

Giving Lethal Injection the Axe

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Yesterday, the State of Arizona successfully executed Joseph Rudolph Wood. Successfully, in this case, means he is no longer alive. The execution itself was less than a complete success, however, as it took [nearly two hours for Wood to die](#). About 10 minutes in, Wood began gasping. He continued gasping every 5 to 12 seconds—more than 600 times.

After more than an hour of Wood gasping, grunting, and snorting, the Federal Public Defender for the District of Arizona pleaded for the Court to stop the execution.¹ [1. [Motion for Emergency Stay of Execution](#), Wood v. Ryan, No. 2:14-cv-01447-NVW-JFM (D. Ariz. filed July 23, 2014).] While the Arizona Supreme Court was [undergoing an emergency telephonic hearing](#) to decide what to do, Wood mercifully died.



The Arizona Death Chamber. Photo: Arizona Department of Corrections

Two days prior to the execution, Chief Judge Kozinski of the Ninth Circuit Court of Appeals presciently noted the flaws with the process of lethal injection as a whole.² [2. See [Wood v. Ryan](#), No. 14-16310 (9th Cir. July 21, 2014) (Kozinski, J., dissenting from denial of rehearing en banc).] Like Judge Kozinski, I will not argue over the morality, efficacy, or propriety of the death penalty. Accepting the premise that the capital punishment is constitutional, the question is not whether we should execute prisoners, but rather, can't we do better than lethal injection?

Wood's botched lethal injection is just [one of many horrible stories involving lethal injections gone wrong](#). Nevertheless, lethal injection is the preferred method of execution in every state

that authorizes capital punishment, and in many states is the *only* method of execution.³ [3. See [Methods of Execution](#), Death Penalty Information Ctr.] Perhaps lethal injection is intended to be the most humane form of execution, but history has shown that we are really not that good at mixing killer cocktails. As Judge Kozinski stated:

Whatever the hopes and reasons for the switch to drugs, they proved to be misguided. Subverting medicines meant to heal the human body to the opposite purpose was doomed to failure. Today's case is only the latest in an unending effort to undermine and discredit this method of carrying out lawful executions. . . .

Whatever happens to Wood, the attacks will not stop and for a simple reason: The enterprise is flawed. Using drugs meant for individuals with medical needs to carry out executions is a misguided effort to mask the brutality of executions by making them look serene and peaceful—like something any one of us might experience in our final moments. But executions are, in fact, nothing like that. They are brutal, savage events, and nothing the state tries to do can mask that reality. Nor should it. If we as a society want to carry out executions, we should be willing to face the fact that the state is committing a horrendous brutality on our behalf.⁴ [4. [Wood v. Ryan](#), No. 14-16310, at 4–5 (9th Cir. July 21, 2014) (Kozinski, J., dissenting from denial of rehearing en banc) (internal citations omitted).]

So what is a better answer? Perhaps, as several commentators have suggested, it is time we adopted the guillotine in America.⁵ [5. See, e.g., Conor Friedersdorf, [Bring the Guillotine Back to Death Row](#), The Atlantic, May 2, 2014; John Kruzel, [Bring Back the Guillotine](#), Slate, Nov. 1, 2013.] Although this may sound like a bad joke, the guillotine is perhaps the quickest and most painless forms of execution ever devised. Even Judge Kozinski argues that “[t]he guillotine is probably [the best method of execution] but seems inconsistent with our national ethos.”⁶ [6. [Wood v. Ryan](#), No. 14-16310, at 5 (9th Cir. July 21, 2014) (Kozinski, J., dissenting from denial of rehearing en banc).]

Methods of execution are judged based on whether they should be considered “cruel and unusual” under the Eight Amendment. The Supreme Court has explicitly stated that lethal injection is not cruel and unusual.⁷ [7. See [Baze v. Rees](#), 128 S.Ct. 1520(2008).] But while lethal injection does not appear to be cruel and unusual in theory, it increasingly appears to be so in practice. And the more executions that end up like Wood's, the stronger the argument becomes for the cruelty inherent to lethal injection. In comparison, the guillotine—an imposing instrument if ever there was one—appears to be cruel and unusual in theory, but seems more and more humane each time another lethal injection causes extended, unintended suffering.

The guillotine is likely to pass Constitutional muster, as the Supreme Court “has never

invalidated a State's chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment."⁸ [8. *Id.* at 1530. See also [Furman v. Georgia](#), 408 U.S. 238, 314 (1972) (Marshall, J., concurring) (providing a comprehensive history of the death penalty in English and American history).] Although the term "cruel and unusual" is difficult to define precisely, the term is thought to apply only to "methods of execution purposely designed to inflict pain."⁹ [9. *Baze*, 128 S. Ct. at 1559 (Scalia, J., concurring). See also [Wilkerson v. Utah](#), 99 U.S. 130, 136 (1879) ("Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by [Blackstone], and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution.")]. "Punishments are cruel when they involve torture or a lingering death."¹⁰ [10. [In re Kemmler](#), 136 U.S. 436, 447 (1890).] Hangings, electrocutions, and firing squads have never been found to fall within this definition, and it is unlikely the swift blade of the guillotine would either.

But if the guillotine is not inhumane for the condemned, is it too cruel or unusual for the American people? Judge Kozinski argues that such an approach "seems inconsistent with our national ethos." Kozinski also suggests, however, that if you are going to do something, do it right. If the State, acting on behalf of the People, is dead set on carrying out executions, perhaps the State should be forced to confront the brutality of its decision head-on.¹¹ [11. Or in this case, head off.] In *Furman*, Justice Brennan argued that "[o]ur concern for decency and human dignity" led to the idea that "public executions are debasing and brutalizing to us all."¹² [12. *Furman*, 408 U.S. at 297 (Brennan, J., concurring).] But by Brennan's own account, it is not the prisoner's humanity we are concerned with, but that of the public. "The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity."¹³ [13. *Id.* at 290.]

Thus, our States seem to want to have it both ways. They want to commit the brutal act of execution without getting blood on their hands. But while lethal injection is not technically bloody, recent history has shown that it can be plenty messy. I understand that lawmakers may never seriously consider using the guillotine to carry out executions, but it would seem to alleviate some of the problems we have with the current approach. Because although the guillotine may seem unusual, at least it is not cruel.