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WHEN POLICE VOLUNTEER TO KILL

Alexandra L. Klein[*]

Abstract

The Supreme Court has upheld the constitutionality of lethal injection, yet states continue to struggle with drug shortages and botched executions. Some states have authorized alternative methods of execution, including the firing squad. Utah, which has consistently carried out firing squad executions throughout its history, relies on police officers from the jurisdiction where the crime took place to volunteer to carry out these executions. This represents a plausible—and probable—method for other states in conducting firing squad executions.

Public and academic discussion of the firing squad has centered on questions of pain and suffering. It has not engaged with the consequences of relying on police officers as executioners. Police participation in executions deserves the same scrutiny as physician participation in executions. Using police officers as executioners is inconsistent with the normative and idealized functions of policing, but consistent with the culture and powers of policing. This Article explores the potential consequences of using police officers as executioners. Relying on police officers as executioners will destabilize policing because it encourages negative aspects of policing culture and undermines officers' ability to work within their communities.

This practice also risks adding impermissible features to executions, further undermining the retributive justifications for capital punishment. Using police officers from the jurisdiction where the crime occurred has a significant association with retributive and expressive functions of punishment. Pain alone should not be the primary way to assess the constitutionality of an execution. The Eighth Amendment prohibits punishment that fails to serve legitimate purposes. The Supreme Court has justified capital punishment as an expression of a community's moral outrage and a way to preserve the legitimacy of the justice system by preventing vigilantism and mob violence. This means that punishment must not be undertaken in a way that endorses vigilantism and vengeance.

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Relying on police officers as executioners in firing squads illustrates that the search for a less painful method of execution may not be without its own serious constitutional defects.

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INTRODUCTION

On January 17, 1977, Gary Gilmore became the first person put to death since the Supreme Court affirmed the constitutionality of capital punishment in *Gregg v. Georgia*[1] approximately six and a half months earlier.[2] He died by firing squad in the Utah State Prison in Draper, Utah.[3] Since that day, two other men have died by firing squad in the United States.[4] The most recent firing squad execution took place in 2010, when Utah executed Ronnie Lee Gardner.[5] The firing squad is by no means a

1. 428 U.S. 153 (1976).

2. *See* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 275 (Harvard Univ. Press 2002) (observing that, although *Gregg* confirmed the constitutionality of the death penalty, the methods of execution continue to spark debate); L. KAY GILLESPIE, THE UNFORGIVEN: UTAH'S EXECUTED MEN 151 (2d ed. 1997).

3. GILLESPIE, *supra* note 2, at 151.

4. Utah has executed seven people since 1977, three by firing squad—including Gilmore—and four by lethal injection. *See Utah State Prison: Death Row Inmates*, UTAH DEP'T OF CORR. 4–5 (Aug. 2021), https://corrections.utah.gov/images/UtahdeathrowAugust2021.pdf [https://perma.cc/XV2L-FJKF].

5. *See* Nate Carlisle, *Firing Squad: An Eyewitness Account of Gardner's Execution*, SALT LAKE TRIB. (June 18, 2010, 8:05 PM), https://archive.sltrib.com/article.php?id=9789613&itype=storyID [https://perma.cc/Z97B-5JAR]; Jennifer Dobner, Associated Press, *Ronnie Lee Gardner*

common method of execution in the United States, but it may play an important role in the next phase of capital punishment in the United States.

Lethal injection is the primary method of execution for states and the federal government.[6] Despite court rulings upholding the constitutionality of lethal injection,[7] states have struggled with actually carrying out such executions.[8] States face shortages of lethal injection drugs due to manufacturers' reluctance to allow their products to be used for executions.[9] States have also botched lethal injection executions at an alarming rate.[10] In response to these difficulties, states have considered new methods of execution, including the firing squad. The imminent possibility of such executions[11] raises significant constitutional and legal questions.

Executed by Firing Squad in Utah, CHRISTIAN SCI. MONITOR (June 18, 2010), https://www.csmonitor.com/From-the-news-wires/2010/0618/Ronnie-Lee-Gardner-executed-by-firing-squad-in-Utah [https://perma.cc/T9P9-SXF3]; Emiley Morgan, *Ronnie Lee Gardner Executed by Firing Squad*, DESERET NEWS (June 18, 2010, 12:21 AM), https://www.deseret.com/2010/6/18/20122257/ronnie-lee-gardner-executed-by-firing-squad#ronnie-lee-gardners-daughter-brandie-gardner-right-is-comforted-by-a-friend-as-family-members-and-others-held-a-vigil-before-the-execution [https://perma.cc/GUG4-HYU9].

6. *See* Alexandra Klein, *Nondelegating Death*, 81 OHIO ST. L.J. 923, 948 (2020); *Methods of Execution*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/methods-of-execution [https://perma.cc/VQ6V-94U3].

7. *See, e.g.*, Baze v. Rees, 553 U.S. 35, 41 (2008) (plurality opinion); Glossip v. Gross, 576 U.S. 863, 869 (2015); Bucklew v. Precythe, 139 S. Ct. 1112, 1126 (2019).

8. *See* Eric Berger, *Courts, Culture, and the Lethal Injection Stalemate*, 62 WM. & MARY L. REV. 1, 23 (2020).

9. *See* CORINNA BARRETT LAIN, LETHAL INJECTION: WHY WE CAN'T GET IT RIGHT AND WHAT IT SAYS ABOUT US ch. 8 (forthcoming) (manuscript on file with the author); Berger, *supra* note 8, at 37–42.

10. *See* BRANDON L. GARRETT, END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE 195–202 (2017); AUSTIN SARAT, GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA'S DEATH PENALTY 120–23 (2014); Deborah W. Denno, *Lethal Injection Chaos Post*-Baze, 102 GEO. L.J. 1331, 1364 (2014) (finding that a shortage of lethal injection drugs, unqualified administrators of the drugs, and generally unsafe procedures have consistently caused painful deaths for inmates); *see also* Robin C. Konrad, *Lethal Injection: A Horrendous Brutality*, 73 WASH. & LEE L. REV. 1127, 1133–37 (2016) (describing the execution of Joseph Wood); Ben Crair, *Photos from a Botched Lethal Injection*, NEW REPUBLIC (May 29, 2014), https://newrepublic.com/article/117898/lethal-injection-photos-angel-diazs-botched-execution-florida [https://perma.cc/8743-5ANR] (discussing the execution of Angel Diaz); Jeffrey E. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, ATLANTIC (June 2015), https://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/ [https://perma.cc/5CHW-2WYS] (describing the execution of Clayton Lockett).

11. *See infra* notes 128–29 and accompanying text.

Four states have designated the firing squad as a possible method of execution, most recently South Carolina in 2021.[12] South Carolina recently developed a firing squad execution protocol and completed the necessary alterations to its execution chamber to carry out such executions.[13] Other states have considered adopting it.[14] In method-of-execution litigation, the firing squad has been identified as a readily available alternative method of execution[15] that may reduce a substantial risk of serious pain.[16] Justice Sonia M. Sotomayor has observed that the

12. *See* MISS. CODE ANN. § 99-19-51(4) (2021) (stating that if other methods of execution are held unconstitutional or are otherwise unavailable, execution shall be done by firing squad); OKLA. STAT. ANN. tit. 22, § 1014(D) (West 2021) (finding that if other execution methods are unconstitutional or unavailable, inmates shall be executed by firing squad); S.C. CODE ANN. § 24-3-530(A) (LexisNexis 2021) (stating that an inmate may elect for execution by firing squad); UTAH CODE ANN. § 77-18-113(a)(2) (LexisNexis 2021) (stating that if a court holds that a defendant has a right to be executed by firing squad, the method of execution for that defendant shall be by firing squad). Idaho authorized execution by firing squad if lethal injection was impractical but amended its method of execution statute in 2009, leaving lethal injection as its sole method. *See* H.B. 107, 60th Leg., 1st Reg. Sess. (Idaho 2009); Deborah W. Denno, *The Firing Squad as a "Known and Available Alternative Method of Execution" Post*-Glossip, 49 U. MICH. J. L. REFORM 749, 780 (2016). Several jurisdictions, while not expressly authorizing the firing squad as a method of execution, have a "catch-all" provision in their method of execution statutes that allow for the use of any constitutional method of execution in the event that the state's primary method of execution is held unconstitutional, which presumably would include a firing squad. *See* Klein, *supra* note 6, at 950.

13. *See* Jaclyn Diaz, *Death Row Executions by Firing Squad Can Now be Carried Out in South Carolina*, NPR (Mar. 18, 2022, 9:37 PM), https://www.npr.org/2022/03/18/1087677686/south-carolina-firing-squad-execution-death-row [https://perma.cc/9DVC-Z43K]; *infra* notes 128–29 and accompanying text.

14. *See, e.g.*, Liz Fields, *Wyoming Is the Latest State to Consider Bringing Back Firing Squads*, VICE (Jan. 26, 2015, 4:40 PM), https://www.vice.com/en_us/article/qvayjd/wyoming-is-the-latest-state-to-consider-bringing-back-firing-squads [https://perma.cc/4LP8-ELFY]; Alex Stuckey, *Missouri Bill Would Allow Execution Using Firing Squad*, ST. LOUIS POST-DISPATCH (Jan. 17, 2014), https://www.stltoday.com/news/local/crime-and-courts/missouri-bill-would-allow-execution-using-firing-squad/article_2a60d84c-f66b-5262-9da9-bb2a59264c81.html [https://perma.cc/N68P-UWJV].

15. Under the analysis set out in the *Baze* plurality, and subsequently affirmed in *Glossip*, a prisoner challenging a state's method of execution must show that the method presents a substantial risk of serious harm and identify an alternative method of execution that is readily available and significantly reduces the substantial risk of serious pain or harm. *See* Baze v. Rees, 553 U.S. 35, 50–52 (2008) (plurality opinion); Glossip v. Gross, 576 U.S. 863, 876–77 (2015). *See also* Arthur v. Comm'r, Ala. Dep't of Corrections, 840 F.3d 1268, 1319 (11th Cir. 2016) (alleging Utah's firing squad protocol as an alternative method of execution in Alabama).

16. *See Glossip*, 576 U.S. at 976–77 (Sotomayor, J., dissenting) (identifying evidence to suggest that the firing squad is more reliable and relatively painless compared with other methods of execution); Boyd v. Warden, Holman Corr. Facility, 856 F.3d 853, 880–81 (11th Cir. 2017) (Wilson, J., concurring in judgment) (concluding that the defendant's allegations supported a reasonable inference that execution by firing squad was feasible and readily implemented); Arthur v. Comm'r, Ala. Dep't of Corr., 840 F.3d 1268, 1321 (11th Cir. 2016) (Wilson, J., dissenting)

firing squad "has yielded significantly fewer botched executions," and may be "near instant" and "comparatively painless."[17] A trial has been scheduled in the Middle District of Tennessee for April 2022 to evaluate this question.[18] Recently, Justice Brett M. Kavanaugh, while declining to "prejudge" the firing squad's feasibility in every state, suggested the firing squad could serve as a readily available alternative for prisoners trying to satisfy *Baze-Glossip*, even if a state had not authorized that method of execution.[19]

Given states' tendencies to copy execution protocols from other jurisdictions, it is highly likely that, should another jurisdiction conduct an execution by firing squad, Utah's procedure for selecting executioners might serve as a reference point for other states' procedures.[20] Prisoners attempting to prove that the firing squad is a readily available alternative

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(asserting that the firing squad may be a viable alternative method of execution under *Baze* and *Glossip*), *abrogated by* Nance v. Ga. Dep't of Corr., 981 F.3d 1201 (11th Cir. 2020); Wood v. Ryan, 759 F.3d 1076, 1103 (9th Cir.) (Kozinski, C.J., dissenting from the denial of rehearing en banc) (arguing that the firing squad is a more appropriate method of execution than sanitized lethal injection), *vacated*, 573 U.S. 976 (2014); Johnson v. Precythe, No. 20-287, slip op. at 1–2 (May 24, 2021) (Sotomayor, J., dissenting from the denial of certiorari); *Nance*, 981 F.3d at 1205 (asserting the firing squad as an alternative to Georgia's lethal injection protocol); Ledford v. Ga. Dep't of Corr., 856 F.3d 1312, 1318 (11th Cir. 2017) (same); McGehee v. Hutchinson, 463 F. Supp. 3d 870, 915–16 (E.D. Ark. 2020) (considering whether the evidence was sufficient to show that the firing squad reduced a substantial risk of severe pain); Kelley v. Johnson, 496 S.W.3d 346, 358 (Ark. 2016); Boyd v. Myers, No. 2:14-CV-1017, 2015 WL 5852948, at *4 (M.D. Ala. Oct. 7, 2015), *aff'd*, 856 F.3d 853 (11th Cir. 2017); Petition for a Writ of Certiorari at 10, Boyd v. Dunn, No. 17-962 (U.S. Oct. 19, 2017); Complaint at 30, 32, Gray v. McAuliffe, No. 3:16-cv-000982, 2017 WL 102970 (E.D. Va. Jan. 10, 2017).

17. Arthur v. Dunn, 137 S. Ct. 725, 733–34 (2017) (Sotomayor, J., dissenting from denial of certiorari).

18. *See* Kimberlee Kruesi, *Trial Set for Death Row Inmates Seeking Firing Squad Option*, ASSOCIATED PRESS (Oct. 16, 2020), https://apnews.com/article/trials-crime-tennessee-executions-00051c6a21a6b3a06aaf89d2d16bf810 [https://perma.cc/8B23-59DX].

19. Bucklew v. Precythe, 139 S. Ct. 1112, 1136 (2019) (Kavanaugh, J., concurring).

20. *See* Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 WASH. U. L. REV. 1, 17–18 (2010) (discussing state copying); Klein, *supra* note 6, at 972–73; Stuckey, *supra* note 14 ("The [Missouri] House bill adds the option of firing squad executions consisting of five law enforcement officers chosen by the state corrections director."); Tim Smith, *As SC Looks at Firing Squad as an Option, Utah May Provide a Template*, GREENVILLE NEWS (Apr. 30, 2019, 9:41 AM), https://www.greenvilleonline.com/story/news/local/south-carolina/2018/02/15/how-firing-squads-work-utah-only-state-executions/338012002/ [https://perma.cc/B4QJ-4FB8]; Caitlin Herrington, *SC is now Prepared to Use a Firing Squad for Executions as Greenville Men Wait for Death*, GREENVILLE NEWS (Mar. 18, 2022, 3:38 PM), https://www.greenvilleonline.com/story/news/local/south-carolina/2022/03/18/sc-now-firing-squad-capital-punishment-executions/9445469002/ [https://perma.cc/3ZLV-CZXZ] (noting that South Carolina officials visited Utah when developing their protocol).

have cited Utah's procedures.[21] Utah's firing squad is composed of "POST certified peace officers."[22] This practice is a significant part of Utah's history of capital punishment: firing squads have traditionally been composed of volunteer law enforcement officers, usually from the jurisdiction where the crime occurred.[23] There may be practical reasons to rely on law enforcement officers as firing squad executioners. But there are also consequences to offering police an opportunity to engage in judicially sanctioned killing. Understanding these consequences affords an opportunity to reevaluate what it means when police punish—or kill.

Legal scholarship examining the firing squad has focused on questions of pain and suffering.[24] It has also explored whether firing

21. *See, e.g.*, Complaint at 30, *Gray*, 2017 WL 102970 (No. 3:16-cv-000982) (identifying the number of state and local law enforcement officers in Virginia and explaining that "[i]t is feasible for the VDOC to find a group of these trained officers to conduct a firing-squad execution"); *Boyd*, 856 F.3d at 880–81 (Wilson, J., concurring in judgment) (noting that Boyd relies on Utah's protocol); Opening Brief of Appellant at 47, *Nance*, 981 F.3d 1201 (No. 20-11393) (noting petitioner's argument highlighting Utah's firing squad protocol as an example of its implementation in other states); Complaint at 37, *McGehee*, 463 F. Supp. 3d 870 (No. 17-CV-00179) (pointing to Utah's firing squad procedure and protocol as an established reference); Petition for a Writ of Certiorari at 18, *Dunn*, No. 17-962 (arguing that petitioner presented a reasonable inference that the firing squad is a feasible and readily implemented alternative and identifying Utah's use of the firing squad as a known alternative); *see also* Kimberly Kruesi, Associated Press, *Four Tennessee Death Row Inmates Ask for Execution by Firing Squad*, GUARDIAN (Nov. 5, 2018, 6:26 PM), https://www.theguardian.com/us-news/2018/nov/05/tennessee-death-row-inmates-execution-firing-squad [https://perma.cc/4DWX-RTNJ] (describing the arguments made in favor of execution by firing squad by four Tennessee death row inmates and identifying Utah as the state that most recently used the firing squad as a method of execution).

22. UTAH DEP'T OF CORR., TECHNICAL MANUAL 54 (2010); UTAH CODE ANN. § 77-19-10(3) (LexisNexis 2021) ("If the judgment of death is to be carried out by firing squad . . . the executive director of the department or a designee shall select a five-person firing squad of peace officers."). Utah police officers are peace officers, although other types of officers may "exercise peace officer authority." UTAH CODE ANN. § 53-13-102 (LexisNexis 2021). "POST" refers to "Peace Officer Standards and Training." *Peace Officer Standards and Training: Basic Training Bureau*, UTAH DEP'T OF PUB. SAFETY, https://post.utah.gov/about-post-2/basic-training-bureau/ [https://perma.cc/S7CX-PBFB]. Aspiring peace officers in Utah must complete "POST Basic Training" and "receive basic training before they can be certified and function with any authority in the state." *Id.*

23. *See* Jennifer Dobner, Associated Press, *Utah Cops Volunteer for Firing Squad Duty*, POLICEONE.COM (June 18, 2010), https://www.policeone.com/patrol-issues/articles/utah-cops-volunteer-for-firing-squad-duty-6BP7xnnKvOIQrt4r/ [https://perma.cc/276C-HCLY]; Brady McCombs, *Utah's Firing Squad: How Does It Work?*, ASSOCIATED PRESS (Mar. 24, 2015), https://apnews.com/58559881d0f743009cfeb52196702382 [https://perma.cc/J3R9-MEX3].

24. *See* Christopher Q. Cutler, *Nothing Less Than the Dignity of Man: Evolving Standards, Botched Executions and Utah's Controversial Use of the Firing Squad*, 50 CLEV. ST. L. REV. 335, 370 (2003); Denno, *supra* note 12, at 777; Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death Over the Century*, 35 WM. & MARY L. REV. 551, 688–89 (1994); Martin R. Gardner, *Executions and Indignities—An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment*, 39 OHIO ST. L.J. 96, 123–

squads are more consistent with the reality of executions, in contrast with the sanitized optics of lethal injection.[25] This scholarship has also assessed the firing squad's potential for enhancing retributive and deterrent messages.[26] Although these are important issues, capital punishment scholarship has not engaged with *who* carries out firing squad executions in the same way it has explored physician involvement in lethal injection. This Article contributes to the literature on capital punishment by examining the role of executioners on firing squads, the justifications associated with the choice to use law enforcement officers as executioners, and the potential consequences of that choice on the legitimacy of capital punishment. This practice has not been adequately explored, even where it has been used. Legislative debates over the firing squad revealed that, even in Utah, some legislators were unaware that police served as executioners.[27] They did not discuss whether it was sound public policy or whether there might be consequences from that choice.

Using police officers as executioners raises important questions, particularly because it is inconsistent with the normative, or idealized, function of policing. Using police officers as executioners is, however, remarkably consistent with the culture and powers of policing. This Article draws upon the growing body of policing scholarship to evaluate the potential harm to policing and communities from voluntary police participation in firing squads. It contributes to recent scholarship and public conversation about the role of police officers in American society and police killings by exploring the relationship between policing and punishment, particularly the negative consequences of allowing police to punish.

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25 (1978); Andrew Jensen Kerr, *Facing the Firing Squad*, 104 GEO. L.J. ONLINE 74, 83 (2015); Stephanie Moran, Note, *A Modest Proposal: The Federal Government Should Use Firing Squads To Execute Federal Death Row Inmates*, 74 U. MIA. L. REV. 276, 302 (2019); P. Thomas DiStanislao, III, Comment, *A Shot in the Dark: Why Virginia Should Adopt the Firing Squad as Its Primary Method of Execution*, 49 U. RICH. L. REV. 779, 799–802 (2015); Alexander Vey, Note, *No Clean Hands in a Dirty Business: Firing Squads and the Euphemism of "Evolving Standards of Decency"*, 69 VAND. L. REV. 545, 575–77 (2016).

25. *See* DiStanislao, *supra* note 24, at 799–801 (comparing lethal injection and firing squad executions).

26. *See* Kerr, *supra* note 24, at 83, 85–86 (discussing the potential for increased dignity in firing squad executions and enhanced deterrence); DiStanislao, *supra* note 24, at 802–04 (briefly discussing deterrence and retribution to support an argument that Virginia should adopt the firing squad); Vey, *supra* note 24, at 582 (observing that "turning to an older, more 'brutal' method could go too far toward promoting retribution," but concluding that these concerns would not prohibit firing squad executions). Deborah Denno has evaluated whether other methods of execution like lethal injection and electrocution comport with the justifications for capital punishment. *See, e.g.*, Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 351–52 (1997).

27. *See infra* notes 111–13 and accompanying text.

The firing squad may be less painful than other methods of execution, but pain should not be the primary gauge for permissibility of a method of execution.[28] In 1976, the Supreme Court justified capital punishment as a way to channel retributive and vengeful impulses and reduce vigilantism.[29] The Eighth Amendment prohibits capital punishment when it fails to serve a legitimate punitive purpose.[30] Methods of execution that invite vengeance undermine legitimate penological purposes and are inconsistent with the values the Eighth Amendment protects. Justifying capital punishment on the grounds that it discourages extrajudicial executions, lynching, vigilantism, and mob violence requires that the punishment must not be undertaken in a way that mimics or encourages them. Relying on police officers as executioners has significant potential to do just that by transforming executions into a personal exercise of public retaliation and vengeance.

This Article proceeds in three parts. Part I offers a history of the firing squad in Utah, the state that has most consistently used it as a method of execution. It describes past and present protocols, as well as the role law enforcement has played in executions. Part I also explores the legislative history surrounding two states' decisions about the firing squad: Utah and, most recently, South Carolina. Part II explores issues of police violence and its role in punishment, especially the legal and cultural frameworks that justify or excuse police violence. It argues that police lack the power to punish and explores the potential consequences of allowing police to do so, which include enhancing negative aspects of policing culture and undermining community trust. Part III weaves these components together, arguing that police participation in executions undermines the legitimacy of capital punishment and policing. The Supreme Court has justified capital punishment as a social-stabilizing exercise in channeled retribution. If it is undertaken in a way that undermines that function, by encouraging vengeance and weakening the criminal legal system, then it no longer serves its constitutional justification and is inconsistent with the fundamental purpose of the Eighth Amendment.

I. FIRING SQUADS

The firing squad, although used most prominently in Utah,[31] is part of the long history of capital punishment in the United States. The first

28. *See* Gardner, *supra* note 24, at 108–09 (arguing that human dignity is critical to the meaning of the Eighth Amendment).

29. *See* Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion).

30. *See* Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion).

31. *See* GILLESPIE, *supra* note 2, at 21; Martin R. Gardner, *Illicit Legislative Motivation as a Sufficient Condition for Unconstitutionality Under the Establishment Clause—A Case for Consideration: The Utah Firing Squad*, 1979 WASH. U. L. Q. 435, 438–40.

recorded execution in the American colonies was by firing squad,[32] as was the first post-*Gregg* execution.[33] Nevada has used the firing squad once.[34] Before their admission to the United States, several regions in the Midwest, as well as Texas and California, used the firing squad.[35] It has also been used in military executions.[36] Approximately 144 individuals have died after being shot by a firing squad in the United States.[37]

This Part focuses on Utah's use of the firing squad because Utah has the longest history with the method. Utah has used the firing squad more frequently than any other method of execution.[38] Despite national and

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32. M. WATT ESPY & JOHN ORTIZ SMYKLA, EXECUTIONS IN THE UNITED STATES, 1608–2002: THE ESPY FILE 1, at 2 (2002); John D. Bessler, *Capital Punishment Law and Practices: History, Trends, and Developments*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 19, 19 (James R. Acker et al. eds., 3d ed. 2014).

33. *See* BANNER, *supra* note 2, at 275; Cutler, *supra* note 24, at 357. *See generally* NORMAN MAILER, THE EXECUTIONER'S SONG (Grand Central Pub. ed. 2012) (1979) (describing the events related to Gary Gilmore's execution by firing squad).

34. *See* Cutler, *supra* note 24, at 400; Denno, *supra* note 12, at 790; Klein, *supra* note 6, at 932.

35. *See* John Gregory Jacobsen, *The Death Penalty in the Great Plains*, *in* INVITATION TO AN EXECUTION: A HISTORY OF THE DEATH PENALTY IN THE UNITED STATES 243, 254–57 (Gordon Morris Bakken ed., 2010) (discussing firing squad executions in Kansas and Oklahoma); *see also id.* at 257 (discussing the history of capital punishment in Texas); Mary Marki & Christopher Clayton Smith, *Vigilantism During the Gold Rush*, *in* INVITATION TO AN EXECUTION: A HISTORY OF THE DEATH PENALTY IN THE UNITED STATES, *supra*, at 403, 405–06 (noting that a group of outlaws in California was executed in 1848 by a "military auxiliary team" made up of "ten U.S. soldiers").

36. *See* Jacobsen, *supra* note 35, at 257 (identifying three men shot for desertion during the Civil War); DEP'T OF THE ARMY, PROCEDURE FOR MILITARY EXECUTIONS, Pamphlet No. 27-4, at 5–8 (1947) (describing the procedure for "execution by musketry"); GEOFFREY ABBOTT, LORDS OF THE SCAFFOLD: A HISTORY OF THE EXECUTIONER 162–63 (1991) (describing American military firing squad procedures); *see also* DAVID JOHNSON, EXECUTED AT DAWN: BRITISH FIRING SQUADS ON THE WESTERN FRONT 1914–1918, at 10 (2015) (discussing the use of firing squad in the executions of British and Commonwealth soldiers for military offenses committed while on active duty on the Western Front). The firing squad is also a common method of execution internationally among countries that retain capital punishment. *See* Cutler, *supra* note 24, at 405–06 (discussing the firing squad's international use). In 2019, Bahrain, Belarus, China, North Korea, Somalia, and Yemen carried out executions by shooting. *Death Sentences and Executions 2019*, AMNESTY INT'L GLOB. REP. 10 (2020), https://www.amnesty.org/en/documents/act50/1847/2020/en/ [https://perma.cc/A74F-943Z]; *see also* Michael Astor et al., Associated Press, *Firing Squad: Which Countries Use Execution Method*, MERCURY NEWS (Mar. 24, 2015, 8:28 AM), https://www.mercurynews.com/2015/03/24/firing-squad-which-countries-use-execution-method/ [https://perma.cc/V7CR-V4YT] (discussing the international use of firing squads or capital punishment by shooting).

37. Vey, *supra* note 24, at 574.

38. *See Executions in the U.S. 1608-2002: The Espy File*, DEATH PENALTY INFO. CTR. 400–01 (2019), https://files.deathpenaltyinfo.org/legacy/documents/ESPYstate.pdf [https://perma.cc/BK86-V5CJ]; *see also* Denno, *supra* note 12, at 781 (describing Utah's firing squad executions as the "most widely used and documented in the country"). Ron Lafferty, who had selected the

regional changes in execution processes, Utah has adhered to historic practices, relying on law enforcement officers as executioners even after it centralized its death row.[39] In 2004, Utah eliminated a defendant's right to choose between lethal injection and the firing squad, but a 2015 amendment reauthorized the penalty if lethal injection was unavailable or held unconstitutional.[40] A defendant who selected the firing squad before 2004 may still be executed by that method.[41] This Article uses Utah's practices as a case study in the use of the firing squad, and its continued retention reflects community preference for localization in capital punishment, a belief in the deterrent value of the firing squad, and strong retributive and expressive justifications. Recent developments in South Carolina, however, merit inclusion in this discussion. The legislative record of that state's decision to adopt the firing squad offers an opportunity to evaluate why a state that had never used that method might decide to adopt it.

Section I.A surveys Utah's historic and current use of firing squads and the role law enforcement officers played in carrying out the penalty. Section I.B describes the legislative history associated with Utah's continued use of the firing squad and the justifications for punishment the Utah legislature identified in reauthorizing the firing squad. It compares Utah's process against South Carolina's and identifies areas of similarity and divergence.

A. *Utah's Firing Squads*

The first criminal code adopted in what would become the state of Utah provided for capital punishment and identified the available methods of execution as shooting, hanging, or beheading.[42] Upon

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firing squad as a method of execution, died at age seventy-eight in November 2019 of natural causes. Pamela Manson & Jessica Miller, *Utah Death Row Inmate Ron Lafferty Dies of Natural Causes*, SALT LAKE TRIB. (Nov. 11, 2019, 12:19 PM), https://www.sltrib.com/news/2019/11/11/utah-death-row-inmate-ron/ [perma.cc/C9V7-XEXV].

39. Denno, *supra* note 12, at 782.

40. *See infra* Section I.B.

41. *See* UTAH DEP'T OF CORR., *supra* note 4, at 1.

42. Wilkerson v. Utah, 99 U.S. 130, 132 (1878); Gardner, *supra* note 31, at 450–51. Gardner links the use of firing squads to the concept of "blood atonement," a rejected doctrine of the Church of Jesus Christ of Latter-day Saints. Gardner, *supra* note 31, at 448. Blood atonement "posits that some sins, primarily murder, are so heinous that the atoning sacrifice of Christ is unavailing as an expiation of the sin of the offender." *Id.* at 442. Gardner traces the relationship between statements from early leaders of the Church and the development of the firing squad as a method of capital punishment in Utah. *See id.* at 443–48. The Church issued a public statement shortly before Ronnie Lee Gardner's execution acknowledging a nineteenth century history of "strong language that included notions of people making restitution for their sins by giving up their own lives." *Mormon Church Statement on Blood Atonement*, DESERET NEWS (June 18, 2010, 12:00 PM), https://www.deseret.com/2010/6/18/20122138/mormon-church-statement-on-blood-

receiving territorial status, Utah adopted the same penalties, with additional language indicating that either the court or the convicted person may select the penalty.[43] Although Utah's adoption of a "more complete criminal code" in 1876 did not specify a mode of execution, "the Utah courts continued to impose capital punishment by firing squad."[44]

Utah's first official firing squad execution took place in 1861, before it became a state.[45] In total, Utah executed eleven men before statehood, eight of them by firing squad.[46] Between 1861 and 1972, Utah executed thirty men by firing squad.[47] In 1878, the Supreme Court addressed the constitutionality of the firing squad in *Wilkerson v. Utah*.[48] Wilkerson had been sentenced to be "publicly shot until [he was] dead."[49] Wilkerson appealed, arguing that his sentence was unlawful because Utah's capital punishment statute did not specify a method of execution.[50] Because a territory has "legislative power which extends to all rightful subjects of legislation not inconsistent with the Constitution,"[51] the Court considered whether death by firing squad violated the Eighth Amendment.[52] *Wilkerson* distinguished the firing squad from execution methods in which "other circumstances of terror, pain, or disgrace were sometimes superadded."[53] These "superadded" punishments included being "drawn or dragged to the place of execution," being "embowelled alive, beheaded, and quartered," being "public[ly] dissect[ed]," and being "burn[ed] alive."[54] The Court concluded that the method was

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atonement [https://perma.cc/ATD3-F5KL]. The Church asserted that "so-called 'blood atonement,' by which individuals would be required to shed their own blood to pay for their sins, is not a doctrine of The Church of Jesus Christ of Latter-day Saints." *Id.*

43. *Wilkerson*, 99 U.S. at 132; Gardner, *supra* note 31, at 451.

44. Gardner, *supra* note 31, at 451.

45. *See* GILLESPIE, *supra* note 2, at 39; Cutler, *supra* note 24, at 342.

46. Cutler, *supra* note 24, at 342–43 & n.31.

47. *Id.* at 348 & n.65.

48. 99 U.S. 130 (1878).

49. *Id.* at 131.

50. *Id.* at 131, 136; James R. Acker & Ryan Champagne, *The Execution of Wallace Wilkerson: Precedent and Portent*, 42 CRIM. JUST. REV. 349, 351–52 (2017). The Court held that the territorial statute imposed the responsibility upon the sentencing court to select the mode of execution. *Wilkerson*, 99 U.S. at 137.

51. *Wilkerson*, 99 U.S. at 133.

52. *Id.* at 133–35.

53. *Id.* at 135. Despite the Court's confident pronouncement, the firing squad missed Wilkerson's heart and he bled to death between approximately fifteen to twenty-seven minutes while the executioners considered whether it would be necessary to shoot him again. *See* Acker & Champagne, *supra* note 50, at 354 (claiming twenty-seven minutes); GILLESPIE, *supra* note 2, at 49 (claiming fifteen minutes).

54. *Wilkerson*, 99 U.S. at 135.

constitutional because of its consistent use by the military,[55] and because it was not a "punishment[] of torture."[56]

Firing squad executions during Utah's territorial period and early statehood were, as in other areas of the United States, localized affairs that happened a short time after sentencing.[57] The local sheriff was responsible for conducting the execution and locating executioners, often utilizing his deputies for the firing squad.[58] Executions took place in the locale where the crime had been committed, rather than at a centralized site.[59] Localized capital punishment offered expressive, deterrent, and retributive messages. For example, John D. Lee, sentenced to death for his role in the Mountain Meadows Massacre,[60] was brought to Mountain Meadows in 1877 and executed by firing squad while sitting on top of his own coffin.[61] When Patrick Coughlin was executed by firing squad in 1896, one of the rifles used to kill him was the rifle Coughlin had used to kill one of his victims.[62] In addition to overt symbolism, localized executions meant local control over crime and punishment, and reflected community condemnation.[63]

In the 1900s, firing squad executions switched from local executions to the yard at Sugarhouse Prison.[64] This move was consistent with the

55. *Id.* at 134–35 (observing that the military "authorities" the Court discussed "are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not" cruel and unusual).

56. *Id.* at 135–36 ("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 . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution.").

57. *See, e.g.*, GILLESPIE, *supra* note 2, at 28, 39–43 (discussing the executions of William Cockroft, Jason Luce, Robert Sutton, and Chauncey Millard).

58. *See, e.g.*, *id.* at 21, 42; Cutler, *supra* note 24, at 343.

59. *See* Cutler, *supra* note 24, at 343.

60. *See* GILLESPIE, *supra* note 2, at 44. *See generally* JUANITA BROOKS, THE MOUNTAIN MEADOWS MASSACRE (1950) (describing the events surrounding the Mountain Meadows Massacre and the Mormon church's involvement in it).

61. GILLESPIE, *supra* note 2, at 44–47.

62. *Id.* at 60.

63. *See* DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 122–23 (2010).

64. *See* GILLESPIE, *supra* note 2, at 65 (describing the location site at Sugarhouse Prison); Cutler, *supra* note 24, at 353; James B. Hill, History of Utah State Prison 1850–1952, at 141–42 (June 1952) (M.S. thesis, Brigham Young University) (on file with the Brigham Young University ScholarsArchive) (listing executions taking place at county jails or other locations); Pat Reavy, *Utah Has Interesting History of Executions*, DESERET NEWS (June 16, 2010, 10:02 PM), https://www.deseret.com/2010/6/17/20121932/utah-has-interesting-history-of-executions#gary-mark-gilmore-was-executed-by-firing-squad-on-jan-17-1977 [https://perma.cc/E6VP-Z7QZ].

broader shift in the United States away from local, public executions.[65] As capital punishment modernized, states abandoned public executions, centralized death row, and created bureaucratic and administrative structures to manage killing. In 1951, Utah transferred its prisoners to the new state prison in Draper, Utah.[66] Two men were executed inside the "Unfinished A Block" at the new prison.[67] Others were executed outside the prison:[68]

> The condemned used to be shot in an open field north of the prison compound, beside a rough drainage ditch that cuts across the high desert of the Salt Lake Valley. They were marched outside the prison's perimeter of barbed wire fence and steel guard towers at dawn, placed in a chair in front of the canal bank, and shot at a command to the riflemen hidden from view inside a temporary burlap enclosure that somewhat resembled a duck blind.[69]

While Utah centralized executions, it did not change its executioners. According to Professor L. Kay Gillespie, early firing squads were usually made up of "volunteers from the sheriff's office in the county where the

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65. *See* JOHN D. BESSLER, DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA 40–72 (1997) (surveying the development of private execution laws and the end of public executions); BANNER, *supra* note 2, at 151–66 (discussing the transition from public hangings to jail yard hangings); CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 12–13 (2016) (same); *see also* BANNER, *supra* note 2, at 155, 193–94 (discussing the way changes in methods of execution ended public executions and centralized execution sites).

66. *See History*, UTAH DEP'T OF CORRECTIONS, https://corrections.utah.gov/history/ [https://perma.cc/XB3B-AUVP]; Hill, *supra* note 64, at 144 (listing the executions of Eliseo Mares and Ray Gardner).

67. Hill, *supra* note 64, at 144. Clark Lobb, *Killer Mares Falls to Firing Squad for 1945 Murder of Ohio Sailor*, SALT LAKE TRIB. (Sept. 11, 1951), https://www.newspapers.com/image/598740793/?terms=clark%20lobb%20killer%20mares%20falls%20to%20firing%20squad&match=1 [https://perma.cc/ XN8R-K5YC].

68. *See* GILLESPIE, *supra* note 2, at 151 (explaining that Gilmore's execution was "the first indoor execution in Utah since 1951"); *Firing Squad Executes Killer at Utah Prison*, MERIDEN REC. (Mar. 31, 1960), https://www.newspapers.com/image/677769099/?terms=Firing%20Squad%20Executes%20Killer%20At%20Utah%20Prison&match=1 [https://perma.cc/MC82-AKLY]; *Two Executed by Firing Squad for Utah Slaying*, DESERT SUN (May 11, 1956), https://www.newspapers.com/image/747264024/?terms=two%20executed%20by%20firing%20squad%20for%20utah%20slaying&match=1 [https://perma.cc/R894-2XR2] ("Braasch and Sullivan died seated in spotlighted chairs in a shed in the outer yard of Utah's Point of the Mountain Prison.").

69. Jon Nordheimer, *2 Dozen Ask to Join Firing Squad; Warden Tells of Utah Volunteers*, N.Y. TIMES (Nov. 11, 1976), https://www.nytimes.com/1976/11/11/archives/2-dozen-ask-to-join-firing-squad-warden-tells-of-utah-volunteers.html [https://perma.cc/DC4V-VYUL]; *see also Firing Squad Executes Killer at Utah Prison*, *supra* note 68 ("A canvass enclosure hid the firing squad 20 feet away [from James Rodgers]. Its rifles were poked through slots.").

crime occurred."[70] Like other executioners, these volunteers, most probably law enforcement officers, were anonymous.[71] Even after localized executions ended, the sheriff from the area where the crime was committed supervised the executions at Sugarhouse and Draper.[72] For example, the Sheriff of Salt Lake County supervised the 1955 execution of Don Jesse Neal, who was convicted of killing a Salt Lake City police officer.[73]

Beginning in the 1960s, Utah put the prison warden in charge of organizing and supervising executions instead of a sheriff.[74] Wardens defaulted to the sheriff's procedure, drawing on local law enforcement officers to serve as executioners.[75] More recent firing squad executions in 1996 and 2010 have followed the same trend.

Under Utah's current procedures, the Executive Director of the Department of Corrections selects "a five-person firing squad of peace officers."[76] Law enforcement officers from the jurisdiction where the crime took place must volunteer, and those officers have priority in the selection process.[77] The Department has never had a shortage of

70. GILLESPIE, *supra* note 2, at 21.

71. *See id.* at 42 (firing squad shot from inside a tent); *id.* at 65 (firing squad fired from behind a curtain at Sugarhouse prison); Cutler, *supra* note 24, at 357 n.121 ("[N]o prison officer has ever served on a firing squad in Utah.").

72. *See* GILLESPIE, *supra* note 2, at 139 (noting that the Sheriff of Iron County, where the trial was held, supervised the double execution of Verne Braasch and Melvin Sullivan); *Firing Squad Executes Killer at Utah Prison*, *supra* note 68 (stating that San Juan County Sheriff Seth Wright supervised the execution of James Rodgers); Nordheimer, *supra* note 69; *see also* Peter Gillins, *7 Men on Death Row at Utah State Prison; High Court Holds Fate*, THE DAILY HERALD (APR. 29, 1976) (on file with author) ("Before the Supreme Court outlawed the death penalty . . . Utah law required the sheriff in a county where a murder was committed to act as executioner.").

73. *Convicted Slayer Shot*, READING EAGLE (July 1, 1955), https://news.google.com/newspapers?nid=1955&dat=19550701&id=SQ0rAAAAIBAJ&sjid=X5oFAAAAIBAJ&pg=6154,8242 [https://perma.cc/K7JS-WHCT]. The article identifies the executioners as "private citizens who volunteered" but does not indicate if they were also law enforcement officers. *Id.*

74. George A. Sorenson, *Warden Carries Burden of Duty*, SALT LAKE TRIB. (Nov. 11, 1976) (noting that in 1961, the Utah legislature put the prison warden in charge of executions, rather than the local sheriff).

75. Gillins, *supra* note 72 ("If I ever have to do it, I suppose I'll follow the procedure used by the county sheriffs. They picked volunteers from people they knew. A lot of law enforcement people usually served." (quoting Warden Sam Smith)).

76. UTAH CODE ANN. § 77-19-10(3) (LexisNexis 2021); UTAH ADMIN. CODE r. 251-107-4(3) (LexisNexis 2021); UTAH DEP'T OF CORR., *supra* note 22, at 53–54.

77. *See* McCombs, *supra* note 23; Robert Kirby, *'96 Firing Squad Shares Motives, Roles*, SEATTLE TIMES (June 17, 2010, 8:09 AM), https://www.seattletimes.com/nation-world/96-firing-squad-shares-motives-roles/ [https://perma.cc/BK4C-BDS2]; *infra* note 112 and accompanying text (discussing the process of locating executioners).

volunteers.[78] Executioners may also be recruited. In an interview with three members of the firing squad who executed John Albert Taylor in 1996, the executioners explained that their "police agency designated an officer to select the other four."[79] Others volunteered: the police officers who executed Ronnie Lee Gardner volunteered and then were "selected by lottery."[80]

Executions take place at the Utah State Prison in Draper, Utah.[81] The "Tie-Down Team" removes the prisoner from the observation cell and escorts him to the execution chamber.[82] The team straps the prisoner into a metal chair.[83] After the prisoner's last words, a black hood is placed over his head.[84] A target is placed over the prisoner's heart.[85] The executioners wait in an adjoining room with slits in the walls allowing them to fire through into the execution chamber.[86] Once all is ready, the team leader "begin[s] the cadence for the executioners to fire."[87] If the prisoner remains alive after the first volley, the execution protocols direct that the executioners must fire a second volley.[88] The process is swift and final.[89] The anonymous officers leave the prison and return to their lives and duties as police officers.

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78. *See* McCombs, *supra* note 23; Joseph P. Williams, *The Return of the Firing Squad*, US NEWS (Mar. 3, 2017, 6:00 AM), https://www.usnews.com/news/the-report/articles/2017-03-03/the-firing-squad-is-making-a-comeback-in-death-penalty-cases [https://perma.cc/ZPK8-359T]; Nordheimer, *supra* note 69; Kirby, *supra* note 77.

79. Kirby, *supra* note 77.

80. *Id.*; *see also* Ashley Hayes, *Executioner: Death by Firing Squad Is "100 Percent Justice,"* CNN (June 10, 2010, 6:37 PM), https://www.cnn.com/2010/CRIME/06/09/utah.firing.squad/index.html [https://perma.cc/4E7D-695X] (interviewing an officer who volunteered for the firing squad that executed John Albert Taylor).

81. Nordheimer, *supra* note 69.

82. UTAH DEP'T OF CORR., *supra* note 22, at 34.

83. *See id.* at 75; Cutler, *supra* note 24, at 364; Denno, *supra* note 12, at 783; Vey, *supra* note 24, at 574; MAILER, *supra* note 33, at 1011–12; Carlisle, *supra* note 5; McCombs, *supra* note 23; Trent Nelson, Photograph of the Firing Squad Execution Chamber at the Utah State Prison in Draper, Utah in June 2010, *in 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/2NZ2-9LD6].

84. Carlisle, *supra* note 5.

85. UTAH DEP'T OF CORR., *supra* note 22, at 89; Cutler, *supra* note 24, at 364; Denno, *supra* note 12, at 783 n.244; Vey, *supra* note 24, at 574.

86. *See* UTAH DEP'T OF CORR., *supra* note 22, at 89; *see also* MAILER, *supra* note 33, at 1011; Carlisle, *supra* note 5.

87. UTAH DEP'T OF CORR., *supra* note 22, at 89.

88. *Id.* at 90–91.

89. Denno, *supra* note 12, at 753. Two firing squad executions in Utah have been botched because the executioners missed the prisoner's heart. The first was Wallace Wilkerson's execution. *See supra* note 53. The other was the 1951 execution of Eliseo Mares. *See* GILLESPIE,

The relationship between the role of executioner and the role of law enforcement officer is a complicated one. Executions are a form of outside employment—executioners receive additional compensation from the Department of Corrections.[90] Yet, because being a peace officer is a necessary qualification to serve as an executioner, and because there are significant areas of overlap between the violence of executions and the violence associated with policing, there is a substantial relationship between the two.[91] Officers have also drawn linkages between the mission of policing and community protection to the decision to volunteer to take a life.[92]

Former executioners who have spoken anonymously about their role in firing squad executions link that decision to their responsibilities as police officers. As one police officer who volunteered[93] to execute Gary Gilmore explained in a statement to *The New York Times*: "Somebody's got to do it . . . and we've got the guts to put our lives on the line every day, so why not us?"[94] Representative Paul Ray, who reintroduced the use of firing squads in Utah in 2015, explained that volunteers "kind of see it as their civic duty . . . to help carry these out."[95]

Disentangling the relationship between community protection functions and a decision to volunteer to kill offers an opportunity to evaluate the way in which the firing squad serves the justifications of punishment and the relationship between punishment and community values.[96] The decision to retain the firing squad and traditional execution practices in the face of significant changes to punishment and capital punishment demonstrates the significance of localized punishment preferences. Punishment serves many goals, but the specificity and the ritual surrounding firing squad executions as Utah has performed them reveals strong preference for localized punishment and the importance of

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supra note 2, at 129 (noting when a firing squad missed, and it took a second volley to kill him); Clark Lobb, *A Recollection of Dawn and Death of Men*, SALT LAKE TRIB. (July 1976) (from L. Kay Gillespie Archives, Weber State University) (on file with author).

90. Executioners are paid separately for the task. *See* UTAH CODE ANN. § 77-19-10(4) (LexisNexis 2021) ("Compensation for persons administering intravenous injections and for members of a firing squad . . . shall be in an amount determined by the director of the Division of Finance.").

91. *See infra* Part II.

92. *See, e.g.*, Nordheimer, *supra* note 69.

93. It is unknown if he was chosen.

94. Nordheimer, *supra* note 69.

95. *More Perfect: Cruel and Unusual*, RADIOLAB, at 32:54–33:08 (Aug. 9, 2019), https://www.wnycstudios.org/podcasts/radiolab/articles/radiolab-more-perfect-cruel-and-unusual [https://perma.cc/BYW7-483P].

96. *Cf.* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 23 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (analyzing methods of punishment "as techniques possessing their own specificity in the more general field of other ways of exercising power").

the retributive and expressive values of those methods.[97] Utah's legislative proceedings addressing the firing squad address these values. By contrast, South Carolina's decision to adopt the firing squad focused less on localized punishment and messages in a particular method of execution and more on the generalized functions of capital punishment.

B. *Legislative Decisions, Justifying Punishment, and the Firing Squad*

The firing squad is overt violence, rather than mechanized or pseudo-medical acts that mask the violence of killing. It bears a greater resemblance to the sort of violence it punishes.[98] Retaining the firing squad as well as its specific procedures—even throughout Utah's process of centralization—may be attributable to history or convenience. It also reflects the localized nature of capital punishment, albeit at a different level than typical community decisionmaking about the death penalty.[99] It puts the responsibility for killing directly in the hands of the community.[100] These themes were present during legislative debates in 2004, when Utah eliminated the firing squad as a method of execution, and in 2015, when the state reauthorized it as a backup method.

In 2004, Utah eliminated a defendant's ability to choose between lethal injection and the firing squad as a method of execution, and set lethal injection as the default method of execution.[101] The bill's sponsor, Representative Sheryl Allen, emphasized that firing squad executions received significant negative international attention—something that the victims of the crime, or the heinousness of the crime, did not receive.[102]

Opposition to the bill focused on the expressive, retributive, and deterrent features of the firing squad. One representative argued against the bill because minimizing scrutiny and trying to "sanitize" the penalty failed to serve penological goals: "[I]f it's something that we believe in, then we need to let people know that this is what you do."[103] A state

97. *Cf.* Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 940 (2016) ("Criminal justice is culture-bearing. It is the site at which cultures negotiate certain kinds of issues connected to wrongdoing and community, social order and violence, identity, the power of the state, and the terms of collective ethical life.").

98. *Cf.* AUSTIN SARAT, WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION 65 (2001) ("[T]he legal construction of state killing, while it appears to reveal empathy or identification between the state and those it kills, works primarily to differentiate state killing from murder.").

99. *See* GARLAND, *supra* note 63, at 35 (explaining that capital punishment "continues to be driven by local politics and populist politicians").

100. *See Hearing on H.B. 11: Death Penalty Procedure Amendments*, 61st Leg., 2015 Gen. Sess., at 39:08–39:48 (Utah Feb. 23, 2015) [hereinafter *Utah House Hearing*] (statement of Rep. Paul Ray), https://le.utah.gov/av/floorArchive.jsp?markerID=90707.

101. *See* H.B. 180, 55th Leg., 2004 Gen. Sess. (Utah 2004).

102. H.B. 180, 55th Leg., 2004 Gen. Sess., at 32:50–33:32 (Utah Jan. 26, 2004) (statement of Rep. Sheryl Allen), https://le.utah.gov/av/floorArchive.jsp?markerID=3537.

103. *Id.* at 54:30–55:26 (statement of Rep. Gregory Hughes).

senator contended that the "media circus" was "exactly what we want" because it served deterrent values: "We want them to know that there are punishments that are severe punishments, if you come to the state of Utah and do these kinds of things."[104] He also argued that, because lethal injection was (purportedly) painless, it offered an "easy way out" to individuals who had committed "gruesome and horrible crimes," and proposed giving the power to choose the method of execution to the jury or the victim's family.[105] From this perspective, death alone was insufficient, and it was more appropriate to allow the method of death to speak for the legislature—and for the victim.

In 2015, in response to the lethal injection litigation that culminated in *Glossip v. Gross*,[106] Representative Paul Ray sponsored H.B. 11, which reauthorized the firing squad as a backup option in the event that lethal injection drugs were unavailable or ruled unconstitutional.[107] The ensuing debates included discussions of the brutality and violence of the firing squad,[108] and statistics about the limited or nonexistent deterrent value of the death penalty.[109] Representative Ray emphasized the possibility of avoiding expensive legal battles over lethal injection and that dying by firing squad was a "quick bleed out" as compared to lethal injection, which was "a lot slower; more painful . . . than a firing squad."[110]

One representative raised the potential for psychological trauma to the executioners based on his assumption that *corrections officers* would conduct the executions.[111] Representative Ray clarified that correctional employees do not participate:

> Understand in a firing squad, it's not the correctional employees that are the firing squad. Let's say for instance, a shooting took place in my district in Clinton, the Clinton Police Department would have the first option to volunteer for the firing squad. And then they would kinda go out to

104. *See Hearing on H.B. 180: Death Penalty Provisions*, 55th Leg., 2004 Gen. Sess., at 1:04:00–1:04:44 (Utah Feb. 18, 2004) [hereinafter *Utah Senate Hearing*] (statement of Sen. David Thomas), https://le.utah.gov/av/floorArchive.jsp?markerID=33616 ("One of the primary purposes of the death penalty is deterrence.").

105. *Id.* at 1:05:10–1:05:52 (statement of Sen. Thomas).

106. 576 U.S. 863 (2015).

107. *See Utah House Hearing*, *supra* note 100, at 24:17–26:03 (statement of Rep. Ray); UTAH CODE ANN. § 77-18-113(3)–(4) (LexisNexis 2021). Like its predecessor, the 2004 bill, H.B. 11 preserves the method of execution for prisoners who chose the firing squad before the 2004 bill was enacted. UTAH CODE ANN. § 77-18-113(2)(b) (LexisNexis 2021).

108. *Utah House Hearing*, *supra* note 100, at 28:39–30:00 (statement of Rep. Brian King) (describing in detail how the state conducts firing squad executions); *id.* at 32:45–33:02 (observing that the perception of the firing squad is that it is "barbaric").

109. *Id.* at 32:08–32:40 (discussing deterrence).

110. *Id.* at 38:06–39:08 (statement of Rep. Ray).

111. *Id.* at 30:04–30:19 (statement of Rep. King) (describing the "attendant psychological trauma" from participating in a "cold-blooded execution").

> like the county, neighboring jurisdictions. Nobody's forced to be on a firing squad. It is done upon a volunteer basis and we've never not had enough volunteers to do that. So, nobody's ever forced or asked to be on it against their will.[112]

Subsequent legislative proceedings did not address whether police should conduct the execution, the impact of drawing executioners from the locality where the crime took place, or the potential consequences. When legislators did consider executioners, their focus was on possible trauma—or the lack thereof. While this is consistent with legislatures' preference to delegate execution details,[113] it is still surprising given the enormity of the policy choice and the legislative emphasis on the justifications and messages associated with lethal injection. Similar patterns are present in South Carolina's recent change to its methods of execution.

South Carolina had never formally adopted the firing squad as a method of execution before 2021.[114] Its decision was, unlike Utah's, driven by immediate necessity. South Carolina ran out of lethal injection drugs in 2013.[115] Before the amendment, South Carolina's method of execution statute provided a choice between lethal injection and electrocution, with lethal injection as the default method if the condemned did not choose.[116] Like Utah's legislators, South Carolina's legislators focused on the ability to carry out executions and the potential to avoid constitutional litigation (although they recognized that litigation was inevitable).[117] Legislators emphasized that if the state did not change its method of execution statute, it would be unable to carry out executions—and that three men whose appeals had been exhausted were waiting on death row.[118] The 2021 amendment offered condemned people

112. *Id.* at 39:15–39:45 (statement of Rep. Ray).

113. *See generally* Klein, *supra* note 6 (describing the broad discretion given to state executive agencies regarding execution details through the lens of the nondelegation doctrine).

114. *See Hearing on S.B. 200 Before the South Carolina Senate*, 124th Leg., 2021–2022 Gen. Sess., at 1:10:00-1:11:02 (S.C. Mar. 2, 2021) [hereinafter *South Carolina Senate Hearing*] (statement of Sen. Greg Hembree), https://www.scstatehouse.gov/video/archives.php (discussing the history of the death penalty in South Carolina).

115. *See* Michelle Liu, *SC Delays Executions, Citing Lack of Lethal Injection Drugs*, ASSOCIATED PRESS (Nov. 30, 2020), https://apnews.com/article/south-carolina-courts-executions-931bae9dd612fe341f3c09b0bcd8ff91 [https://perma.cc/NJH5-FKR9].

116. *See South Carolina Senate Hearing*, *supra* note 114, at 1:10:00-1:11:02 (statement of Sen. Hembree) (discussing the history of the death penalty in South Carolina).

117. *See id.* at 1:11:55–1:12:46 (discussing the constitutionality of firing squad executions); *id.* at 1:15:27–1:16:43 (discussing the constitutionality of firing squad executions and the likelihood that they would be challenged in court).

118. *Id.* at 1:09:33–1:10:07 (discussing delays in carrying out executions); *Hearing on S.B. 200 Before the South Carolina House of Representatives*, 124th Leg., 2021–2022 Gen. Sess., at 1:10:40–1:11:09 (S.C. May 5, 2021) [hereinafter *South Carolina House Hearing*],

a choice of the electric chair, lethal injection (if the drugs are available), or the firing squad.[119] Changing the default and adding another method meant that executions could go forward, even without lethal injection drugs.

As in the Utah reauthorization, the sponsors of the South Carolina law emphasized that the firing squad was more "humane" than the electric chair.[120] But legislators addressed the punitive justifications for capital punishment, rather than a specific method. Some legislators who favored the amendment also appeared more comfortable acknowledging the relationship between vengeance and capital punishment. One sponsor agreed there was "no question" that capital punishment was a form of vengeance.[121] Another representative who supported the bill offered both retributive and vengeful justifications—he asserted that death was appropriate for people who have killed, and the government's role is not to prevent crime, but avenge it.[122] Others critiqued a public desire for vengeance,[123] emphasizing incapacitation over other justifications.[124]

South Carolina's legislators were similarly uninformed about who might carry out executions, although the bill's sponsors suggested that

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https://www.scstatehouse.gov/video/archives.php (explaining that three people on death row have exhausted their appeals but cannot be executed).

119. *See* Victoria Hansen, *Death Row Inmates Sue After They're Asked to Pick Firing Squad or Electric Chair*, NPR (May 20, 2021, 2:09 PM), https://www.npr.org/2021/05/20/998600135/south-carolina-reinstates-firing-squad-but-not-without-legal-challenges [https://perma.cc/74BD-QD9P]. The amendment also changed the default method to the electric chair. *See id.*

120. *South Carolina Senate Hearing*, *supra* note 114, at 1:16:43–1:17:35 (statement of Sen. Hembree) (explaining that the firing squad may be more "humane" than the electric chair); *id.* at 1:57:15–1:57:46 (statement of Sen. Penny Gustafson) (emphasizing the need for a humane and quick method of execution); *id.* at 2:05:46–2:07:32 (statement of Sen. Dick Harpootlian) (explaining that hanging is not humane, that the electric chair produces agony, and that the firing squad is less painful); *see also* Jamie Lovegrove, *Why a Democrat Pushed for Firing Squad to Be Added to SC Death Penalty Bill*, POST & COURIER (May 7, 2021), https://www.postandcourier.com/politics/why-a-democrat-pushed-for-firing-squad-to-be-added-to-sc-death-penalty-bill/article_bac5e5f6-af3d-11eb-9eee-17c6341208cb.html [https://perma.cc/BB6S-VFTV] ("'There's instance after instance after instance where people are not dead after the first jolt, they're screaming and on fire,' Harpootlian said. 'Horrible, horrible thing to do to another human being.'").

121. *South Carolina Senate Hearing*, *supra* note 114, at 1:19:08–1:19:20 (statement of Sen. Hembree) (responding to a question about whether the death penalty involves vengeance).

122. *See South Carolina House Hearing*, *supra* note 118, at 5:27:52–5:29:20 (statement of Rep. Josiah Magnusen) (explaining that the purpose of "civil government" is to responsibly wield force and provide justice).

123. *See South Carolina Senate Hearing*, *supra* note 114, at 2:04:56–2:05:08 (statement of Sen. Harpootlian) (condemning the public for gathering outside a penitentiary to cheer for the execution of a death row inmate).

124. *See id.* at 2:03:22–2:04:30 (explaining that execution was the only way to incapacitate an individual who would predictably continue to murder).

Utah's protocol might serve as a model.[125] Representatives expressed concern about involvement in executions from "agencies" outside the Department of Corrections.[126] Although it is no secret that Utah's executioners are law enforcement officers, one sponsor explained that he thought Utah's executioners were from the state's Department of Corrections.[127] South Carolina's Supreme Court stayed the pending executions of Brad Sigmon and Freddie Owens until the Department of Corrections could develop a protocol for the firing squad so Sigmon and Owens could exercise their statutorily granted choice between electrocution and the firing squad.[128] South Carolina's Department of Corrections developed its protocol by "looking to other states for guidance."[129]

Although both legislatures cited humanitarian impulses, by retaining or adopting the firing squad, the legislatures opened an avenue of violence that did not exist before, while using a form of punishment that draws upon justifications that conflict with the Eighth Amendment's role of blocking baser, more vengeful impulses.[130] Adopting the firing squad, while ostensibly intended to ensure that executions can continue despite drug shortages and lethal injection litigation, also carries important expressive and retributive messages. As Professor Joshua Kleinfeld has argued, the decline in executions in the United States means that capital punishment holds even greater significance as a "cultural symbol."[131] Policing—and police killing—also carries significance as a cultural symbol. And surprisingly, one South Carolina representative centered police violence in his remarks in opposition to the adoption of the firing

125. *South Carolina House Hearing*, *supra* note 118, at 1:12:49–1:14:08 (discussion between Reps. Weston Newton and Robert Williams about who would carry out the execution and whether an outside entity would be involved).

126. *See id.* at 1:12:52–1:14:08; *id.* at 1:15:22–1:15:40 (statement of Rep. Newton responding to questions about who would carry out the execution).

127. *South Carolina Senate Hearing*, *supra* note 114, at 2:06:50–2:07:07 (statement of Sen. Harpootlian) (discussing Utah's firing squad procedure and the "marksmen" the Department of Corrections uses as executioners).

128. State v. Sigmon, Nos. 2002-024388 & 2021-000584 (S.C. June 16, 2021), https://documents.deathpenaltyinfo.org/Sigmon-Stay-Order-SC-2021-06-16.pdf [https://perma.cc/RL4K-PS6E]; State v. Owens, No. 2006-038802 (S.C. June 16, 2021), https://documents.deathpenaltyinfo.org/Owens-Stay-Order-SC-2021-06-16.pdf [https://perma.cc/GRU3-C3MG].

129. Michelle Liu & Meg Kinnard, *2 South Carolina Executions Halted Until Firing Squad Formed*, ASSOCIATED PRESS (June 16, 2021), https://apnews.com/article/south-carolina-executions-government-and-politics-eb4c65a31c298c87063dd3445dbcd43c [https://perma.cc/W9SC-JAVP]; *see* Herrington, *supra* note 20.

130. *See* GARLAND, *supra* note 63, at 247–48 (describing legislators' modern arguments for public, local executions).

131. Kleinfeld, *supra* note 97, at 987 ("Capital punishment *says* something about where a culture stands on matters of violence, evil, wrongdoing, and rights—something we feel intuitively but that is extremely difficult to identify and articulate.").

squad. In response to a statement by another representative that South Carolina, which had not carried out an execution in a decade, had a de facto moratorium,[132] Representative Chris Hart argued that the state *had* carried out executions through police killings.[133] He asserted that Walter Scott had been executed by the "hands of this government," and, unlike the men on death row, Scott did not receive a choice of how he was to die.[134] Representative Hart drew parallels between capital punishment and police violence, arguing that Black residents of South Carolina deserved a choice *not* to be executed by the police for accusations or minor infractions.[135] Perhaps in recognition of this issue, South Carolina elected not to rely on police as executioners; instead, their firing squad executioners will be three employees from the South Carolina Department of Corrections who volunteer to carry out executions.[136] South Carolina's decision, however, does not mean that other states will not follow the same practice as Utah.

Using police officers as executioners underscores the complex tensions inherent in government decisions to kill at any level. The normative, aspirational functions of policing are inconsistent with serving as executioners. Yet, the role of executioner is consistent with the cultural problems and powers of policing that are associated with discretionary, and sometimes punitive, police violence.

II. THE PUNISHERS

Evaluating methods of execution sometimes requires assessing executioners. Capital punishment scholarship has, for example, explored physicians' participation in lethal injection executions.[137] Police

132. *South Carolina House Hearing*, *supra* note 118, at 1:18:40–1:19:04 (statement of Rep. Jonathon Hill).

133. *Id.* at 1:20:16–1:20:40 (statement of Rep. Chris Hart).

134. *Id.* at 1:20:43–1:21:01. In 2015, Officer Michael Slager of the North Charleston Police Department shot and killed Walter Scott. *See* Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged with Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), https://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html [https://perma.cc/Z7ZT-PNCS]. Slager stopped Scott for driving with a broken taillight. *Id.* When Scott fled on foot, Slager chased him, fired his Taser at Scott, and then fired eight shots at Scott as he fled. *Id.* Scott was unarmed. *Id.* Slager was sentenced to twenty years in federal prison for violating Scott's civil rights. Jamiel Lynch & Jason Hanna, *A Judge Declined to Toss the Federal Sentence of Ex-Officer Michael Slager in Fatal Walter Scott Shooting*, CNN (Apr. 20, 2021, 10:17 AM), https://www.cnn.com/2021/04/20/us/michael-slager-walter-scott-sentence/index.html [https://perma.cc/6W97-A7CP].

135. *South Carolina House Hearing*, *supra* note 118, 1:21:05–1:22:20 (statement of Rep. Hart); *id.* at 1:24:11–1:24:59.

136. Press Release, South Carolina Dep't of Corr., (March 18, 2022) (on file with author).

137. *See* TIMOTHY V. KAUFMAN-OSBORN, FROM NOOSE TO NEEDLE: CAPITAL PUNISHMENT AND THE LATE LIBERAL STATE 199 (2002) (discussing the medical profession's resistance to

participation in executions deserves similar scrutiny. Like physicians, police officers have a distinct professional identity. Police officers are a part of a community's immediate response system of investigation and response, rather than the formal punishment apparatus. Yet police—and punishment—are part of the criminal legal system as a whole. Unlike physicians, however, police officers who have performed executions have described the activity as routine, even indistinguishable, from their policing function.[138]

Police killings in the line of duty and executions "are the two most prominent types of deliberative killings by agencies of government in the United States."[139] Professor Franklin Zimring asserts that executions and police killings are "polar opposite[s]."[140] But this Article argues that they are related, both because of the broad discretion in execution decisions and police violence, and because firing squad executions rely on police officers as volunteer executioners.

Assessing the tensions and contradictions in this role offers an opportunity to reevaluate the relationship between policing and punishment. The "community caretaking" component of police participation in firing squads is consistent with negative aspects of policing culture. Section II.A draws upon scholarship exploring police violence and policing as punishment. It asserts that, despite legal frameworks for police violence that tolerate police punishment, police are not supposed to punish. Section II.B addresses the potential consequences of allowing police to punish. Using police officers to conduct executions

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participation in executions). *See generally* Ty Alper, *The Truth About Physician Participation in Lethal Injection Executions*, 88 N.C. L. REV. 11 (2009) (considering the necessary roles physicians play in state ordered executions); James K. Boehnlein, *Should Physicians Participate in State-Ordered Executions?*, 15 AM. MED. ASS'N J. ETHICS 240 (2013), https://journalofethics.ama-assn.org/sites/journalofethics.ama-assn.org/files/2018-05/pfor3-1303.pdf [https://perma.cc/W4SP-D9K7] (explaining the arguments for and against physician participation in lethal injections); Deborah W. Denno, *Physician Participation in Lethal Injection*, 380 N. ENGL. J. MED. 1790 (2019) (discussing the issues surrounding physician participation in lethal injection); Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49 (2007) [hereinafter Denno, *The Lethal Injection Quandary*] (arguing that, in order for states to avoid the early mistakes surrounding the implementation of lethal injection as a method of execution, a commission including medical personnel should consider and create proper injection protocols); Atul Gawande, *When Law and Ethics Collide—Why Physicians Participate in Executions*, 354 N. ENGL. J. MED. 1221 (2006) (providing stories recounted by physicians who participated in state executions and explaining how the physicians became involved in the practice).

138. *See* Hayes, *supra* note 80; Kirby, *supra* note 77; Denno, *The Lethal Injection Quandary*, *supra* note 137, at 69 (quoting one of the developers of the first lethal injection protocol as saying that participating in a execution "cannot reasonably be construed to be the practice of medicine" (quoting A. Jay Chapman, *Lethal Injections Not Practice of Medicine*, AM. MED. NEWS, Apr. 22–29, 1991, at 45, 45)).

139. FRANKLIN E. ZIMRING, WHEN POLICE KILL 5 (2017).

140. *Id.* at 120.

threatens the legitimacy of both policing and punishment because it invites extrajudicial violence and bad motives, is likely to undermine community trust, and exacerbates cultural problems of policing.[141]

A. *When Police Punish*

Violence is primarily a state monopoly that is most commonly expressed through policing and punishment.[142] Police officers enforce the law as agents of the executive.[143] Policing, at its heart, is the discretionary ability to enforce the law through violence.[144] Arrests, for example, are a form of violence because they deprive an individual of their liberty. An arrest may be controlled, state-authorized violence, but it remains a violent act. Other forms of police violence include the use of force to apprehend or subdue suspects. Like the violence used to carry out a criminal or death sentence, the power to police is the power to engage in violent force—including killing.[145]

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141. *See generally* Seth W. Stoughton, *Principled Policing: Warrior Cops and Guardian Officers*, 51 WAKE FOREST L. REV. 611 (2016) [hereinafter Stoughton, *Principled Policing*] (explaining how the "Warrior ethos" of policing has caused the overuse of force by police officers and resulted in low confidence in the institution of policing across the United States); Seth Stoughton, *Law Enforcement's "Warrior" Problem*, 128 HARV. L. REV. F. 225 (2015) (describing the problems created by the widespread adoption of Warrior mentality in the police force).

142. *See* KAUFMAN-OSBORN, *supra* note 137, at 200; *cf.* Ingraham v. Wright, 430 U.S. 651, 671 (1977) (holding that corporal punishment inflicted by administrators and teachers does not violate the Eighth Amendment because the students attended public school). *But see* GARLAND, *supra* note 63, at 171 (discussing how America's failure to "fully succeed[] in its efforts to monopolize legitimate violence" has "produce[d] America's high levels of interpersonal violence and distinctive patterns of violence control").

143. *See* Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1833 (2015); Brandon Hasbrouck, *The Unconstitutional Police*, 56 HARV. C.R.-C.L. L. REV. 239, 248 (2021).

144. *See* EGON BITTNER, THE FUNCTIONS OF THE POLICE IN MODERN SOCIETY 36–37 (1970) (discussing legitimacy in the use of responsive force); Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1152 (2008) ("[I]t is the discretionary capacity to back a state directive with force that constitutes the essence of *policing*."); *see also* Foley v. Connelie, 435 U.S. 291, 297 (1978) ("Police officers . . . are clothed with authority to exercise an almost infinite variety of discretionary powers.").

145. *See* BITTNER, *supra* note 144, at 39 ("It makes much more sense to say that the police are nothing else than a mechanism for the distribution of situationally justified force in society."); *see also* ZIMRING, *supra* note 139, at 17 ("The use of force and therefore the possibility of violence is more than an occasional by-product of police officers doing their jobs; it is an essential characteristic of the role of police in a modern social system."); Friedman & Ponomarenko, *supra* note 143, at 1831 & n.15 (defining police by their use of surveillance and force); Diarmaid M. Harkin, *The Police and Punishment: Understanding the Pains of Policing*, 19 THEORETICAL CRIMINOLOGY 43, 48 (2015) ("[T]he police can gain legitimacy from use-of-force, violence and inflicting types of injury." (emphasis omitted)); Harmon, *supra* note 144, at 1121 (discussing police use of force in relation to state power).

Legislatures and courts regulate police violence.[146] Police receive substantial discretion in how and when they use violence. Judges evaluating police use of force emphasize officers' need to make "split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[147] This assessment, which combines "state authority and human agency . . . distinguishes police violence from other forms of state coercion and from other forms of justified force by individuals."[148] Judicial inquiry into police use of force operates from the perspective of a "reasonable *officer* on the scene."[149] Courts do not assess an officer's subjective motivations, even if an officer may have used force to punish, rather than subdue, a suspect.[150] The Supreme Court has expressly acknowledged that some policing may always be violent—and that such violence may evade scrutiny.[151] The quasi-objective police perspective allows courts to normalize and routinize violence because it often presumes that violence *is* a normal police response.[152]

Police do not carry out the penalties for violating the law. Professor Rachel Harmon distinguishes police violence from punishment, explaining that, "[b]ecause police uses of force are both determined and

146. *See* U.S. CONST. amend. IV; Graham v. Connor, 490 U.S. 386, 394 (1989). State laws may also limit the circumstances in which police can use deadly force. *See, e.g.*, CONN. GEN. STAT. § 53a-22(c) (2021); IDAHO CODE § 18-4011 (2021); KAN. STAT. ANN. § 21-5227 (2020); MO. ANN. STAT. § 563.046.3(2) (West 2020); TENN. CODE ANN. § 40-7-108 (2021); UTAH CODE ANN. § 76-2-404 (LexisNexis 2021). *See generally* Chad Flanders & Joseph Welling, *Police Use of Deadly Force: State Statutes 30 Years After* Garner, 35 ST. LOUIS U. PUB. L. REV. 109 (2015) (discussing the different standards that states use to regulate police use of force).

147. *Graham*, 490 U.S. at 397.

148. Harmon, *supra* note 144, at 1121.

149. *Graham*, 490 U.S. at 387 (emphasis added). The standard is quasi-objective because it relies on *police* perspectives in assessing the need for violence, rather than a reasonable person's perspective or a normative standard that considers the force law enforcement should be allowed to use in a "free and open society." Smith v. Maryland, 442 U.S. 735, 750 (1979) (Marshall, J., dissenting) (contending that the Court should determine the legitimacy of privacy expectations by considering the risks an individual should be forced to assume in a free and open society).

150. *See Graham*, 490 U.S. at 397–98 (declining to consider subjective motivations of individual officers).

151. *See id.* at 396 ("'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' violates the Fourth Amendment." (citation omitted) (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973))); *see also* Harkin, *supra* note 145, at 48 ("[P]olice pain-delivery can be placed within a wider sociology of punishment that demonstrates how police violence is provided with a warranty of approval and encouragement from larger, aggregate, deeply held emotions and sensibilities."); RADLEY BALKO, RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES 173 (2014) (discussing how violence is "an acceptable outcome of drug policing").

152. *Cf.* Jelani Jefferson Exum, *The Death Penalty on the Streets: What the Eighth Amendment Can Teach About Regulating Police Use of Force*, 80 MO. L. REV. 987, 992 (2015) ("When the only constitutional standard regulating use of force by police is a reasonableness standard that is informed by the judgment of police officers, the result is limited justice.").

imposed by persons who are under threat, these acts are unlike punishment, the paradigmatic form of state coercion, which is detached, impersonal, and institutionally enacted."[153] She observes that this force is "instrumental," and there are no "deontological justifications for the practice of exercising state force against criminal suspects."[154] As police violence is a poor fit with legitimate goals of punishment, Professor Harmon reasons that "[t]he state is therefore not justified in empowering its police officers to use force to achieve the goals of punishment."[155] Professor Didier Fassin observes that, under a "normative" definition of punishment,[156] police should not punish because "their legal authority does not imply that such would be an appropriate role for them."[157]

Courts have generally rejected deontological justifications for police use of force against suspects. In *Tennessee v. Garner*,[158] Tennessee argued that police were justified in using deadly force against a fleeing suspect—regardless of the danger that suspect might present—to guarantee that offenders did not evade punishment.[159] In other words, provided an officer had probable cause to seize a suspect, the Constitution did not impose any restraints on how to effect the seizure—doing otherwise might interfere with the state's interest in punishing individuals who violate the law.[160] Tennessee's argument drew on retributive (if

153. Harmon, *supra* note 144, at 1121.

154. *Id.* at 1151.

155. *Id.* at 1152.

156. *See* H. L. A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 4–5 (1st ed. 1968) (defining punishment as involving "pain or other consequences normally considered unpleasant," "for an offence against legal rules," "of an actual or supposed offender for his offence," "intentionally administered by human beings other than the offender," and "imposed and administered by an authority constituted by a legal system against which the offence is committed"); *see also* Dan Markel et al., Essay, *Beyond Experience: Getting Retributive Justice Right*, 99 CALIF. L. REV. 605, 619 (2011) ("[S]tate punishment is best and conventionally thought of as those intended, coercive, condemnatory deprivations inflicted *against* persons *in response to their crimes* and *by* state officials who are authorized to inflict those deprivations.").

157. Didier Fassin, *The Police Are the Punishment*, 31 PUB. CULTURE 539, 545 (2019). Fassin discusses police violence and police punishment based on his ethnographic research in Paris, France, but his observations and conclusions are relevant to the problem of police violence in the United States. *See id.* at 554–55.

158. 471 U.S. 1 (1985).

159. *See id.* at 9–10 (noting that the State of Tennessee argued that "overall violence will be reduced by encouraging the peaceful submission of suspects who know that they may be shot if they flee"); Brief of Petitioners at 15, Tennessee v. Garner, 471 U.S. 1 (1985) (No. 83-1070), 1984 WL 566026 ("It must be recognized that [a felon's] right to escape, once probable cause to arrest exists, is not a constitutionally protected interest. There is no constitutional right to commit felonious offenses and to escape the consequences of those offenses.").

160. *See Garner*, 471 U.S. at 7.

disproportionate) rationales: offenders should be punished, and escape means the offender might evade punishment.[161]

The Court rejected this argument because of changes to punishment. The common law authorized any force necessary to apprehend a fleeing felon, but at that time, as the Court explained, virtually *all* felonies were capital offenses.[162] Since most felonies are no longer punishable by death, the state's interest in punishment did not justify an officer's use of deadly force: "These changes have undermined the concept, which was questionable to begin with, that use of deadly force against a fleeing felon is merely a speedier execution of someone who has already forfeited his life."[163] Deadly force, unless absolutely necessary,[164] actually frustrated the important interest in "judicial determination of guilt and punishment,"[165] matters critical to an orderly society.[166] Officers, in other words, do *not* have the authority to punish.

The reasonableness of police use of force may overlap with deontological rationales at times. *Scott v. Harris*[167] suggested that calling off potentially dangerous high-speed pursuits might incentivize fleeing suspects to behave recklessly to evade police.[168] Incapacitation supported police action because sometimes, the Court reasoned, police may need to engage in force to prevent a suspect from harming others.[169] The reasonableness inquiry receives support from the generalized justifications for state violence, although such support is limited.[170]

Yet police have used their state-granted authority and discretion to wield physical force that bears striking similarity to punishment. Police may engage in unofficial, yet sanctioned violence—punishment—against

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161. *See* Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1315 (2000) ("[C]rime inherently merits punishment.").

162. *Garner*, 471 U.S. at 12–13.

163. *Id.* at 14.

164. *See id.* at 11–12 ("Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.").

165. *Id.* at 9.

166. *See id.*; Harmon, *supra* note 144, at 1128.

167. 550 U.S. 372 (2007).

168. *Id.* at 385; Harmon, *supra* note 144, at 1150.

169. *Scott*, 550 U.S. at 386 ("A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."). *Garner* similarly signals to incapacitation in describing when deadly force falls within the Fourth Amendment. *See supra* note 164.

170. *See Scott*, 550 U.S. at 393 (Stevens, J., dissenting) (arguing that, while Harris's flight "merited severe punishment," it was "not . . . a capital offense, or even an offense that justified the use of deadly force").

individuals they perceive as suspect, or as having violated some legal rule or norm, before judicial process takes place.[171] Such violence may even be, as Dean Jelani Jefferson Exum asserts, "the administration of the death penalty on the streets, absent the procedural protections and focus on human dignity given in the criminal justice system through the Eighth Amendment."[172] Other scholars have concluded that police violence can be punitive, serving retributive and retaliatory functions.[173] Professor Fassin contends that the *reality* of police violence reveals punitive motivations, even though such action may not fit within the legal definition of punishment.[174]

Police violence as punishment is inconsistent with democratic norms because it is spontaneous, reactive, and outside the judicial process. Yet, Professor Fassin points out that the legal and social frameworks around police violence demonstrate that "society delegates to certain institutions and professions, notably the police, the dirty work of punishing with the implicit permission to exceed the moral and legal limits of punishment."[175] Police violence can be conceptualized as an unsanctioned form of punishment insofar as it is a response by a state authority to perceived (or real) transgressions. Police may administer violence—and sometimes legal charges—as a form of "street justice," sometimes in response for noncompliance, resistance, or disrespect.[176]

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171. *See* Fassin, *supra* note 157, at 542 (asserting that police violence is the result of societal delegation of "a significant part of the retributive justice process to the police"); C.R. Div., *Investigation of the Ferguson Police Department*, U.S. DEP'T OF JUST. 55–56 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/QG6K-EWJ8]; Stoughton, *Principled Policing*, *supra* note 141, at 655. Other scholars contend that police violence against Black people has officially been sanctioned through silence and inaction as official ratification, or judicial ratification of those police practices. *See* Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 127 (2017); Hasbrouck, *supra* note 143, at 265.

172. Exum, *supra* note 152, at 988.

173. *See generally* Fassin, *supra* note 157 (discussing law enforcement as "suppliers of extrajudicial punishment" around the world, including the United States); Harkin, *supra* note 145 (arguing that police violence should be examined in relation to "punitiveness").

174. Fassin, *supra* note 157, at 547 ("[T]he fact that . . . there [are] acts of brutality and a sense of revenge does not exclude the possibility that it is also a form of punishment, that is, the administration of a form of justice in the street meant to correct an alleged wrong.").

175. *Id.* at 559; *see id.* at 541–42 ("Because it is a justified or justifiable practice in the eyes of many officers, because it is effectively protected by the institution, because it is treated with clemency by the judges, because it may even be encouraged by the state, and perhaps above all because it targets certain populations, . . . I argue that it should be regarded as a form of punishment. Far from being a deviant practice, it reveals that, for what concerns its lower segments, society delegates a significant part of the retributive justice process to the police.").

176. *See* Exum, *supra* note 152, at 998 (arguing that police killings in the line of duty are comparable to punishment because "individuals are being executed for their perceived

And like punishment within the criminal legal system, police use of force may be linked to officers' social attitudes, biases, and perceptions.[177]

The Department of Justice's (DOJ) investigation of the Ferguson Police Department after an officer shot and killed Michael Brown revealed evidence of "punitive and retaliatory" excessive force.[178] Ferguson Police appeared to use canines to apprehend suspects, "not to counter a physical threat but to inflict punishment."[179] The DOJ observed that "[t]he use of canines and [electronic control weapons], in particular, appear[ed] prone to . . . abuse by [the Ferguson Police Department]."[180] Officers also used excessive force against individuals who declined to stop and speak to them: "[f]orce at times appeared to be used as punishment for non-compliance with an order that lacked legal authority."[181]

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objectionable response to a police encounter"); Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 492 n.18 (2008) (discussing the beating of Rodney King and other incidents of police brutality); Li Cohen, *Former Aurora Cop Admits to Ignoring Black Woman's Cries for Help After She Fell Head-First on the Floor While Hogtied in a Patrol Car*, CBS NEWS (Oct. 1, 2020, 9:45 PM), https://www.cbsnews.com/news/aurora-police-officer-ignored-black-woman-back-of-patrol-car/ [https://perma.cc/HAR4-L53J] (reporting that a police officer "hobble[d]" a woman, who later fell head-first in the police car, because she attempted to get out of the squad car, even though it is not possible to exit the backseat of a police car from inside); Azi Paybarah, *Eight Police Officers in Louisiana Face Charges of Excessive Force*, N.Y. TIMES (June 30, 2020), https://www.nytimes.com/2020/06/30/us/louisiana-police-violence-excessive-force.html?action=click&module=RelatedLinks&pgtype=Article [https://perma.cc/V9KQ-YB88] (describing an incident during which eight law enforcement officers assaulted two men in a truck who had initially refused to stop for the police); *see also* Stoughton, *Principled Policing*, *supra* note 141, at 654–55 (discussing the "Warrior" mentality, in which "disrespect is tantamount to resistance, and resistance indicates than an individual is one of the 'bad guy[s],' an 'enemy'"(alteration in original)).

177. Harkin, *supra* note 145, at 51 (observing that policing is connected to "wider social attitudes," and that "police share the imprint of social attitudes towards race, class, gender, age, sexuality and migration status, illustrating the influence of popular emotions on punitive eligibility").

178. C.R. Div., *supra* note 171, at 28.

179. *Id.* at 33; *see also* Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 UCLA L. REV. 1108, 1115 & n. 30 (2020) (describing how police bred dogs "specifically . . . for the systematic use of putting down slave rebellions, canine warfare, colonial enterprising, and torture" (quoting P. Khalil Saucier, *Traces of the Slave Patrol: Notes on Breed-Specific Legislation*, 10 DREXEL L. REV. 673, 680 (2018))).

180. C.R. Div., *supra* note 171, at 33; *see also id.* at 32–33 (describing use of canine force without warning and in response to the flight of unarmed suspects).

181. *Id.* at 34–35. The Civil Rights Division's investigation of the Ferguson Police Department explains that officers might lack reasonable suspicion or probable cause to justify detention, but nonetheless used force to effect unlawful stops, or in some cases effected lawful stops and then "needlessly escalate[d] the situation[s]" such that officers felt "force [wa]s necessary." *Id* at 35.

In assessing policing and punishment, it is crucial to distinguish between formal state-imposed retribution administered after adjudication, and informal, or personal, retribution imposed for other reasons. Police may lack information about a suspect's guilt or innocence, and their violence is often inconsistent with due process norms.[182] Police violence may often be personal to particular officers. It may be retributive only insofar as it is what the officer administering the punishment considers a "deserved" response to a perceived transgression.[183] Yet this justification is a poor fit if the individual is not actually violating the law, such as refusing to stop when she is not legally required to, even if an officer perceives her behavior to be an offense.[184] It is an equally poor fit when police violence steps beyond the bounds of a reasonable response to a situation. But reasonableness can shield retaliatory (or retributive) motives.[185] Courts may find an officer's punitive conduct justified under the flexible and deferential reasonableness framework, which does not consider an officer's subjective motivations.[186] Even if such force is not deemed reasonable, it may not be recognized as punishment—but simply a product of excessive force, rather than the officer's desire for retribution. Punitive police violence does not serve *legitimate* retributive purposes. It serves *personal* ones.

The extrajudicial nature of police violence creates tension because it is administered by a state authority but lacks the procedural guarantees necessary for legitimate, socially accepted punishment. It is part of the criminal legal system, but it is contrary to justice. This tension accounts for some of the discomfort from using police officers as executioners. It is similar to the tension present when one considers the idea of a physician participating in an execution—the individual is operating outside of what

182. *See* Cynthia Lee, "*But I Thought He Had A Gun": Race and Police Use of a Deadly Force*, 2 HASTINGS RACE & POVERTY L.J. 1, 10 (2004) ("[P]olice officers may not have time to evaluate whether they are responding to actual danger or assumptions.").

183. *See* Michael S. Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179, 179 (Ferdinand Schoeman ed., 1987) ("*Retributivism* is the view that punishment is justified by the moral culpability of those who receive it. A retributivist punishes because, and only because, the offender deserves it.").

184. *See* Fassin, *supra* note 157, at 557 ("In the absence of [an] offense committed, it is difficult to resort to the utilitarian and retributivist arguments, in a strict sense, to justify the punishment.").

185. *See* Harmon, *supra* note 144, at 1183 n.287 (noting that the reasonableness standard does not consider actual motive).

186. *See id.* at 1151 (discussing why police may not punish); Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1114–15, 1125–26 (2000) (describing racial profiling by police and "judicial preference" in "individualized suspicion" with "defer[ment] to reasonable majoritarian decisions").

is perceived as their typical position.[187] Doctors are not supposed to harm patients.[188] Police are not supposed to punish suspects. Encouraging police to punish adds potentially impermissible features to punishment, risks increasing public distrust of police, and intensifies cultural problems of policing.

B. *The Consequences of Police Punishment*

Executions and police killings are homicides at the hands of state authority, yet they receive different treatment and attention. Professor Zimring asserts that this is so because, until recently,[189] capital punishment was seen as a national policy issue and police killings were a local problem, even though police kill more people annually than are executed.[190] Despite the frequency of police killings, the idea of mobilizing police as executioners is disconcerting because of normative perceptions about police and punishment, even if reality is different.

Police punishment is inconsistent with socially accepted understandings of lawful punishment. In some ways, the violence of unlawful and excessive force resembles historic corporal punishment practices long since abandoned.[191] It has a greater temporal and proximal relationship to the alleged offense. Like historic punishment, police

187. *See* Gawande, *supra* note 137, at 1229 (discussing the ethical conflicts present when physicians and medical professionals participate in executions).

188. *See* Kathy Oxtoby, *Is the Hippocratic Oath Still Relevant to Practising Doctors Today?*, 355 BMJ i6629 (Dec. 14, 2016), https://www.bmj.com/content/355/bmj.i6629 [https://perma.cc/72WR-VLBJ].

189. *See* ZIMRING, *supra* note 139, at 15 (describing the rise of attention and concern toward lethal force, which was formerly "regarded as an issue of crime policy"); India Thusi, Essay, *Blue Lives & The Permanence of Racism*, 105 CORNELL L. REV. ONLINE 14, 15–16 (2020).

190. *See* ZIMRING, *supra* note 139, at 120–21 (contrasting the difference between number of executions and police killings). In 2018, eight states carried out a total of twenty-five executions. In 2019, seven states carried out a total of twenty-two executions. *See Execution Database*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/executions/execution-database?filters%5Byear%5D=2019&filters%5Byear%5D=2018 [https://perma.cc/CQ6K-YK7N] (filtering for executions in 2018 and 2019 only). In 2020, although the COVID-19 pandemic slowed executions, the federal government executed nine people, and three more in January 2021. *See id.* (filtering for executions in 2020 and 2021). By contrast, police kill almost 1,000 people in the United States annually. *See* ZIMRING, *supra* note 139, at 120–21; John Sullivan et al., *Four Years in a Row, Police Nationwide Shoot Nearly 1,000 People*, WASH. POST. (Feb. 12, 2019), https://www.washingtonpost.com/investigations/four-years-in-a-row-police-nationwide-fatally-shoot-nearly-1000-people/2019/02/07/0cb3b098-020f-11e9-9122-82e98f91ee6f_story.html [https://perma.cc/5FYD-LTSV].

191. *See* GARLAND, *supra* note 63, at 145–46 (discussing the decline in corporal punishment in connection with "civilized" society); JOHN D. BESSLER, CRUEL & UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS' EIGHTH AMENDMENT 268–70 (2012) (discussing the range of corporal punishments in early America); *see also* Kleinfeld, *supra* note 97, at 949, 1007 (discussing the difference between punishment as "harsh treatment" and punishment as "social control").

punishment commonly involves physical pain, which is "no longer the constituent element" of punishment.[192] While police punishment may be driven by personal and emotional motives, a police officer's status as a state authority administering this violence expresses dueling messages of lawlessness and authority. Certain behavior means that an offender can be subjected to violent or dehumanizing treatment because doing so will deter others from defying the police.[193] Retributive police violence, however, cannot be punishment.[194] It is imposed without judicial process, and lacks proportionality.[195] This violence may also be spontaneous, but retroactively justified through legal doctrines protecting police discretion to use violent force.[196]

Executions, by contrast, better fit within normative social understandings of punishment. Executions carry both punitive justifications and expressive messages.[197] The death penalty is administered within the judicial process. Executions are deliberate acts, intended to be divorced from spontaneous, emotional responses. Executions—even firing squad executions—are generally sterile, formal procedures to end an offender's life and conceal the violence of killing.[198] Brutality and extreme violence in executions may trigger negative responses towards the institution of capital punishment or raise constitutional concerns.

Using police officers to perform executions raises two primary issues for policing. First, it may exacerbate the cultural problems of policing by putting officers in a role that further departs from the policing mission. Second, it may undermine officers' ability to work in communities and build community relationships. Police violence has contributed to historic levels of distrust in police. Using Utah's protocol means that officers will be asked to volunteer to conduct executions, which may increase distrust and negative perceptions of policing.

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192. *See* FOUCAULT, *supra* note 96, at 11.

193. *Cf.* Kleinfeld, *supra* note 97, at 1135–36 (describing the "recklessness" and over-application of punishment in the American criminal justice system).

194. *See supra* note 156 and accompanying text (defining punishment).

195. *See* Exum, *supra* note 152, at 1003 ("[W]hen it comes to the death penalty on the streets—when death is imposed by police officers as a response to an individual's objectionable behavior—procedural protections are nonexistent.").

196. *See* Fassin, *supra* note 157, at 554 ("[O]ne can see that such police operations are conducted by a legal institution that is not designed to punish but considers itself entitled and is incited by public authorities to do so . . . ."); *supra* Section II.A.

197. *See* Kleinfeld, *supra* note 97, at 941.

198. *See* Hayes, *supra* note 80 (describing firing squad executions as "instantaneous and carried out with the utmost professionalism"); *see also* FOUCAULT, *supra* note 96, at 11 ("The modern rituals of execution attest to this double process: the disappearance of the spectacle and the elimination of pain."); KAUFMAN-OSBORN, *supra* note 137, at 198–200 (discussing the contradictions of lethal injection).

To explore the potential consequences and the impact on punishment, this Article relies in part on the subjective meanings officers who have served as executioners assign to their actions, particularly their perspective on the relationship between policing and executions.[199] Police officers who have spoken publicly (albeit anonymously) about their participation in executions describe the role as one that is consistent with their duties and obligations as police officers.[200] This is consistent with the "Warrior ethos," which, as Professor Seth W. Stoughton explains, "promot[es] a self-image of officers as soldiers on the front lines in the never-ending battle to preserve order and civilization against the forces of chaos and criminality."[201] Policing—especially as it is currently carried out in the United States—requires police officers to "take actions that the laws and moral standards of a free society typically forbid," including killing.[202] The "Warrior ethos" resolves the "cognitive dissonance" between "being a 'good guy' while doing bad things."[203] An officer's self-perception as a "Warrior" has been shown to correlate with valuing "physical control and more favorable attitudes toward use of force."[204] This valuation of violence is a cultural problem that skews police perceptions of their role.[205] Police participation in firing squads is likely to exacerbate these problems.

Police officers are not supposed to kill in the line of duty except in certain narrow circumstances.[206] Participating in a firing squad requires volunteering to intentionally kill another person without the threat

199. Other literature addressing police reform uses similar methodology. *See* Fassin, *supra* note 157, at 554 (proposing that the meaning police assign to their actions is inconsistent with normative criteria for punishment). *See generally* Stoughton, *Principled Policing*, *supra* note 141 (describing best practices for policing that reduce the use of violence among officers); Thusi, *supra* note 189 (arguing that proposed Blue Lives Matter laws, designed to protect police forces, demonstrate systemic and permanent racism in the U.S.).

200. *See* Kirby, *supra* note 77 (interviewing police officers who participated in an execution); Hayes, *supra* note 80 (same).

201. Stoughton, *Principled Policing*, *supra* note 141, at 612. Stoughton identifies five characteristics of the Warrior mentality that make it "the most highly venerated metaphor for modern policing": "importance, exclusivity, psychological protection, survival, and public support." *Id.* at 641; *see also* BALKO, *supra* note 151, at 325–28 (discussing problems associated with the culture of policing).

202. Stoughton, *Principled Policing*, *supra* note 141, at 637.

203. *Id.*

204. *See Data-driven Evidence on Warrior vs. Guardian Policing*, SCIENCEDAILY (Feb. 26, 2019), https://www.sciencedaily.com/releases/2019/02/190226155011.htm [https://perma.cc/F2W5-5GX2]; Kyle McLean et al., *Police Officers as Warriors or Guardians: Empirical Reality or Intriguing Rhetoric?*, 37 JUST. Q. 1096, 1110 (2019).

205. Stoughton, *Principled Policing*, *supra* note 141, at 615.

206. *See supra* note 164 and accompanying text.

typically required for a justifiable officer-involved shooting.[207] Officer executioners recognize the difference between killing in the line of duty and performing an execution, but emphasize that the results are the same.[208] One anonymous officer, who was a member of the firing squad that killed John Albert Taylor in 1996, said in an interview, "To me, it was just an assignment, nothing more than getting an order to do something like kicking in a door to serve a warrant."[209] Treating executions as an act consistent with the ordinary functions of policing risks blurring the already indistinct lines between policing and punishing, to the detriment of both. Blurring those lines allows a police officer to describe volunteering to kill another human being as an act of "100 percent justice."[210]

Giving the task of punishment to police may further entrench the Warrior culture. Inviting police to engage in lawfully sanctioned, violent punishment may further promote the ideal that violence is justice.[211] Relying on police to volunteer for executions in their home jurisdictions risks cementing the adversarial approach to policing with its corresponding negative impacts on relationships between police and the communities they serve.[212] This concern is heightened because, despite centralized execution sites, capital punishment is highly localized.[213]

Most death sentences come from a handful of counties.[214] Local prosecutors determine whether to seek a death sentence and jurors—who are intended to represent the conscience of their community—decide

207. *See* Tennessee v. Garner, 471 U.S. 1, 11 (1985) ("Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.").

208. *See* Hayes, *supra* note 80 ("Zimmerman [a former police chief who investigated the murder Taylor committed] points out that an officer who saw Taylor running from the murder scene with a gun and shot him would have been considered a hero. 'Both ways, we killed him,' he said.").

209. Kirby, *supra* note 77.

210. Hayes, *supra* note 80.

211. *See* GARLAND, *supra* note 63, at 189 (explaining that support for capital punishment in "rural Western states" is "grounded in traditional practices of community self-help, a culture of masculine honor, and a relatively high tolerance of physical violence").

212. *See* Stoughton, *Principled Policing*, *supra* note 141, at 656–57.

213. *See* GARLAND, *supra* note 63, at 177 ("This persistence of localism is highly pertinent to death penalty politics, having shaped America's engagement with capital punishment . . . . [S]ince the 1970s, the right to retain capital punishment has come to symbolize for many the assertion of states' rights and local autonomy.").

214. GARRETT, *supra* note 10, at 138–40 (demonstrating that "death sentences come from a shrinking group of individual counties"); Adam Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty*, 63 VAND. L. REV. 307, 314–18 (2010) (describing discrepancies among counties in seeking and imposing capital sentences).

whether to impose that sentence.[215] Some counties may have a disproportionate number of executions to carry out, which may make it difficult to locate sufficient officers willing to volunteer or force counties to rely on a small group of dedicated volunteers. For example, there are over 700 people on California's death row.[216] Approximately 222 of them are from Los Angeles County, which "[i]n the last five years . . . produced more death sentences per capita than any large county in Texas, North Carolina, Pennsylvania, Utah or Washington—and sent more people to death row than the states of Georgia, Louisiana, Mississippi, Tennessee and Virginia combined."[217] Recent incidents involving the Los Angeles Police Department and the Los Angeles County Sheriff's Department have negatively affected community confidence and trust.[218] Although the likelihood of executions in California, particularly firing squad executions, is slim at the moment given California's long-standing moratorium, police may have a difficult time building community trust if they volunteer to execute members of those communities.[219] Other jurisdictions that may be more likely to adopt the firing squad reflect similar statistical disparities.[220] Even if

215. *See* GARRETT, *supra* note 10, at 149–50 & n.20 (discussing prosecutors' role in the death penalty); GARLAND, *supra* note 63, at 273 ("[T]he most important decisions in death penalty proceedings are now made by locally elected officials and by juries selected from the local community.").

216. *See California*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/news/california-governor-announces-moratorium-on-executions [https://perma.cc/HR7P-TUP9]. Governor Newsom imposed a moratorium on the death penalty after taking office. *See* Tim Arango, *California Death Penalty Suspended; 737 Inmates Get Stay of Execution*, N.Y. TIMES (Mar. 12, 2019), https://www.nytimes.com/2019/03/12/us/california-death-penalty.html [https://perma.cc/592L-8WMJ].

217. Sam Levin, *In Los Angeles, Only People of Color Are Sentenced to Death*, GUARDIAN (June 18, 2019, 9:00 AM), https://www.theguardian.com/us-news/2019/jun/18/los-angeles-death-penalty-sentences-jackie-lacey [https://perma.cc/73JA-99BL]. Virginia abolished the death penalty in March 2021. *See* Whittney Evans, *Virginia Governor Signs Law Abolishing the Death Penalty, a 1st in the South*, NPR (Mar. 24, 2021, 2:50 PM), https://www.npr.org/2021/03/24/971866086/virginia-governor-signs-law-abolishing-the-death-penalty-a-1st-in-the-south [https://perma.cc/9Z4G-UJUS].

218. *See* Alene Tchekmedyian, *Can You Trust the Police to Tell the Truth? Reliability Under Scrutiny as Cases Tossed*, L.A. TIMES (Aug. 31, 2020, 5:00 AM), https://www.latimes.com/california/story/2020-08-31/la-county-sheriff-deputies-lawsuit [https://perma.cc/ZF2B-JR9A]; Alene Tchekmedyian & Maya Lau, *L.A. County Deputy Alleges "Executioner" Gang Dominates Compton Sheriff Station*, L.A. TIMES (July 30, 2020, 4:18 PM), https://www.latimes.com/california/story/2020-07-30/sheriff-clique-compton-station-executioners [https://perma.cc/FG7A-D4Z5].

219. *See* ELIZABETH HINTON, AMERICA ON FIRE: THE UNTOLD HISTORY OF POLICE VIOLENCE AND BLACK REBELLION SINCE THE 1960S 15 (2021) ("[P]olice violence precipitates community violence.").

220. *See* Glossip v. Gross, 576 U.S. 863, 941 (Breyer, J., dissenting); John H. Blume et al., *When Lightning Strikes Back: South Carolina's Return to the Standardless Capital Sentencing*

executioners' identities are shielded from the public, knowing that officers in one's local police department have volunteered to conduct executions may well produce unease and discomfort in dealing with police, even in routine matters.

Racial disparities associated with policing and the death penalty are likely to further impact community trust. Racial bias in the death penalty is well-known and well-documented.[221] South Carolina, for example, has executed 284 people since 1912.[222] 75 of those people were white, and 209 were Black.[223] Levels of public trust in the police are at a national low, due in part to police killings of unarmed Black men.[224] Professor Zimring's analysis of police killings reveals that Black people are "overrepresented" in police killings in comparison to their proportion to the general population.[225] Relying on police officers to conduct executions may only increase concerns about the impact of

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Regime of the Pre-Furman *Era*, 4 CHARLESTON L. REV. 479, 529 n.217 (2010); *supra* note 213 and accompanying text.

221. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 286–87 (1987); Alexis Hoag, *Valuing Black Lives: A Case for Ending the Death Penalty*, 51 COLUM. HUM. RTS. L. REV. 983, 992–96 (2020) (identifying racial disparities in capital punishment); Scott Phillips & Justin Marceau, *Whom the State Kills*, 55 HARV. C.R.-C.L. L. REV. 585, 605–07 (2020); James D. Unnever et al., *Race, Racism and Support for Capital Punishment*, *in* 37 CRIME & JUSTICE: A REVIEW OF RESEARCH 45, 69 (Michael Tonry ed., 2008) (finding that "racial animus is one of the most consistent and robust predictors of support for the death penalty"); Lincoln Caplan, *Racial Discrimination and Capital Punishment: The Indefensible Death Sentence of Duane Buck*, NEW YORKER (Apr. 20, 2016), https://www.newyorker.com/news/news-desk/racial-discrimination-and-capital-punishment-the-indefensible-death-sentence-of-duane-buck [https://perma.cc/SJW4-GS3A].

222. *Death Row/Capital Punishment*, S.C. DEP'T OF CORR., http://www.doc.sc.gov/news/deathrow.html [https://perma.cc/AMM4-8ZSH].

223. *Id.*

224. *See* Aimee Ortiz, *Confidence in Police Is at Record Low, Gallup Survey Finds*, N.Y. TIMES (Aug. 12, 2020), https://www.nytimes.com/2020/08/12/us/gallup-poll-police.html [https://perma.cc/AV2D-N292] (confidence in police is at 48% nationally); Jeffrey M. Jones, *In U.S., Confidence in Police Lowest in 22 Years*, GALLUP (June 19, 2015), https://news.gallup.com/poll/183704/confidence-police-lowest-years.aspx [https://perma.cc/4LH5-SUMK] (confidence in police at 52% in 2015); *see also* Alexandra Klein & Brandon Hasbrouck, *A Few Words for the Firing Squad*, NATION (May 24, 2021), https://www.thenation.com/article/society/south-carolina-firing-squad/ [https://perma.cc/AN8A-JCGG (describing how public trust in police reached historically low levels after the murder of George Floyd by police officer Derek Chauvin); NATHAN JAMES ET AL., CONG. RSCH. SERV, R43904, PUBLIC TRUST AND LAW ENFORCEMENT—A DISCUSSION FOR POLICYMAKERS 3 (2020), https://fas.org/sgp/crs/misc/R43904.pdf [https://perma.cc/6W49-UGPJ] (summarizing various polls tracking public confidence in the police).

225. ZIMRING, *supra* note 139, at 46 (noting that Black people "account for 12.2 percent of the 2010 census population but 26.1 percent of all killings by police in service calls and patrol"). Professor Zimring examined statistics from several sources and observed that other statistics show a "much larger discrepancy." *Id.* at 47; *see also* Raff Donelson, Commentary, *Blacks, Cops, and the State of Nature*, 15 OHIO ST. J. CRIM. L. 183, 184–85 (2017) (discussing the higher rate of police killings of Black people than White people in the U.S.).

discrimination and exacerbate distrust of police, especially in communities that have ongoing problems with excessive use of police force or police killings.[226]

These two issues reflect two larger problems in capital punishment. The first is a concern about capital punishment that scholars and legal practitioners have discussed since eighteenth-century criminologist and philosopher Cesare Beccaria's observations in *On Crimes and Punishment*: executions increase social brutality.[227] This concern is especially urgent considering the critical problem of excessive force and limited accountability for that use of force among police officers. If capital punishment is intended to deter violence, then it should not be carried out in a way that encourages additional—and often unlawful—violence. Police participation in executions risks reinforcing negative aspects of policing culture. Even philosopher Immanuel Kant, who favored capital punishment, recognized that executions should not be performed in a way that increases brutality and diminishes the humanity of those performing the execution.[228]

Second, as the next Part explores in greater detail, capital punishment has struggled to navigate the line between retribution and vengeance. Retributivism is, as a matter of Supreme Court precedent, a valid justification for capital punishment. The Supreme Court has insisted that appropriately channeled retribution serves social-stabilizing functions, minimizing opportunities for vigilantism and vengeance. An execution protocol that relies on law enforcement officers as executioners, especially if those officers are from the jurisdiction where the crime took place, risks personalizing executions and verging towards vengeance, which undermines purported justifications for capital punishment.

III. ILLEGITIMATE VIOLENCE

The death penalty "must serve legitimate and substantial penological goals in order to survive Eighth Amendment scrutiny."[229] Retribution is one of the most common justifications for capital punishment.[230]

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226. *See supra* notes 132–35 and accompanying text.

227. *See* CESARE BECCARIA, ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 70–71 (Richard Bellamy ed., Richard Davies trans., Cambridge Univ. Press 1995) (1764) ("The death penalty is not useful because of the example of savagery it gives to men.").

228. *See* IMMANUEL KANT, THE METAPHYSICS OF MORALS 142 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797).

229. Ceja v. Stewart, 134 F.3d 1368, 1370 (9th Cir. 1998) (Fletcher, J., dissenting) (citing Furman v. Georgia, 408 U.S. 238, 312–13 (1972) (White, J., concurring)).

230. Glossip v. Gross, 576 U.S. 863, 930 (2015) (Breyer, J., dissenting) ("Thus, as the Court has recognized, the death penalty's penological rationale in fact rests almost exclusively upon a belief in its tendency to deter and upon its ability to satisfy a community's interest in retribution."); Baze v. Rees, 553 U.S. 35, 79–80 (2008) (Stevens, J., concurring in the judgment) (explaining

Punishment also expresses a community's moral anger and condemnation.[231]

Expressive messages associated with punishment may be aimed at both the offender and a larger audience.[232] Decisions about punishment carry significant symbolism, even if the justification for punishment does not rely on that symbolism. Whom the state punishes, how the state punishes, and whom the state designates to punish all are significant decisions that can carry expressive messages. The death penalty, like all punishment, carries significant expressive messages, even if it is justified by retribution, rather than the expressive messages in a death sentence.[233] The same is true of how states choose to execute people.[234]

State punishment is a critical tool of social control and sovereignty.[235] Punishment "is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs."[236] Decisions about who society punishes, why it punishes, and how much it should punish implicate state control over individuals' lives and their

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that retribution is "the primary rationale for imposing the death penalty"); Spaziano v. Florida, 468 U.S. 447, 461 (1984) ("[T]he primary justification for the death penalty is retribution."), *overruled by* Hurst v. Florida, 577 U.S. 92 (2016); *see also* Cotton, *supra* note 161, at 1361 ("It would make more sense to say that the purpose of criminal punishment is retribution, and other incidental purposes may be served only so long as they do not interfere with or subordinate the achievement of retribution.").

231. *See* Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion) ("[C]apital punishment is an expression of society's moral outrage at particularly offensive conduct."); Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 400 (1965) (arguing that the essential feature of punishment is its expressive and condemnatory function); Chad Flanders, *Time, Death, and Retribution*, 19 U. PA. J. CONST. L. 431, 434 (2016); Kleinfeld, *supra* note 97, at 940.

232. *See* Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407, 428 n.99, 429 (2005).

233. *See Gregg*, 428 U.S. at 184 (plurality opinion); Flanders, *supra* note 231, at 434–35; Kleinfeld, *supra* note 97, at 985 ("[Capital punishment] is best interpreted as an expressive claim to the effect that the very worst wrongs are so serious as to forfeit one's moral humanity, and with it, the rights grounded in one's moral humanity, including the right to life."); *see also Furman*, 408 U.S. at 289 (Brennan, J., concurring) ("The unusual severity of death is manifested most clearly in its finality and enormity. Death, in these respects, is in a class by itself.").

234. *See generally* 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 (2008) (discussing the states' methods of execution and how these various methods have formed the country's perception of the death penalty).

235. *See Furman*, 408 U.S. at 333 (Brennan, J., concurring).

236. *Gregg*, 428 U.S. at 183 (plurality opinion); *see also* Paul Butler, *Retribution, for Liberals*, 46 UCLA L. REV. 1873, 1879 (1999) ("[S]ome retributivists believe that punishment by the government is necessary because without it those who suffer injury would retaliate on their own."). On the other hand, a preference for capital punishment has significant connections to cultures of vigilantism. *See* FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 89–118 (2003).

ethical, legal, and moral obligations. Because acts of punishment are typically impermissible, the state's justification for punishment and the methods by which it punishes require legitimacy and perceptions of fairness.[237] Recognition of a state's authority to punish is essential to the legitimacy of that state because it demonstrates the state's monopoly on violence.

This Part explores these issues as they pertain to the firing squad in greater detail. Capital punishment has been justified by its social-stabilizing functions. If it is undertaken in a way that undermines those functions, by encouraging vengeance and weakening other components of the criminal legal system, then it is no longer serving those functions, undermining the legitimacy of the particular punishment. Section III.A discusses the Supreme Court's jurisprudence in *Furman* and *Gregg*, particularly the Court's disagreement on the role of retribution and the social-stabilizing functions of capital punishment. It argues that these values must carry over to executions and explores the Court's method-of-execution jurisprudence, concluding that the Eighth Amendment's focus on physical pain is not the only standard for gauging the constitutionality of a method of execution. Section III.B explores the retributive functions of the firing squad and how those further exacerbate the negative consequences of relying on police as executioners. Section III.C addresses why using police as executioners undermines the purportedly social-stabilizing functions of capital punishment and its legitimacy. Section III.D addresses the applicability of these arguments to the current status of firing squad executions.

A. *Channeled Retribution*

At one point, the Supreme Court announced that retribution was no longer the "dominant objective of the criminal law."[238] *Furman* reflected the Court's internal conflicts about the role of retribution. The Justices disagreed on whether retribution was an adequate justification for capital punishment, whether community preference for retribution contradicted the Eighth Amendment, and whether capital punishment, as administered, even served its purported justifications. The Justices did seem to agree that the legitimacy of capital punishment depended upon its underlying justifications. Whether community preference supported the punishment depended upon each Justice's perception of retribution.

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237. *Cf. Furman*, 408 U.S. at 331 (Marshall, J., concurring) ("[A] penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose.").

238. Williams v. New York, 337 U.S. 241, 248 (1949). Scholars agreed. *See* Hugo Adam Bedau, *Retribution and the Theory of Punishment*, 75 J. PHIL. 601, 601 (1978); Cotton, *supra* note 161, at 1352–54; David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1623 n.1 (1992).

Justice William J. Brennan Jr. disagreed that the death penalty "serves to manifest the community's outrage at the commission of the crime."[239] From his perspective, the public perception that "death is a just punishment" did not warrant the imposition of capital punishment[240] because of the way communities imposed capital punishment.[241] Other punishments, he insisted, adequately satisfied the states' desire for retribution and carried expressive messages of public condemnation.[242] Similarly, Justice Thurgood Marshall argued that, while retribution may be a permissible goal of punishment, "retribution for its own sake" could not "become the State's sole end in punishing."[243] Like Justice Brennan, he rejected community and legislative preference as the sole justification for any form of punishment.[244] Under that rationale, "all penalties selected by [a] legislature would by definition be acceptable means for designating society's moral approbation of a particular act," and effectively "read out" the Eighth Amendment's prohibitions on cruel and unusual punishment.[245] Community desires could not override constitutional limits.

Justice Potter Stewart, whose vote would be crucial four years later in *Gregg*, accepted public preference more readily, observing that "[t]he instinct for retribution is part of the nature of man."[246] Because retribution is an inherent part of human nature, Justice Stewart argued that a criminal justice system that "channel[ed]" retribution served social-stabilizing functions.[247] He explained, "[w]hen people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law."[248] Justice

239. *Furman*, 408 U.S. at 303 (Brennan, J., concurring).

240. *Id.* at 304.

241. *See id.* at 303 (expressive messages); *id.* at 304–05 (retribution).

242. *See id.* at 303–04 ("To serve that purpose our laws distribute punishments according to the gravity of crimes and punish more severely the crimes society regards as more serious. That purpose cannot justify any particular punishment as the upper limit of severity."); *id.* at 304 ("When the overwhelming number of criminals who commit capital crimes go to prison, it cannot be concluded that death serves the purpose of retribution more effectively than imprisonment.").

243. *See id.* at 343 & n.86 (Marshall, J., concurring).

244. *See id.* at 344–45.

245. *Id.* at 344.

246. *See id.* at 308 (Stewart, J., concurring).

247. *See id.*

248. *Id.* For an expansion on these arguments, see Charles J. Bonaparte, *Lynch Law and Its Remedy*, 8 YALE L.J. 335, 341–42 (1899), arguing that expanding capital punishment would limit lynching, which happens because the government fails to administer justice in a way consistent with the community's moral values. *But see Furman*, 408 U.S. at 303 (Brennan, J., concurring) ("If capital crimes require the punishment of death in order to provide moral reinforcement for the basic values of the community, those values can only be undermined when death is so rarely

Stewart did not elaborate on why he believed that capital punishment was necessary to satisfy retributive instincts.[249] A legislature's belief that the penalty served retributive justifications was enough. Here, he was in closer agreement with the dissenters.[250] Justice Lewis F. Powell Jr., for example, agreed that controlled violence based on perceptions of the offender's desert served stabilizing functions.[251]

Despite this conflict, *Gregg* expressly designated retribution as a key justification for capital punishment, with deterrence serving as a supporting (if questionable) justification.[252] The theory of retribution that *Gregg* articulated emphasized the expressive value in giving rein to community preference and impulse. It crystalized the "social-stabilizing" thesis: structured retribution in a criminal legal system that responds to "society's moral outrage at particularly offensive conduct," is necessary to minimize extrajudicial violence.[253] Channeling retribution preserves the legitimacy of government and the social order by preventing

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inflicted upon the criminals who commit the crimes. Furthermore, it is certainly doubtful that the infliction of death by the State does in fact strengthen the community's moral code; if the deliberate extinguishment of human life has any effect at all, it more likely tends to lower our respect for life and brutalize our values.").

249. *See Furman*, 408 U.S. at 308 (Stewart, J., concurring) ("The constitutionality of capital punishment in the abstract is not, however, before us in these cases.").

250. *See id.* at 394 (Burger, C.J., dissenting) ("[T]he Court has consistently assumed that retribution is a legitimate dimension of the punishment of crimes."); *id.* at 453 (Powell, J., dissenting) ("While retribution alone may seem an unworthy justification in a moral sense, its utility in a system of criminal justice requiring public support has long been recognized.").

251. *See id.* at 453–54.

252. *See* Glossip v. Gross, 576 U.S. 863, 930 (2015) (Breyer, J., dissenting) ("[T]he death penalty's penological rationale in fact rests almost exclusively upon a belief in its tendency to deter and upon its ability to satisfy a community's interest in retribution."); Gregg v. Georgia, 428 U.S. 153, 183–84 (1976) (plurality opinion); *see also* Bedau, *supra* note 238, at 602 ("Even the Bill of Rights has been interpreted in the last few years by the Supreme Court . . . so that it now accommodates retributive purposes in general and on behalf of the severest mode of punishment—the death penalty—in particular."). Some argue that the death penalty serves as a general deterrent to capital offenses. *See* MATTHEW H. KRAMER, THE ETHICS OF CAPITAL PUNISHMENT 20 (2011); PUNISHMENT AND THE DEATH PENALTY: THE CURRENT DEBATE 20 (Robert M. Baird & Stuart E. Rosenbaum eds., 1995). Research suggests that there is little to no evidence that capital punishment deters. *See Glossip*, 576 U.S. at 930–31 (Breyer, J., dissenting) (collecting studies); Baze v. Rees, 553 U.S. 35, 79 & n.13 (2008) (Stevens, J., concurring in the judgment); *Gregg*, 428 U.S. at 184–85 (plurality opinion); Robert Apel et al., *Is Capital Punishment an Effective Deterrent for Murder? An Updated Review of Research and Theory*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT, *supra* note 32, at 271, 273; HUGO ADAM BEDAU, DEATH IS DIFFERENT 31–38 (1987); Michael L. Radelet & Ronald L. Akers, *Deterrence and the Death Penalty: The Views of Experts*, 87 J. CRIM. L. & CRIMINOLOGY 1, 10 (1996); Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 775–79 (2005).

253. *Gregg*, 428 U.S. at 183 (plurality opinion) ("This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.").

vigilantism and other unsanctioned forms of retaliation.[254] *Gregg* also accepted community and legislative preference, deferring to "the moral consensus concerning the death penalty and its social utility as a sanction."[255] Relying on social preference, in other words, demonstrated legitimacy.

Justice Marshall's dissent skewered the majority's focus on social stability—a community's preference for a particular form of punishment did not outweigh the values of human dignity inherent in the Eighth Amendment.[256] A community's desire to impose death could never allow a punishment that would deny "the wrongdoer's dignity and worth."[257] Capital punishment was not necessary to reflect community outrage and prevent "the American people from taking the law into their own hands."[258]

Since *Gregg*, the Court has emphasized deterrence and retribution in considering the applicability of capital punishment to certain offenders or offenses.[259] Capital punishment may be unconstitutional when it fails to serve those goals because either the offender's culpability or the offense is disproportionate to the penalty.[260] The Court has relied on retribution to preserve the broader institution of capital punishment: only the most

254. *See id.* at 183–84.

255. *Id.* at 186–87.

256. *See id.* at 240 (Marshall, J., dissenting) ("[T]he implication of the statements appears to me to be quite different—namely, that society's judgment that the murderer 'deserves' death must be respected not simply because the preservation of order requires it, but because it is appropriate that society make the judgment and carry it out.").

257. *Id.* at 240–41.

258. *Id.* at 238.

259. For example, death row prisoners have alleged that the delays between conviction and execution render capital punishment unconstitutional because the length and nature of that punishment have already satisfied the state's interest in retribution, and the delay ultimately becomes cruel and unusual punishment. *See* Lackey v. Texas, 514 U.S. 1045, 1045 (1995) (Stevens, J., respecting denial of certiorari); Glossip v. Gross, 576 U.S. 863, 925 (2015) (Breyer, J., dissenting); Ceja v. Stewart, 134 F.3d 1368, 1369–70, 1373–78 (9th Cir. 1998) (Fletcher, J., dissenting); Flanders, *supra* note 231, at 431–33, 438; *see also* John D. Bessler, *The Anomaly of Executions: The Cruel and Unusual Punishments Clause in the 21st Century*, 2 BRIT. J. AM. LEGAL STUD. 297, 444 (2013) ("[T]he failure of the Supreme Court to take up the question of whether it is 'cruel and unusual' punishment to execute inmates who have spent in some cases more than 25 years on death row is inexplicable.").

260. *See* Enmund v. Florida, 458 U.S. 782, 800–01 (1982) (finding that whether retribution justifies execution is based on the offender's culpability); Roper v. Simmons, 543 U.S. 551, 571 (2005) ("Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."); Coker v. Georgia, 433 U.S. 584, 597–98 (1977) (plurality opinion) (holding that death penalty is excessive for rape); Thompson v. Oklahoma, 487 U.S. 815, 836–38 (1988) (plurality opinion) (finding that death penalty for offenders under 16 years of age is excessive); Kennedy v. Louisiana, 554 U.S. 407, 420, *modified on denial of reh'g*, 554 U.S. 945 (2008); Atkins v. Virginia, 536 U.S. 304, 317–18 (2002) (discussing diminished culpability of "mentally retarded offenders").

culpable deserve the death penalty.[261] Assessments of culpability connect to capital punishment's purported social-stabilizing function by channeling the community outrage to the most atrocious crimes, purportedly preventing vigilantism and lawlessness.[262]

This emphasis on retribution has affected the Court's method-of-execution jurisprudence. The Court has insisted that because capital punishment is constitutional, there has to be a constitutional way of carrying it out.[263] The Eighth Amendment prohibits punishments that include "torture" and "unnecessary cruelty."[264] In *In re Kemmler*,[265] the Court famously explained, "Punishments are cruel when they involve torture or a lingering death, but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life."[266] In this inquiry, the Court has primarily focused on pain, although it has sometimes considered the mental and emotional impact of a punishment.[267]

At one time, the Supreme Court had linked the limits of punishment to human dignity and "civilized standards."[268] A punishment violated the Eighth Amendment when it was inconsistent with "the evolving standards of decency that mark the progress of a maturing society."[269]

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261. *See Roper*, 543 U.S. at 568 ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" (quoting *Atkins*, 536 U.S. at 319)); *Kennedy*, 554 U.S. at 420; *Atkins*, 536 U.S. at 319. *But see* Corinna Barrett Lain, *Three Observations About the Worst of the Worst, Virginia-Style*, 77 WASH. & LEE L. REV. ONLINE 469, 470 (2021) (arguing that execution in practice is not limited to most culpable offenders and using Virginia's history of executions as an example).

262. *See Roper*, 543 U.S. at 571 ("Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult."); *Ceja*, 134 F.3d at 1373–74 (Fletcher, J., dissenting).

263. *Glossip*, 576 U.S. at 869.

264. Wilkerson v. Utah, 99 U.S. 130, 135–36 (1878); *see also supra* notes 48–54 and accompanying text (discussing *Wilkerson*).

265. 136 U.S. 436 (1890).

266. *Id.* at 447.

267. *See* Weems v. United States, 217 U.S. 349, 366 (1910) (explaining that the severity of *cadena temporal*, or imprisonment for more than twelve years at "hard and painful labor" and in chains, leaves an offender "subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty").

268. *See* Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion).

269. *Id.* at 101; *see Weems*, 217 U.S. at 378 (explaining that the Eighth Amendment should "acquire meaning as public opinion becomes enlightened by a humane justice"); *see also* Robinson v. California, 370 U.S. 660, 666 (1962) (evaluating whether making drug addiction a criminal offense violates the Eighth Amendment by considering "contemporary human knowledge"); Bessler, *supra* note 259, at 392–96 (tracing origins of Supreme Court's reference

Social preference mattered, but it was an aspirational, forward-looking standard. More recently, the Court has signaled its preference for a narrower conception of the Eighth Amendment.[270] As in *Gregg*, the Court's vision of the kinds of punishment the Eighth Amendment prohibits defers substantially to legislative and community preference.[271] "The deference we owe to the decisions of the state legislatures under our federal system, . . . is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy.'"[272]

In practice, this deference has sharply curtailed the Eighth Amendment's applicability to methods of execution. Even if a death row prisoner can demonstrate that a state's method of execution is likely to cause severe pain and suffering, if there are no available alternatives, the state may proceed.[273] *Bucklew v. Precythe*[274] took this restriction further: states do not have to be the first to test a method of execution, and prisoners have a heavy burden to prove that there is a readily available alternative that will reduce a substantial risk of pain from the state's chosen method.[275] *Bucklew* also demonstrates that a majority of the Court has totally abandoned the evolving standards of decency standard: the

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to contemporary standards in deciding Eighth Amendment claims); Denno, *supra* note 26, at 329–30, 329 n.40 (explaining that *Weems* held that the Eighth Amendment did not apply solely to punishments considered cruel and unusual at the time of the Amendment's passage); Gardner, *supra* note 24, at 103–04 (explaining how *Weems* and *Trop* broke from the "historical interpretation" that had formerly been used to resolve Eighth Amendment claims in favor of drawing from contemporary standards of civility).

270. *See* Bucklew v. Precythe, 139 S. Ct. 1112, 1123–25 (2019) (stating that the Eighth Amendment permits pain in death, relying on a separate opinion by Justice Clarence Thomas in *Baze*). Justice Neil Gorsuch signaled his willingness to adopt an even harsher standard, observing that Justices Antonin Scalia and Thomas had argued in earlier cases that "an inmate must show that the State *intended* its method to inflict such pain." *Id.* at 1126; Eric Berger, *Gross Error*, 91 WASH. L. REV. 929, 981 (2016) (concluding that *Glossip* is inconsistent with the "evolving standards of decency" analysis).

271. *See* Guus Duindam, *Judicial Incoherence, Capital Punishment, and the Legalization of Torture: A Response to* Glossip v. Gross *and* Bucklew v. Precythe, 108 GEO. L.J. ONLINE 74, 75 (2019) (discussing the "extraordinary shift in the Court's thinking—away from its long-held view that the 'basic concept underlying the Eighth Amendment' is 'the dignity of man'" (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion))).

272. *Gregg*, 428 U.S. at 176 (plurality opinion) (citation omitted) (quoting Gore v. United States, 357 U.S. 386, 393 (1958) (plurality opinion)); Furman v. Georgia, 408 U.S. 238, 456 (1972) (Powell, J., dissenting).

273. *See* Glossip v. Gross, 576 U.S. 863, 879 (2015) (requiring prisoners to plead an alternative method of execution); *id.* at 949 (Sotomayor, J., dissenting) ("A method of execution that is intolerably painful—even to the point of being the chemical equivalent of burning alive—will, the Court holds, be unconstitutional *if,* and only if, there is a 'known and available alternative' method of execution.").

274. 139 S. Ct. 1112 (2019).

275. *See id.* at 1130 ("But choosing not to be the first to experiment with a new method of execution is a legitimate reason to reject it."); *id.* at 1129 (faulting Bucklew for failing to provide a detailed protocol).

Eighth Amendment prohibits "long disused (unusual) forms of punishment that intensified the sentence of death with a (cruel) 'superadd[ition]' of 'terror, pain, or disgrace.'"[276] Under the "superadded" *Bucklew* standard, states cannot burn prisoners alive, flay them, tear them apart with horses, whip them to death, display or dissect a prisoner's corpse, or disembowel prisoners.[277] But this standard states the obvious and the irrelevant because states are unlikely to resume these practices. Instead, executions may cause the amount of pain that is necessary to kill—even if that pain could be potentially severe.[278] Under this standard, pain has less constitutional significance in capital punishment.[279]

Like the Supreme Court's jurisprudence on police violence, *Bucklew* assumes that a certain amount of violence and suffering will happen, that it is acceptable, and that it is not a matter for judicial scrutiny.[280] *Bucklew*, in other words, like the Court's precedent that grants police wide discretion in the use of force, affirms that states have similar discretion when they kill prisoners who have been sentenced to death.[281] But state discretion should not extend to violence that relies on retributivism for its own sake, retaliation, or vengeance.[282]

Even if pain is not at issue, carrying out capital punishment in a way that is a "pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes" is "patently excessive and cruel and unusual punishment violative of the Eighth Amendment."[283] The Court sustained the continued use of capital

276. *Id.* at 1124 (alteration in original) (quoting Baze v. Rees, 553 U.S. 35, 48 (2008) (plurality opinion)).

277. *Id.* at 1123–24; *see id.* at 1135 (Thomas, J., concurring) (listing various forms of torture and execution); *Glossip*, 576 U.S. at 908 (Breyer, J., dissenting) ("[T]he Constitution prohibits various gruesome punishments that were common in Blackstone's day."); Bessler, *supra* note 259, at 304–05.

278. *See Glossip*, 576 U.S. at 869 ("[B]ecause some risk of pain is inherent in any method of execution, we have held that the Constitution does not require the avoidance of all risk of pain."); SARAT, *supra* note 98, at 71.

279. I explore these issues in greater detail in a forthcoming work. *See* Alexandra L. Klein, *The Irrelevance of Pain* (forthcoming) (on file with author).

280. *Bucklew*, 139 S. Ct. at 1125 ("The Eighth Amendment does not come into play unless the risk of pain associated with the State's method is 'substantial when compared to a known and available alternative.'" (quoting *Glossip*, 576 U.S. at 878)).

281. *See id*. (discussing state discretion in executions); *supra* Section III.A.

282. *See* Furman v. Georgia, 408 U.S. 238, 343 (1972) (Marshall, J., concurring) ("Retaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations for a government in a free society.").

283. *Id.* at 312 (White, J., concurring in the judgment); *see also* Ford v. Wainwright, 477 U.S. 399, 410 (1986) ("Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction [on executing an insane person] finds enforcement in the Eighth Amendment.").

punishment as an expression of community retribution and outrage. That outrage does not extend to the method of execution. Some punishments go beyond permissible bounds by the pain they inflict, the indignities they cause, or the ways in which they undermine the justifications for the punishment.[284] Punishment that fails to serve *any* justification may violate the Eighth Amendment.[285] This reasoning extends to punishment that serves illegitimate justifications. Punishments that draw on vengeful or retaliatory motives are more than "the mere extinguishment of life."[286]

Professor Austin D. Sarat argues that the legitimacy of state killing depends upon the method of execution,[287] which "must appear to be different from the violence to which it is opposed and to which it is seen as a response."[288] When punishment begins to take on impermissible features, such as brutality, arbitrariness, or vengeance, it undermines the legitimacy of that punishment as a state tool.[289] A method of execution that fails to further the goals of punishment, or only serves impermissible forms of those goals, is inconsistent with the constitutional requirements of punishment.[290] Dying by firing squad may be quicker and less painful

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284. *See* Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion) (determining excessive punishment requires assessing proportionality and whether the punishment involves "the unnecessary and wanton infliction of pain").

285. *See* Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion) ("Under *Gregg*, a punishment is 'excessive' and unconstitutional if it . . . makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering . . . .").

286. *In re* Kemmler, 136 U.S. 436, 447 (1890); *see also* Ceja v. Stewart, 134 F.3d 1368, 1373 (9th Cir. 1998) (Fletcher, J., dissenting) ("I believe that the Court's treatment of the subject of retribution definitively demonstrates that the exaction of blood vengeance is not a legitimate basis for the imposition of the death penalty.").

287. SARAT, *supra* note 10, at 5.

288. SARAT, *supra* note 98, at 19.

289. *See* Glass v. Louisiana, 471 U.S. 1080, 1084 (1985) (Brennan, J., dissenting from denial of certiorari) ("The Court has *never* accepted the proposition that notions of deterrence or retribution might legitimately be served through the infliction of pain beyond that which is minimally necessary to terminate an individual's life."); SARAT, *supra* note 10, at 3–7.

290. *See* Furman v. Georgia, 408 U.S. 238, 312–13 (1972) (White, J., concurring) (stating that when the imposition of the death penalty ceases to realistically further the purpose of justifying the social ends it was supposed to serve, it is a "pointless and needless extinction of life" in violation of the Eighth Amendment); Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion) (explaining that capital punishment "cannot be so totally without penological justification that it results in the gratuitous infliction of suffering"); Atkins v. Virginia, 536 U.S. 304, 319 (2002) (arguing that "mentally retarded offender[s]" be excluded from the death penalty since the lesser culpability of these offenders does not merit the goal of retribution); Enmund v. Florida, 458 U.S. 782, 798 (1982) (requiring that imposition of the death penalty consider individualization as a constitutional requirement since it was impermissible, under the Eighth Amendment, to assign an individual who did not kill the same culpability of those who did kill); *Ceja*, 134 F.3d at 1373 (Fletcher, J., dissenting) (stating that the State should be required to show that belated execution "will serve as an effective expression of the community's moral outrage"

than lethal injection. But how the firing squad is carried out can undermine the legitimacy of capital punishment and even undermine public support for capital punishment by exposing the violence of killing in a way that lethal injection does not.[291] Retribution may be a permissible supporting justification to impose punishment. Its attendant expressive features reflect community condemnation. But drawing too much upon personalized, localized outrage may venture beyond retribution.

B. *Community Retribution*

Executions, and the way they are carried out, carry expressive messages. Legislative discussions about the firing squad focused on these messages.[292] Some Utah legislators thought that other methods of execution did not transmit the same retributive and deterrent messages that the firing squad did.[293] South Carolina legislators, however, were preoccupied with ensuring that the state retained the death penalty and its retributivist messaging.[294] Both legislatures emphasized that the firing squad would be less painful than either lethal injection or electrocution.[295] Professor Deborah W. Denno has argued that legislatures retain methods of execution that may be more painful to "reflect what they consider to be the public's views toward punishment,"[296] particularly symbolic values of "'moral outrage' or 'revenge-utilitarianism' toward criminals."[297] But the firing squad may be less painful than some lethal injection protocols, provided it is carried out correctly.[298] Nor is there any

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when justifying execution under the goal of retribution); *see also* SARAT, *supra* note 98, at 19–22 (discussing legitimacy of state violence).

291. *See* Glossip v. Gross, 576 U.S. 863, 977 (2015) (Sotomayor, J., dissenting) ("A return to the firing squad—and the blood and physical violence that comes with it—is a step in the opposite direction. And some might argue that the visible brutality of such a death could conceivably give rise to its own Eighth Amendment concerns.").

292. *See supra* Section II.B (discussing the Utah firing squad debates).

293. *See supra* notes 103–05 and accompanying text.

294. *See supra* notes 121–24 and accompanying text; *see also* Denno, *supra* note 26, at 388–90 (arguing that states switch execution methods to keep capital punishment in anticipation of a constitutional challenge to a particular method).

295. *See supra* notes 110, 120 and accompanying text.

296. Denno, *supra* note 26, at 391.

297. *Id.* at 392–93 (footnotes omitted).

298. For a discussion of the different types of lethal injection protocols and their potential for pain, see Eric Berger, *Evolving Standards of Lethal Injection*, *in* THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT 234, 247–49 (Meghan J. Ryan & William W. Berry III eds., 2020). Professor Sarat calculates that states have botched 7.12% of their lethal injection executions. *See* SARAT, *supra* note 10, at 177; *see also* sources cited *supra* note 10 (addressing botched lethal injections). Recent investigations have revealed that 84% of prisoners who died by lethal injection suffered pulmonary edema during the execution, meaning their lungs filled with fluid, causing sensations of suffocation and drowning. *See* Noah Caldwell et al.,

evidence that a particular method of execution provides more of a deterrent than the existence of capital punishment.[299] Retribution, and its attendant expressive messages, is a far more salient feature of the firing squad.

There are two features of the firing squad that are most relevant in considering retributive justifications. First, the overt violence of the method directly contrasts with the historic trajectory of capital punishment, which prioritizes technological refinement to achieve a purportedly more humane and less overtly violent method of execution. Second, the way in which executions are carried out emphasizes local involvement in executions and self-selection among law enforcement. This Section addresses both in turn and describes how they exacerbate the negative consequences associated with relying on law enforcement officers as executioners.

As Part II discussed, early firing squad executions included symbolism intended to connect to local control, such as the choice of execution site, the executioners, or the weapons used.[300] Modern firing executions lack the heavy-handed symbolism of shooting the condemned with the murder weapon, but the inherent spectacle remains. The open violence of the firing squad is inconsistent with modern, medicalized executions. For that reason, its use and adoption carry distinct, expressive, and highly retributive messages.

Death by firing squad is more similar to criminal homicides than lethal injection.[301] Some have argued that this method, evoking *lex talonis*, may

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Gasping for Air: Autopsies Reveal Troubling Effects of Lethal Injection, NPR (Sept. 21, 2020, 7:00 AM), https://www.npr.org/2020/09/21/793177589/gasping-for-air-autopsies-reveal-troubling-effects-of-lethal-injection [https://perma.cc/QBD3-4GS8]. The researchers argue that pulmonary edema occurs because of the way states administer lethal injection drugs rather than the type of drugs they are using. *Id.* Poor drug choice may also contribute to pain. *See* Berger, *supra* note 270, at 931–32; Berger, *supra* (contrasting single-drug and three-drug protocols). By contrast, the firing squad may not present the same risk of pain. *See* Denno, *supra* note 12, at 785–87 (discussing pain in firing squad executions). Botches also appear to be far less frequent—research indicates that there has been only two botched executions since 1879. *See id.* at 778 n.204, 787; *see also supra* note 89 (identifying two botched firing squad executions).

299. *See* Denno, *supra* note 26, at 392. *But see* Kerr, *supra* note 24, at 83 (suggesting that if lethal injection deters, "then the graphic truth of the firing squad should increase the statistical significance of the deterrence effect"); DiStanislao, *supra* note 24, at 804 (suggesting a more significant deterrent effect may appear if Virginia were to adopt the firing squad, and maybe make its executions public).

300. *See supra* notes 60–62 and accompanying text (discussing retributive symbolism in firing squad executions).

301. *See* SARAT, *supra* note 98, at 83; Timothy V. Kaufman-Osborn, *Regulating Death: Capital Punishment and the Late Liberal State*, 111 YALE L.J. 681, 704 (2001) (book review) ("Capital punishment's medicalization helps to nail down this distinction precisely because it appears so unlike an act of bloodthirsty retaliation . . . ."). Firearm homicides make up a substantial

better serve retributive justifications. Painless executions, after all, may "undermine[] the very premise on which public approval of the retribution rationale is based."[302] A firing squad execution might be less painful than lethal injection, but the expressive-retributive messages from strapping another human into a chair and firing four bullets into his heart unequivocally express a community's moral judgment that someone who has chosen to use violence deserves an equally violent death. This is the sort of moral judgment that some communities frequently express about someone who dies at the hands of the government.

When the police kill a person, the victim too often loses their presumption of innocence, regardless of the circumstances of their death. To die at the hands of the police is to die under suspicion.[303] Relying on law enforcement perspectives creates a presumption that the violence was justifiable—and that the decedent may have deserved it for a transgression, real or imagined. These assumptions remain despite the fact that very few of the perceived transgressions amount to capital offenses.

Second, localized involvement in executions enhances the risk of transforming retribution into vengeance. As Professor David W. Garland explains, the delocalization of capital punishment was "only ever partial, shifting the location and control of executions but leaving prosecution and sentencing decisions under local control."[304] Drawing executioners from the local community attaches communities to executions in a way that most jurisdictions have largely abandoned.[305] This practice may be a pragmatic choice to find executioners, but it personalizes the execution

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part of all homicides in the United States. *See Assault or Homicide*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 13, 2021), https://www.cdc.gov/nchs/fastats/homicide.htm [https://perma.cc/UR57-VDLN].

302. Baze v. Rees, 553 U.S. 35, 80–81 (2008) (Stevens, J., concurring in the judgment); Kaufman-Osborn, *supra* note 301, at 704 ("What Blanchard and Scalia both understand is that execution by lethal injection involves, on the one hand, a tension between our desire to realize the claims of retribution by killing those who kill, and, on the other, a method that, because it seems to do no harm other than killing, cannot satisfy the intuitive sense of equivalence that informs this conception of justice.").

303. *See* Exum, *supra* note 152, at 1008. Responses to unlawful police killings of Black people sometimes focus on a perceived failure to comply—despite the fact that individuals killed by the police *were* complying or engaged in totally innocent activity. *See* Ed. Bd., *Rudy Giuliani's Racial Myths*, N.Y. TIMES (July 11, 2016), https://www.nytimes.com/2016/07/12/opinion/rudy-giulianis-racial-myths.html [https://perma.cc/L66F-FVRT]; *see also* Jamison v. McClendon, 476 F. Supp. 3d 386, 390–91 (S.D. Miss. 2020) (citing examples of Black people killed by the police). Professor I. India Thusi observes that the "the myth of Black criminality" has justified social control and police violence. *See* Thusi, *supra* note 189, at 23–24; *see also* ZIMRING, *supra* note 236, at 122 ("The criminal offender is an outsider in the vigilante imagination, not a genuine member of the community.").

304. GARLAND, *supra* note 63, at 116–17.

305. *See id.* (discussing the trend away from localized executions).

and invites bad motives into the process. Professor Martin Gardner, in considering the constitutionality of firing squads, briefly observed that "[t]he involvement of ordinary citizens in the execution process allows the firing squad to be a vehicle of public vengeance, stripping the execution process of whatever dignity it might otherwise have."[306] Professor Gardner's assessment addresses the real problem of the firing squad: relying on volunteers transforms executions into a personal exercise of public retaliation and vengeance. It carries echoes of vigilantism.

In considering the relationship between vigilantism and capital punishment, Professor Zimring emphasizes the contradiction between vigilantism—which centers on a community, an individual, and the personal—with the more formal traditions of legality and due process.[307] Professor Zimring disagrees that vigilantism will inspire vengeance or further violence. Instead, he explains, "The citizen who has positive feelings about vigilante values will identify more closely with the punishment process, will think of punishments as a community activity rather than the conduct of a governmental entity separate from community processes."[308] Yet, both vengeance and vigilantism rely on violence as a personal response to a wrong, real or perceived.[309] Leaving punishment in a community's control keeps that punishment personal to the community, which seems inconsistent with *Gregg*. The Court's insistence that capital punishment is a response to *public outrage* and is socially stabilizing by preventing the community from taking matters into its own hands suggests that decisions to utilize capital punishment must be a separate thing from a community response in executions. The place for a moral judgment, *Gregg* suggests, is in the courtroom, not the execution chamber.[310]

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306. *See* Gardner, *supra* note 24, at 124. Professor Gardner also argued that "the firing squad is potentially a source of torture at the hands of citizens seeking revenge," and cited the botched execution of Eliseo Mares in 1951 as an example to justify his argument that a firing squad is a potentially unconstitutional method of execution. *Id.*; *see supra* note 89 and accompanying text (discussing Eliseo Mares). Professor Gardner did not consider the distinction between ordinary civilian participation and law enforcement participation.

307. *See* ZIMRING, *supra* note 236, at 108–09. Professor Zimring defines the "vigilante tradition" as one in which "groups of citizens regard the punishment of criminal threats to the community as the privilege and responsibility of dominant social groups." *Id.* at 109.

308. *Id.* at 99. Therefore, even if citizens with vigilante preferences trust government power less, they may be less concerned if punishment is a "local concern." *Id.* at 98.

309. *See* CHARLES K.B. BARTON, GETTING EVEN: REVENGE AS A FORM OF JUSTICE 55 (1999) (emphasizing that revenge is personal); ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 366–68 (1981) (distinguishing retribution from revenge on the grounds that revenge is personal); SARAT, *supra* note 98, at 40–43 (discussing revenge).

310. GARLAND, *supra* note 63, at 260 ("The Court was saying, in effect, that the states could put people to death so long as they did not stage anything that looked like a lynching.").

Relying on police officer volunteers rather than ordinary civilians does not eliminate the risk of firing squad executions becoming exercises of public vengeance. While police are not supposed to punish,[311] police violence can go beyond violence that is necessary for enforcement, becoming punitive, retaliatory, and vengeful.[312] The ongoing problems of policing—a lack of accountability for violence and the problem of Warrior culture—carry the potential to *enhance* the risk of public vengeance. Giving local police officers the opportunity to kill puts the responsibility for killing squarely in the hands of community members who may feel that the justice system is not moving quickly enough.[313] Doing so risks creating perceptions of publicly endorsed vigilantism in the same way that incidents of police violence or misconduct may be forms of vigilantism.[314]

Some argue that institutionalized punishments cannot be revenge because those who enforce the law are not specially connected to the victims and those who punish in institutional settings are not motivated by personal ties.[315] If the police kill a person on the street, that person does not receive a trial, appeals, or any process. A person executed by a firing squad composed of police officers has received judicial process, even if that process may be flawed.

Despite the process leading up to an execution, it is impossible to escape the historical and present-day context of police killings. The history of capital punishment in its myriad forms affects how it is perceived today. So does the history of lynching, in which law enforcement officers were at times complicit or active participants.[316] It is not possible to truly separate out executions from this history and the rest of the criminal legal system. Violence cannot escape all context.

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311. *See supra* notes 143–71 and accompanying text.

312. *See supra* Part III.

313. *See* Stoughton, *Principled Policing*, *supra* note 141, at 659 (explaining that the Warrior officers express frustration with "laws that frustrate justice betray officers' professional commitment to distinguish[] right from wrong"); GARLAND, *supra* note 63, at 289 (discussing law enforcement preference for capital punishment); Hayes, *supra* note 80 (quoting one of Taylor's executioners as saying that delays in the appellate process for capital prisoners were "a little out of control," and insisting that the penalty "needs to be used more often").

314. *See* PAUL H. ROBINSON & SARAH M. ROBINSON, SHADOW VIGILANTES: HOW DISTRUST IN THE JUSTICE SYSTEM BREEDS A NEW KIND OF LAWLESSNESS 186–87 (2018).

315. BARTON, *supra* note 309, at 55.

316. *See* Screws v. United States, 325 U.S. 91, 92–93 (1945) (stating that the sheriff participated in beating a Black man to death in a public square); GILBERT KING, DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA 242–44 (2012) (explaining that the sheriff and deputy shot three Black men accused of a crime, killing two in a framed escape attempt); *Lynching in America: Confronting the Legacy of Racial Terror*, EQUAL JUST. INITIATIVE 9, 32, 47, 56–58 (2017), https://lynchinginamerica.eji.org/report/ [https://perma.cc/4LW3-NDL7] (noting law enforcement involvement in lynchings); GARLAND, *supra* note 63, at 124–25 (discussing how local law enforcement officials tolerated lynching).

Consider this: Arizona recently began overhauling its gas chamber for executions.[317] The state purchased chemicals to make hydrogen cyanide gas—the same type of gas the Nazis used to murder millions during the Holocaust.[318] One might point out that Arizona has used gas in executions since 1934 and continued those executions even after the Holocaust.[319] One might also point out that the people Arizona executes have been convicted of murder and received judicial process, rather than being deported and murdered *en masse* simply for existing. But despite these observations, it is impossible to escape the historical and cultural context of using Zyklon B to kill. The judicial process cannot remove the social meaning of a method of execution.

Police officers who volunteer for executions may disclaim vengeance as a motivation. In an interview with a journalist, one executioner asserted, "I don't think any of us were motivated by a sense of revenge. We took it very seriously and wanted to do it right."[320] But sometimes justice is personal—law enforcement may engage in conduct that subverts the judicial process to ensure a conviction or to punish arrestees.[321] Officers may perceive their role in community protection as one that includes killing.[322]

A jurisdictional connection for executioners necessarily personalizes an execution, inviting vengeful or retaliatory motives, even if the officers may not have been involved in investigations associated with the underlying crime.[323] The idealized, normative role that a police officer should fill is inconsistent with the role of an officer as a community avenger. Like the debate in *Garner* over whether the role of police violence is to ensure punishment by any means necessary, using police officers as executioners, especially when jurisdictional connections exist,

317. Christine Hauser, *Outrage Greets Report of Arizona Plan to Use "Holocaust Gas" in Executions*, N.Y. TIMES (June 2, 2021), https://www.nytimes.com/2021/06/02/us/arizona-zyklon-b-gas-chamber.html [https://perma.cc/Z3XV-WSZG].

318. Ed Pilkington, *Arizona "Refurbishes" Its Gas Chamber To Prepare for Executions, Documents Reveal*, GUARDIAN (May 28, 2021, 1:00 PM), https://www.theguardian.com/us-news/2021/may/28/arizona-gas-chamber-executions-documents [https://perma.cc/P5PH-BZPF].

319. *See Arizona*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/arizona [https://perma.cc/59W2-GH4D].

320. Kirby, *supra* note 77.

321. *See* Lieutenant Arthur Doyle, *From the Inside Looking Out: Twenty-nine Years in the New York Police Department*, *in* POLICE BRUTALITY 171, 173 (Jill Nelson ed., 2000) ("One rule I learned was that any suspect who assaulted a police officer in any way was never supposed to be able to walk into the station house on his own. He was supposed to be beaten so badly that he couldn't walk."); ROBINSON & ROBINSON, *supra* note 314, at 186–87 (discussing the practice of "testilying" at suppression hearings as a police response to achieve convictions); Stoughton, *Principled Policing*, *supra* note 141, at 660–61.

322. *See supra* note 94 and accompanying text.

323. Would-be executioners appear to receive some sort of screening, but there is little to no information about the criteria that might disqualify an executioner.

highlights the tension between process as justice and violence as justice.[324]

The consequences of using law enforcement officers as executioners have not been adequately explored, even where it is the norm. Utah's legislators critiqued the brutality of the method of execution[325] but did not discuss whether using police as executioners was sound public policy or the potential consequences of that policy.[326] Despite the publicity surrounding firing squad executions, including interviews with police executioners, not all of Utah's legislators knew that law enforcement would volunteer to conduct executions.[327] Utah's seeming indifference to this problem is likely due to two factors. First, Utah conducts executions infrequently—it has only executed seven people since 1976, and only three of them by firing squad.[328] Second, Utah has *always* carried out firing squad executions this way.[329] That is not to suggest that Utah does not have problems associated with policing and punishment,[330] but rather that the historical roots of the practice have normalized it in the relevant community. While the firing squad had fallen out of favor in Utah, the decision to resume, even if it is a backup option, suggests both a preference for maintaining capital punishment as well as the localized relationship connected to punishment.[331] By contrast, if a jurisdiction has never used the firing squad and has relinquished local control over executions, introducing this practice may be more problematic, especially

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324. *See supra* notes 158–66 and accompanying text.

325. *See Utah Senate Hearing*, *supra* note 104, at 1:08:25–1:09:10 (discussing what was meant by a statement that abolishing the firing squad would allow Utah to join the "civilized world").

326. *See supra* notes 111–13 and accompanying text.

327. *See supra* note 111–12 and accompanying text.

328. *See supra* note 4 and accompanying text.

329. *See* GARLAND, *supra* note 63, at 189–90 (discussing the social role and norms of the death penalty in the rural west); *see also supra* Section I.A (discussing Utah's history of utilizing volunteer firing squads to carry out executions).

330. For example, between 2005 and 2014, Utah police officers shot and killed eighty-seven people. *See Fatal Shootings By Law Enforcement*, SALT LAKE TRIB., http://local.sltrib.com/charts/shootings/policeshootings.html [https://perma.cc/74AC-2XWW]. In 2020 alone, there were twenty-five officer-involved shootings, most of them taking place in two jurisdictions. *See* MacKenzie Ryan, *Who Is Getting Shot and Killed in Utah's Officer-Involved Shootings?*, 2KUTV (Sept. 25, 2020), https://kutv.com/news/2news-investigates/oici-2020 [https://perma.cc/7JET-FV8M].

331. As of 2016, a survey of Utah residents indicated a greater preference for capital punishment than the rest of the United States. *See* Jennifer Dobner, *Support for Death Penalty Stronger in Utah Than Nationally, Poll Shows*, SALT LAKE TRIB. (Oct. 11, 2016, 7:50 PM), https://archive.sltrib.com/article.php?id=4452272&itype=CMSID [https://perma.cc/4SV4-EQV3]. More recent polling, however, shows diminished public support for the death penalty. *See* McKenzie Romero, *Support for the Death Penalty Waning in Utah, Study Says*, DESERET NEWS (Feb. 10, 2018, 1:53 PM), https://www.deseret.com/2018/2/10/20639702/support-for-the-death-penalty-waning-in-utah-study-says [https://perma.cc/ASC5-HGZL].

if that jurisdiction has a troublesome history of police violence, as South Carolina does.[332] South Carolina may also conduct more frequent executions. At present, there are three men on its death row who have exhausted their appeals, and the state is eager to execute them.[333] Although South Carolina has not selected police officers as executioners at this time, its decision to rely on employees of the Department of Corrections does not eliminate all constitutional problems.

While the firing squad may satisfy constitutional criteria regarding pain, the crucial difference is that the features of the method, not the pain it causes, are inconsistent with the values the Eighth Amendment should protect.[334] The death penalty relies on retribution—expressions of community outrage and moral judgment—for its underlying justification, which must be controlled through process for its legitimacy within the justice system. When community outrage becomes part of the process of conducting executions, rather than expressing moral condemnation, the death penalty may become an exercise in retaliation and vengeance.[335] As Section III.C explores, the purportedly social-stabilizing functions of retribution in capital punishment may become destabilizing, undermining legitimacy of punishment and raising the question of whether such a punishment serves any legitimate function.

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332. *See supra* notes 132–35 and accompanying text.

333. *See supra* notes 118, 128–29 and accompanying text.

334. *See* Provenzano v. Moore, 744 So. 2d 413, 429 (Fla. 1999) (Shaw, J., dissenting) ("Although pain is an important indicator of cruelty, it is not the only indicator—for a method of execution can involve minimal pain and yet still be extraordinarily cruel. To meet the requirement that a punishment not be impermissibly cruel, a method of execution also must entail no undue violence, mutilation, or disgrace . . . .").

335. Scholars have raised concerns about vengeance in response to the Court's decision to allow victim impact testimony and the increasing role victims may play in sentencing. *See, e.g.*, SARAT, *supra* note 98, at 43–59 (discussing the victims' rights movement and vengeance); Austin Sarat, *Putting a Square Peg in a Round Hole: Victims, Retribution, and George Ryan's Clemency*, 82 N.C. L. REV. 1345, 1355 (2004) ("The victims' rights movement points to the difficulty of 'reconciling grief and rage and vengefulness with practicable moral enforcements of civil association . . . [and] of reconciling a cultural preoccupation with vengeance and . . . forms of legal punishment which deny it.'" (alteration in original) (quoting Terry Aladjem, Vengeance & Democratic Justice: American Culture and the Limits of Punishment 3 (1992) (unpublished manuscript) (on file with the North Carolina Law Review))); Jonathan Simon, *Fearless Speech in the Killing State: The Power of Capital Crime Victim Speech*, 82 N.C. L. REV. 1377, 1383–87 (2004). *See generally* Regina Austin, *Documentation, Documentary, and the Law: What Should Be Made of Victim Impact Videos?*, 31 CARDOZO L. REV. 979 (2010) (discussing the lack of relevance or probative value of victim impact videos); Bennett Capers, *Crime Music*, 7 OHIO ST. J. CRIM. L. 749 (2010) (explaining how music in victim impact videos is often covertly prejudicial and may emotionally impact a jury).

C. *The Myth of Social Stabilization*

The legitimacy of the criminal justice system depends upon public support and a belief in the justness, accuracy, and fairness of that system.[336] Failures of justice undermine the perceived legitimacy of this system, as do public perceptions of unfairness in meting out punishment. *Gregg* insisted that by allowing capital punishment to express the community's anger at certain offenses or offenders, capital punishment may restore faith in the justice system and prevent acts of vigilantism and unsanctioned violence that are contrary to this system.[337] Professor Sarat has theorized that the United States' preference for capital punishment is linked to our "deep attachment to popular sovereignty."[338] It is unclear whether capital punishment truly serves these goals, especially because judicial deference to legislative and administrative preference undermines procedures that give capital punishment an appearance of legitimacy.[339]

As a matter of capital punishment procedure, an insistence on process to determine whether someone should die is intended to separate out instinctual, vengeful retribution and offer a judicially tested account of that offender's desert. It is supposed to be distinct from the kind of violence it is punishing. Likewise, executions and other forms of state violence supposedly draw legitimacy from their status as acts that are distinct from the sorts of violence they are intended to prevent or respond to and their provenance as exercises of government power rather than vigilantism.[340] Yet, this violence undermines its own legitimacy because, despite the best efforts of judges and legislatures, it relies on impermissible motives and substantial discretion of executive officers, and encourages community brutality.[341] Treating violence imposed through a judicial process as distinct from unlawful violence fails when

336. *See* Furman v. Georgia, 408 U.S. 238, 453–54 (1972) (Powell, J., dissenting); ROBINSON & ROBINSON, *supra* note 314, at 218 ("[A] criminal law that is seen by the community as regularly doing injustice and failing to do justice is one that is likely to provoke resistance and subversion and to lose the power to harness social and normative influence.").

337. *See* Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion).

338. SARAT, *supra* note 98, at 17.

339. *See id.* at 20–21; *see also* United States v. Higgs, No. 20–927, 141 S. Ct. 645, 646 (2021) (Breyer, J., dissenting) (criticizing the Court for allowing executions without resolving legal claims); *Higgs*, 141 S. Ct. at 648–49 (Sotomayor, J., dissenting) (same). The same can be said of execution procedures, which too often lack the hallmarks of democratic decision-making. *See* Berger, *supra* note 20, at 17–18, 39; Klein, *supra* note 6, at 972–73.

340. SARAT, *supra* note 98, at 21.

341. *See Furman*, 408 U.S. at 344–45 (Marshall, J., concurring); SARAT, *supra* note 98, at 15 ("State killing damages us all, calling into question the extent of the difference between the killing done in our name and the killing that all of us would like to stop and, in the process, weakening, not strengthening, democratic political institutions.").

the primary justification for lawful violence is that the popular will demands death.[342]

More than any other member of the Supreme Court, Justice Marshall recognized the potential of the Eighth Amendment. "If retribution alone could serve as a justification for any particular penalty, then all penalties selected by the legislature would by definition be acceptable means for designating society's moral approbation of a particular act."[343] Justice Marshall reasoned that reliance on society's moral outrage as a sole or primary justification for punishment was inconsistent with the Eighth Amendment, which "limits the avenues through which vengeance can be channeled."[344] He also questioned whether the majority correctly identified social stabilization as a function of capital punishment or whether it was a conclusion that "it is appropriate that society make the judgment and carry it out."[345] From this perspective, one that the Court has admittedly not accepted, a punishment may not be painful, but it fails to serve legitimate justifications for punishment when it relies on *motivations* for punishment that are inconsistent with the values of the Eighth Amendment. Popular will alone is an inadequate justification for imposing a particular penalty if constitutional principles restrain legislators and the people from doing so.[346]

This problem has always existed in capital punishment, and the firing squad illustrates it. While retribution may dictate that an offender should be punished for the bad acts he has done, pointing to community preference as a justification for a *type* of punishment, rather than the general imposition of punishment, relies on an underlying framework of vengeance and populist preference. Justice Marshall argued in *Furman* that community outrage is not a legitimate justification for punishment, even if retribution partially justifies punishment.[347] The same applies to methods of execution. Even if community outrage demands a violent and painful death,[348] the Eighth Amendment is intended to prevent that because it prevents punishments that are excessive and serve no

342. *See Gregg*, 428 U.S. at 240 (Marshall, J., dissenting) ("The mere fact that the community demands the murderer's life in return for the evil he has done cannot sustain the death penalty, for as Justices Stewart, Powell, and Stevens remind us, 'the Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society.'" (quoting *id.* at 182 (plurality opinion))).

343. *Furman*, 408 U.S. at 344 (Marshall, J., concurring).

344. *Id.* at 345 ("Were this not so, the language would be empty and a return to the rack and other tortures would be possible in a given case.").

345. *Gregg*, 428 U.S. at 240 (Marshall, J., dissenting).

346. *See Furman*, 408 U.S. at 331–32 (Marshall, J., concurring) (arguing that the Eighth Amendment prohibits imposition of "excessive or unnecessary penalties . . . even though popular sentiment may favor them").

347. *Id.* at 344–45; *see* Gardner, *supra* note 24, at 124.

348. *See supra* note 105 and accompanying text.

legitimate purpose.[349] Giving communities a hand in methods of execution draws upon the populist justifications the Court relied on in *Gregg* to justify the *imposition* of the penalty. Carrying out the penalty cannot be an exercise in community preference for methods of execution or community involvement—reliance on community outrage demonstrates how the penalty diminishes human dignity and encourages violence.

These issues arise in policing and violence. The legitimacy of policing requires support as well as tangible proof that the police are behaving fairly and in compliance with the law. Police are part of the community in which they live and work, yet policing culture increasingly emphasizes the divide between *them* and *us*.[350] The growing personalization of policing culture, as well as the history of police involvement in acts of vigilantism and unsanctioned brutality, echoes the history of the death penalty. Requiring police officers to volunteer ensures that nobody who does not want to participate in an execution has to, but it also reflects sufficient confidence that officers *will* volunteer—and legislative confidence that the role of executioner is appropriate for police officers.

Like capital punishment, for policing to be legitimate, the acts of violence that police engage in should not be the same as the violence police are intended to control. And, like capital punishment, violence in policing blurs those lines. When police behave lawlessly, undermine the judicial process, act violently, or are not held accountable for unlawful actions, they undermine the legitimacy of policing. A popular preference for more aggressive, intrusive policing cannot justify the imposition of an unconstitutional policing regime.[351] The state's monopoly on violence requires it and the actors it empowers to not reenact the crimes it prohibits and examine more thoroughly the potentially impermissible motives behind possibly lawful actions.

Community involvement—even by police—in executions represents the endurance of localized principles that capital punishment has by and large left behind. A direct community connection has vestiges of "frontier justice" or lynch law. To apply such a method of execution may have a direct relationship to the flavor of populist retributivism that permeates *Gregg* and other capital punishment decisions. Indeed, the Court *justified* capital punishment on those grounds.[352] But personalizing executions encourages community sentiments of vengeful retribution and only reinforces the greater preference for vengeance underlying capital

349. *See supra* note 283 and accompanying text.

350. *See* Stoughton, *Principled Policing*, *supra* note 141, at 651.

351. *But see* City of Chicago v. Morales, 527 U.S. 41, 73–74 (1999) (Scalia, J., dissenting) (arguing that citizens of Chicago could give police the power to exercise substantial discretion in enforcing vague laws).

352. Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion).

punishment. When punishment begins to take on characteristics more closely associated with vigilantism and extrajudicial violence, populist retribution's purportedly social-stabilizing functions may prove to be destabilizing. This threat is more acute when the punishers are people tasked with significant authority over the whole population, and who already lack adequate restraint that prevents them from engaging in unlawful, extrajudicial violence. Just as procedural mechanisms purport—and fail—to hold police accountable, relying on a veneer of legality through process in capital punishment also fails to address underlying fatal flaws.

D. *Retribution and Choice*

If the firing squad is to be a viable method of execution, there must be individuals able to carry out executions. One option might be civilian volunteers.[353] But such a proposal fails to resolve the underlying problem of relying on raw populist preference in executions and affording an opportunity to bring vengeance into the execution chamber.[354] Such a proposal would offer a legitimating gloss on vigilantism and undermine legitimate penological goals.

Using existing execution teams made up of employees of departments of correction is another option—those employees already participate in executions. This may, however, risk botched executions, especially if employees have inadequate expertise with firearms. When the question of using correctional employees came up in Utah, the bill's sponsor emphasized that this would not be a responsibility for the department of corrections and that the police officers who carried out executions would volunteer to do so.[355] Legislators did not consider police officers' mental health in this conversation—instead, they focused on *voluntary participation*. By contrast, South Carolina has designated volunteer corrections employees as executioners—and taken other steps that may impact those employees' well-being, even if they did volunteer.[356] South Carolina will only use three executioners and all of their rifles will have live ammunition, eliminating the traditional approach that provides

353. *See, e.g.*, Conor Friedersdorf, *What If Citizens Chosen at Random Carried Out Executions?*, ATLANTIC (Sept. 9, 2011), https://www.theatlantic.com/politics/archive/2011/09/what-if-citizens-chosen-at-random-carried-out-executions/244752/ [https://perma.cc/GL2Y-8ZK6].

354. *See* Gardner, *supra* note 24, at 124 (discussing why involving civilians in firing squad executions is a bad idea).

355. *See supra* note 111 and accompanying text. South Carolina's developing protocols will also use volunteers, although it has not yet identified *who* those volunteers will be. *See* Catherine Welch, *South Carolina Prepares to Bring Firing Squads to Death Row*, WFAE (July 14, 2021, 6:00 AM), https://www.wfae.org/south-carolina-news/2021-07-14/south-carolina-prepares-to-bring-firing-squads-to-death-row [https://perma.cc/X28D-L9XQ].

356. *See* Press Release, South Carolina Dep't of Corr., *supra* note 136.

executioners with doubt as to whether they fired the fatal shot.[357] Several executioners in South Carolina have recently described the long-term negative impacts of participation in executions on their mental and emotional health.[358] Executing someone in a more violent way that eliminates rituals permitting deniability—even if the executioners volunteer—may enhance the negative effects that executioners already experience.[359]

Utah has always had enough volunteers.[360] The Warrior ethos, as discussed above, might lend a way for officers to justify firing squad participation.[361] Ethical tenets of policing caution against excessive force[362] but lack the medical community's absolute prohibition on participating in executions.[363] The power to use force is, after all, a key element of policing.[364] Even if a national policing organization issued a statement critiquing participation, officers may still volunteer. Despite physicians' general refusal to participate in lethal-injection executions, states have managed (albeit with errors), and some physicians have participated anyway.[365]

The problems this Article describes should not bar *prisoners* from alleging that the firing squad is a readily available alternative method of execution. Under *Baze-Glossip*, prisoners who bring constitutional challenges to a state's method of execution must demonstrate that the method presents a substantial risk of severe pain *and* identify a readily available alternative that substantially reduces that risk.[366] This is a

357. *Id.*

358. *See* Chiara Eisner, *They Executed People for the State of South Carolina. For Some, it Nearly Destroyed Them*, STATE (Jan. 4, 2022, 12:24 PM), https://www.thestate.com/news/local/crime/article254201328.html [https://perma.cc/7L33-8GEN].

359. South Carolina, in fact, may not have relied on volunteers to staff its execution teams before. Jim Harvey, who supervised prisons and developed execution processes, emphasized that executioners were "hand-picked," rather than volunteers. *See id.*

360. *See supra* note 112 and accompanying text.

361. *See supra* notes 201–05 and accompanying text.

362. *See Law Enforcement Code of Ethics*, INT'L ASS'N OF CHIEFS OF POLICE, https://www.theiacp.org/resources/law-enforcement-code-of-ethics [https://perma.cc/75S7-98P6] ("With no compromise for crime and with relentless prosecution of criminals, I will enforce the law courteously and appropriately without fear or favor, malice or ill will, never employing unnecessary force or violence . . . .").

363. *Cf.* Baze v. Rees, 553 U.S. 35, 66 (2008) (Alito, J., concurring) (explaining that changing a lethal injection protocol is not feasible if it requires participation "either in carrying out the execution or in training those who carry out the execution—by persons whose professional ethics rules or traditions impede their participation").

364. *See supra* notes 144–45 and accompanying text.

365. *See supra* notes 137, 187 and accompanying text (discussing physician participation).

366. *See* Bucklew v. Precythe, 139 S. Ct. 1112, 1121 (2019); Glossip v. Gross, 576 U.S. 863, 877 (2015); Baze, 553 U.S. at 50–52 (plurality opinion).

significant hurdle.[367] The alternative method of execution must be "feasible" and "readily implemented," and "the inmate's proposal must be sufficiently detailed to permit a finding that the State could carry it out 'relatively easily and reasonably quickly.'"[368] Under these circumstances, a decision to pick Utah's firing squad protocol as an alternative method of execution is sensible. It is proven, easily implemented, and readily available.[369]

States' choices about execution methods and procedures are distinct from prisoners' choices. The state's choice is an extension of its authority to punish, and that choice conveys intended and incidental messages about that authority. State decisions involve issues of legitimacy, democratic process, and the immediate and long-term consequences associated with executions, including avoiding litigation.[370] States, however, should be cautious when selecting methods of execution that are implemented in ways that potentially undermine the legitimacy of their punishments or invite additional brutality. Prisoners do not share this burden. Prisoners' Eighth Amendment claims are intended to protect human rights, dignity, and prevent pain and suffering.[371] A prisoner seeking to avoid a not-insubstantial risk of a botched lethal injection execution may be forced to select a more violent method because that is the only choice the Supreme Court has left to him. Prisoners' choices, therefore, do not have the same impact on the legitimacy of punishment as legislative or judicial decisions.

This problem of police executioners is especially acute because legislators seem to be disinclined to think about the consequences—and they are the primary government body equipped to do that. The Supreme Court defers substantially to states' legislative and administrative

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367. *See Bucklew*, 139 S. Ct. at 1130–33; Zagorski v. Haslam, 139 S. Ct. 20, 21 (2018) (mem.) (Sotomayor, J., dissenting from denial of application for stay and denial of certiorari).

368. *Bucklew*, 139 S. Ct. at 1129 (quoting McGehee v. Hutchinson, 854 F.3d 488, 493 (8th Cir. 2017)).

369. *See id.* at 1136 (Kavanaugh, J., concurring) (explaining that a prisoner might satisfy the readily available alternative component of the *Baze-Glossip* test by "adequately plead[ing]" the firing squad). Initially some courts had rejected the firing squad as an alternative because it was not authorized by state law. *See, e.g.*, Boyd v. Warden, Holman Corr. Facility, 856 F.3d 853, 868–70 (11th Cir. 2017). In *Bucklew*, the Supreme Court clarified that an alternative method of execution need not be authorized by state law. 139 S. Ct. at 1128 ("An inmate seeking to identify an alternative method of execution is not limited to choosing among those presently authorized by a particular State's law."). *But see* Gardner, *supra* note 24, at 123–24 (concluding the firing squad is likely unconstitutional because of the potential for pain and the risk of "public vengeance").

370. *See supra* note 117 and accompanying text.

371. Of course, prisoners who may choose between certain methods of execution may send expressive messages by that choice. *See* GILLESPIE, *supra* note 2, at 168 ("[John Albert Taylor] told me he opted for the firing squad because 'It is symbolic to me. I maintain[] my innocence. If they put a bullet in me they are murdering me. It is the most hassle and the most expensive.'").

judgments about carrying out executions.[372] Its opinions on methods of execution repeatedly insist that the Court has *never* found a method of execution unconstitutional.[373] Based on their deferential posture to decisions about capital punishment, courts are simply not likely to pay attention to these problems. Based on past police participation in executions, it is less likely that police will object either.

Police kill the residents of the United States at an alarming rate.[374] A decision to authorize law enforcement officers to participate in firing squads may create uneasy parallels to other countries whose police departments are known to conduct extrajudicial executions.[375] Outrage over police shootings, especially those that lack valid justification for violence,[376] has proved to destabilize public confidence in the police.[377] Police officers may be an arm of the state's mechanism to enforce the laws, but they are not a typical part of the state's punishment mechanism—their role in the justice system ends *before* punishment can be lawfully administered. Police wield considerable power over people in a way that corrections employees do not. Thus, the power dynamics at issue are distinct. Corrections employees lack power over the unincarcerated. By contrast, the power to police applies to *everyone*—and it is not a power that allows its wielder to punish.

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372. *See* Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2038–40, 2082–84 (2011); Berger, *supra* note 270, at 959–76; *supra* notes 271–73 and accompanying text.

373. *See Bucklew*, 139 S. Ct. at 1124; Glossip v. Gross, 576 U.S. 863, 869 (2015); Baze v. Rees, 553 U.S. 35, 48 (2008) (plurality opinion).

374. *See supra* note 190 (identifying the number of people killed by the police annually in the United States).

375. *See, e.g.*, Manuela Andreioni & Ernesto Londoño, *"License to Kill": Inside Rio's Record Year of Police Killings*, N.Y. TIMES (May 18, 2020), https://www.nytimes.com/2020/05/18/world/americas/brazil-rio-police-violence.html [https://perma.cc/52EM-ZRBW]; *More Than 7,000 Killed in the Philippines in Six Months, as President Encourages Murder*, AMNESTY INT'L UK (May 18, 2020, 5:53 PM), https://www.amnesty.org.uk/philippines-president-duterte-war-on-drugs-thousands-killed [https://perma.cc/DMV8-DELY].

376. *See, e.g.*, Evan Hill et al., *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Sept. 7, 2021), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html [https://perma.cc/FV3F-UTJF]; Derrick Bryson Taylor, *No Charges for Second Officer Involved in Shooting of Oscar Grant, D.A. Says*, N.Y. TIMES (Jan. 12, 2021), https://www.nytimes.com/2021/01/12/us/oscar-grant-charges-anthony-pirone.html [https://perma.cc/VX69-V7SD]; Michael Levenson, *Grand Jury Votes Not to Indict Buffalo Police Officers Accused of Shoving Protester*, N.Y. TIMES (Feb. 23, 2021), https://www.nytimes.com/2021/02/11/nyregion/martin-gugino-buffalo-police.html [https://perma.cc/H25W-K46B].

377. *See supra* note 224 and accompanying text.

CONCLUSION

The legitimacy of punishment depends on how societies punish. Drawing volunteer police officers from the jurisdiction where the crime took place demonstrates issues in the social aspects of punishment, reflecting underlying motivations of vengeance and outrage.[378] It is difficult to decide whether it is more troubling that legislators see this as an appropriate role for police officers, or that police officers are willing to volunteer to do it. It is unknown why South Carolina selected corrections employees instead of police as executioners, but that choice merely puts a veneer of official formality over a punishment that is consistently driven by vengeance.

Reliance on "community outrage retribution"[379] to justify capital punishment should not extend to executions. As this Article has discussed, doing so may have significant destabilizing effects on the overall system. These parallels can be seen in the response to police violence. Punishment in the ordinary course of policing is too often retaliatory and unlawful "street justice." Further operationalizing police to conduct executions risks destabilizing effects upon the criminal legal system—something capital punishment *per se* routinely tests. It does so by undermining community trust, potentially incentivizing additional violence through encouraging negative aspects of policing culture, and inviting vengeful motives. Using police officers as firing squad executioners draws upon community members with significant power to kill the powerless. It blurs the boundaries between punishment and unlawful violence, enacting punishment as an exercise in community-oriented populist retribution. In so doing, it destabilizes the system it purports to uphold.

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378. *See* DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY 31 (1990) ("Modern penal systems may try to achieve utilitarian objectives, and to conduct themselves rationally and unemotively, but at an underlying level there is still a vengeful, motivating passion which guides punishment and supplies its force.").

379. *See* Flanders, *supra* note 231, at 456.