dies instantly." Michelle L. Price, *Utah Revives Plan for Executions by Firing Squad*, APNEWS ARCHIVE (Nov. 19, 2014, 7:40 PM), <http://www.apnewsarchive.com/2014/Some-Utah-lawmakers-back-executions-by-firing-squad;-plan-needs-full-Legisla-ture%27s-approval/id-4e1cdc9f04b745c2aea4a0fe5b46ea8a>.

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.<sup>117</sup> 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.<sup>118</sup> 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.<sup>119</sup> 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.<sup>120</sup> 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.<sup>121</sup>

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.<sup>122</sup> 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

<http://www.standard.co.uk/news/live-by-the-gun-die-by-the-gun-us-killer-executed-by-firing-squad-6482113.html>.

117. See *Death Row Inmates by State*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year?scid=9&did=188> (last visited Feb. 27, 2015); Ben Winslow, *At Least 3 Inmates in Utah Want to Die by Firing Squad* (Nov. 19, 2014), <http://fox13now.com/2014/11/19/at-least-3-inmates-in-utah-want-to-die-by-firing-squad>; Phil Gast, *Utah Inmate Asks To Die by Firing Squad*, CNN (Feb. 10, 2012), <http://edition.cnn.com/2012/02/09/justice/utah-firing-squad/>.

118. H.B. 11, 2015 Gen. Sess. (Utah 2015), available at <http://le.utah.gov/~2015/bills/static/HB0011.html>; see also Erica Palmer, *Firing Squad Bill Passes Utah House After Tough Debate*, SALT LAKE TRIB. (Feb. 13, 2015), <http://www.sltrib.com/home/2178285-155/firing-squad-bill-passes-utah-house>; see also *In Close Vote, Utah House Oks Firing-Squad Proposal*, FOX NEWS (Feb. 14, 2015), <http://www.foxnews.com/politics/2015/02/14/in-close-vote-utah-house-oks-firing-squad-proposal/>.

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-32f5-5f00-8369-34ba66b0572d.html](http://trib.com/news/state-and-regional/govt-and-politics/wyoming-house-passes-firing-squads-execution-bill/article_1c77faca-32f5-5f00-8369-34ba66b0572d.html). This resolution is less significant than Utah's bill as there are currently no inmates on death row in Wyoming. *Id.*

120. SF0013, 2015 Leg. Sess. (Wyo. 2015) (amended Feb. 10, 2015).

121. See *supra* text accompanying notes 1-7.

122. Cutler, *supra* note 36, at 344.

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123. *Id.* at 345.

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128. *Id.* at 413.

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without a moan or cry or a tremor of the body except for a convulsive twitching of the fingers of his left hand.<sup>123</sup>

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.<sup>124</sup> Guidelines allow nine members of the media to be present, and the execution chamber is arranged so that witnesses can view the execution itself but not the gunmen.<sup>125</sup> The chamber is used for both lethal injections and firing squads, containing both a gurney and a chair.<sup>126</sup>

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.<sup>127</sup>

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."<sup>128</sup>

Virginia has a history of executing inmates by firing squad,<sup>129</sup> 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<sup>130</sup> 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.<sup>131</sup> "An entire military unit from Fort Bragg[,] North Carolina[,] volunteered to participate."<sup>132</sup> 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.<sup>133</sup> 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.<sup>134</sup> The

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.*

133. Mark Berman, *What It Was Like Watching the Botched Oklahoma Execution*, WASH. POST (May 2, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/05/02/what-it-was-like-watching-the-botched-oklahoma-execution> [hereinafter *Berman, Oklahoma Execution*]. Though support for the death penalty is diminishing, a majority of the country still supported it in 2013. See Michael Lipka, *Support for Death Penalty Drops Among Americans*, PEW RES. CTR. (Feb. 12, 2014), <http://www.pewresearch.org/fact-tank/2014/02/12/support-for-death-penalty-drops-among-americans/>; *In U.S., Support for Death Penalty Falls to 39-Year Low*, GALLUP (Oct. 13, 2011), <http://www.gallup.com/poll/150089/support-death-penalty-falls-year-low.aspx>.

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

inmate would be shocked, organ damage would follow soon thereafter.

When compared to four botched let alone one, it is both more reliable and the Supreme Court's grant of certiorari of midazolam's use in the Commonwealth could be avoided by adopting firing squads as the method for a sufficient

### III. POLICY

If firing squads were the method of execution, it would do so in order to avoid the controversy regarding its constitutionality. As to lethal injections, the Supreme Court in *Wilkerson* and *Thompson* rejected the argument that the use of lethal injection was cruel and unusual punishment. In *Wilkerson*, the Supreme Court, per Justice Stevens, rejected the argument that the use of lethal injection was cruel and unusual punishment. In *Thompson*, the Supreme Court, per Justice Stevens, rejected the argument that the use of lethal injection was cruel and unusual punishment.

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135. See *Description of the Death Penalty Process*, [deathpenaltyinfo.org/death-penalty-process](http://deathpenaltyinfo.org/death-penalty-process) (last visited May 12, 2014); also Veljko Strajina et al., *Death Penalty: A Review of the Current State of the Law*, 33 AM. J. FORENSIC PSYCHIATRY 1 (2007), <http://www.amjforensicpsychiatry.com/issue33/1-33-07-Strajina.pdf> (noting that the most common cause of death in the United States is heart disease).

136. See *supra* text accompanying note 135.

137. The inmate who was executed by lethal injection in 2010, and Virginia itself, have both been cited as examples of the drug shortages, Virginia's use of the default method of execution, and the Supreme Court's decision in *Berman*. *Recent History of the Death Penalty in the United States*, 33 AM. J. FORENSIC PSYCHIATRY 1 (2007), <http://www.amjforensicpsychiatry.com/issue33/1-33-07-Strajina.pdf> (noting that the default method of execution is the electric chair, which is a controversial method of execution because of the botch issues inherent in the process). See also *Report in the General Assembly*.

138. See *supra* text accompanying note 137.

139. Emergency Medical Services, 2014 Cir. 2014) (No. 14-1631).

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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.<sup>135</sup>

When compared to the gruesome deaths suffered during the four botched lethal injections of 2014,<sup>136</sup> 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.<sup>137</sup>

### 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,<sup>138</sup> Joseph Rudolph Wood III petitioned the Ninth Circuit for a stay of his execution.<sup>139</sup> 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.<sup>140</sup> 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."<sup>141</sup> 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.<sup>142</sup>

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."<sup>143</sup> 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.<sup>144</sup> 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).

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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.<sup>145</sup>

By losing the retributive nature inherent in capital punishment, lethal injection does little to provide closure, even during a botched execution.<sup>146</sup> 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[?]”<sup>147</sup>

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.”<sup>148</sup> 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.<sup>149</sup> As Justice Scalia wrote, death-by-injection is “de-

145. *Baze v. Rees*, 553 U.S. 35, 80–81 (2008) (Stevens, J., concurring).

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.washingtonpost.com/wp-dyn/content/article/2009/11/09/AR2009110903493.html>.

147. *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).

148. Cutler, *supra* note 36, at 350.

149. See *Callins v. Collins*, 510 U.S. 1141, 1142–43 (1994) (Scalia, J., concurring in denial 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.

sirable" and "enviable" when compared to the brutal crimes for which the condemned were sentenced.<sup>150</sup>

There is also a possibility that the use of firing squads would reinvigorate the other, long defunct, justification for capital punishment: deterrence.<sup>151</sup> 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.<sup>152</sup>

In the past, executions were always public affairs because "[w]ithout a public audience[,] state killing would have been meaningless."<sup>153</sup> 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."<sup>154</sup> 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."<sup>155</sup> 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

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 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, *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.

155. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 58 (1977).

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156. *See Warner v. nom. Glossip v. Gross, Gross: Questions Presen* rt.gov/qp/14-07955qp.pdf

157. *See Searchable deathpenaltyinfo.org/view/Injection, supra* note 48; (Aug. 18, 2011), <http://widow/>.

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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*.<sup>156</sup>

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.<sup>157</sup> 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

156. See *Warner v. Gross*, 776 F.3d 721 (10th Cir. Jan. 12, 2015), cert. granted sub nom. *Glossip v. Gross*, 83 U.S.L.W. 3625 (U.S. Jan. 23, 2015) (No. 14-7955); *Glossip v. Gross*: *Questions Presented*, SUPREMECOURT.GOV, (Jan. 14, 2015), <http://www.supremecourt.gov/qp/14-07955qp.pdf>.

157. See *Searchable Execution Database*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/views-executions> (last visited Feb. 27, 2015); *State by State Lethal Injection*, supra note 48; *Va. Executes Man Who Raped, Killed Elderly Widow*, CBS NEWS (Aug. 18, 2011), <http://www.cbsnews.com/news/va-executes-man-who-raped-killed-elderly-widow/>.

of Clayton Lockett in Oklahoma serves as a primer for this position.<sup>158</sup>

On April 29, 2014, twelve reporters arrived at the Oklahoma State Penitentiary to watch Lockett die by lethal injection.<sup>159</sup> 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.<sup>160</sup> 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.<sup>161</sup> The execution was delayed twenty-three minutes due to the technician's difficulties in finding a usable vein to establish the IV line.<sup>162</sup> But the blinds were lifted at 6:23 PM and the execution began.<sup>163</sup>

The first drug, midazolam, was administered and, ten minutes later, Lockett was declared unconscious.<sup>164</sup> Three minutes later, Lockett's foot began to kick.<sup>165</sup> "Then his body bucked, he clenched his jaw and began rolling his head from side to side, trying to lift his head up."<sup>166</sup> He was overheard saying "Something is wrong," and "The drugs aren't working."<sup>167</sup> 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.<sup>168</sup> They were never raised.<sup>169</sup> The reporters were ordered to leave and it was only after they returned to the media center on the penitentiary's

158. See *supra* note 14.

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).

160. See Berman, *Oklahoma Execution*, *supra* note 133.

161. See *id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. Warner v. Gross, 574 U.S. \_\_\_, \_\_\_ (2015) (Sotomayor, J., dissenting from denial on application for stay).

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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."<sup>171</sup> 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."<sup>172</sup>

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.<sup>173</sup> 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"

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 blood stream 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.

Warner, 574 U.S. at \_\_\_ (2015).

171. Berman, *Oklahoma Execution*, *supra* note 133.

172. Gibson & Lain, *supra* note 8. Michel Foucault noted that executions hold a juridi-co-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,<sup>174</sup> 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.<sup>175</sup> 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.<sup>176</sup> 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.<sup>177</sup>

### 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)).

175. Hesitance to find capital punishment unconstitutional is demonstrated in opinions ranging from the nineteenth century to the twenty-first century. *See, e.g., Baze v. Rees*, 553 U.S. 35, 62–63 (2008) (plurality opinion); *In re Kemmler*, 136 U.S. 436, 449 (1890); *Wilkerson v. Utah*, 99 U.S. 130, 137 (1879).

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).

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\* J.D. Candidate 2015, University of Richmond. I would like to thank the editors of the Richmond Law Review for their assistance. I would like to thank Robert Harris for his insight, Robert Harris for their support, encouraging me to write this article. If this would be possible, for me to have where articles like this are

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U.S. 436, 449 (1890);

ozinski, J., dissenting

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 \**

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