

# LET’S GOSSIP ABOUT *GLOSSIP*: THE SUPREME COURT’S MISGUIDED ADOPTION OF AN UNSURPASSABLE STANDARD FOR METHOD OF EXECUTION CHALLENGES UNDER THE EIGHTH AMENDMENT

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## INTRODUCTION

As of June 2018, approximately fifty-four percent of Americans support the death penalty,<sup>1</sup> while thirty-nine percent are opposed to it.<sup>2</sup> Furthermore, when given a choice between lethal injection, the electric chair, the gas chamber, firing squad, or hanging, sixty-five percent of people opined that lethal injection is the most humane form of punishment.<sup>3</sup> Despite this public approval, data from 2014 might surprise many, showing that lethal injection has had the highest rate of errors in executions when compared to all of these purportedly less-humane methods.<sup>4</sup> Evidence of these botched executions directly contradicts states' proposition that lethal injection is "quick, clean and painless."<sup>5</sup> What if lethal injection is actually the *least* humane method to date, but no one sentenced to execution by lethal injection can prove that it is cruel and unusual punishment?

In a spirited dissent to the Supreme Court's denial of certiorari in a recent case alleging that Alabama's lethal injection protocol is cruel and unusual, Justice Sonia Sotomayor contemplated this very issue by saying, "What cruel irony that the method that appears most humane may turn out to be our most cruel experiment yet."<sup>6</sup> The controversial lethal injection method that was at issue then also was challenged in an earlier case, *Glossip v. Gross*, which is the focus of this note.<sup>7</sup> In *Glossip*, the Supreme Court affirmed and applied a test for assessing claims regarding whether a particular method of execution violates the Cruel and Unusual Punishment Clause of the Eighth Amendment of the United States Constitution.<sup>8</sup>

Considering the significance of the death penalty and the longstanding debate surrounding the bounds of its constitutionality, the Supreme Court has heard numerous arguments regarding the constitutionality of capital punishment and specific methods of execution implemented by the states. The Supreme Court now considers it well-settled, however, that capital punishment is constitutional.<sup>9</sup> Furthermore, never once

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1. This note uses the terms "death penalty" and "capital punishment" interchangeably.

2. Death Penalty Information Center, *National Polls and Studies*, <https://deathpenaltyinfo.org/facts-and-research/public-opinion-polls/national-polls-and-studies#pew2018> (last visited September 14, 2019) [<https://perma.cc/PGH8-UDTZ>].

3. *Death Penalty*, GALLUP, <https://deathpenaltyinfo.org/national-polls-and-studies#pew2018> (last visited Aug. 14, 2019) [<https://perma.cc/R8XK-76JM>].

4. AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA'S DEATH PENALTY 123 (2014); see generally *Furman v. Georgia*, 408 U.S. 238, 369 (1972) (Marshall, J., concurring) (noting that the public does not fully understand the current state of the death penalty and that if they did, they would have different views about it).

5. SARAT, *supra* note 4, at 6.

6. *Arthur v. Dunn*, 137 S. Ct. 725, 733 (2017) (Sotomayor, J., dissenting).

7. *Glossip v. Gross*, 135 S. Ct. 2726 (2015), *aff'g by an equally divided court* *Wamer v. Gross*, 776 F.3d 721 (10th Cir. 2015).

8. U.S. CONST. amend. VIII.

9. *Baze v. Rees*, 553 U.S. 35, 47 (2008) (citing *Gregg v. Georgia*, 428 U.S. 153, 177 (1976)).

has the Court struck down a state's method of execution as unconstitutional under the Eighth Amendment,<sup>10</sup> giving states considerable flexibility in how to implement a sentence of death. Consequently, the Court's conclusion that the death penalty is constitutional has implicitly led to the idea that all possible methods of execution must also be deemed constitutional.

This note concludes that the *Glossip* test for determining when a method of execution runs afoul of the Eighth Amendment and constitutes cruel and unusual punishment improperly limits Eighth Amendment protection. Therefore, it should be overturned in favor of a new, more practical and impartial test that would lighten the prisoners' burden and hold states more accountable while still enabling states to carry out executions. Part I begins by examining the history of the death penalty in America, specifically exploring the nation's journey through various execution methods and the conclusion that lethal injection is the most humane method. Part II discusses the Supreme Court decision in *Baze v. Rees*<sup>11</sup> and the subsequent case, *Glossip v. Gross*,<sup>12</sup> which led to the Court's arrival at the current test for assessing challenges to execution methods under the Eighth amendment. Part III illuminates the problems that the *Glossip* test creates. Finally, Part IV contends that the Supreme Court should overrule *Glossip* and proposes an alternative test for assessing method of execution cases.

## I. THE EVOLUTION OF EXECUTION METHODS IN AMERICA

The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted,”<sup>13</sup> and it initially only applied to the federal government.<sup>14</sup> The Fourteenth Amendment provided a vehicle by which the Bill of Rights, including the Cruel and Unusual Punishment clause of the Eighth Amendment, could be equally binding on state and local governments.<sup>15</sup> The language in the Due Process Clause of the Fourteenth Amendment mirrors that of the Fifth Amendment<sup>16</sup> and served as the basis for the selective incorporation doctrine. The Supreme Court used this doctrine to determine which rights protected by the Bill of Rights were fundamental to our concept of “ordered liberty” such that they needed to be honored by the states as well as the federal government.<sup>17</sup>

In 1962, the Supreme Court expressly ruled that the Eighth Amendment applies to the states with regard to the Cruel and Unusual

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10. *Id.* at 48.

11. *Id.* at 47.

12. *Glossip*, 135 S. Ct. at 2737–38.

13. U.S. CONST. amend. VIII.

14. Raff Donelson, *Who Are the Punishers?*, 86 UMKC L. REV. 259, 279 (2017).

15. THOMAS G. WALKER, *ELIGIBLE FOR EXECUTION* 54 (2008).

16. U.S. CONST. amends. V, XIV.

17. *Palko v. Connecticut*, 302 U.S. 319, 324–25 (1937).

Punishment Clause.<sup>18</sup> Although the death penalty violates the Eighth Amendment when imposed on certain offenders<sup>19</sup> and for certain offenses,<sup>20</sup> the death penalty itself has never been found to violate the prohibition against cruel and unusual punishment nor any other provision of the Constitution.<sup>21</sup> Textual interpretations of the Due Process Clause suggest that there must be instances in which someone's life may be constitutionally taken.<sup>22</sup> Therefore, the framers accepted the death penalty as a tolerable form of punishment.<sup>23</sup>

Throughout America's experiment with capital punishment, the prevailing method of execution has evolved consistent with the prevailing views that the next method is more humane than the last.<sup>24</sup> Hanging was the primary method of execution in the United States for many years, and over half of the executions carried out in the United States have been by hanging.<sup>25</sup> Execution by hanging required only rope and a tree or scaffold, so it could be easily implemented regardless of the available resources.<sup>26</sup> People likely preferred hanging because it was easy to perform and because the public nature of it served a desired penological purpose, general deterrence.<sup>27</sup> The rationale was that if the entire community witnessed a criminal being hung, it would encourage them to refrain from committing a crime themselves.<sup>28</sup>

Hanging continued to prevail as the leading method of execution until the late 1800s when the New York Legislature appointed a commission to discover "the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases."<sup>29</sup> As a result of the commission's findings in 1890, the state of New York performed the first execution by electrocution.<sup>30</sup> The United States Supreme Court approved electrocution as an acceptable method because it did not "involve torture or a lingering death" or "something inhuman and barbarous."<sup>31</sup> New York's use of electrocution represented a major turning point, as many states

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18. U.S. CONST. amend. VIII; *Robinson v. California*, 370 U.S. 660, 667 (1962).

19. See Death Penalty Information Center, *Crimes Punishable by the Death Penalty*, <https://deathpenaltyinfo.org/crimes-punishable-death-penalty> (last visited Aug. 14, 2019) [<https://perma.cc/4UMW-KPZG>] (listing all of the crimes for which each state has made the death penalty an available punishment).

20. *Id.*

21. WALKER, *supra* note 15, at 59.

22. *Id.* at 59–60.

23. *Id.* Noting this context, this note merely examines method of execution challenges and makes no attack on the constitutionality of the death penalty.

24. WALKER, *supra* note 15, at 57; Chris Wilson, *Every Execution in U.S. History in a Single Chart*, TIME (Apr. 25, 2017, 8:00 AM), <http://time.com/82375/every-execution-in-u-s-history-in-a-single-chart/> [<https://perma.cc/3VYE-BBBK>].

25. See Wilson, *supra* note 24.

26. Richard C. Dieter, *Methods of Execution and Their Effect on the Use of the Death Penalty in the United States*, 35 FORDHAM URB. L.J. 789, 790 (2008).

27. *Id.*

28. *Id.*

29. *In re Kemmler*, 136 U.S. 436, 444 (1890).

30. Dieter, *supra* note 26, at 790–91.

31. *Kemmler*, 136 U.S. at 447.

followed New York's lead, triggering a shift in favor of this new, more private method of execution.<sup>32</sup>

In 1924, Nebraska introduced another method of execution—lethal gas.<sup>33</sup> With this method, a prisoner is locked inside a gas chamber and expected to breathe deeply to expedite the process.<sup>34</sup> Although Nebraska, like New York, sought a more humane method of execution in developing the gas chamber, witnesses asserted that there was “evidence of extreme horror, pain, and strangling. The eyes pop. The skin turns purple and the victim begins to drool.”<sup>35</sup> Therefore, the search for a more humane method of execution went on.

Finally, in 1977, Oklahoma introduced the method that is commonly used today, lethal injection.<sup>36</sup> Bill Wiseman, an Oklahoma legislator trying to assuage his guilty conscience, conceptualized lethal injection.<sup>37</sup> Although Wiseman fundamentally opposed the death penalty, his political aspirations caused him to disregard his beliefs and vote in favor of the death penalty.<sup>38</sup> In an effort to minimize the impact of his decision to support the death penalty, Wiseman sought help from the Oklahoma State Medical Examiner, Jay Chapman, to develop the first three-drug cocktail to be used in an execution.<sup>39</sup> Today, all of the states that allow the death penalty have lethal injection as a method.<sup>40</sup> Despite the intent to effect a more humane, dignified death, evidence is beginning to suggest that lethal injection, like execution methods that preceded it, might be just as distasteful as the methods that were abandoned in favor of it.<sup>41</sup>

While lethal injection remains the most widespread method of execution among the states, it is not the only method that is approved under the various state laws.<sup>42</sup> Other methods include hanging, electrocution, and the gas chamber.<sup>43</sup> Death by firing squad, however, never gained the

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32. *Glossip v. Gross*, 135 S. Ct. 2726, 2732 (2015); see Wilson, *supra* note 24.

33. Death Penalty Information Center, *Descriptions of Execution Methods* [hereinafter “DPIC, *Descriptions*”], <https://deathpenaltyinfo.org/descriptions-execution-methods> (last visited Aug. 14, 2019) [<https://perma.cc/BL2Q-EQ3D>].

34. *Id.*

35. JACOB WEISBERG, *THIS IS YOUR DEATH* 26 (1991).

36. DPIC, *Descriptions*, *supra* note 33.

37. *Oklahoma Man Who Developed Lethal Injection Recipe Lived with Regret*, NEWS ON 6 (May 1, 2014, 8:20 PM), <http://www.newson6.com/story/25406037/oklahoma-man-who-developed-lethal-injection-recipe-lived-with-regret> [<https://perma.cc/6WXS-3WVB>].

38. *Id.*

39. Rick Lowery, *The Bible and Lethal Injection: Why the Man Who Wrote Oklahoma's Law Opposed the Death Penalty*, HUFFPOST (July 27, 2014, 6:28 PM), [https://www.huffingtonpost.com/rick-lowery-phd/the-bible-and-lethal-injection\\_b\\_5395445.html](https://www.huffingtonpost.com/rick-lowery-phd/the-bible-and-lethal-injection_b_5395445.html) [<https://perma.cc/3VAA-475X>].

40. DPIC, *Descriptions*, *supra* note 33.

41. See Zaria Gorvette, *The People Rethinking Methods of Execution*, BBC FUTURE (June 6, 2018), <http://www.bbc.com/future/story/20180604-is-there-a-humane-way-to-kill-a-criminal> [<https://perma.cc/Z28D-JJAN>].

42. DPIC, *Descriptions*, *supra* note 33.

43. *Id.*

popularity of the other methods.<sup>44</sup> It is worth noting, however, because Utah reinstated it as a backup method in 2015 as a result of a nationwide shortage of common lethal injection drugs.<sup>45</sup> Like Utah, most states have statutes that allow for backup methods of execution that provide for alternative methods if the primary method is unavailable or found to be unconstitutional.<sup>46</sup> Currently, however, only three states have a provision allowing for firing squads: Utah, Mississippi, and Oklahoma.<sup>47</sup>

While the death penalty is predominantly a state issue given the significantly higher number of persons executed by the states,<sup>48</sup> the federal government also utilizes the death penalty.<sup>49</sup> Unlike some of the state laws addressed above, federal law does not list alternative, backup execution methods.<sup>50</sup> The Code of Federal Regulations provides the following: “Except to the extent a court orders otherwise, a sentence of death shall be executed . . . [b]y intravenous injection of a lethal substance or substances in a quantity sufficient to cause death. . . .”<sup>51</sup>

Lethal injection is undisputedly the principal method of execution in America,<sup>52</sup> and the historical trend of abandoning execution methods in favor of more humane ones suggests that the death penalty states and the federal government believe that lethal injection is the most humane method to date.<sup>53</sup> As this note will address, there is evidence to the contrary. Consequently, one would expect that a death row inmate could successfully challenge lethal injection as an inhumane method of execution. Two recent Supreme Court cases serve as examples of inmates attempting such a challenge.

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44. See Wilson, *supra* note 24.

45. *Utah Brings Back Firing Squad Executions; Witnesses Recall the Last One*, NPR (Apr. 5, 2015, 7:15 PM), <https://www.npr.org/2015/04/05/397672199/utah-brings-back-firing-squad-executions-witnesses-recall-the-last-one> [<https://perma.cc/HSQ9-5H55>].

46. Death Penalty Information Center, *Methods of Execution* [hereinafter “DPIC, *Methods*”], <https://deathpenaltyinfo.org/methods-execution> (last visited Aug. 14, 2019) [<https://perma.cc/5WVA-4BNL>].

47. *Id.*

48. Death Penalty Information Center, *State & Federal Info*, <https://deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty> (last visited Aug. 11, 2019) [<https://perma.cc/EW4D-RYL6>].

49. Death Penalty Information Center, *Federal Laws Providing for the Death Penalty*, <https://deathpenaltyinfo.org/federal-laws-providing-death-penalty> (last visited Aug. 14, 2019) [<https://perma.cc/9CNF-MYWP>].

50. See *id.*

51. 28 C.F.R. § 26.3 (2019).

52. DPIC, *Methods*, *supra* note 46.

53. See Dieter, *supra* note 26, at 814–15.

## II. EIGHTH AMENDMENT JURISPRUDENCE REGARDING METHOD OF EXECUTION CHALLENGES

The Supreme Court has repeatedly emphasized that the death penalty is not per se unconstitutional.<sup>54</sup> As such, the Justices are hesitant to declare that a state's chosen method of execution is unconstitutional because such a ruling could threaten the death penalty as a whole.<sup>55</sup> The Court's opinions in *Baze v. Rees*<sup>56</sup> and subsequently, *Glossip v. Gross*,<sup>57</sup> which reaffirmed *Baze*, outline the test used to determine whether a state's execution method constitutes cruel and unusual punishment that is violative of the Eighth Amendment. This section explains these decisions and lays the groundwork for the current landscape regarding method of execution challenges.

### A. *Baze v. Rees*

The Supreme Court issued a plurality opinion for *Baze v. Rees* in 2008, when thirty-six states and the federal government had capital punishment as an available sentence for certain crimes.<sup>58</sup> At that time, every jurisdiction that utilized capital punishment, including Kentucky, the subject of the case, used lethal injection as a potential method of carrying out the execution.<sup>59</sup> The petitioners in *Baze*, Ralph Baze and Thomas Bowling,<sup>60</sup> were both convicted of double homicides and sentenced to death. The death sentence called for both Mr. Baze and Mr. Bowling to be executed by lethal injection.<sup>61</sup> Similar to most other states, Kentucky's lethal injection protocol called for a three-drug cocktail using sodium thiopental, pancuronium bromide, and potassium chloride.<sup>62</sup> The drugs, used in that order, are intended to render the individual unconscious, paralyze his or her body, and finally, induce cardiac arrest.<sup>63</sup>

Petitioners Baze and Bowling contended that Kentucky's lethal injection method constituted cruel and unusual punishment because there was a risk that the protocol might not be administered properly and could, therefore, result in significant pain.<sup>64</sup> The trial court, in a bench trial, heard testimony from approximately twenty witnesses, including some experts, and found that the risk of incorrect administration of the protocol was minimal,

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54. *Warner v. Gross*, 776 F.3d 721, 728 (10th Cir. 2015) (citing *Baze v. Rees*, 553 U.S. 47, 47 (2008)), *aff'd sub nom.*, *Glossip v. Gross*, 135 S. Ct. 2726 (2015).

55. *Glossip*, 135 S. Ct. at 2732–33, 2738.

56. *Baze*, 553 U.S. at 50.

57. *Glossip* 135 S. Ct. at 2737–38.

58. *Baze*, 553 U.S. at 40.

59. *Id.* at 40–41.

60. *Id.* at 46.

61. *Id.* at 41.

62. *Id.* at 44.

63. *Id.*

64. *Id.* at 41.

considering the numerous safeguards<sup>65</sup> included. The case went to the Kentucky Supreme Court, which determined that an execution method violates the Eighth Amendment when it “creates a substantial risk of wanton and unnecessary infliction of pain, torture or lingering death.”<sup>66</sup> Noting the applicable standard, the Kentucky Supreme Court affirmed the lower court’s decision.

The Supreme Court of the United States, in a plurality opinion authored by Chief Justice Roberts,<sup>67</sup> agreed that Kentucky’s protocol survived the Eighth Amendment.<sup>68</sup> The by-product of this opinion was a two-prong test in which inmates, to successfully argue that their method of execution violates the Eighth Amendment, must show that the chosen execution method presents “a substantial risk of serious harm,” which has also been described as an “objectively intolerable risk of harm.”<sup>69</sup> Additionally, the inmates must plead and prove an alternative execution method that is “feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.”<sup>70</sup>

Inmates must prove, therefore, that the challenged method presents a risk that is “substantial *when compared to the known and available alternatives*.”<sup>71</sup> Finally, if an inmate meets this burden and presents a feasible alternative, there is one more inquiry for the Court. There might be cruel and unusual punishment if the state cannot proffer a “legitimate penological justification” for retaining its current execution method and refusing to adopt the inmate’s proposed alternative in light of its proven benefits.<sup>72</sup>

Before applying the articulated test to the facts of *Baze*, the Court noted that it would be difficult to characterize Kentucky’s execution method as “objectively intolerable” because it is in fact “widely tolerated.”<sup>73</sup> In making this observation, the Court was referring not only to the nationwide tolerance of lethal injection as an acceptable method in general, but also to the exact three-drug protocol Kentucky used.<sup>74</sup> At the time, thirty states and the federal government used the same combination of drugs: sodium thiopental, pancuronium bromide, and potassium chloride.<sup>75</sup>

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65. The trial court and the Supreme Court found the following safeguards of the protocol, among others, to be significant: only qualified personnel with at least one year of professional experience are responsible for inserting the IV catheters, the warden and deputy warden stay in the execution chamber to ensure that the first drug is successful and to watch for problems with the tubing, and a physician is present to help revive the prisoner in the event of a last-minute stay of execution. *Id.* at 45–46.

66. *Id.* at 46 (quoting *Baze v. Rees*, 217 S.W.3d 207, 209 (Ky. 2006)).

67. Justices Kennedy and Alito joined the opinion. *See id.* at 63, 71.

68. *Id.* at 47.

69. *Id.* at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846 n.9 (1994)).

70. *Id.* at 52.

71. *Id.* at 61 (emphasis added).

72. *Id.* at 52.

73. *Id.* at 53.

74. *Id.*

75. *Id.* (citing *Workman v. Bredesen*, 486 F.3d 896, 902 (6th Cir. 2007)).

The Court went on, however, to acknowledge that this “broad consensus” was not per se dispositive.<sup>76</sup> The fact that lethal injection was widely tolerated and used was merely the beginning of the Court’s analysis. The Court assessed the validity of the petitioners’ claim by declaring that the petitioners had the “heavy burden” of showing that Kentucky’s lethal injection procedure is “cruelly inhumane.”<sup>77</sup> The potential for inaccurate administration of the first drug in the process was the gravamen of the petitioners’ challenge. The Court accepted the uncontested fact that if a prisoner did not get an accurate dose of the sodium thiopental sufficient to result in unconsciousness, “a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride” would follow.<sup>78</sup>

The Court was not impressed with the petitioners’ argument that such an error was likely to occur, however. The Court determined that the instructions being printed on the package, explaining how to calculate and mix the dosage, made it doubtful that the sodium thiopental would be prepared incorrectly.<sup>79</sup> Similarly, anticipated issues with the IV lines were also not enough to sway the Court because of the numerous safeguards included in Kentucky’s protocol.<sup>80</sup> The most significant safeguard, according to the Court, is the requirement that the IV team members must have at least one year of relevant professional experience.<sup>81</sup> Therefore, the “risks” that the petitioners asserted were neither “so substantial or imminent” as to serve as the foundation for an Eighth Amendment violation.<sup>82</sup> The Court highlighted the protocol’s safeguards as evidence that the alleged risks of harm were unlikely, thus negating most of the petitioners’ argument.<sup>83</sup>

Accordingly, the Court held that petitioners had not satisfied the first prong of the test because they failed to prove that there was a “substantial risk of serious harm.”<sup>84</sup> Despite this, the Court still considered the fact that the petitioners did propose an alternative that would use only a single drug. Notably, however, it was a procedure that no state had tried or even adopted.<sup>85</sup> Since that method had never been used, petitioners had no evidence or data demonstrating its effectiveness.<sup>86</sup> Because of this, the Court concluded that Kentucky’s refusal to adopt the proposed method did not implicate Eighth Amendment concerns.<sup>87</sup> Similarly-situated inmates hoping

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76. *Id.*

77. *Id.* (citing *Gregg v. Georgia*, 428 U.S. 153, 175 (1976)).

78. *Id.* (citing Tr. of Oral Arg. 27).

79. *Id.* at 54 (quoting 5 Tr. 695 (Apr. 19, 2005)).

80. *Id.* at 55.

81. *Id.*

82. *Id.* at 56.

83. *Id.* at 55.

84. *Id.* at 53–54.

85. *See id.* at 41, 56.

86. *Id.* at 56–57.

87. *See id.* at 56–57, 62.

to propose novel execution methods encounter this same obstacle of having no evidence to support the method's efficacy.

### B. *Glossip v. Gross*

The Supreme Court decided *Glossip v. Gross*<sup>88</sup> approximately seven years after *Baze*. Richard Glossip was one of twenty-one inmates on death row who brought a 42 U.S.C. § 1983<sup>89</sup> claim challenging Oklahoma's lethal injection protocol under the Eighth Amendment.<sup>90</sup> All of the inmates faced death sentences as a result of first-degree murder convictions.<sup>91</sup> Four plaintiffs—Charles Warner, Richard Glossip, John Grant, and Benjamin Cole—filed for a preliminary injunction to stay their executions until the overall case was decided on the merits because they had set execution dates.<sup>92</sup> The basis of the complaint was that the first of the three drugs used in Oklahoma's lethal injection protocol, midazolam, would not serve its essential purpose of rendering the inmates insensate to pain.<sup>93</sup> This first drug is intended to shield the inmate from the discomfort of receiving the paralytic and ultimately, the cardiac arrest-inducing drug.

The District Court for the Western District of Oklahoma denied the prisoners' preliminary injunction because it found the prisoners' arguments that midazolam has a ceiling effect and could result in paradoxical reactions and negligent administration speculative.<sup>94</sup> Applying the standard from *Baze*, the District Court found that the prisoners had failed to show that the chosen lethal injection protocol presents a substantial risk of pain when compared to known and available alternatives.<sup>95</sup> In essence, the prisoners were unable to prove that Oklahoma's lethal injection protocol presented a substantial risk of harm. Additionally, they did not sufficiently plead and prove that there is a feasible, readily implemented alternative method. The Tenth Circuit affirmed, finding no grounds upon which to reverse.<sup>96</sup>

By the time the case got to the Supreme Court, one of the petitioners, Charles Warner, had already been executed with the three-drug cocktail

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88. *Id.*

89. To summarize, § 1983 creates a cause of action allowing individuals to allege a deprivation of constitutional rights under color of state law. 42 U.S.C. § 1983 (2017).

90. *Warner v. Gross*, 776 F.3d 721, 723 (10th Cir. 2015), *aff'd sub nom.*, *Glossip v. Gross*, 135 S. Ct. 2726 (2015).

91. *Id.* at 723.

92. *Id.* at 723–24.

93. *Glossip*, 135 S. Ct. at 2731.

94. The plaintiffs argued that midazolam has a ceiling effect, meaning that after a certain dosage level is administered, “incremental increases in dosage . . . have no corresponding incremental effect.” *Warner*, 776 F.3d at 726. Additionally, the plaintiffs contend that midazolam presents a risk of paradoxical reactions such as “agitation, involuntary movements, hyperactivity, and combativeness” that makes midazolam inapt as a “stand-alone anesthetic.” *Id.* at 726–27 (quoting ROA Vol. 1 at 960).

95. *Id.* at 731 (quoting ROA Vol. 3 at 927).

96. *Id.* at 735–36.

utilizing midazolam.<sup>97</sup> Justice Alito wrote the majority opinion, ruling against the remaining petitioners.<sup>98</sup> The central theme of the opinion was that rigorous standards must be maintained because without them, challenges to a particular method of execution could serve as a means of dismantling the death penalty, itself.<sup>99</sup> Those rigorous standards were articulated by the Court in *Baze* and affirmed in this case.<sup>100</sup>

The Court utilized three important principles as the basis for that affirmation. First, because it is well-established that capital punishment is a constitutional form of punishment, “[i]t necessarily follows that there must be a [constitutional] means of carrying it out.”<sup>101</sup> Second, in the long history of the death penalty in America, the Court has never found a state’s chosen method of execution to constitute cruel and unusual punishment.<sup>102</sup> Finally, even the most humane methods of execution may result in some inherent risk of pain, however, “the Constitution does not demand the avoidance of *all risk* of pain.”<sup>103</sup>

With these principles in mind, the Court looked to what was articulated in *Baze* as the appropriate test, considering whether the method in question presented a substantial risk of serious harm and whether the inmates sufficiently proved that there was a feasible, readily implemented alternative that would significantly reduce the substantial risk of pain.<sup>104</sup> The test can be more succinctly explained as determining whether the challenged execution method presents a substantial risk of harm “when compared to the known and available alternatives.”<sup>105</sup>

The Supreme Court explained that the first prong means showing that the risks presented are “sure or very likely to cause serious illness and needless suffering.”<sup>106</sup> In considering this, the Court gave great weight to the fact that many courts have concluded that midazolam is likely to render an inmate sufficiently insensate to pain and determined that the inmates in this case had not met their burden in proving the contrary.<sup>107</sup> In further explaining the Court’s analysis of the first prong, Justice Alito markedly stated that “federal courts should not ‘embroil [themselves] in ongoing scientific controversies beyond their expertise.’”<sup>108</sup>

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97. *Glossip*, 135 S. Ct. at 2726, 2734.

98. *Id.* at 2731.

99. *See id.* at 2738, 2738.

100. *Id.* at 2746; *Baze v. Rees*, 553 U.S. 35, 61 (2008).

101. *Glossip*, 135 S. Ct. at 2732–33 (quoting *Baze*, 553 U.S. at 47).

102. *Id.* at 2732 (quoting *Baze*, 553 U.S. at 48).

103. *Id.* at 2795 (quoting *Baze*, 553 U.S. at 47) (emphasis added).

104. *Id.* at 2737–38.

105. *Id.* at 2737 (quoting *Baze*, 553 U.S. at 61).

106. *Id.* (quoting *Baze*, 553 U.S. at 50).

107. *Id.* at 2739–40.

108. *Id.* at 2740 (quoting *Baze*, 553 U.S. at 51).

The majority also concluded that the inmates failed to prove that there was a “known and available alternative method of execution.”<sup>109</sup> The inmates proposed the use of sodium thiopental (or pentobarbital in the absence of sodium thiopental) as a single-drug protocol because these drugs are arguably better-able to render an inmate insensate.<sup>110</sup> These proposed drugs had both been used in successful executions, but the Court affirmed the lower courts’ determination that both were now unavailable.<sup>111</sup> Although these inmates proposed two well-tested drugs, they could not satisfy the alternative prong. Without directly explaining whether pentobarbital or sodium thiopental would be substantially less painful than midazolam, the Court concluded that both of these proposed drugs were unavailable.<sup>112</sup>

Justice Breyer’s dissent and Justice Scalia’s concurring opinion debated solely the constitutionality of the death penalty in general, which is beyond the scope of this note.<sup>113</sup> However, Justice Thomas’s concurrence warrants some discussion.<sup>114</sup> Thomas posed the following questions, which have remained unanswered since the *Baze* decision: “At what point does a risk become ‘substantial’? What makes an alternative procedure ‘feasible’ and ‘readily implemented’? When is a reduction in risk ‘significant’? What penological justifications are ‘legitimate?’”<sup>115</sup> This note does not undertake the task of answering these questions, but it highlights the fact that they remain unanswered, leaving inmates unsure of what is required of them.

Thomas also argued that an execution method only violates the Eighth Amendment “if it is deliberately designed to inflict pain.”<sup>116</sup> He contended that the inmates in this case had no valid claim since they did not attempt to argue that Oklahoma chose midazolam specifically to “add elements of terror, pain, or disgrace to the death penalty.”<sup>117</sup> This is an intriguing conclusion, but it is one that is not supported by the language or policy of the Eighth Amendment because the amendment provides for an outright prohibition of cruel and unusual punishments,<sup>118</sup> not one that is effective *only if* the state’s purpose was to inflict torture. This must be the case because to think otherwise would mean that if a state proposed a method of execution that would be sufficiently torturous simply because it was their only option, it would not violate the Eighth Amendment by Justice Thomas’s approach.

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109. *Id.* at 2738.

110. *Id.*

111. *Id.* at 2733–34, 2738.

112. *Id.*

113. *Id.* at 2746 (Scalia, J., concurring); *id.* at 2755 (Breyer, J., dissenting).

114. *Id.* at 2750 (Thomas, J., concurring).

115. *Baze v. Rees*, 553 U.S. 35, 105 (2008) (Thomas, J., concurring).

116. *Glossip*, 135 S. Ct. at 2750 (Thomas, J., concurring) (quoting *Baze*, 553 U.S. at 94 (Thomas, J., concurring)).

117. *Id.* (quoting *Baze*, 553 U.S. at 107).

118. *Id.* at 2780–81 (Sotomayor, J., dissenting).

Finally, Justice Sotomayor's dissenting opinion explained that if the midazolam did not function as intended, the use of the remaining drugs in the protocol would torturously cause "burning, searing pain" while the inmate is unable to express discomfort due to the paralytic.<sup>119</sup> Contrary to the majority, Sotomayor concluded that the inmates furnished ample evidence to show that this risk posed by the state's use of midazolam was substantial and constitutionally intolerable.<sup>120</sup> Mainly, petitioners showed that midazolam has a ceiling effect, above which higher dosages are ineffective.<sup>121</sup> Sotomayor posited that the majority ignored substantial evidence suggesting that even if midazolam effectively induces unconsciousness, it is incapable of maintaining that state when confronted with the pain caused by the subsequent drugs.<sup>122</sup>

Sotomayor concluded by arguing that the Court's ruling on the alternative prong was "legally indefensible,"<sup>123</sup> and turned what should be a categorical ban on cruel and unusual punishment into a conditional one.<sup>124</sup> Rather than definitively banning cruel and unusual punishment, the Court now finds a method of execution unconstitutional *only if* there is a "known and available alternative." Additionally, since *Baze* was a plurality opinion, Sotomayor noted that the alternative requirement did not represent the majority view and was not the holding.<sup>125</sup> She further analyzed the *Baze* opinion to support her contention that what the majority in *Glossip* articulated as the prong of the test that requires plaintiffs to prove that there is an available alternative was not actually what the plurality meant,<sup>126</sup> but for purposes of this note, it is assumed that the current test is what the majority applied in *Glossip*.

The rule outlined in *Glossip* resulted in much commentary and criticism, and the debate is far from over.<sup>127</sup> Justice Sotomayor has reiterated her dissatisfaction with the test and the challenges it causes, but to date, she has been unable to change the landscape of method of execution cases.<sup>128</sup> The

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119. *Id.* at 2780–81 (Sotomayor, J., dissenting).

120. *Id.* at 2781 (Sotomayor, J., dissenting).

121. *Id.* at 2783 (Sotomayor, J., dissenting).

122. *Id.* at 2785 (Sotomayor, J., dissenting).

123. *Id.* at 2792 (Sotomayor, J., dissenting).

124. *Id.* at 2793 (Sotomayor, J., dissenting).

125. *Id.* (Sotomayor, J., dissenting).

126. *Id.* at 2793–95 (Sotomayor, J., dissenting).

127. See *Glossip v. Gross Coverage and Commentary Recap*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/glossip-commentary> (last visited Aug. 14, 2019) [<https://perma.cc/RR55-NGJQ>].

128. There are multiple instances in which Justice Sotomayor dissented and expressed concerns regarding *Glossip*. See generally *Zagorski v. Haslam*, 139 S. Ct. 20 (2018); *Zagorski v. Parker*, 139 S. Ct. 11 (2018); *Irick v. Tennessee*, 139 S. Ct. 1 (2018); *Arthur v. Dunn*, 137 S. Ct. 1838 (2017); *Arthur v. Dunn*, 137 S. Ct. 725 (2017); *Warner v. Gross*, 135 S. Ct. 824 (2015).

subsequent section of this note highlights some of these issues and indicates that Justice Sotomayor's stance is the most logical.<sup>129</sup>

### III. PROBLEMS WITH THE ADOPTED TEST

In response to Justice Stevens's concurring opinion in *Baze*, Chief Justice Roberts declared, "the standard we set forth here resolves more challenges than [Justice Stevens] acknowledges."<sup>130</sup> Despite that belief, *Baze* and *Glossip* left many unanswered questions that lower courts have struggled to answer.<sup>131</sup> The Supreme Court's failure to adequately define the contours of what must be proven in a successful method of execution case under the Eighth Amendment is causing inconsistencies between the circuit courts.<sup>132</sup> Even if the Court had gone further and defined each part of the test, however, *Glossip* should still be overturned for four reasons. First, it is inconsistent with the Eighth Amendment and limits the protections therein. Second, it unfairly creates an errant standard that is nearly impossible for inmates to satisfy. Third, the misguided standard that *Glossip* imposes gives states too much deference, thus allowing the state to use virtually any execution method they choose. Finally, the states' unconstrained autonomy over executions compromises the integrity of drug manufacturing companies.

Society has accepted lethal injection under the potentially misguided belief that it is humane and simple, but there is mounting evidence to show that the first drug in many states' lethal injection protocol does not and, indeed, cannot work as needed or anticipated.<sup>133</sup> Prior executions using midazolam indicate that upon administration of the second and third drugs, inmates might wake up and be conscious of the pain that the first drug was supposed to shield them from.<sup>134</sup> Despite such evidence that lethal injection has the potential to result in lingering and painful death, the Supreme Court has shielded it from Eighth Amendment scrutiny by adopting the *Glossip* test that makes it impossible for an inmate to prove that lethal injection could be cruel and unusual punishment.

The definitive effect of the *Glossip* test is that the protections guaranteed by the Eighth Amendment collapse. Additionally, all future method of execution challengers are fighting a losing battle due to both the high burden of proving an alternative and the importance the Supreme Court

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129. See *infra* Part III.

130. *Baze v. Rees*, 553 U.S. 35, 61 (2008).

131. Debra Cassens Weiss, *Federal and State Judges Block Executions of Eight Arkansas Inmates; State Appeals*, ABA J. (Apr. 17, 2017, 8:20 AM), [http://www.abajournal.com/news/article/federal\\_and\\_state\\_judges\\_block\\_executions\\_of\\_seven\\_arkansas\\_inmates\\_state\\_a](http://www.abajournal.com/news/article/federal_and_state_judges_block_executions_of_seven_arkansas_inmates_state_a) [<https://perma.cc/D5TT-QQMN>].

132. Tyler Baum, *McGhee v. Hutchinson: The Cruel and Unusual Battle with Eighth Amendment Method-of-Execution Claims*, 11 J. MARSHALL L.J. 110, 115–16 (2017).

133. *Inventor of Midazolam Opposes Its Use in Executions*, DEATH PENALTY INFO. CTR., URL (last visited Jan. 25, 2019) [<https://perma.cc/CG9S-KWRZ>].

134. *Glossip v. Gross*, 135 S. Ct. 2726, 2782 (2015) (Sotomayor, J., dissenting).

has placed on maintaining deference to the states in upholding the constitutionality of the death penalty.

### A. Limited Eighth Amendment Protection

As Justice Sotomayor explained in her dissenting opinion in *Glossip*, the implication of the majority's test is that even a very painful execution method would violate the Eighth Amendment "if, and only if, there is a 'known and available alternative' method of execution."<sup>135</sup> The Eighth Amendment *categorically* prohibits cruel and unusual punishment<sup>136</sup> and thus, a finding of a violation should not be based on whether another punishment is available that would be less painful. The Court's current jurisprudence, nonetheless, limits the scope of the Eighth Amendment's protection.<sup>137</sup>

A historical look at method of execution cases ranging from the first one before the United States Supreme Court to today reveals that the Supreme Court has never invalidated a state's chosen method of execution as unconstitutional. The Court has appeared comfortable acknowledging that certain barbaric methods are clearly unconstitutional, and declared that "[p]unishments are cruel when they involve torture or a lingering death. . . . It implies there something inhuman and barbarous,—something more than the mere extinguishment of life."<sup>138</sup> While people are not guaranteed a painless death,<sup>139</sup> one that causes lingering death or an inhumane end should be considered cruel and unusual. Therefore, the *Glossip* test contravenes this idea by making Eighth Amendment protection provisional, especially since the required condition is too difficult to meet.

Inmates allege that midazolam, the controversial lethal injection drug challenged in *Glossip*—and other cases<sup>140</sup>—is incapable of adequately rendering someone unconscious, resulting in the sensation of being chemically burned from the inside.<sup>141</sup> Despite evidence of the limitations and problems that are possible with midazolam, even when administered as written by state protocols,<sup>142</sup> the Supreme Court will not conclude that it is cruel and unusual unless the inmates can sufficiently satisfy the alternative requirement of *Glossip*. This is a flawed and illogical result.

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135. *Id.* at 2793 (Sotomayor, J., dissenting) (emphasis in original).

136. *Penry v. Lynaugh*, 492 U.S. 302, 305 (1989).

137. *Trop v. Dulles*, 356 U.S. 86, 101 (1958); WALKER, *supra* note 15, at 56.

138. *In re Kemmler*, 136 U.S. 436, 447 (1890).

139. *Baze v. Rees*, 553 U.S. 35, 37 (2008).

140. Other states have faced litigation after adding midazolam to their protocols. *See generally* *Abdur'Rahman v. Parker*, 558 S.W.3d 606 (Tenn. 2018).

141. *Glossip v. Gross*, 135 S. Ct. 2726, 2781 (2015) (Sotomayor, J., dissenting).

142. Dave Boucher, *Tennessee Warned About Use of Controversial Drug Combination for Lethal Injection*, TENNESSEAN (Jan. 19, 2018, 1:30 PM), <https://www.tennessean.com/story/news/crime/2018/01/19/tennessee-warned-use-controversial-drug-combination-lethal-injections/1046487001/> [<https://perma.cc/BAF2-YFUV>].

By this standard, an execution method might be deemed cruel and unusual one day, because there is a substantially safer alternative. And yet, that same method would be constitutional on another day or in another state, merely because there are no alternatives. Justice Breyer's dissenting opinion listed four factors supporting his assertion that the death penalty should be outlawed, and one of the factors is arbitrariness.<sup>143</sup> The arbitrariness of method of execution claims is correspondingly unpalatable.

If a state decided to execute someone by burning them at the stake, which is determinedly torturous, they would be able to do so if the inmate was unable to show that there was an available alternative. This is even more problematic than it may initially appear because, not only does the alternative method have to be feasible, readily implemented, and available, but it also has to be an enumerated method that the state provides for by statute.<sup>144</sup> This aspect of the test will be discussed further, but it completely contravenes an important purpose of the Eighth Amendment by requiring the inmate to show that the state has authorized another, safer method before being able to find relief from cruel and unusual punishment. The burden of the alternative prong has the unfortunate consequence of giving too much deference to the states at the expense of the inmates' Eighth Amendment protections.

### **B. Unfair Burden on Death Row Inmates**

Before *Glossip*, the Supreme Court had never held that a method of execution challenge required the proposal of an alternative.<sup>145</sup> In previous cases, proving an alternative was a way for petitioners to indicate that the purpose of the suit was not to nullify their death sentence under the pretextual claim that the specific method is unconstitutional.<sup>146</sup> In declining to accept the government's view that a petitioner *must* prove an alternative, the Court previously explained that "as long as the civil rights challenge did not foreclose execution, it was properly styled, and the condemned prisoner was not required to plead or prove an alternative method of execution."<sup>147</sup> The Court should return to this reasoning and reject the stringent alternative requirement.

This section argues that the Supreme Court set a bad precedent in choosing to defend the death penalty and all proposed methods to such an extent as to disregard the constitutional protections guaranteed to death row inmates. The Court has created a "perverse requirement" and a "macabre challenge"<sup>148</sup> that compels condemned prisoners to propose an alternative

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143. *Glossip*, 135 S. Ct. at 2755–56 (Breyer, J., dissenting).

144. *Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268, 1314–15 (11th Cir. 2016).

145. Megan McCracken, *Legally Indefensible: Requiring Death Row Prisoners to Prove Available Execution Alternatives*, 41 CHAMPION 46, 47 (2017).

146. *See Hill v. McDonough*, 547 U.S. 573 (2006); *Nelson v. Campbell*, 541 U.S. 637 (2004).

147. McCracken, *supra* note 145, at 47.

148. *Irick v. Tennessee*, 139 S. Ct. 1, 3 (2018) (Sotomayor, J., dissenting).

method for their own executions. In addition to the manifestly unorthodox nature of placing this burden on the prisoners rather than the states, there is the additional consequence that it is an unattainable standard.<sup>149</sup>

Consideration of post-*Glossip* cases shows that the burden the Court has crafted is too heavy to satisfy. In *Arthur v. Commissioner, Alabama Department of Corrections*, Alabama's chosen method of execution used the same three drugs that the petitioners in Oklahoma challenged in the *Glossip* case: midazolam, rocuronium bromide,<sup>150</sup> and potassium chloride.<sup>151</sup> Thomas Arthur, who was a death row inmate in Alabama, presented what the District Court for the Middle District of Alabama deemed "impressive" evidence regarding the risks posed by midazolam. However, because the district court concluded that Arthur had failed to meet the "known and available alternative" requirement, the court did not consider this evidence.<sup>152</sup>

Arthur had initially proposed a single drug protocol utilizing either pentobarbital or sodium thiopental, which were both the primary lethal injection drugs prior to a national shortage<sup>153</sup> that resulted in the use of midazolam.<sup>154</sup> After the district court found that these drugs were not available, Arthur filed a motion to amend his complaint to propose the firing squad as his alternative.<sup>155</sup> The district court denied Arthur again because, according to the court, the firing squad was also not a feasible or readily implemented alternative because Alabama does not provide for it by statute.<sup>156</sup> The Court of Appeals for the Eleventh Circuit affirmed the judgment in the state's favor.<sup>157</sup>

Alabama's death penalty statute expressly states the approved methods of execution.<sup>158</sup> Because the statute does not explicitly allow the firing squad, the Eleventh Circuit concluded that it was beyond the authority of the Department of Corrections and declined to consider Arthur's evidence regarding the dangers of midazolam.<sup>159</sup> This is one example of an inmate that presumably had enough evidence to show by a preponderance of the evidence that midazolam poses a substantial risk of severe harm but could not win his

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149. McCracken, *supra* note 145, at 48.

150. Oklahoma used pancuronium bromide, but the Court explained in *Glossip* that pancuronium bromide, vecuronium bromide, and rocuronium bromide are all virtually equivalent in that they act as a paralytic. *Glossip v. Gross*, 135 S. Ct. 2726, 2735 (2015).

151. *Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268, 1274 (11th Cir. 2016).

152. *Arthur v. Dunn*, 137 S. Ct. 725, 728 (2017) (Sotomayor, J., dissenting).

153. Anti-death penalty advocates rallied to get manufacturers to stop making the drugs, which had the ironic consequence that no death row inmates have available alternatives to argue. *Glossip*, 135 S. Ct. at 2733–34.

154. *Id.* at 2734.

155. *Arthur*, 137 S. Ct. at 728 (Sotomayor, J., dissenting).

156. *Id.*

157. *Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268, 1314–15 (11th Cir. 2016).

158. ALA. CODE § 15-18-82.1(c) (2019).

159. *Arthur*, 137 S. Ct. at 728 (Sotomayor, J., dissenting).

Eighth Amendment challenge because he could not successfully propose another method despite three attempts to do so.<sup>160</sup>

Unfortunately, The Supreme Court did not endeavor to define what makes a proposed alternative “feasible” or “readily implemented,”<sup>161</sup> so it is unclear whether the Eleventh Circuit was correct. When considering the common, dictionary definitions of the terms, it seems reasonable to think that the firing squad could meet these requirements because it would be an instantaneous death that requires little resources. Merriam-Webster defines “feasible” as “capable of being carried out”<sup>162</sup> and “readily” as “without much difficulty.”<sup>163</sup> Under these definitions, Arthur clearly met his burden, but *Glossip* has been interpreted to mean that the method must also be expressly authorized by the state’s execution statute.<sup>164</sup> One court markedly suggested that this understanding of the availability requirement places a near “impossible burden” on plaintiffs challenging their method of execution,<sup>165</sup> which is the one of the main issues with *Glossip* that this note highlights.

Surprisingly, the Sixth Circuit held in a 2017 case that the plaintiffs successfully argued that pentobarbital was an available alternative despite Ohio being unable to purchase it and having none on hand because the plaintiffs proposed using compounded pentobarbital.<sup>166</sup> The plaintiffs argued that, to succeed, they needed to propose a method that is *possible*, not necessarily one that the state has on hand.<sup>167</sup> This is a more lenient standard than what other circuits have adopted<sup>168</sup> and shows that death row inmates are not only saddled by the crude requirement of *Glossip*. They are also subject to the inconsistency of not knowing how the circuit they are in will

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160. Justice Sotomayor concluded that he had met his burden for both prongs of *Glossip* because he “amassed significant evidence that Alabama’s current lethal-injection protocol will result in intolerable and needless agony, and he has proposed an alternative—death by firing squad.” *Id.* at 725 (Sotomayor, J., dissenting).

161. *See* *Baze v. Rees*, 553 U.S. 35, 105 (2008) (Thomas, J., concurring); *In re Ohio Execution Protocol*, 853 F.3d 822, 836 (6th Cir. 2017), *vacated*, 855 F.3d 702.

162. *Feasible*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/feasible> (last visited Aug. 14, 2019) [<https://perma.cc/R8XT-XHZW>].

163. *Readily*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/readily> (last visited Aug. 14, 2019) [<https://perma.cc/LRY4-ZEPY>].

164. The Supreme Court has not explicitly said this, but the Court has also not stepped in to correct the Circuits that have declared that this is required. *See* *McGehee v. Hutchinson*, 854 F.3d 488, 493 (8th Cir. 2017); *Arthur v. Comm’r, Ala. Dep’t of Corr.*, 840 F.3d 1268, 1300 (11th Cir. 2016).

165. *McGehee v. Hutchinson*, No. 4:17-CV-00179 KGB, 2017 WL 1399554, at \*39 (E.D. Ark. Apr. 15, 2017).

166. Drugs from compounding pharmacies, unlike those from regular drug manufacturers, are distributed without approval from the Food and Drug Administration and are subject to little regulation and no testing. This leads to the following common issues: “subpotency, superpotency, contamination, overmedication, and medication-replacement.” Jesse M. Boodoo, *Compounded Drug Products and the FDAMA Circuit Split*, 36 AM. J.L. & MED. 220, 225 (2010).

167. *In re Ohio Execution Protocol*, 853 F.3d 822, 836 (6th Cir. 2017), *vacated*, 855 F.3d 702.

168. *McGehee*, 854 F.3d at 500 (Kelly, C.J., dissenting).

interpret “alternative.” The courts are divided and need answers from the Supreme Court,<sup>169</sup> so it should not be long before there is an opportunity to correct these issues along with the others that resulted from *Glossip*.

Despite the Sixth Circuit’s more lenient approach, a recent case in Tennessee, *Abdur’Rahman v. Parker*, highlighted the issue of this undue burden on method of execution challengers.<sup>170</sup> Despite others’ failure, thirty-three death row inmates in Tennessee sought a declaration that the state’s lethal injection protocol violated the Eighth Amendment, mainly due to the risks posed by midazolam.<sup>171</sup> The inmates proposed pentobarbital as an alternative since it was one of two options written in Tennessee’s execution protocol.<sup>172</sup> Two days after the inmates proposed pentobarbital, the Tennessee Department of Corrections changed the protocol to remove pentobarbital as an alternate method.<sup>173</sup>

Despite expert testimony about midazolam’s failure to act as a sufficient analgesic, the feeling of suffocation caused by vecuronium bromide, and the burning feeling of potassium chloride, the Tennessee Supreme Court focused on the inmates’ failure to prove an alternative and affirmed the trial court’s dismissal of the complaint.<sup>174</sup> One of the inmates, Billy Ray Irick, was scheduled to be executed on August 9, 2018, and when the Supreme Court denied his application for a stay of execution, Justice Sotomayor again dissented.<sup>175</sup>

Justice Sotomayor lamented, “If the law permits this execution to go forward in spite of the horrific final minutes that Irick may well experience, then we have stopped being a civilized nation and accepted barbarism.”<sup>176</sup> Tennessee proceeded to execute Irick utilizing the debated drug, and witnesses observed him choking, moving his head, and straining against the restraints on his arms.<sup>177</sup> Dr. Lubarsky, the expert witness who testified for the inmates at trial, indicated that Irick was likely not in a general plane of anesthesia while being killed, and was therefore subject to the “torturous effects” of the drugs.<sup>178</sup> This unfortunate outcome was largely a result of the inmates being unable to satisfy the insuperable burden required by *Glossip*.

In addition to providing an example of someone suffering because the *Glossip* requirements are impossible to satisfy, the *Abdur’Rahman* case

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169. *Id.*

170. *Abdur’Rahman v. Parker*, 558 S.W.3d 606 (Tenn. 2018).

171. Tennessee, like Oklahoma and Alabama, uses a three-drug protocol beginning with midazolam, followed by vecuronium bromide and potassium chloride. *Id.* at 610, 612.

172. *Id.* at 612.

173. *Id.*

174. *Id.* at 626.

175. *Irick v. Tennessee*, 139 S. Ct. 1 (2018) (Sotomayor, J., dissenting).

176. *Id.* at 4 (Sotomayor, J., dissenting).

177. Steven Hale, *Medical Expert: Billy Ray Irick Was Tortured During Execution*, NASHVILLE SCENE (Sept. 7, 2018, 9:00 AM), <https://www.nashvillescene.com/news/pith-in-the-wind/article/21021361/medical-expert-billy-ray-irick-was-tortured-during-execution> [<https://perma.cc/2FR9-TDBU>].

178. *Id.*

shows states' willingness to act in bad faith to shield their chosen execution methods. The Tennessee Department of Corrections initially had the option to execute using the three-drug protocol or pentobarbital alone, but conveniently decided to remove pentobarbital on the eve of trial to support their contention that it was unavailable.<sup>179</sup> While it is very likely that it would have been extremely difficult for Tennessee officials to obtain pentobarbital, their actions raised suspicions that *Glossip* permitted the court to ignore because, under *Glossip*, inmates bear the burden of proving an alternative. Because of *Glossip*'s irrational burden, what we see, as illustrated by *Abdur'Rahman*, is that the state can act in bad faith and remove an alternative from a statute, solely for the purpose of frustrating the inmate's claim.

### C. Excessive Deference to States

As Justice Alito iterated in *Glossip*, the purpose of the alternative requirement of the test is to prevent inmates from attacking the death penalty in general by presenting a pretextual argument that the methods the states chose are unconstitutional.<sup>180</sup> While this may be decent motivation, the Supreme Court has drawn a very fine line between upholding the death penalty and giving the states unconditional authority to utilize any method of execution they choose.<sup>181</sup> Additionally, this deference allows the states to employ any means necessary to procure lethal injection drugs without fear that the questionable circumstances may serve as grounds for a successful Eighth Amendment challenge.<sup>182</sup>

If a state wanted to execute someone with an unconstitutionally torturous method, they would be permitted to do so, as long as the relevant statute did not provide for any other method of execution.<sup>183</sup> Giving deference to the states is one thing, but disregarding the Supremacy Clause is another. The Supremacy Clause of the Constitution is a crucial guarantee that ensures that the Constitution and other federal laws take precedence over state law.<sup>184</sup> Accordingly, a test that essentially shields states from judicial review cannot possibly be acceptable.<sup>185</sup>

Not only does the unlikelihood of success under *Glossip* give the states an avenue to directly infringe on death row inmates' constitutional rights, but it also permits the states to illegally obtain execution drugs, which

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179. *Abdur'Rahman v. Parker*, 558 S.W.3d 606, 612 (Tenn. 2018).

180. *Glossip v. Gross*, 135 S. Ct. 2726, 2732–33, 2738 (2015).

181. *Id.*

182. *Id.*

183. *Arthur v. Dunn*, 137 S. Ct. 725, 729 (2017) (Sotomayor, J., dissenting).

184. U.S. CONST. art. VI, § 1, cl. 2; National Constitution Center Staff, *Article VI: Prior Debts, National Supremacy Clause, and Oaths of Office*, NAT'L CONST. CTR. (Feb. 21, 2014), <https://constitutioncenter.org/blog/article-vi-prior-debts-national-supremacy-clause-and-oaths-of-office> [https://perma.cc/MSX4-N4K7].

185. *Arthur*, 137 S. Ct. at 729 (Sotomayor, J., dissenting).

may include some that are compounded and therefore, untested.<sup>186</sup> It may sound like a good argument for plaintiffs to say that, because the state illegitimately obtained drugs that may not be what they are proffered as or work as they should, their executions would be an experiment and constitutional violation. The *Glossip* test, however, grants boundless ability to the states to continue acting in a reprehensible manner because men and women on death row are unable to convince the courts of an alternative method for carrying out their execution.<sup>187</sup>

Because there is virtually no way that a prisoner would have the resources to sufficiently propose an alternative, scholars have characterized *Glossip* as imposing an “impossible pleading standard” that is “unprovable.”<sup>188</sup> This is partly due to the secrecy laws enacted by many states that make information regarding drug acquisition, budgets, capabilities, personnel, and all related information in the sole control of the state and not to be disclosed.<sup>189</sup> These secrecy laws further lead states to illegitimate procurement methods, including the black market.<sup>190</sup> Jennifer Moreno, a staff attorney for the Death Penalty Clinic at the University of California, Berkeley, School of Law, explained that “States are now buying drugs from illegal sources, ordering new ones from compounding pharmacies or trading with other states.”<sup>191</sup> This behavior should be sanctioned rather than tolerated.

The Supreme Court has essentially relished the fact that it has never invalidated a state’s chosen method of execution,<sup>192</sup> but “[c]ourts’ review of execution methods should be more, not less, searching when States are engaged in what is in effect human experimentation.”<sup>193</sup> Especially because the consequences not only affect the lives of the inmates that must endure the outcome, but have larger implications as well.

#### D. Jeopardized Integrity of the Pharmaceutical Industry

Because the result of *Glossip* gives states free rein to get lethal injection drugs by any means, the drug manufacturers are forced to bolster

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186. Boodoo, *supra* note 166, at 225; McCracken, *supra* note 145, at 46–49.

187. McCracken, *supra* note 145, at 49.

188. *Id.* at 48.

189. *Id.* at 48–49.

190. Brief of Amici Curiae Pharmacy, Medicine, and Health Policy Experts in Support of Petitioner, *Bucklew v. Precythe*, No. 17-8151, 2018 WL 3546328, at \*24 (U.S. July 23, 2018); Meghan Elizabeth Hall, *Botched: The “Lethally Injected” Effect of Glossip on the Future of Capital Punishment*, 22 SUFFOLK J. TRIAL & APP. ADVOC. 161, 175 (2017).

191. John Ericson, *Botched Execution Shows Perils of Lethal Injection Drug Shortage*, NEWSWEEK (Apr. 30, 2014, 10:00 AM), <https://www.newsweek.com/2014/05/16/states-go-great-lengths-find-lethal-injection-drugs-249154.html> [<https://perma.cc/2EU8-Z6ZV>].

192. *Glossip v. Gross*, 135 S. Ct. 2726, 2732 (2015).

193. *Id.* at 2796 (Sotomayor, J., dissenting).

their attempts to protect the integrity of the industry.<sup>194</sup> Sodium thiopental and pentobarbital were manufactured and approved for therapeutic reasons such as insomnia, preoperative sedation, and management of seizures.<sup>195</sup> Once these drugs began being favored as lethal injection drugs, they quickly became unavailable.<sup>196</sup> There was only one manufacturer of sodium thiopental in America, and it chose to stop making the drug altogether to prevent its use in lethal injections, thus removing it from its intended uses as well.<sup>197</sup> Similarly, anti-death penalty advocates pressured European manufacturers to stop producing pentobarbital, which became the primary execution drug after sodium thiopental became unavailable.<sup>198</sup>

This shows how allowing the state to get the drugs however they can, including ignoring manufacturers' distribution controls or using the black market, puts drug manufacturers in a tough position that compels them to decide whether to be complacent with the improper use or to halt production altogether to the detriment of the people for whom the drug was made.<sup>199</sup> The spokesperson for Lundbeck, the Danish pharmaceutical company that made pentobarbital, stated, "This [lethal injection] is a misuse of our product. We are in an ethical dilemma where we are opposed to the use of our medication for capital punishment while at the same time we want to make sure that patients who benefit from our medication get access to it."<sup>200</sup>

Unfortunately, manufacturers' hopes of keeping the drugs available for those who need it proved to be difficult given the manufacturers' contemporaneous commitment to keeping the drugs out of prisons.<sup>201</sup> Pharmaceutical companies face fiscal, reputational, and legal risks when their drugs end up being used for lethal injections.<sup>202</sup> These companies currently have no meaningful way of ensuring that their products are not being used for lethal injections due to the secrecy laws of many states and the states' willingness and ability to disregard implemented distribution controls. The Lethal Injection Information Center created a risk index

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194. Teri Schultz, *Europe Fights the Death Penalty—With Drugs*, PUB. RADIO INT'L (May 13, 2011, 10:03 AM), <https://www.pri.org/stories/2011-05-13/europe-fights-death-penalty-drugs> [<https://perma.cc/6MVV-NZUX>].

195. Francisco Lopez-Munoz et al., *The History of Barbiturates a Century After Their Clinical Introduction*, 1 NEUROPSYCHIATRIC DISEASE & TREATMENT 329, 329–30 (2005).

196. *Glossip*, 135 S. Ct. at 2733.

197. *Id.*

198. *Id.*

199. Schultz, *supra* note 194.

200. *Id.*

201. *Id.*

202. *Respecting Corporate Contracts: State-by-State Risk Index*, LETHAL INJECTION INFO. CTR. (2018), <http://lethalinjectioninfo.org/wp-content/uploads/2018/06/State-by-State-Risk-Index.pdf> [<https://perma.cc/RZ9C-ZM8Q>].

highlighting which states pose the greatest threat for misuse of drugs, with eighteen states being categorized as high-risk.<sup>203</sup> It explained:

Despite repeated requests from pharmaceutical companies that their medicines not be diverted for use in capital punishment, Alabama has pressed ahead in its efforts to secure these firms' products under the cover of a sweeping secrecy law. In doing so, Alabama officials may be knowingly and deliberately undermining the contractual restrictions that companies have established to prevent the same of their drugs to death rows.<sup>204</sup>

Courts should consider such illegitimate acquisition methods in assessing whether a method of execution is constitutional. However, because of *Glossip*, petitioners' claims consistently fail at the outset when they are unable to overcome the burden of demonstrating an alternative method of execution. Prisoners, unlike the states, are not allowed to break the law in search of execution drugs, so *Glossip* presents an unfair advantage in favor of the states. Consequently, pharmaceutical companies are left having to sue the states for improper acquisition and use in defiance of the companies' stance against executions.<sup>205</sup>

#### IV. RECOMMENDATIONS

Although the Supreme Court's objective in keeping method of execution claims from dismantling the entire system of capital punishment was sound, *Glossip* missed the mark. Criminal defense lawyer and author, Clive Stafford Smith wrote, "[W]e know that mistakes are inevitable, so roughly what error rate are we willing to accept, in light of the value of our goal?"<sup>206</sup> No one expects the Court to issue flawless opinions that create win-win situations for everyone involved, but how much are we willing to ignore in furtherance of the idea that there must be constitutional means of implementing the death penalty?

The bad precedent set forth in *Glossip* should be overruled and replaced by a new test because the *Glossip* decision limits the protection awarded by the Eighth Amendment, presents a challenge that cannot be won, allows states to go unchecked, and compromises the pharmaceutical industry. The new test should involve a threshold inquiry and a burden-shifting

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203. High-risk states include: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Mississippi, Missouri, Nebraska, North Carolina, Ohio, Pennsylvania, South Dakota, Tennessee, Texas, Virginia, and Wyoming. *Id.*

204. Alabama is just one example of a state that has ignored regulations put in place without being reprimanded. *Id.*

205. See, e.g., Richard A. Oppel Jr., *Nevada Execution Is Blocked After Drugmaker Sues*, N.Y. TIMES (July 11, 2018), <https://perma.cc/2B5P-5LX6>.

206. CLIVE STAFFORD SMITH, THE INJUSTICE SYSTEM ix (2012).

framework, resulting in a more balanced approach that will require some accountability on the states' part.

### A. Overturning Precedent

At times, the Supreme Court opts to uphold conceivably bad decisions because the Justices value precedent.<sup>207</sup> The long-standing principle of *stare decisis* means that the Supreme Court is expected to adhere to previous rulings until there is adequate reasoning to abandon the prior ruling.<sup>208</sup> The purpose of reverencing precedent is to provide predictability and finality.<sup>209</sup> However, this is not always the best option.

To Justice Thomas, precedent is never a sufficient reason for upholding bad law,<sup>210</sup> so he is perhaps the most likely to change his vote in favor of the four dissenters in *Glossip*.<sup>211</sup> Justice Scalia once said of Thomas, “[He] doesn’t believe in *stare decisis*, period.”<sup>212</sup> Despite Thomas being an outlier in this belief, he is unwavering in pushing his colleagues to reevaluate their decisions when they have gotten it wrong.<sup>213</sup> For Thomas, “the ultimate precedent is the Constitution.”<sup>214</sup> Although not ideal, the Court must overrule precedent to correct mistakes.<sup>215</sup>

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, when deciding whether to overturn the controversial holding of *Roe v. Wade*,<sup>216</sup> the Court discussed factors to consider when assessing the effect of overturning precedent.<sup>217</sup> The Court explained that the purpose of these “prudential and pragmatic considerations” is to “test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.”<sup>218</sup>

Justice O’Connor listed the following inquiries as the basis for this consideration: (1) “whether the rule has proven to be intolerable simply in defying practical workability”; (2) “whether the rule is subject to a kind of

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207. Randy Kozel, *The Problem of Precedent*, WASH. POST (July 10, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/07/10/the-problem-of-precedent/> [<https://perma.cc/369G-8RKZ>].

208. WALKER, *supra* note 15, at 55.

209. *Id.*

210. Lincoln Caplan, *Clarence Thomas’s Brand of Judicial Logic*, N.Y. TIMES (Oct. 22, 2011), <https://www.nytimes.com/2011/10/23/opinion/sunday/clarence-thomass-brand-of-judicial-logic.html> [<https://perma.cc/XTK5-8H6W>].

211. *Glossip* was a 5–4 decision with Justices Sotomayor, Ginsburg, Breyer, and Kagan dissenting. *Glossip v. Gross*, 135 S. Ct. 2726, 2732 (2015).

212. Caplan, *supra* note 210.

213. *Id.*

214. *Id.*

215. *Id.*

216. The Court held in *Roe* that women’s constitutional right to privacy encompasses the right to choose to have an abortion. *Roe v. Wade*, 410 U.S. 113, 114 (1973).

217. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992).

218. *Id.* at 854.

reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation”; (3) “whether related principles of law have so far developed as to have left the old rule no more than a remnant of an abandoned doctrine;” and (4) “whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.”<sup>219</sup> The Supreme Court decided *Glossip v. Gross* approximately seven years after *Baze v. Rees*.<sup>220</sup> Analysis of these factors indicates that, when *Glossip* was decided, the Court should have voted to overturn *Baze*. The circumstances that fuel this necessity are even more true today.

The first inquiry is whether the rule has proven to be intolerable simply in defying practical workability.<sup>221</sup> This is arguably the factor that weighs the most heavily in favor of overturning *Glossip*. The rule is entirely unworkable and left multiple unanswered questions, leaving lower courts lost as to what the Justices meant.<sup>222</sup> Part III outlined the issues with *Glossip* that need not be reiterated,<sup>223</sup> but should be noted as the basis for finding that this factor favors abandoning *Glossip*.

Next, the Court must consider whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation.<sup>224</sup> The Eighth Amendment, like all of the amendments included in the Bill of Rights, is meant to protect citizens from overreach by the government.<sup>225</sup> The rule of law from *Glossip* does the opposite, and the people subject to its effects cannot be said to be relying on it such that overturning it would lead to inequity or hardship for them. To the contrary, overruling *Glossip* would benefit people whose Eighth Amendment rights are currently in jeopardy because of the condition that *Glossip* placed on those rights.

Third, the Court must ask whether related principles of law have so far developed as to have left the old rule no more than a “remnant of abandoned doctrine.”<sup>226</sup> It is doubtful that there is any conceivable way to construe this factor in favor of abandoning *Glossip*. The Court decided it a mere four years ago, in 2015, and it cannot be considered “a remnant of an abandoned doctrine.”<sup>227</sup>

Finally, the Court must assess whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification. Since *Glossip*, more states have begun using

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219. *Id.* at 854–55.

220. *Glossip v. Gross*, 135 S. Ct. 2726 (2015); *Baze v. Rees*, 553 U.S. 35 (2008).

221. *Casey*, 505 U.S. at 854.

222. *Baze*, 553 U.S. at 105 (Thomas, J., concurring).

223. *See supra* Part III.

224. *Casey*, 505 U.S. at 854.

225. *See* Robert A. Sedler, *The Enduring Constitution of the People and Protection of Individual Rights*, 66 U.S. MICH. B. J. 1108, 1108 (1987).

226. *Casey*, 505 U.S. at 855.

227. *Glossip v. Gross*, 135 S. Ct. 2726 (2015); *Casey*, 505 U.S. at 855.

midazolam despite the arguments for its inefficacy. While the problem is bigger than the use of this one drug, midazolam's failures indicate that the Court got it wrong in declaring it constitutional simply because there was no alternative.<sup>228</sup>

Since the Court decided *Glossip*, there have been numerous botched executions and mishaps involving midazolam,<sup>229</sup> but even one is one too many when people's well-being and constitutional rights are at stake. In 2016, Alabama executed Ronald Smith using midazolam, and he experienced prolonged heaving and gasping before dying.<sup>230</sup> The following year, Arkansas used midazolam to execute Kenneth Williams, and witnesses observed him "coughing, convulsing, lurching, and jerking."<sup>231</sup> These are not the only examples of the drug going awry, and as states began to see the problems with it, some began to voluntarily abandon its use.<sup>232</sup> Midazolam was a newer execution drug when *Glossip* was decided, and there was not yet evidence of its failures. Now, however, there is increasing evidence of the pain people have suffered from midazolam, so much so that states are choosing to stop using it. Therefore, the facts surrounding whether the use of midazolam in lethal injections is constitutional have sufficiently changed, and they have changed in such a way that favors overruling *Glossip*.

The Court decided *Roe v. Wade* in 1973, encompassing a woman's right to an abortion as a part of the right to privacy.<sup>233</sup> In deciding whether to overturn *Roe*, the Court said in *Casey*, "where the Court acts to resolve the sort of unique, intensely divisive controversy reflected in *Roe*, its decision has a dimension not present in normal cases and is entitled to rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation."<sup>234</sup> While the Court was right to uphold *Roe*, the weight that the Justices placed on appearing steadfast in sticking to their opinion despite pressure is a dangerous premise that should not be applied in this context.<sup>235</sup>

Although precedent is important and leads to consistency, the Court is charged with making decisions that promote justice and are consistent with the spirit of the Constitution. While it is arguable that an analysis of the *Casey*

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228. *Glossip*, 135 S. Ct. at 2737–38.

229. Death Penalty Information Center, *Botched Executions*, <https://deathpenaltyinfo.org/state-lethal-injection> (last visited Aug. 23, 2019) [<https://perma.cc/GM2T-F8JE>].

230. *Id.*

231. Max Brantley, *Death in Arkansas: The Botched Execution of Kenneth Williams and the Fallout, or Lack of It*, ARK. TIMES (Nov. 13, 2017, 10:08 AM), <https://arktimes.com/arkansas-blog/2017/11/13/death-in-arkansas-the-botched-execution-of-kenneth-williams-and-the-fallout-or-lack-of-it> [<https://perma.cc/M8ZR-T798>].

232. Death Penalty Information Center, *State by State Lethal Injection*, <https://deathpenaltyinfo.org/executions/lethal-injection/state-by-state-lethal-injection-protocols> (last visited Aug. 14, 2019) [<https://perma.cc/RMX8-YLCP>].

233. *Roe v. Wade*, 410 U.S. 113, 114 (1973).

234. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 836 (1992).

235. *Id.*

factors indicate that the Court could overturn *Glossip* with a clear conscience, if the Court feels it must sustain precedent by reaffirming *Glossip*, it could follow the *Casey* decision in a different regard. In *Casey*, the Court analyzed the abovementioned factors and its reasons for *not* overturning *Roe*, while nevertheless chiseling away at it and completely revamping abortion regulations in the process.<sup>236</sup> As in *Casey*, the Court could similarly *say* it is upholding *Glossip* while practically changing its core to reflect its changing standards.

*Roe* presented the “trimester framework,” which provided that, during the first trimester, the states may not regulate abortions; during the second trimester, the government may begin to place increasing restrictions on abortions if they are related to maternal health; and during the third trimester, the government may prohibit abortions except when it affects mothers’ well-being because the government’s interest in potential life becomes compelling at the point of viability of the fetus.<sup>237</sup> Although the Court claimed to be reaffirming *Roe*’s central holding in *Casey*, it rejected the trimester framework and held that the proper standard is that of undue burden.<sup>238</sup>

In assessing whether the abortion regulations in *Casey* were undue, the Court essentially used a rational basis standard.<sup>239</sup> This new standard allowed the Court to hold that requiring a 24-hour waiting period before allowing an abortion was not an undue burden,<sup>240</sup> and such a regulation does not seem to align with *Roe* at all. Therefore, if the Court wants to say it is upholding the premise of *Glossip*, that lethal injection cannot be used as a means to unravel the death penalty, it can do that while still altering the inner workings and practical effects of the decision.

While *stare decisis* is valued because it leads to reliability based on previous decisions, ultimately, the best route is for the Court to follow Justice Thomas’s approach and abandon precedent in this instance.<sup>241</sup> With an issue as pressing as capital punishment, there are advocates with valid opinions on both sides. But in cases where the method of execution is not well-established, life should be valued over death.

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236. *Id.* at 837.

237. *Roe*, 410 U.S. at 114.

238. *Casey*, 505 U.S. at 873–74.

239. Rational basis refers to the level of judicial scrutiny the Court applied and defines how closely the Court is assessing the law. Rational basis, or minimal scrutiny, gives great deference to the government, which often leads to laws being upheld. R. George Wright, *What If All the Levels of Constitutional Scrutiny Were Completely Abandoned?*, 45 U. MEM. L. REV. 165, 169 (2014).

240. *Casey*, 505 U.S. at 886–87.

241. *See* Caplan, *supra* note 210.

## B. Proposed Approach

The Court left some uncertainty on how to properly apply the requirements of *Glossip*.<sup>242</sup> As subsequent cases have illustrated, there are many unanswered questions, including to what extent an inmate must prove that an alternative is “feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.”<sup>243</sup> Theoretically, there are two options before the Court: (1) uphold the two-prong test of *Glossip* and clarify the open questions about what it truly requires; or (2) overrule *Glossip* and completely rework the test. As the preceding section assessed, *Glossip* warrants being overturned.<sup>244</sup> The Court should adopt a test that is unambiguous and practical, while still balancing the states’ important penological justifications and the interest of the inmates’ lives.

Because of the ambiguity in what a death row inmate must prove in proposing an available alternative, no one can be sure what the Court was looking for. Surely it would not be sufficient for one to simply suggest that there are probably other things that might be less painful. Conversely, the other end of the spectrum would be a requirement that demands specifics from the prisoner, such as precise options including willing manufacturers and appropriate dosages. What, then, should the Court look for in method of execution claims?

Currently, the burden is on the inmate to show that their execution method poses a substantial risk of harm when compared to available alternatives that significantly reduce that risk of harm.<sup>245</sup> This burden presents the inmate with an insuperable obstacle and should therefore be reassessed.<sup>246</sup> The Court should adopt a burden-shifting framework that makes it at least possible that an inmate could succeed.

To assess an Eighth Amendment challenge of a proposed method of execution, courts should first look to the inmate to see if he or she can prove the threshold inquiry of whether the proposed method presents a substantial risk of serious harm. To satisfy this threshold inquiry, the inmate should have to present non-speculative evidence, such as the known ceiling effect of midazolam and testimony explaining previously botched executions. To satisfy this standard, the inmate will have to show that the risk of harm exceeds the pain that may be inherent in any death.<sup>247</sup>

If an inmate can successfully meet this threshold, the burden should then shift to the state to show that: (1) there are no available alternatives that would significantly reduce the risk of severe pain; and (2) the penological interests in performing the execution outweigh the risk of harm that the

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242. *Baze v. Rees*, 553 U.S. 35, 105 (2008) (Thomas, J., concurring).

243. *Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015) (quoting *Baze*, 553 U.S. at 52).

244. *See supra* Section IV.A.

245. *Glossip*, 135 S. Ct. at 2740.

246. *See supra* Section III.B.

247. *Glossip*, 135 S. Ct. at 2733.

inmate faces. If a state makes a good faith effort to secure other acceptable methods to no avail, it should still have to make a showing that there are reasons to justify putting the inmate at risk of serious harm.

The “feasible” and “readily implemented” language from *Baze* and *Glossip* can still be included in the analysis, of whether there is an available alternative that would significantly reduce the risk of severe pain, but the terms should be given clear definitions.<sup>248</sup> A “feasible” method would be one that does not present an unreasonable burden on the state financially or otherwise. Furthermore, a “readily implemented” method would mean that the state does not have to expend unwarranted amounts of time or funds acquiring the materials or preparing for implementation. If an available method is going to be incredibly complicated and require extensive training and money, a state should not be required to use it. If, on the other hand, a state has people willing to volunteer to implement an execution by firing squad, that would be an example that is feasible and readily implemented.

### C. Rationale Supporting the Proposed Approach

Adopting a threshold inquiry, after which the validity of a claim is triggered, is ideal because in many failed method of execution claims, plaintiffs’ evidence about the risk of harm was largely ignored due to their failure to prove an alternative.<sup>249</sup> With the changed approach, courts will have to assess the weight of evidence offered to show that a method is likely to cause unnecessary suffering. The standard for this should be preponderance of the evidence, which is the standard of proof in most civil cases.<sup>250</sup> This standard of proof requires that a fact be more likely than not.<sup>251</sup>

Once this showing is met, the state would have to provide evidence indicating that they exerted a good-faith effort to find and implement reasonable and safe alternatives.<sup>252</sup> This burden shift is necessary because it adds a layer of accountability on the states that would prevent them from adopting known controversial protocols and circumventing legal methods of acquisition. States would therefore be more likely to stick to appropriate measures for obtaining necessary execution drugs,<sup>253</sup> which would also have the added benefit of pharmaceutical companies having less trouble keeping drugs out of executions if they desire to do so.<sup>254</sup>

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248. *Id.* at 2737; *Baze*, 553 U.S. at 52.

249. *See* *Abdur’Rahman v. Parker*, 558 S.W.3d 606, 616 (Tenn. 2018).

250. *Evidentiary Standards and Burdens of Proof*, JUSTIA, <https://www.justia.com/trials-litigation/lawsuits-and-the-court-process/evidentiary-standards-and-burdens-of-proof/> (last visited Aug. 14, 2019) [<https://perma.cc/7HVE-GUBP>].

251. *Id.*

252. This requirement would not compel violations of the secrecy laws. Rather, states could simply redact names and identifying information when explaining their efforts.

253. *See supra* Section III.C.

254. *See supra* Section III.D.

It makes more sense and is fairer to have the state prove whether there is an alternative because this information is much more accessible for state officials than for death row inmates and their attorneys. Indeed, states have ensured that *only* state officials have this information by enacting the secrecy laws,<sup>255</sup> making the burden-shifting approach even more appropriate. This approach also prevents states from shielding execution methods by neglecting to provide for any alternatives expressly by statute<sup>256</sup> because the state, itself, will be considering alternative methods it can and may use. Finally, this burden-shifting framework is supported by public policy<sup>257</sup> because it encourages states to think about how they are choosing to implement executions by exploring all viable options and selecting those that are likely to meet judicial scrutiny.

Additionally, evaluating various factors related to who should bear the burden of proof supports the proposed burden-shifting framework. There are several factors that courts consider when determining who should bear the burden of proof.<sup>258</sup> The Supreme Court of Wisconsin, for example, uses five factors to help determine how to allocate the burden of proof.<sup>259</sup> The factors are as follows: (1) “the natural tendency to place the burden on the party desiring change”; (2) “special policy considerations such as those disfavoring certain defenses”; (3) convenience; (4) fairness; and (5) “the judicial estimate of the probabilities.”<sup>260</sup> At least three of the factors favor putting the burden on the state.

First, plaintiffs hoping to change the current landscape of the law expectedly bear the burden of proof or persuasion.<sup>261</sup> Clearly, death row prisoners would be the ones seeking change, so this factor favors placing the burden on them, which is the rationale for requiring them to at least make a threshold showing before the state can be troubled with proving that there are no feasible alternatives.

Second, the consequences of putting the full weight on the prisoners, outlined in Part III, would advance the assertion that this factor supports shifting the burden to the state.<sup>262</sup> If the burden remains on the prisoners, the result is the disfavored fact that states can implement and alter execution statutes so as to keep prisoners from proceeding because the prisoners’ proposed method is not in the statute. Because this allows states to act unconstitutionally by removing alternatives from the statutes, it is a less than ideal allocation of the burden.

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255. *See supra* Section III.C.

256. *See* Abdur’Rahman v. Parker, 558 S.W.3d 606, 612 (Tenn. 2018).

257. SARAT, *supra* note 4, at 4.

258. Martin J. LaLonde, *Allocating the Burden of Proof to Effectuate the Preservation and Federalism Goals of the Coastal Zone Management Act*, 92 MICH. L. REV. 438, 440 (1993).

259. *State v. McFarren*, 215 N.W.2d 459, 463 (Wis. 1974).

260. *Id.* at 463–65.

261. *Id.* at 463.

262. *Id.* at 464.

Third, the convenience factor is the most important in this context. Courts have explained that “where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue.”<sup>263</sup> The states are in a much better position to know what methods are available, if any, and what is feasible given the capacity of the staff and the budget, as well as the secrecy laws that put information regarding executions in the sole possession of state officials. Arguably, this factor alone is enough to shift the burden to the state.

Fourth, the fairness factor includes proof of exceptions and proof of negatives.<sup>264</sup> Proof of exceptions is inapplicable because there are no *exceptions* to the Eighth Amendment prohibition of cruel and unusual punishment that anyone would need to assert. Because this proposed burden-shifting test solicits the proof of a negative (i.e., there is no available alternative that is feasible, readily implemented, and significantly reduces the risk of harm), the party that asserts that the negative is true should have the burden of proving it. Here, that party is the state.

Finally, the last factor assesses the obscurity of what the parties are arguing and suggests that the burden should be on the party who is arguing the more unusual circumstance.<sup>265</sup> Because courts very rarely determine that execution methods violate the Eighth Amendment, this factor would weigh against placing the burden on the state. Ultimately, however, there is still a legitimate argument that the burden shift is appropriate in this context when weighing all of the factors.

If the state can meet its burden showing that there are no available alternatives, the structure of this proposed test would conclude by requiring the state to show that, if there is indeed no available alternative, the state should be allowed to proceed with its chosen method because it has a penological justification that outweighs the potential risk of harm to the inmate. The “penological justification” language was also used in *Baze*<sup>266</sup> but has not been assessed because inmates have never been able to suggest an alternative to allow courts to reach this issue. This balancing approach would help courts determine when it is appropriate to uphold the method and when the Eighth Amendment should step in and protect an inmate from an unjustifiable risk of harm.

## CONCLUSION

As Henry David Thoreau said in *Civil Disobedience*, “Unjust laws exist: shall we be content to obey them, or shall we endeavor to amend them . . . ?”<sup>267</sup> *Glossip v. Gross* is a prime example of an unjust law that

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263. *Id.*

264. *Id.* at 464–65.

265. *Id.* at 465.

266. *Baze v. Rees*, 553 U.S. 47, 52 (2008).

267. HENRY DAVID THOREAU, *CIVIL DISOBEDIENCE AND OTHER ESSAYS* 367 (1906).

prejudices death row inmates: is stare decisis enough to warrant upholding it, or is it time to change the approach to method of execution claims?

Considering the ever-changing landscape of the death penalty and the fact that the Eighth Amendment draws its meaning from the “evolving standards of decency that mark the progress of a maturing society,”<sup>268</sup> it is time for the Supreme Court to review its previous rulings on method of execution claims. Since *Glossip*, more evidence has emerged that previously-accepted execution methods cannot withstand appropriate constitutional muster, which would come to light in the face of a suitable test. Failure to reassess the *Glossip* requirements could result in more needless botched executions, painful deaths, and nefarious behavior by the states.

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268. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).