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I. **INTRODUCTION**

Oklahoma State officials escorted Clayton Lockett into the execution chamber, and strapped him into the gurney.1 The state scheduled what was supposed to be a quick and painless lethal injection for 6:00 PM. The executioners began by injecting Lockett with midazolam, a controversial and largely un-tested muscle relaxant,2 followed by a drug to induce paralysis and a final drug to induce cardiac arrest.3 Sixteen minutes later, after the execution staff should have pronounced Lockett dead, Lockett’s face contorted and body tensed; his head rose from the gurney and his feet kicked.4 Instead of the virtually instantaneous execution lethal injections are supposed to administer, Lockett suffered for forty minutes and eventually died of a heart attack.5 This botched execution fueled a fierce Eighth Amendment debate over the constitutionality of Oklahoma’s three-drug lethal injection protocol.6

On June 25, 2014, in response to Lockett’s execution, Charles Warner7 and twenty other Oklahoma death row inmates sued Oklahoma state officials under 42 U.S.C.§ 1983,8 challenging the state’s lethal injection procedures as a violation of the Eighth Amendment and seeking to

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2. Id. Midazolam is supposed to render the condemned inmates unconscious before the lethal drugs enter their system, however the drug is not FDA approved, and has caused several botched executions. See infra Section II.A.2, Fretland, supra note 1
3. Id.
4. Id.
5. Id.
6. See infra Section II.B.
7. Charles Warner is an Oklahoma inmate scheduled for execution two hours after Lockett, but whose execution was stayed. Fretland, supra note 1.
8. 42 U.S.C. § 1983 permits any person within U.S. jurisdiction to file suit against anyone who, acting under color the color of state law, causes them to be deprived of a right, privilege, or immunity secured by federal law.
stay their executions until a court rules on the merits.9 Although the Supreme Court refused the stay,10 the Court granted certiorari on the constitutional issue and on June 29, 2015 declared Oklahoma’s three-drug lethal injection protocol constitutional.11 *Glossip v. Gross* marks the second time the Supreme Court has upheld the constitutionality of the lethal injection, which has been a controversial execution method since its inception in 1977.12 The Court first assessed the constitutionality of the lethal injection in 2008 in *Baze v. Reese*, and found the particular three-drug lethal injection that states throughout the country used at the time constitutional.13 The *Baze* Court also outlined an oft-cited Eighth Amendment test that declares a method of execution to be cruel and unusual punishment if it presents a “substantial” or “objectively intolerable” risk of “serious harm” compared to “known and available alternatives.”14

The lethal injection drugs the *Baze* Court analyzed are no longer available, and the new, largely-untested drug combinations states such as Oklahoma experiment with today fall far short of the *Baze* constitutionality standard.15 This Article argues that although execution by lethal injection is not inherently unconstitutional, the *Gross* Court erred in declaring Oklahoma’s use of the controversial drug midazolam16 and the reckless manner in which Oklahoma officials administer three-drug lethal injections, constitutional under the *Baze* test. This Article also rejects the contention that a single-drug lethal injection is not a feasible alternative to the current three-drug protocols, and explains that a single-drug lethal injection is a viable, more consistent, instantaneous, and humane alternative. Part II overviews the controversy surrounding the lethal

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13 See id.
14 Id. at 50, 61 (plurality opinion) (internal quotation marks omitted).
15 See infra Section II.A.
16 See supra text accompanying note 2.
injection, and overviews the Supreme Court’s landmark Eighth Amendment method-of-execution decisions, including the recent *Gross* decision. Part III applies the *Baze* test to Oklahoma’s three-drug lethal injection protocol and illustrates why, contrary to the *Gross* majority ruling, Oklahoma’s current lethal injection protocol is unconstitutional.

II. **BACKGROUND: CRITICISMS AND JURISPRUDENCE CONCERNING LETHAL INJECTIONS**

Although the procedures, doses, and drug types in lethal injection protocols vary considerably across states, lethal injection as a class is the *default* execution method in every state that institutes the death penalty.\(^{17}\) Some states still permit inmates to elect alternative execution methods,\(^{18}\) but society and lawmakers consider the lethal injection the most humane execution method available.\(^{19}\) Though humane in theory, the history of botched lethal injections in practice demonstrates otherwise.\(^{20}\) A study of all U.S. executions between 1890 and 2010 revealed that the rate of botched lethal injections alone was more than double the rate of botched executions across all methods.\(^{21}\) The complication of administering multi-drug lethal injections, paired with the largely-untrained prison employees that administer these procedures and the frequent accidents that result, raise concern about the humaneness of this execution method.

Section A describes the typical lethal injection procedure of administering three consecutive drugs, and discusses the accidents that are emblematic of this complicated procedure, especially

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\(^{18}\) See *Methods of Execution*, supra note 17.


with the inclusion of a controversial drug called midazolam. Section B outlines Supreme Court jurisprudence in Eighth Amendment method-of-execution challenges, and Section C introduces *Glossip v. Gross*.

**A. Criticisms and Evolution of the Lethal Injection**

Although execution by lethal injection is supposed to be quick and painless, many aspects of the complicated three-drug procedure can and do go wrong, leaving the inmate in prolonged agony. Criticisms of three-drug lethal injections center on the execution staff’s ineptitude when administering such a complicated procedure, which leads to frequent mishap. Additional criticisms of three-drug lethal injections focus on the trend amongst states such as Oklahoma to incorporate midazolam—a controversial and largely untested drug—into what is already a very risky and complicated execution procedure. This section first discusses the procedure states use in typical three-drug lethal injections, then overviews criticisms of the lethal injection procedure, and finally introduces a single-drug lethal injection alternative many states are implementing.

1. **Procedural Criticisms of Three-Drug Lethal Injection Protocols**

Before understanding why three-drug lethal injections commonly go wrong, it is important to understand what the procedure entails. First, prison guards strap the inmate to a gurney and insert intravenous (IV) lines into one of the inmate’s arms. Then the prison employees inject the inmate with a lethal quantity of three drugs: An anesthetic (traditionally sodium thiopental), followed by a muscle relaxant to paralyze the inmate (traditionally pancuronium bromide), and finally potassium chloride to induce cardiac arrest.

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22 *See supra* Section II.A.1.
23 *See* Denno, *The Troubling Paradox* *supra* note 19, at 146.
24 The FDA now prohibits pharmaceutical companies from selling this drug to prisons. *See infra* Section II.A.2.
25 The paralytic stops the inmate’s breathing by paralyzing the diaphragm and lungs.
if given in high enough doses, protects the inmate from experiencing the excruciating pain associated with the paralysis and cardiac arrest the second two drugs induce.\(^27\) If the execution staff administers the procedure correctly, the inmate should die within minutes of the first injection.\(^28\)

One common procedural criticism of the three-drug lethal injection hinges on the incapacity of the prison employees to administer such a medically-complicated procedure.\(^29\) The basis of the concern is that prison employees perform this medical procedure with minimal training and with no medical professionals in the death chamber to assist.\(^30\) The most common accident in three-drug lethal injection procedures is the prison employees’ failure to properly administer the anesthetic, which results in the inmate experiencing agony as the executioners inject the second and third drugs.\(^31\) If the prison guards improperly administer the anesthetic, the inmate will remain conscious as the second drug suffocates him by paralyzing his diaphragm, and the third drug—potassium chloride—“inflame[s] . . . [his] sensory nerve fibers, literally burning up [his] veins as it travels to [his] heart.”\(^32\) Moreover, an inmate in complete agony will still appear calm to witnesses due to the partial paralysis that prevents him from crying out.\(^33\)


\(^29\) See Erik Eckholm, Panel Urges One-Drug Lethal Injections, N.Y. TIMES (May 7, 2014), http://www.nytimes.com/2014/05/07/us/panel-urges-one-drug-lethal-injections.html?_r=0. Execution team members often do not know the nature or properties of the drugs they are injecting into inmates, nor the risks associated with the procedure. See Morales v. Tilton, 465 F.Supp.2d 972, 979 (N.D. Cal. 2006).

\(^30\) See Eckholm, supra note 29.


\(^32\) See Beck, 2006 WL 3914717, at *7; Denno, Lethal Injection Chaos, supra note 17, at 1334; Murderer Executed After a Leaky Lethal Injection, supra note 32, at A29; Pain As Fact And Heuristic, supra note 32, at 837; HUMAN RIGHTS WATCH REPORT, supra note 31, at 21.

\(^33\) HUMAN RIGHTS WATCH REPORT, supra note 31, at 21.
The complications inherent in a three-drug injection procedure paired with the medical incompetence of the execution staff trigger frequent botched executions throughout the nation. In Oklahoma’s execution of Lockett, the prison staff struggled to find a vein in his arm so they tried to set an IV into his groin, which blew out one of his veins and caused blood to squirt on him.\textsuperscript{34} In a Kentucky execution, an improperly trained prison guard faced similar struggles and decided to inject the lethal chemicals into the inmate’s neck.\textsuperscript{35} In Florida, the prison staff “pushed [the needles] all the way through the blood vessels into surrounding soft tissue,” leaving chemical burns and causing severe pain.\textsuperscript{36} In Texas, an inmate took forty minutes to die after the IV popped out of his vein and sprayed chemicals towards the witnesses.\textsuperscript{37} In Illinois, a kink in the IV tube prevented the drugs from reaching the inmate,\textsuperscript{38} and in another case the drugs unexpectedly clogged the IV tube and prolonged the execution\textsuperscript{39}; Anesthesiologists blamed the inexperienced prison officials, saying an “IV 101” class would have prevented the error.\textsuperscript{40} In Missouri, the prison staff strapped the inmate so tightly to the gurney that the chemicals stopped circulating and he was left convulsing.\textsuperscript{41} In Ohio, prison guards inserted needles into the inmate eighteen times in their pursuit of a usable vein, and at one point the inmate tried to help them

\textsuperscript{34} Id.; Katie Fretland, \textit{Scene at botched Oklahoma execution of Clayton Lockett was 'a bloody mess'}, GUARDIAN (Dec 13, 2014), http://www.theguardian.com/world/2014/dec/13/botched-oklahoma-execution-clayton-lockett-bloody-mess.


\textsuperscript{37} \textit{See Drawn-out Execution Dismays Texas Inmates}, DALLAS MORNING NEWS, Dec. 15, 1988, at 29A.

\textsuperscript{38} \textit{See Niles Group Questions Execution Procedure}, UNITED PRESS INTERNATIONAL, Nov. 8, 1992 (LEXIS/NEXUS file).


\textsuperscript{40} Rob Karwath & Susan Kuczka, \textit{Gacy Execution Delay Blamed on Clogged IV Tube}, CHICAGO TRIB., May 11, 1994, at 1 (Metro Lake Section).

locate a vein. These are just a few of the countless accidents that occur during complicated three-drug lethal injection procedures.

2. **Criticisms of the Inclusion of Midazolam in Lethal Injections**

   In addition to the complications inherent in three-drug lethal injection protocols, states such as Oklahoma add greater complication and risk by including a largely-untested drug called midazolam as an experimental anesthetic replacement. Before 2009, states across the nation uniformly administered a standard, well-tested, three-drug cocktail that included the powerful anesthetic sodium thiopental. After 2009, the Food and Drug Administration (FDA) stopped licensing U.S. pharmaceutical companies to sell sodium thiopental for use in executions, and international laws against the death penalty depleted the supply of sodium thiopental from overseas providers. Capital punishment states therefore were forced to come up with new lethal-injection cocktails. Without avenues for rigorously testing lethal drugs before use, however, the inmates effectively became lab rats. These untested drug combinations resulted in a slew of botched executions and subsequent Eighth Amendment challenges, which in turn led states to pass secrecy laws to avoid condemned inmates’ attorneys finding out the ingredients, effectiveness, doses, and suppliers of these new chemicals.

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43 See infra, notes 44-45. See also Denno, When Legislatures Delegate Death, supra note 19, at 146 tbl. 11.  
44 In lethal injection case, high court has a chance to take a bold step, LA TIMES (Jan 26, 2015), http://www.latimes.com/opinion/editorials/la-ed-death-penalty-supreme-court-oklahoma-drugs-20150127-story.html. In 2011, the last U.S. supplier, a company called Hospira, stopped making sodium thiopental. Id.  
46 See Redden, supra note 45.  
47 Id.  
48 For example, Arkansas, Georgia, South Dakota, Texas and Tennessee have all passed laws to keep their execution recipes secret. See Paul Lewis, Report urges one-drug lethal injection to avoid botched US executions. GUARDIAN (May 7, 2014), http://www.theguardian.com/world/2014/may/07/oklahoma-lethal-injection-execution-drugs-constitution-animals; see also Three-Drug Protocol Persists for Lethal Injections, Despite Ease of Using One, N.Y.
One such anesthetic replacement drug that states throughout the country have begun to experiment with is midazolam, but midazolam’s anesthetic qualities differ markedly from sodium thiopental and therefore has a markedly different effect on inmates. Sodium thiopental is a rapid-onset, short-acting barbiturate that hospitals widely use as their general anesthetic because it causes unconsciousness within thirty to forty-five seconds. Midazolam, however, is not an anesthetic; rather, it causes muscle relaxation and memory loss by enhancing the effect of the neurotransmitter gamma-aminobutyric acid (GABA), allowing it to more easily attach to the GABA_\text{A} receptors. Midazolam, like all benzodiazepines, reaches a “ceiling effect” when there is no more GABA available to bind to GABA receptors. This ceiling effect often occurs before midazolam saturates the subject’s nerves to a level necessary to induce unconsciousness. Arizona’s execution of Joseph Wood demonstrates midazolam’s ceiling effect, because despite the state’s administration of 750 mg of midazolam—fifteen times the normal dose—Wood still gasped and writhed for two hours before dying. Moreover, even if midazolam does cause some level of unconsciousness, it cannot induce a “coma-like” state of unconsciousness, and therefore the inmate may be “jolted into consciousness” by stimulations such as the pain potassium

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50 Central nervous system depressants that produce a spectrum of effects, from mild sedation to total anesthesia.


53 Drug that causes sedation, sleep, muscle relaxation, hypnosis, and decreased anxiety by enhancing the effect of the GABA at the GABA_\text{A} receptor. See id.

54 Id.


chloride inflicts—which is the third drug in the three-drug lethal injection.\textsuperscript{57} Thus, midazolam on its own cannot serve as a reliable anesthetic.

Despite warnings of the ineffectiveness of midazolam, Arizona, Florida, Ohio, and Oklahoma each incorporated the drug into their executions, and the results were disastrous.\textsuperscript{58} Ohio was the first state to use midazolam in an execution, and the inmate gasped, writhed, and struggled for air for twenty-six minutes.\textsuperscript{59} A priest who witnessed the execution described it as “ghastly” and “inhumane.”\textsuperscript{60} Arizona also used midazolam in an execution, and the inmate gulped and snorted for ninety minutes before he died.\textsuperscript{61} The magnitude of these botched procedures led Ohio, Arizona, and Kentucky each to categorically ban midazolam from all prospective lethal injections.\textsuperscript{62} Oklahoma then used midazolam in Lockett’s execution, and he writhed in pain for forty minutes before suffering a heart attack.\textsuperscript{63} Thus, although the inclusion of midazolam in lethal injections is relatively new, the rapid adverse results led to widespread controversy over the humaneness of the drug.

The sweeping criticisms of midazolam and three-drug lethal injections in general induced several states to turn to a more simple, consistent, and error-proof method of lethal injection that involves only one drug. Single-drug executions are carried out with lethal doses of a single

\textsuperscript{58} Louisiana, Kentucky, Alabama and Virginia also made future plans to incorporate midazolam, but have not yet done so. See Death Penalty Info. Ctr., \textit{State by State Lethal Injection}, http://www.deathpenaltyinfo.org/state-lethal-injection (last visited Feb 27, 2015).
\textsuperscript{59} Erica Goode, \textit{After a Prolonged Execution in Ohio, Questions over ‘Cruel and Unusual,’} \textit{N.Y Times}, Jan. 17, 2014; Pilkington & Yuhas, \textit{supra} note 36.
\textsuperscript{60} Pilkington & Yuhas, \textit{supra} note 36.
\textsuperscript{61} See Pearce et al., \textit{supra} note 49.
\textsuperscript{63} Fretland, \textit{supra} note 1.
anesthetic or barbiturate, much like doctor-assisted suicides and euthanasia. Ohio was the first state to administer a one-drug execution in 2009, and the inmate died within ten minutes and showed no sign of suffering. Currently, eight states have formally adopted single-drug lethal injection protocols and six more plan to do so for future executions. Experts throughout the nation are starting to call for this alternative. Richard Dieter, the executive director of the Death Penalty Information Center, explained that single-drug executions are “the wave of the future” and that “all… major death penalty states have been switching to a single drug.” Additionally, the “Constitution Project”— a highly respected thinktank composed of bipartisan legal experts— issued a 2014 Report specifically calling for a single-drug lethal injection. The Constitution Project’s report carries particular clout because it is endorsed by experts who both oppose and favor the death penalty, including former judges, police chiefs, attorneys general and governors who have signed execution warrants. The trend throughout the nation towards single-drug

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lethal injections, paired with the widespread societal outrage over contemporary three-drug lethal injections, casts significant doubt on the constitutionality of these complicated and experimental multi-drug procedures.

B. Evolution of Eighth Amendment Jurisprudence on Method-of-Execution Challenges

The Eighth Amendment’s prohibition on cruel and unusual punishment limits state execution methods to those that do not inflict pain or suffering beyond what is reasonably necessary to induce death. The exact standards the Eighth Amendment imposes vary over time because the Amendment “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.”\textsuperscript{71} The Supreme Court’s first method-of-execution decision, \textit{Wilkerson v. Utah}, upheld the constitutionality of the firing squad and instituted the principle that punishments are “cruel and unusual” if they involve pain beyond what is normally expected of death.\textsuperscript{72} Eleven years later, the Court expounded the Eighth Amendment principle that execution methods must also guarantee a quick and painless death.\textsuperscript{73} In so deciding, the Court explained that New York’s “application of electricity to the vital parts of the human body” would undoubtedly cause an instantaneous and painless death.\textsuperscript{74} Half a century later, in \textit{Louisiana ex rel. Francis v. Resweber}, the Court addressed whether a second imposition of electrocution, after an initial attempt failed, violated the Eighth Amendment.\textsuperscript{75} The Court determined that the second electrocution attempt did not run afoul of the Eighth Amendment because the first failed attempt

\textsuperscript{71} Trop v. Dulles, 356 U.S. 86, 100 (1958).
\textsuperscript{72} 99 U.S. 130, 135-36 (1879). Wilkerson declined to be strapped down before his execution by firing squad. After a sheriff gave the command to fire, Wilkerson moved enough that the bullets struck his arm and torso but not his heart. Wilkerson took 27 minutes to bleed to death. \textit{See} Gilbert King, \textit{Cruel and Unusual History}, N.Y. Times (April 23, 2008), http://www.nytimes.com/2008/04/23/opinion/23king.html?_r=0.
\textsuperscript{73} In re Kemmler, 136 U.S. 436 (1890); Harding, \textit{supra} note 17, at 162.
\textsuperscript{74} \textit{See} Kemmler, 136 U.S. at 443.
\textsuperscript{75} 329 U.S. 459 (1947)
was an unforeseeable accident and therefore did not add an element of cruelty to the subsequent execution.\textsuperscript{76}

Then in the 2008 \textit{Baze v. Reese} opinion, the Court issued its first lethal injection Eighth Amendment analysis.\textsuperscript{77} The Court upheld the constitutionality of a particular lethal-injection drug combination in wide use at the time, but the opinion established an Eighth Amendment test to determine when a method of execution would cross this constitutional line.\textsuperscript{78} Under \textit{Baze}, for an execution method to violate the Eighth Amendment, “a prisoner [must] establish that the state's lethal injection protocol [1] creates a demonstrated risk of severe pain,” and “[2] that the risk is substantial when compared to the known and available alternatives.”\textsuperscript{79}

The “risk of pain” prong of the test focuses on the amount of pain the execution method could inflict upon the inmate, as well as the risk of accidents during the administration of the execution. The \textit{Baze} Court emphasized that “[s]imply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of ‘objectively intolerable risk of harm’ that qualifies as cruel and unusual” under the Eighth Amendment.\textsuperscript{80} If, however, an execution repeatedly failed—as opposed to an isolated accident—that would constitute an Eighth Amendment violation.\textsuperscript{81} The \textit{Baze} Court found Kentucky’s inclusion of sodium thiopental in its three-drug cocktail\textsuperscript{82} eliminated any significant risk of pain because, if the prison employees properly administered the anesthetic, the prisoner would not feel the subsequent injection of drugs.\textsuperscript{83} The Court further explained that “[a] state with a lethal

\textsuperscript{76} Id.
\textsuperscript{77} See 553 U.S. 35 (2008).
\textsuperscript{78} See generally, id.
\textsuperscript{79} Id. at 61; \textit{A New Test For Evaluating Eighth Amendment Challenges To Lethal Injections}, 120 HARV. L. REV. 1301, 1301 (2007).
\textsuperscript{80} \textit{Baze}, 553 U.S. at 50.
\textsuperscript{81} Id. at 49 (citing Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 470-71 (1947) (Frankfurter, J., concurring)).
\textsuperscript{82} See supra Section II.A (discussing the three-drug combination that, since 2009, is no longer long available).
\textsuperscript{83} \textit{Baze}, 553 U.S. at 50.
injection protocol substantially similar to the protocol [upheld in *Baze*]” would not present an unconstitutional risk of pain.\(^84\) The Court did, however, recognize that without a proper dose of sodium thiopental to render the prisoner unconscious, there would be a “constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and of pain from potassium chloride.”\(^85\) Thus, to meet the first prong of the *Baze* test, the inmate must either prove that the drug combination itself presents a substantial risk of pain, or that there is substantial risk of mishap during the procedure that would cause pain.\(^86\)

The “viable alternative” prong of the *Baze* test includes a comparison to other, equally-effective methods of execution the state could implement that would substantially lower the risk of pain.\(^87\) In *Baze*, the Court rejected the petitioner’s argument that a single-barbiturate injection was a viable alternative because such a method had “not been adopted [or tried] by any State.”\(^88\) The Court explained that “Kentucky's continued use of the three-drug protocol cannot be viewed as posing an ‘objectively intolerable risk’ when petitioners have proffered no study showing that the one-drug method is an equally effective manner of imposing a death sentence.”\(^89\) The drastic change in the availability of lethal injection drug and consequent slew of botched executions since Baze, however, paved the way for the re-assessment of the constitutionality of three-drug lethal injections in *Gross*.\(^90\)

**C. Glossip v. Gross: Constitutional Challenge to Oklahoma’s Three-Drug Lethal Injection**

After Oklahoma’s botched 2014 execution of Lockett, Charles Warner and twenty other death row inmates sued the state, citing the state’s adoption of midazolam as a replacement for

\(^{84}\) *Id.* at 61.

\(^{85}\) *Id.* at 53, 55.

\(^{86}\) See generally, *id*.

\(^{87}\) “A condemned prisoner cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative.” *Id.* at 51 (Alito, J., concurring).

\(^{88}\) *Id.* at 41 (plurality opinion).

\(^{89}\) *Id.* at 53, 57.

\(^{90}\) See supra Section II.A.2.
sodium thiopental in its lethal-injection protocol as an Eighth Amendment violation. The three-drug lethal injection Oklahoma used on Clayton Lockett caused him to strain on the gurney in what seemed to be extreme pain and claim “something is wrong” and the “drugs aren’t working.” The initial drug failed to induce Lockett into a “coma-like state,” and he lay suffering for forty minutes until finally suffering a heart attack. The White House released a statement that the execution “fell short of humane standards.”

On June 29, 2015 the Supreme Court’s majority opinion rejected this constitutional challenge to Oklahoma’s lethal injection protocol, but the opinion was accompanied by scathing dissents from Justice Ginsburg, Sotomayor, Breyer, and Kagan. The core question for the Supreme Court was whether it is constitutional for a state to carry out a three-drug lethal injection that includes midazolam, even though there is great risk it will cause the condemned inmate significantly pain. Oklahoma defended its lethal injection protocol by arguing there was no viable alternative, and that the constitutional concerns that may have existed during Lockett’s execution no longer exists now because the state substantially increased the dose of midazolam to ensure complete unconsciousness. The state also cited the fact that Florida has executed ten inmates with a protocol that incorporates midazolam “without serious incident” as reason to support the constitutionality of midazolam.

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91 See Warner v. Gross, 2014 WL 7671680 (W.D. Okla. 2014) (aff’d 776 F.3d 721 (10th Cir. 2015)).
92 For more on the crimes Lockett committed and the details of his execution, see Jaime Fuller, Why were the two inmates in Oklahoma on death row in the first place?, WASH. POST (April 30, 2014), http://www.washingtonpost.com/news/post-nation/wp/2014/04/30/why-were-the-two-inmates-in-oklahoma-on-death-row-in-the-first-place/.
94 Warner, 135 S.Ct. at 824.
95 Lewis, Report urges one-drug lethal injection, supra note 48.
97 See id.
99 See id.
The majority opinion in Gross applied the Baze test to Oklahoma’s lethal injection protocol, and made two findings. First, the majority explained that the condemned inmates failed to prove a single-drug lethal injection was a viable alternative.\textsuperscript{100} This finding rested largely on Oklahoma officials’ cursory claim that their good-faith effort to procure drugs for a single-drug lethal injection was unsuccessful.\textsuperscript{101} Second, the court found the condemned inmates failed to prove a substantial risk of significant pain in future Oklahoma lethal injections because the state allegedly addressed the errors that caused Lockett’s painful and prolonged execution.\textsuperscript{102} Based on these findings, the court affirmed the Tenth Court’s decision, but four Justices delivered scathing dissents that highlighted the extreme suffering Oklahoma’s three-drug protocol will likely inflict on future inmates. Justice Sotomayor even referred to the execution method as a “chemical equivalent of being burned at the stake.”\textsuperscript{103} The dissenting Justices explained, in scathing depth, how majority misapplied the Baze test, which raises the question of whether these experimental three-drug lethal injections can accurately be labeled constitutional.

\textbf{III. \underline{Analysis: Why Oklahoma’s Three-Drug Cocktail is Unconstitutional and a Call for the Adoption of a Single-Drug Lethal Injection}}

The Gross majority opinion misapplied the Baze test and erroneously declared Oklahoma’s three-drug lethal injection protocol constitutional. The three-drug lethal injection Oklahoma used to execute Lockett\textsuperscript{104} violates the Eighth Amendment under Baze because the use of midazolam paired with the clumsy and inconsistent administration of the injections creates a substantial risk of pain, and a readily available alternative exists that would considerably reduce this risk of pain. The constitutionally-sound result in Gross would have been a reversal of

\textsuperscript{101} See id.
\textsuperscript{102} See Id. at 16-17.
\textsuperscript{103} Id. at 2 (Sotomayor J., dissenting).
\textsuperscript{104} Oklahoma still permits three-drug lethal injections in future executions. See supra Section II.B.2 (introducing Glossip v. Gross).
the Tenth Circuits ruling, and a mandate that Oklahoma adopt an alternative execution method that eliminates the substantial risk of repeating Lockett’s excruciating experience. Section A discusses why Oklahoma’s lethal injection protocol is unconstitutional under Baze, and Section B examines the practical implications of an alternate Court ruling in the future.

A. Oklahoma’s Lethal Injection is an Eighth Amendment Violation Under Baze v. Reese

In Baze, the Supreme Court conceded that without appropriate anesthesia, the second and third drugs in a three-drug lethal injection would cause “constitutionally unacceptable” pain. Thus, the determination of whether Oklahoma’s lethal injection protocol is “cruel and unusual” under Baze rests entirely on the reliability and effectiveness of the first drug—the anesthetic—to protect against the pain the last two drugs cause. Contrary to the Gross majority opinion, Oklahoma’s particular drug combination is unconstitutional under Baze because (1) it produces a substantial risk of a prolonged and painful death, and (2) there is a viable alternative that substantially reduces the risk of pain.

1. Oklahoma’s Current Three-Drug Protocol Produces a Substantial Risk of Pain

The petitioners in Gross met the first Baze factor because, contrary to the Gross majority’s assertions, Oklahoma’s three-drug lethal injection protocol that includes midazolam presents a “substantial risk” of serious pain. Although the Baze opinion explained that any lethal injection protocol substantially similar to the protocol the Court upheld in Baze would not create a risk that meets this standard, Oklahoma’s lethal injection protocol starkly diverges from the protocol in Baze. First, three-drug lethal injections as a whole are significantly less safe and predictable today than they were when the Court decided Baze due to the widespread

105 See Baze v. Reese, 553 U.S. 35, 113-14 (Ginsburg, J., dissenting).
106 Id. at 61.
unavailability of sodium thiopental and consequent state experimentation with new drugs.\textsuperscript{107} Second, the inclusion of midazolam in place of sodium thiopental further differentiates Oklahoma’s lethal-injection protocol from the protocol the \textit{Baze} Court analyzed.

The significant increase in the risk of accidents associated with insufficiently-trained prison employees administering medically-complicated three-drug lethal injections since the 2009 \textit{Baze} opinion is enough to meet the “substantial risk of pain” prong of the test. The slew of botched three-drug lethal injections over the last several years reveals that prison employees have questionable competence to administer these medically-complicated procedures.\textsuperscript{108} Although the \textit{Baze} Court rejected the argument that “an unforeseeable accident” could render the entire lethal-injection protocol “cruel and unusual,”\textsuperscript{109} at the time the Court rendered that decision the rate of botched lethal injections was far lower than it is today.\textsuperscript{110} The shortage of sodium thiopental since \textit{Baze} led states to reduce their anesthetic doses, be secretive and experimental about their drug combinations, and to seek drugs from unknown suppliers, which all greatly increases the complication and risk of accident inherent in the procedure.\textsuperscript{111} Moreover, what the Court deemed constitutional in 2008 can certainly become unconstitutional in 2015, because the Eighth Amendment “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.”\textsuperscript{112} The national awareness and outrage over the inhumaneness of three-drug lethal injections has increased significantly since \textit{Baze}, and therefore indicates a change in societal standards of decency.\textsuperscript{113}

\begin{footnotesize}
\begin{enumerate}
\item See supra Section II.A.2.
\item See supra Section II.A.1.
\item \textit{Baze}, 553 U.S. at 49 (citing Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 470-71 (1947) (Frankfurter, J., concurring)). See supra Section II.B.1 (detailing the \textit{Baze} opinion).
\item See Tierney-Sneed, supra note 19; Sarat el a., supra note 19.
\item See supra Section II.A.1.
\item See supra Section II.A (citing the plethora of botched executions and subsequent societal outcry over lethal injections since 2009).
\end{enumerate}
\end{footnotesize}
In addition to the risk of severe pain associated with contemporary three-drug lethal injections in general, an isolated look at three-drug lethal injections that include midazolam illustrates an even higher risk of pain that was not present in the cocktail the Baze court analyzed. The Baze Court acknowledged that without the proper dose of sodium thiopental, Kentucky’s lethal injection protocol would have presented an unconstitutional risk of pain and suffocation from the administration of the subsequent drugs. The use of midazolam in lieu of sodium thiopental raises the very risk the Baze court cautioned against. Specifically, midazolam’s anesthetic qualities are far inferior to sodium thiopental due to the ceiling effect that prevents midazolam from inducing a coma-like unconsciousness, and the likely reversal of midazolam’s sedative effects when mixed with stimuli like potassium chloride—the final drug in the three-drug protocol. Although in Gross Oklahoma officials argued the state’s increase in the dosage of midazolam from 100mg to 500mg since Lockett’s execution makes it a more reliable anesthetic, midazolam’s ceiling effect renders this dosage increase completely ineffective. Arizona’s execution of Joseph Wood demonstrates this point perfectly, as the state used 750 mg of midazolam—250 mg more than Oklahoma requires—yet Mr. Wood still gasped and struggled to breathe for hours, because, even in substantial doses, midazolam cannot reliably induce a comatose state.

In applying the Baze test to declare Oklahoma’s three-drug lethal injection constitutional, the Gross majority failed to address the slew of botched executions across the nation that

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114 See supra Section II.A.2 (discussing the botched executions in states throughout the nation that have used midazolam in their lethal injections).
115 See Baze, 553 U.S. at 53, 55; see also supra Section II.A.
116 See supra Section II.A.2 (discussing why midazolam is an unreliable anesthetic).
117 See supra Section II.B.2 (discussing Oklahoma’s arguments in Glossip v. Gross).
118 See supra Section II.A.2.
confirm the ineffectiveness of midazolam as an anesthetic.\textsuperscript{120} Although Oklahoma cited Florida’s use of midazolam in ten executions “without significant incident” as proof of the drug’s success, all this citation proves, as reiterated in Sotomayor’s dissent, is that Florida’s properly-administered paralytic successfully masked the painful results of using midazolam.\textsuperscript{121} In Lockett’s execution the prison guards did not administer the paralytic properly, which is why viewers witnessed his slow asphyxiation.\textsuperscript{122} If prison employees do administer the paralytic properly, the pain is no less; the viewers simply do not see the pain beneath the inmate’s paralyzed exterior. The paralyzed inmate still fully experiences the suffocation and the agonizing burning sensation as the potassium chloride literally burns through the veins.\textsuperscript{123} The substantial risk of accidents in contemporary three-drug lethal injections in general, compounded with the ineffectiveness of midazolam as a sedative, was certainly sufficient for the petitioners in Gross to meet the first Baze factor, and the Court erred in finding otherwise.

2. \textit{One-Drug Lethal Injection Protocols Present a Viable Alternative}

Contrary to the majority’s finding in Gross, the petitioners also met the second Baze factor because a single-drug lethal injection is a feasible alternative method of execution that “significantly reduces a substantial risk of severe pain.”\textsuperscript{124} Although the Baze Court rejected the one-drug lethal injection as a viable alternative in 2008, the grounds for that rejection no longer exist.\textsuperscript{125} Specifically, in 2008 no state had used the one-drug protocol yet and the petitioner in Baze was therefore unable to effectively argue it was as reliable as the three-drug protocol.\textsuperscript{126}

\begin{footnotes}
\item[120] See supra Section II.A.2 (discussing botched lethal injections due to inclusion of midazolam).
\item[121] See Brief for Respondent, supra note 98, at 7. See also Glossip v. Gross, 576 U.S. __, 20-21 (Sotomayor J., dissenting) (“because the protocol involves the administration of a powerful paralytic, it is as Drs. Sasich and Lubarsky explained, impossible to tell whether the condemned inmate in fact remained unconscious”).
\item[122] See supra Section I.
\item[123] See supra Section II.A.2.
\item[124] See Baze, 553 U.S. at 51; see also supra Section II.B.1.
\item[125] See id. at 41 (plurality opinion); see also supra Section II.B.1.
\item[126] See id. (plurality opinion); see also supra Section II.B.1.
\end{footnotes}
Moreover, because other states had yet to try the one-drug method in 2008, it was not a “widely available alternative.”\(^{127}\) Today, however, single-drug lethal injections are irrefutably viable alternatives because eight states—Arizona, Georgia, Idaho, Missouri, Ohio, South Dakota, Texas, and Washington—have each adopted the single-drug lethal injection method.\(^{128}\)

The *Gross* majority’s rejection of the viability of a single-drug alternative today is therefore baseless. The majority erroneously placed the burden on the petitioners to *prove* the viability of this single-drug alternative, rather than challenging Oklahoma’s cursory claim against such viability.\(^{129}\) Although Oklahoma complained that it could not obtain one of the drugs\(^ {130}\) states commonly use for single-drug lethal injections, well-respected scholars in the field reject that claim.\(^ {131}\) For example, Fordham Professor Deborah Denno, a known expert in the field of lethal injections, explained that any compounding pharmacy can make pentobarbital, and that “[y]ou could build a pharmacy in your prison.”\(^ {132}\) Additionally, pentobarbital is certainly not the only feasible drug for single-drug lethal injections. For example, in Oregon patients undergoing doctor-assisted suicide have a choice between either seconal or nembutal, both of which cause a quick, painless, and certain death.\(^ {133}\)

Moreover, from a resource standpoint, using a one-drug rather than three-drug protocol will not impose significant fiscal hardship on the states, considering single-drug injections

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\(^{127}\) See *id.* (plurality opinion); *see also supra* Section II.B.1.


\(^{129}\) See *Gross*, 576 U.S. at 29 (Sotomayor J., dissenting) (criticizing the majority’s imposition of the burden of proof on the condemned inmates.)

\(^{130}\) Pentobarbital.


\(^{132}\) *Id.* (quoting Fordham University School of Law professor Denno, who has been studying lethal injection for two decades).

involve fewer drugs, less machinery, and far less medical expertise to administer. The single-drug lethal injection is also just as—if not more—reliable at inducing death, as has been documented by veterinarians that use single-drug methods to euthanize animals, doctors that perform single-drug doctor-assisted suicides of terminally-ill patients, and states that already use one-drug lethal injections.

Contrary to the Gross majority, single-drug lethal injections also present a substantially reduced risk of pain compared to three-drug lethal injections due to the near elimination of opportunity for accidents. First, administering one drug is much simpler than three, which addresses the significant concern of an incompetent execution staff. Second, because the one-drug method does not involve a paralytic agent or potassium chloride, the one-drug method eliminates the risk of subjecting the inmate to the suffocation and immense pain associated with those latter two drugs. Thus, because of the substantial risk of pain as well as the availability of a viable alternative that significantly reduces the risk of pain, the three-drug lethal injection Oklahoma used to execute Lockett is cruel and unusual punishment under the Baze test, and the majority’s application of the Baze test in Gross was therefore incorrect.

B. Implications of a Supreme Court Decision that Three-Drug Lethal Injections like Oklahoma’s Are Unconstitutional

If, through the inevitable slew of botched lethal injection certiorari petitions in the future, the Supreme Court were to reverse its holding in Gross, significant benefits and a few practical challenges would result. One positive implication of a Supreme Court determination that lethal

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134 Currently three-drug lethal injections contain a lethal dose of all three drugs; thus states are simply subtracting the latter two drugs, not changing or adding to the first drug. See supra Section II.A.2.
137 See supra Section II.A.
injections like Oklahoma’s are unconstitutional would be upholding the integrity of the Eighth Amendment. To date, the Supreme Court has sided with the state in every method-of-execution case it has heard.\textsuperscript{138} This trend will continue to degrade the public legitimacy of the Eighth Amendment’s protections unless the Court establishes clear boundaries on the amount of pain state-sanctioned executions may inflict upon inmates. Eighth Amendment boundary setting is particularly important now, when there is widespread scientific evidence that contemporary three-drug lethal injections are paralyzing inmates before subjecting them to “the chemical equivalent of being burned at the stake.”\textsuperscript{139} Witnesses in the execution chambers are habitually sickened by the sight of these botched executions, and have spoken out about their disgust at witnessing such torture.\textsuperscript{140} Thus, a reversal of the \textit{Gross} holding in a future Supreme Court decision is necessary to ensure that no more death-row inmates or witnesses suffer this fate.

Furthermore, although a reversal of the \textit{Gross} holding in the future would solely be a ruling against the particular state in that case, the implications of the decision would protect the constitutional rights of condemned inmates throughout the nation. The fear of being found in violation of the Eighth Amendment in the future would drive states to better train their execution staff, put more care and research into the selection of drug combinations and dosages, and put more safeguards in place in case a drug does not work. Additionally, a determination that a single-drug lethal injection is a constitutional alternative will steer the nation towards a more consistent and easily-administrable alternative that will likely produce far less controversy and litigation.

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{139} \textit{Gross}, 576 U.S. at 28 (Sotomayor J., dissenting). \textit{See also, supra} Section II.A.
\item\textsuperscript{140} \textit{See id.}
\end{itemize}
\end{footnotesize}
A reversal of the *Gross* holding would naturally also give rise to a few concerns. One concern may be the fear that declaring a specific combination of lethal injection drugs unconstitutional could derail the current state of capital punishment throughout the nation, and force states to clamor for a new method or combination of drugs. This concern, however, would become moot if the Court simultaneously declares the single-drug lethal injection constitutional, because states that use the lethal injection already have the machinery, execution staff, and drugs in place to immediately adopt this change.\textsuperscript{141} A related concern that may arise, and one Oklahoma raised in *Gross*, is that many states who use single-drug lethal injection protocols use a lethal dose of sodium thiopental, which is largely unavailable today because the FDA and international laws prohibited the sale of the drug to American prisons.\textsuperscript{142} Single-drug lethal injections, however, can and have been successfully administered with other more-widely available drugs such as pentobarbital, seconol and nembutal.\textsuperscript{143}

Lastly, critics of a reversal of *Gross* might fear such a reversal would provide condemned inmates with a strong legal backing in their Eighth Amendment fight against any execution method states choose to adopt. It is true that inmates could cite the new favorable precedent to argue that a multitude of accidents related to a particular execution method, or widespread scientific evidence of pain associated with that method, renders the method unconstitutional. However, because the long list of brutally-botched lethal injections and evidence of pain is so widespread today,\textsuperscript{144} if another method of execution ever invokes a similar level of widespread outrage, reliance on this precedent to garner another determination of an Eighth Amendment

\begin{itemize}
\item \textsuperscript{141} Or can procure such drugs with reasonable efforts. *See supra* Section III.A.2.
\item \textsuperscript{142} *See supra* Section II.A.2.
\item \textsuperscript{143} *See* Death Penalty Info. Ctr., *State by State Lethal Injection*, http://www.deathpenaltyinfo.org/state-lethal-injection (last visited Feb 27, 2015).
\item \textsuperscript{144} *See generally supra* Section II.A.
\end{itemize}
violation may well be necessary. Thus, although practical challenges may result from a reversal in *Gross* in the future, the integrity of the Eighth Amendment depends on such a ruling.

IV. CONCLUSION

Three-drug lethal injections have come under sharp and much-deserved scrutiny due to frequent accidents and visibly torturous pain certain drug combinations inflict upon condemned inmates. After Lockett’s botched Oklahoma lethal injection in 2014, fellow inmates brought suit, citing Oklahoma’s particular drug combination that left Lockett writhing and gasping on the gurney for forty minutes as a violation of the Eighth Amendment’s prohibition against cruel and unusual punishment.145 The Supreme Court granted certiorari on this issue in *Glossip v. Gross*,146 which marked a crucial opportunity for the Court to uphold the integrity of the Eighth Amendment, and put an end to the inhumane suffering states throughout the nation currently inflict upon their inmates.

Unfortunately, the majority *Gross* opinion continued the Court’s legacy of refusing to deem an execution method unconstitutional. The majority opinion based its ruling on the 2008 *Baze v. Reese* opinion, which outlined a test to determine when an execution method crosses that constitutional line. This test includes a finding that the execution method presents a “substantial” or “objectively intolerable” risk of “serious harm” compared to “known and available alternatives.”147 The particular lethal drug combination the 2008 *Baze* opinion upheld is no longer widely available, and the new controversial combinations states like Oklahoma experiment with fall far short of the *Baze* standard. This Article argues that, contrary to the holding in *Gross*, Oklahoma’s three-drug lethal injection that includes the controversial and

146 *See id.* at 824. Arguments are scheduled for April 29, 2015.
147 *See Baze*, 553 U.S. at 50, 61 (plurality opinion) (internal quotation marks omitted); *see also, supra* Section II.B.1.
largely-untested drug midazolam fails the Baze test because it presents a substantial risk of pain, and a single-drug lethal injection that substantially reduces the risk of pain is now a viable alternative. Therefore, when the Court next has the opportunity to rule on an Eighth Amendment challenge to three-drug lethal injections, the Court should reverse its holding in Gross, and determine that the torture states inflict upon their condemned inmates through the guise of a seemingly humane three-drug lethal injection can no longer stand under the Eighth Amendment.

On my honor, I submit this work in good faith and pledge that I have neither given nor received improper aid in its completion.

- Lisa Lindhorst 11.6.2015