

Facing the Firing Squad

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The recent Supreme Court decision in Glossip v. Gross¹ affirmed the legality of midazolam for use in lethal injection. The 5–4 majority opinion reads the Constitution to require an available form of execution. But it does little to counter Professor Denno’s claim in “Lethal Injection Chaos Post-Baze” that pragmatic supply-side concerns should dismantle the economy for lethal injection.² Off-brand substitutes for lethal injection drugs have led to recent high-profile botches. Both Utah and Wyoming have proposed a return to the firing squad. Lethal injection is comparatively sanitary and bureaucratic. But I respond that the firing squad is more coherent with death penalty administration heuristic concerns of retribution and dignity. The visibility of the firing squad also serves an abolitionist, information-forcing function by requiring a candid look at death penalty process from the perspective of the executed.

INTRODUCTION

In “Lethal Injection Chaos Post-Baze,” Professor Denno suggests that a dose of conscious consumerism may be fatal to the increase in botched executions involving lethal injection.³ Alternatives to the traditional three-part process involving sodium thiopental have evolved because of Europe’s abolitionist posture to the death penalty.⁴ The desiccated market for this anesthetic has forced U.S. wardens to shop for off-brand pharmaceuticals in places like India⁵ or U.S. state-regulated “compounding” pharmacies, where standards of quality control might be lacking. For example, Denno points to a virulent 2012 meningitis outbreak resulting from a fun-

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1. 135 S. Ct. 2726 (2015).

2. See Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L.J. 1331 (2014).

3. *Id.*

4. See *id.* at 1361.

5. See Mary D. Fan, *The Supply-Side Attack on Lethal Injection and the Rise of Execution Secrecy*, 95 B.U. L. REV. 427, 440–41 (2015).

gal infection in a Massachusetts compounding pharmacy.⁶ The problems associated with the lack of quality pharmaceutical product are manifold. Wardens must seek out untested substitutes or consider deleting certain steps from the valorized three-step method. States are now protecting the confidentiality of these updated execution cocktails or strategically releasing their ingredients within only hours of execution to mitigate opportunity for legal challenge.⁷ Denno is hopeful that the administration of the death penalty will be enjoined as public relations-conscious officials wait out the delivery of a more humane drug protocol.⁸ Still, a first principle of Supreme Court death penalty jurisprudence is that there must be *some* kind of available, lawful form of execution.⁹ Core to the Supreme Court's analysis in *Glossip v. Gross* is that petitioners must identify an alternative execution method.¹⁰

Still, *Glossip* does serve the information-forcing function of exposing the public to the brutal facticity of lethal injection. Not as a sanitary, “desirable” form of euthanasia,¹¹ but instead as an often-botched process vulnerable to producing a horrific quantum of pain. A determination of midazolam's lawfulness¹² should not interfere with the main thesis of this

6. Denno, *supra* note 2, at 1370.

7. See generally Fan, *supra* note 5.

8. See Denno, *supra* note 2, at 1332 (“Rather than masking the ‘machinery of death,’ the mimicry of medicine may end up dismantling it.”).

9. See, e.g., *Glossip v. Gross*, 135 S. Ct. 2726, 2732–33 (2015) (“[B]ecause it is settled that capital punishment is constitutional, ‘[i]t necessarily follows that there must be a [constitutional] means of carrying it out.’” (second and third alterations in original) (citation omitted)); *Baze v. Rees*, 553 U.S. 35, 47 (2008) (“We begin with the principle, settled by *Gregg*, that capital punishment is constitutional.”).

10. *Glossip*, 135 S. Ct. at 2737. Justice Sotomayor describes this as a “surreal” requirement in her dissent. *Id.* at 2796 (Sotomayor, J., dissenting)).

11. Timothy V. Kaufman-Osborn, *Regulating Death: Capital Punishment and the Late Liberal State*, 111 YALE L.J. 681, 703–04 (2001) (“[A]s Justice Antonin Scalia once noted, ‘a quiet death by lethal injection’ appears ‘pretty desirable’ when compared to the torments endured by many homicide victims.” (quoting *Callins v. Collins*, 510 U.S. 1141, 1143–43 (Scalia, J., concurring))).

12. There is some evidence that the Supreme Court might revisit the constitutionality of the death penalty in the near future. Only four votes are required to grant certiorari, and there is some coalescence around an abolitionist position. In *Glossip*, Justice Ginsburg signed on to Justice Breyer's broadly written dissent. *Glossip*, 135 S. Ct. at 2755 (Breyer, J., dissenting). Justice Sotomayor's dissent in the *Warner v. Gross* stay of execution might also signal a transformative holding. *Warner v. Gross*, 135 S. Ct. 824, 824 (2015) (Sotomayor, J., dissenting). There, Justice Sotomayor indicated a distaste for the “readily available” standard by reference to *Hill v. McDonough*, 547 U.S. 573 (2006) (penned by potential swing vote Kennedy), which cast suspicion on this alternative meth-

short essay: that more death penalty states will face the prospect of alternative means of execution, including a return to the firing squad. For proponents, the firing squad achieves deterrence and retributive¹³ values that seem required by this ultimate form of punishment while cohering to a doctrinal condition for efficiency. And for all Americans, comparison of lethal injection to the firing squad requires us to unpack the constitutional heuristic of dignity and reflect on *whose* dignity is at stake in the administration of death.

I. “THE MIMICRY OF MEDICINE”¹⁴

A threshold issue in death penalty jurisprudence is the relevance of medicine to lethal injection. As early as 1888, the governor of New York rejected lethal injection because of the medical symbolism of the syringe.¹⁵ The American Medical Association disavows any association with the death penalty.¹⁶ The oath of the physician is to do no harm; conflating the roles of the doctor as savior and as administrator of death can do violence to the public perception of America’s medical workers.¹⁷ Still, this binary of death and healing is warped by the persistent reference to the euthanasia vanguard of the Netherlands as a control for humane killing,¹⁸ as well as the analogue comparison between the IV technician of the execution room and the IV nurse in the hospital.¹⁹

The sanitized façade of lethal injection betrays cracks in its original architecture. Oklahoma (where the *Gross* protest over midazolam began)

od requirement. *Id.* at 826. Perhaps prudential concerns informed the narrower compass of Sotomayor’s dissent in *Glossip*, which analogized the graphic terror of executions by midazolam to tortuous deaths—like burning at the stake—deemed unconstitutional by the Framers of the Constitution. *See Glossip*, 135 S. Ct. at 2792 (Sotomayor, J., dissenting) (citing *In re Kemmler*, 136 U.S., 436, 446 (1890)).

13. *See* P. Thomas DiStanislao, III, *A Shot in the Dark: Why Virginia Should Adopt the Firing Squad as Its Primary Method of Execution*, 49 U. RICH. L. REV. 779, 802–03 (2015) (arguing that the retributive policy underlying the practice of capital punishment is better served by firing squad executions than by lethal injection executions).

14. Denno, *supra* note 2, at 1332.

15. *Id.* at 1339.

16. Robert Blecker, *Killing Them Softly: Meditations on a Painful Punishment of Death*, 35 FORDHAM URB. L.J. 969, 988–89, 991 (2008).

17. *See id.* at 988–992.

18. *See id.* at 992.

19. *See id.* at 988.

was coincidentally the first state to employ lethal injection. State medical examiner Dr. Jay Chapman was expediently drafted to concoct this ad hoc three-step profile, despite his concession to being “an expert in dead bodies but not an expert in getting them that way.”²⁰ Needling for a vein can be laborious; this noxious cocktail also requires the delicate use of a catheter.²¹ Corresponding botch rates have historically been higher for injection as compared to alternatives.²² From 1900 to 2010, the aggregated botch rate for all execution methods has been estimated at 3.15%, while the botch rate specific to lethal injection is thought to be over 7%.²³ In 2014 alone, there were four botched executions in Arizona, Oklahoma, and Ohio.²⁴

In his January 2015 majority *Gross* opinion, Tenth Circuit Judge Briscoe describes the misadventures involved with plaintiff Clayton Lockett’s ultimately “successful” execution as a “procedural disaster.”²⁵ It took nearly an hour and twelve attempts for the execution team to establish IV access. The team declared Lockett unconscious after the midazolam injection; however, a team member then heard Lockett announce during the administration of potassium chloride (to induce cardiac arrest) that “this shit is fucking with my mind . . . something is wrong.”²⁶ The team removed the sheet covering his body to find a turgid mass the size of a golf ball at the IV access point; the IV fluid had leaked into the muscle tissue at the insertion site (his right groin) rather than entering his cardiovascular system. The team failed to locate another suitable vein. Lockett died 33 minutes after the midazolam was first injected, even though the intended amount of potassium chloride was never delivered.²⁷

20. Denno, *supra* note 2, at 1340.

21. See *Baze v. Rees*, 553 U.S. 35, 54 (2008); see also Eric Berger, *The Executioners’ Dilemmas*, 49 U. RICH. L. REV. 731, 735 (2015).

22. David Raybin, Book Review, TENN. B.J., Nov. 2014, at 30, 31 (2014) (reviewing AUSTIN SARAT, *GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA’S DEATH PENALTY* (2014)).

23. DiStanislao, *supra* note 13, at 788.

24. Fan, *supra* note 5, at 443–44.

25. *Warner v. Gross*, 776 F.3d 721, 725 (10th Cir. 2015).

26. *Id.*

27. *Id.* at 725–26.

II. PAIN AND RETRIBUTION

The *Baze* test demands that the pain involved with a particular drug or form of administration not transcend the nature of execution.²⁸ In short, the pain involved must not be gratuitous. There is a twin analytic here that the death process must not “linger.” Unfortunately, in the 1982 Charlie Brooks test case for lethal injection, the “shaken” onlookers agreed that this death did not appear painless.²⁹ In the more recent high-profile *Wood v. Ryan*³⁰ case, the Ninth Circuit split from other appellate courts that have affirmed newly created confidentiality laws protecting the drug profile or identity of execution teams, staying the petitioner’s execution until he received information about the method of execution to be used.³¹ But in a dramatic twist, the Supreme Court summarily lifted the Ninth Circuit’s stay,³² which led directly to a botched two-hour midazolam execution for petitioner Wood.³³ This certainly must have put the Supreme Court on notice of the consequential impact of their *Glossip* decision. But how to respond to death penalty advocates like New York Law School Professor Robert Blecker, who contend that botched, painful deaths are a deontological necessity to bring karmic balance to the moral universe?³⁴

This test of painlessness not only fosters a medicalized image of execution but also cancels the retributive value of the death penalty. Justice Stevens pointed in his *Baze* concurrence to the insoluble tension that as death administration approaches an asymptotic limit of painlessness, it voids the singular, unique value of death as a punishment.³⁵ There should

28. See Rose Carmen Goldberg, *Safe and Effective for Human Executions? Glossip v. Gross and the Eighth Amendment Bar Against Off-Label Drug Lethal Injection*, 68 STAN. L. REV. ONLINE 1, 6 (2015).

29. Robert Reinhold, *Technician Executes Murderer in Texas by Lethal Injection*, N.Y. TIMES, Dec. 7, 1982, <http://www.nytimes.com/1982/12/07/us/technician-executes-murderer-in-texas-by-lethal-injection.html>.

30. 759 F.3d 1076 (9th Cir. 2014) (staying death row inmate’s execution until he received information about the method of execution to be used).

31. Fan, *supra* note 5, at 430.

32. *Ryan v. Wood*, 135 S. Ct. 21 (2014) (mem.) (reversing Ninth Circuit’s stay of execution).

33. Fan, *supra* note 5, at 431.

34. See Blecker, *supra* note 16, at 982.

35. *Baze*, 553 U.S. at 80–81 (Stevens, J., concurring).

be some kind of congruence between the executed's crime and his punishment. Otherwise, mere premature death might not *feel* much different from life without parole. The Foucauldian interpretation of the modern penal system is one of an economy of suspended rights and privileges that has replaced a barbaric protoeconomy of pain and death.³⁶ Punishment is generally now meant to be boring, not violent. But death has been distinguished as paradigmatically "different."³⁷ If this excepted form of punishment is assumed to be violent (as coerced death necessarily is), then shouldn't it be? In his own *Baze* concurrence, Scalia quipped, "[I]f a punishment is not retributive enough, it is not retributive at all."³⁸ A hedonic scale of pain and pleasure has been part of our moral code since Bentham's *An Introduction to the Principles of Morals and Legislation*.³⁹

The Supreme Court has conditioned that punishment must not be exclusively retributive.⁴⁰ Otherwise, most any punishment could meet this capacious, self-definitional test. Still, retribution can at least be a partial justification. Robert Blecker is an outlier voice for "emotional retribution" and has managed to antagonize even fellow death penalty advocates with his biblical, calibrated sense of justice. One can empathize with his puzzlement over things like the Jewish Lawyers' amicus brief in *Baze*, which claimed Talmudic support for the "most beautiful death possible."⁴¹ The sterile, bureaucratic setting of the execution chamber seems incompatible with the sublime apotheosis of Blake or Wordsworth. This call for an aesthetic death reminds one of author Aldous Huxley opening the "final door of perception" while on a heavy dose of lysergic acid.⁴² Retributivists might ask: isn't a last meal enough?

But the main tension here is not that lethal injection is too dignified for the executed, but that it contains the very real possibility of a *negation* of dignity. It can be hellish. Scalia, perhaps like most Americans, intuitively finds lethal injection as a "desirable" alternative to other possible forms of

36. Cf. Blecker, *supra* note 16, at 977.

37. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

38. *Baze*, 553 U.S. at 91 (Scalia, J., concurring).

39. JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (1789).

40. *Furman v. Georgia*, 408 U.S. 238, 343 (1972) (Marshall, J., concurring).

41. Blecker, *supra* note 16, at 996 (quoting Brief for American Association of Jewish Lawyers and Jurists ("AAJLJ") as Amicus Curiae Supporting Petitioners, *Baze v. Rees*, No. 07-5439, 2008 WL 1733259).

42. See generally ALDOUS HUXLEY, *THE DOORS OF PERCEPTION* (1954).

death.⁴³ Professor Berger concedes that lethal injection in its ideal administration (and with ideal drugs) might often achieve a “good death” similar to euthanasia.⁴⁴ But in the post-*Baze* world of midazolam and other off-brand substitutes, the trigger anesthetic might fail to sedate the executed. Indeed, the *anti-epileptic* drug pentobarbital has even been repurposed to replace sodium thiopental.⁴⁵ The deleterious consequences of these kinds of substitute compounds are exacerbated by the tranquilizing effect of pancuronium (the second drug of the traditional three-part cocktail). The feint here is that in the botched injection this muscle relaxant can mimic a look of serenity on the face of the executed, when they are in fact experiencing the visceral terror of their “whole body burning.”⁴⁶ It is the orca’s false smile of *Blackfish*.⁴⁷ The executed person’s musculature is too incapacitated to reflect the existential pain of cardiac arrest. Instead, the mask of the executed is inflected as a performance of dignified passing for the execution audience. This peaceful ebb to the turbulent life of the criminal helps actualize Judge Bybee’s notion of public “catharsis” for us all.⁴⁸

III. DIGNITY IN DEATH

*“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”*⁴⁹

Dignity as a construct eludes definition, but in the death penalty context it can, at minimum, be interpreted to exclude torture.⁵⁰ This is the starting point of Eighth Amendment jurisprudence, and it is what motivated the Framers to use the phrase “cruel and unusual” to prohibit contemporary forms of execution such as quartering and disembowelment. But as the technologies of death have evolved since the late 18th century, the court in *Trop v. Dulles* recognized the concomitant need to develop a con-

43. See *Callins v. Collins*, 510 U.S. 1141, 1142 (1994).

44. See Berger, *supra* note 21, at 744 (2015).

45. Fan, *supra* note 5, at 442.

46. See DiStanislao, *supra* note 13, at 794 (quoting the final words of Oklahoma convict Michael Wilson as he was executed with midazolam).

47. *BLACKFISH* (Magnolia Pictures 2013). Marine mammals are not “smiling”—that’s just the way their faces are.

48. See *Wood v. Ryan*, 759 F.3d 1076, 1091 (9th Cir. 2014) (Bybee, J., dissenting).

49. *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

50. *Wilkerson v. Utah*, 99 U.S. 130, 135–36 (1878).

temporary proxy for our “evolving standards of decency.”⁵¹ Whether the electric chair is lawful cannot depend on its (non)existence prior to 1789.

A. FOR THE EXECUTIONER?⁵²

And thus a definitional question here is for *whom* do we care that this process remains “dignified”? What is the locus of this inquiry of dignity and death? Is this dignity qualification exterior to the act of killing—a mere aesthetic? Or an aspirational substance? For example, in his *Wood* dissent, Judge Kozinski suggests that the matrix of anarchic or dehumanizing connotations attached to the guillotine make it discordant with “our national *ethos*.”⁵³ To the chagrin of Justice Scalia, there does seem to be an outward-looking element to this dignity concern.⁵⁴ A dignified death penalty is part of our exceptional national identity. As the metonymic reference to “the people” as prosecutor/executioner is writ literal, our projected image must be sanitized by the medicalized vocabulary of death by injection. The semiotics of science provides an anesthetic cover for the use of things like pentobarbital or midazolam. Lethal injection is—it must appear to be—a clinical, un-messy death.

B. OR THE EXECUTED?

But it is intuitively much more important that the dignity of the executed be preserved. Again, the death process must not be untowardly “lingering.”⁵⁵ This efficiency heuristic informs why the injection cocktail cannot simply be a prodigious dose of anesthetic. It might catalyze (a profoundly) deep sleep, but not death. The Netherlands medical establishment has estimated that, for up to six percent of individuals, this kind of “one-

51. *Trop*, 365 U.S. at 101; see also 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, 159–60.

52. A similar template is used in 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, 419–23 (2002–2003) (“Three interests are at play in considering the dignity of man with respect to an execution method: that of the executed, that of the executioner, and that of the society that enables the execution.”).

53. *Wood v. Ryan*, 759 F.3d 1076, 1103 (9th Cir. 2014) (Kozinski, J., dissenting) (emphasis added).

54. See generally *Roper v. Simmons*, 542 U.S. 551, 607–30 (2005) (Scalia, J., dissenting).

55. See Harding, *supra* note 51, at 161.

step” sodium thiopental procedure induces a coma, from which the euthanized patient could eventually wake.⁵⁶

Dignity also encompasses an even more lingering part of the death process—the integrity of the corpse. The relative intactness of the injected body makes it preferable to a bullet-ridden one (Mr. Lockett’s distended groin notwithstanding).⁵⁷ Looking good is a common human motivation, and both the mortician industry and the wake ritual reflect in part this primordial want to go out on the “George Costanza high note.”⁵⁸ But should this trump the alacrity and confidence of the firing squad?

IV. DIGNITY, FACING THE FIRING SQUAD

This past March, Utah Governor Gary Herbert signed a bill to bring back the firing squad.⁵⁹ Previously, this option was only available to Utah death row denizens who had been sentenced before 2004. Indeed, the archetype of the firing squad taps into a psychohistory of the Wild West, of a mythology where death was rote and the stuff of shared ritual. Literary theorist Jeffrey Meyers traces this intersection of memoir and execution in his “Invitation to a Beheading.”⁶⁰ Public execution is a necessarily public experience, one of which we cannot feign ignorance. But isn’t this a good thing?⁶¹

The terrific pain of the botched lethal injection remains masked. Indeed, there is a real epistemological puzzle in Justice Alito’s requirement that the petitioner provide reliable scientific proof about the pain involved with an execution method.⁶² Interpersonal knowledge of living people is already difficult enough—how can we mine our midazolam-executed for

56. *Baze v. Rees*, 553 U.S. 35, 68 (2008) (Alito, J., concurring).

57. *Warner v. Gross*, 776 F.3d 721, 726 (10th Cir. 2015); *see also* *Glossip v. Gross*, 135 S. Ct. 2726, 2797 (2015) (Sotomayor, J., dissenting).

58. *See* (literally) *George Goes Out on a High Note*, YOUTUBE (Sept. 11, 2012), <https://www.youtube.com/watch?v=8YaaZZN9VYs> (clip from *Seinfeld: The Burning* (NBC television broadcast Mar. 19, 1989)).

59. H.B. 11, 61st Leg., 2015 Gen. Sess. (Utah 2015); *see also* *All Things Considered: Utah Brings Back Firing Squad Executions; Witnesses Recall the Last One*, NPR (Apr. 5, 2015), <http://www.npr.org/2015/04/05/397672199/utah-brings-back-firing-squad-executions-witnesses-recall-the-last-one>.

60. Jeffrey Meyers, *Invitation to a Beheading*, 25 LAW & LITERATURE 268 (2013).

61. *See generally* David Lat & Zachary Shemtob, *The Execution Should be Televised: An Amendment Making Executions Public*, 78 TENN. L. REV. 859 (2011).

62. *Baze v. Rees*, 553 U.S. 35, 67 (2008) (Alito, J., concurring).

their death experience? The pain associated with getting shot in the chest is comparatively familiar, thought equivalent to a hard punch to the chest.⁶³ This brief but intense pain does capture the distinctly retributivist value of the death penalty. Worth noting is that Cesare Beccaria, vanguard 18th-century death penalty abolitionist, actually favored meting out circumscribed amounts of pain.⁶⁴ Importantly, the pain of the bullet is different only in degree, not kind, from the kinds of everyday injuries from which we suffer. Botched lethal injection, on the other hand, seems to produce an alien, qualitatively different type of pain that thus falls into the Eighth Amendment's purview.⁶⁵

The resonant image of the firing squad also serves a possible deterrence rationale. The deterrence quantum of the death penalty versus life without parole is a perennial debate. Pennsylvania Attorney General William Bradford concluded in 1793 that (absent more evidence) the use of the death penalty in his state seemed to lack any deterrence benefit.⁶⁶ Cass Sunstein and Adrian Vermeule expand on the well-known Ehrlich hypothesis (that the death penalty deters homicide) in their consequentialist justification of the death penalty in "Is Capital Punishment Required? Acts, Omissions, and Life-Life Tradeoffs."⁶⁷ Their argument that the act/omission binary is a false distinction in terms of government responsibility is compelling. But it is ironic that, for an article built on the reification of the anonymous, "statistical" victim as a real person worthy of life, the authors tend to an abstracted, sanitized view of lethal injection. Death penalty proponents might also question whether deterrence rates differ depending on the specific *form* of death penalty implemented. Scalia identifies lethal injection as a desirable death,⁶⁸ perhaps would-be murderers do as well. If that still deters, then the graphic truth of the firing squad should increase the statistical significance of the deterrence effect.⁶⁹

63. DiStanislao, *supra* note 13, at 799.

64. Blecker, *supra* note 16, at 972.

65. A shared concern of the *Trop* court was that divesting citizenship is a qualitatively different kind of punishment outside of our shared schema of what constitutes a conventional punishment. *See Trop v. Dulles*, 356 U.S. 86, 99–101 (1958).

66. *Furman v. Georgia*, 408 U.S. 238, 353–54 (1972) (Marshall, J., concurring).

67. Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2005).

68. *See supra* note 43.

69. DiStanislao, *supra* note 13, at 804. Relatedly, Baccaria argued that deterrence values require that a punishment *look* more violent to observers than it actually feels.

Sunstein and Vermeule also use the prism of the trolley/footbridge problem to theorize the relationship of the death penalty to the volition of personal responsibility.⁷⁰ In its core form, this philosophical paradox surveys whether a person would throw a switch to save five trolley passengers at the expense of killing one innocent pedestrian, and then whether one would physically use an innocent pedestrian as a barrier to save this greater number of trolley passengers. Not surprisingly, throwing the switch is the much-preferred choice, even though the cost-benefit analysis comes out the same. Neuroscience suggests an increase in emotional sensitivity to the more physically violent option.⁷¹ Sunstein and Vermeule therefore posit that an aversion to the death penalty might reflect more of a visceral emotional response than a cognitive analysis.⁷² Perhaps true—and perhaps this is perfectly fine. But I find this tension more valuable as an example of how dispersed responsibility in lethal injection actually aligns it closer to the mechanical, impersonal nature of “throwing the switch.”⁷³ Professor Berger posits that a Weberian dynamic of anonymity and inertia have prevented necessary criticism of lethal injection from realizing. The concentrated, more easily intuited violence of the firing squad obliges us as a society to face the core brutality of the death penalty head on.⁷⁴

One rejoinder from Professor Fan is that, in states where death row prisoners are provided a choice of method, they almost overwhelmingly elect for lethal injection.⁷⁵ While this is perhaps historically accurate, the publicity of recent botches might be reshaping these preferences. DiStani-

Blecker, *supra* note 16, at 986. Maybe we should, for example, instead perform holographic executions and maroon the would-be executed to a black site prison?

70. Sunstein & Vermeule, *supra* note 67, at 742.

71. *Id.*

72. *Id.* at 43.

73. *Cf.* Berger, *supra* note 21, at 748–52.

74. *See* Wood v. Ryan, 759 F.3d 1076, 1103 (9th Cir. 2014) (Kozinski, J., dissenting) (“[I]f we are willing to carry out executions, we should not shield ourselves from the reality that we are shedding human blood. If 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.”); *see also* Glossip v. Gross, 135 S. Ct. 2726, 2797 (Sotomayor, J., dissenting) (“At least from a condemned inmate’s perspective, however, such visible yet relatively painless violence may be vastly preferable to an excruciatingly painful death hidden behind a veneer of medication. The States may well be reluctant to pull back the curtain for fear of how the rest of us might react to what we see. But we deserve to know the price of our collective comfort before we blindly allow a State to make condemned inmates pay it in our names.”).

75. Fan, *supra* note 5, at 434.

slao writes that four of nine current Utah death row inmates have announced their preference for the firing squad.⁷⁶ DiStanislao might be a tad hyperbolic in his assertion that the firing squad is wholly immune to botch.⁷⁷ However, death row prisoners are correct to think this is the safest available option—the two known counter-examples of botched firing squad executions seem to have been very preventable (by simply drawing the target above the heart, rather than above the right pectoral).⁷⁸ Other prisoners might resist the recumbent, convulsive imagery of lethal injection. Utah death row inmate John Albert Taylor selected the firing squad because he didn't "want to go flipping around like a fish."⁷⁹ Notions of traditional masculinity and cowboy justice are intertwined with the public conception of the firing squad. This sort of manliness might be a contested value in today's society, but it is one that probably holds some purchase for persons on death row in these frontier states.⁸⁰

A final comment is that perhaps simply having the *choice* over one's execution method is what brings dignity to this process.⁸¹ In 1996, Utah death row inmate Ronnie Lee Gardner argued in response to a proposed bill to end the firing squad, "I'm going to fight for [the firing squad]. We have no other decisions on our own, basically, and that's one I'd like to keep."⁸² Much has been written about how individual autonomy or freedom is impinged by the modalities of capital accumulation. But Richard Epstein would agree there is at least one profound good in the capitalist economy: that of choice.⁸³ Providing the alternative of the firing squad allows the executed to author their own catharsis,⁸⁴ and it forces the public

76. DiStanislao, *supra* note 13, at 797–98.

77. *Id.* at 788 (citing statistic that the botch rate associated with the firing squad is zero percent).

78. *See, e.g.*, Cutler, *supra* note 52, at 356–57.

79. *Id.* at 360 (citing Beverly DeVoy, *11-Year-Old's Killer Picks Death by Firing Squad*, DESERET NEWS, Dec. 5, 1995, <http://www.deseretnews.com/article/455576/11-YEAR-OLDS-KILLER-PICKS-DEATH-BY-FIRING-SQUAD.html>).

80. *Id.* at 420–21.

81. *See id.*

82. *Id.* at 403; *see also* Amy Donaldson, *Inmate Threatens to Sue If State Won't Let Him Die by Firing Squad*, DESERET NEWS (Feb. 9, 1996, 12:00 AM), <http://www.deseretnews.com/article/470713/INMATE-THREATENS-TO-SUE-IF-STATE-WONT-LET-HIM-DIE-BY-FIRING-SQUAD.html>.

83. *See, e.g.*, (and chuckle at) The Federalist Society, *Commentary by Richard Epstein and Q&A, Pt. 8*, YOUTUBE, <https://www.youtube.com/watch?v=8YaaZZN9VYs> (last visited Sept. 20, 2015).

84. *Wood v. Ryan*, 759 F.3d 1076, 1091 (9th Cir. 2014) (Bybee, J., dissenting).

audience to take an active, dialogic posture in our ongoing American narrative of death and justice with the rest of the world.⁸⁵ Fittingly, the syntactic emphasis of dignity in this concluding sentence depends on the personality of the reader: is dignity facing the firing squad, or is there dignity in facing the firing squad?

85. Interestingly, both the People's Republic of China and Vietnam recently began to phase out use of the firing squad (or a shooting death) in favor of lethal injection.