

2015

"Laboratories of Democracy" or "Machinery of Death"? The Story of Lethal Injection Secrecy and a Call to the Supreme Court for Intervention

Harrison Blythe

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>



Part of the [Law Commons](#)

Recommended Citation

Harrison Blythe, *"Laboratories of Democracy" or "Machinery of Death"? The Story of Lethal Injection Secrecy and a Call to the Supreme Court for Intervention*, 65 Case W. Res. L. Rev. 1269 (2015)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol65/iss4/15>

This Comments is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

— Comment —

“LABORATORIES OF DEMOCRACY” OR
 “MACHINERY OF DEATH”? THE
 STORY OF LETHAL INJECTION
 SECRECY AND A CALL TO THE
 SUPREME COURT FOR INTERVENTION

“A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce, or a Tragedy; or, perhaps both.”¹

CONTENTS

INTRODUCTION..... 1269

I. THE STORY BEHIND LETHAL INJECTION SECRECY LAWS..... 1274

II. THE CONSTITUTIONAL CONCERNS WITH LETHAL INJECTION
 SECRECY LAWS 1281

 A. *In re Lombardi*..... 1283

 B. *Owens v. Hill*..... 1284

III. A BRIEF ARGUMENT FOR SUPREME COURT INTERVENTION 1287

INTRODUCTION

Lethal injection is by far the most common method of capital punishment in the United States today. Over the course of the last three decades, roughly 85 percent of all executions have been by lethal injection.² Many states still have other methods of execution available by law, but in practice only five prisoners have been executed using one of these alternative methods since the turn of the century.³

In 1982, Texas became the first state to execute a prisoner by injecting drugs intravenously.⁴ While Texas has this landmark to its

-
1. Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 THE WRITINGS OF JAMES MADISON 71 (Gaillard Hunt ed., 1900).
 2. Kate Pickert, *A Brief History of Lethal Injection*, TIME, Nov. 10, 2009. For a concise overview of the evolution of methods of capital punishment, from death by hanging to lethal injection, see Brief for the Fordham University School of Law, Louis Stein Center for Law and Ethics, as Amicus Curiae Supporting Petitioners, *Baze v. Rees*, 553 U.S. 35 (2008) (No. 07-5439) [hereinafter Fordham Amicus Brief].
 3. Pickert, *supra* note 2.
 4. See Fordham Amicus Brief, *supra* note 2, at 28.

name, Oklahoma might have made the more influential contribution to the current condition of capital punishment when it became the first state to create lethal injection protocols.⁵ The story of how Oklahoma made those first lethal injection protocols serves as a metaphor for the newest evolution of capital punishment protocols and the subject of this Comment: Lethal Injection Secrecy Laws.

Before lethal injection, most states used electrocution as their primary means of capital punishment. Electric chairs, it turns out, are quite expensive.⁶ The Oklahoma legislature was struggling with the financial implications of a broken “chair” in the late 1970s when some legislators began to look outside the box, mulling alternative methods of execution that would be cheaper and, hopefully, more humane.⁷ Two men, a politician and a doctor, spearheaded the movement to find a way to execute prisoners by injecting deadly drugs. Assembly Member Bill Wiseman, the politician, first approached the state medical board with the idea but was rebuffed over concerns of public perception.⁸

Wiseman then sought the help of Dr. Jay Chapman, the state medical examiner at the time.⁹ Despite the fact that Chapman admitted to having “no experience” with creating lethal drug concoctions, Chapman and Wiseman sat down together one day to crank out a lethal injection protocol.¹⁰ Chapman’s protocol, as dictated to Wiseman, went as follows: “An intravenous saline drip shall be started in the prisoner’s arm, into which shall be introduced a lethal injection consisting of an ultra-short-acting barbiturate in combination with a chemical paralytic.”¹¹

5. *Id.* at 15.

6. Senator Bill Dawson estimated in 1977 that it would cost Oklahoma about \$62,000 to fix its electric chair. *See* Deborah Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 95 (2002).

7. *See id.* at 95–96 (noting that the legislators were given assurances that lethal injection was “extremely humane” compared to the electric chair or gas chambers).

8. Robbie Byrd, *Informal Talks Opened Door to Lethal Injection*, THE HUNTSVILLE ITEM, Oct. 3, 2007, http://www.itemonline.com/news/local_news/informal-talks-opened-door-to-lethal-injection/article_c48882d1-39b2-5613-820c-eda28193d4e0.html.

9. Fordham Amicus Brief, *supra* note 2, at 17–18.

10. HUMAN RIGHTS WATCH, SO LONG AS THEY DIE: LETHAL INJECTIONS IN THE UNITED STATES 14 (2006), <http://www.hrw.org/print/reports/2006/04/23/so-long-they-die-0>; *see also* Fordham Amicus Brief, *supra* note 2, at 18 (noting that Chapman and Wiseman “hastily dictated” their execution method).

11. Fordham Amicus Brief, *supra* note 2, at 18.

Another Oklahoma legislator, State Senator Bill Dawson, was also looking into the possibility of a lethal injection protocol. Dawson met with a friend, Dr. Stanley Deutsch, who was the head of the anesthesiology department at Oklahoma Medical School. In a letter that would influence the state legislature’s eventual bill, Dr. Deutsch suggested that prisoners be given a heavy dose of an anesthetic.¹² Thus, a three-drug protocol was born: the first drug anesthetized, the second drug paralyzed and ceased breathing, and the third drug stopped the heart.¹³ Each drug alone would produce death in the amounts called for by the protocols.¹⁴ When asked why he chose to use three drugs, Chapman responded by saying, “You just wanted to make sure the prisoner was dead at the end, so why not just add a third lethal drug?”¹⁵

Perhaps the most startling aspect of this story, the story of the birth of lethal injection in the United States as the modern method of capital punishment,¹⁶ is the utter lack of medical or scientific expertise supporting it. Dr. Chapman later described how he came up with the idea of the multiple drug protocol: “I didn’t do any research. I just knew from having been placed under anesthesia myself . . . what we needed. I wanted to have at least two drugs in doses that would each kill the prisoner, to make sure if one didn’t kill him, the other would.”¹⁷

12. Human Rights Watch, *supra* note 10, at 2. *See also* Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 *FORDHAM L. REV.* 49, 67 (2007); Fordham Amicus Brief, *supra* 2, at 19 (“Although these specific drugs apparently were considered and discussed with Chapman at the time, the legislators chose instead to propose vague statutory language, which specified neither specific drugs nor doses. They did so because they were uncertain how much time would pass before a lethal injection execution would be carried out and thus contemplated that drug technology might advance by that time. *See id.* In effect, the result of this decision was the delegation to Oklahoma prison officials of all critical decisions regarding the implementation of lethal injection.”) (internal citation omitted).

13. *See* Pickert, *supra* note 2.

14. HUMAN RIGHTS WATCH, *supra* note 10, at 2.

15. *Id.* at 15.

16. Nazi Germany experimented with lethal injection in a large-scale euthanasia program. For a physician’s take on the parallels between that Nazi program and lethal injection in the United States, see Jonathan I. Groner, *Lethal Injection: A Stain on the Face of Medicine*, 325 *BRIT. MED. J.* 1026 (2002).

17. *See* HUMAN RIGHTS WATCH, *supra* note 10, at 15; *see also* Fordham Amicus Brief, *supra* note 2, at 15 (“The historical evidence demonstrates that states adopted the nearly ubiquitous three-drug lethal injection protocol quickly and haphazardly. In so doing, they engrained a seemingly modern, scientific method of execution without conducting any relevant medical or scientific study or soliciting input from appropriate experts.”).

The three-drug protocol was an answer to the political question, “How can the state continue executing prisoners in the wake of Oklahoma’s broken electric chair?” Oklahoma and Texas then served as the laboratories for developing and implementing these first lethal injection procedures. Other states fell in line soon after the first years of lethal injection, usually by simply copying the procedures that Oklahoma and Texas had used.¹⁸ These protocols remained in place in most states for about three decades.¹⁹

The old protocols are now changing in response to a new political impediment to lethal injection: pharmaceutical manufacturers are refusing to provide states with the drugs needed to execute prisoners.²⁰ At its essence, the problem is lethal injection’s version of the broken electric chair. Just like Oklahoma’s broken electric chair in the late 1970s, this impediment has state legislatures haphazardly throwing ideas at the wall to see what sticks. As Fordham law professor and noted death penalty scholar Deborah W. Denno puts it, “states are just

-
18. Fordham Amicus Brief, *supra* note 2, at 15 (“Oklahoma was the first state to adopt a lethal injection protocol, in 1977. Almost immediately thereafter, state after state—including Kentucky—uncritically copied Oklahoma’s procedure.”).
 19. See Deborah Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L.J. 1331, 1335 (2014) (“There have been more changes in lethal injection protocols during the past five years than there have been in the last three decades.”).
 20. See Mark Berman, *Ohio Drops Controversial Lethal Injection Drug, Postpones Upcoming Execution*, WASH. POST, Jan. 9, 2015, <http://www.washingtonpost.com/news/post-nation/wp/2015/01/09/ohio-drops-controversial-lethal-injection-drug-postpones-upcoming-execution/> (“[The] ongoing drug shortage . . . has caused states . . . to scramble to find the necessary drugs or consider alternative methods of execution.”); Alan Johnson, *Judge Orders Temporary Moratorium on Ohio Executions*, COLUMBUS DISPATCH, May 29, 2014, <http://www.dispatch.com/content/stories/local/2014/05/28/temporary-moratorium-on-lethal-injections.html> (noting widespread controversy since the time “European manufacturers either stopped making drugs used in executions or refused to sell them to U.S. distributors”); Manny Fernandez, *Executions Stall as States Seek Different Drugs*, N.Y. TIMES, Nov. 8, 2013, http://www.nytimes.com/2013/11/09/us/executions-stall-as-states-seek-different-drugs.html?_r=0 (“Looking for alternatives, state prison systems have been more eager to try new drugs, buy drugs from new sources, keep the identities of their drug suppliers secret and even swap drugs among states.”); Makiko Kitamura & Adi Narayan, *Europe Pushes to Keep Lethal Injection Drugs from U.S. Prisons*, BUSINESSWEEK, Feb. 7, 2013, <http://www.bloomberg.com/bw/articles/2013-02-07/europe-pushes-to-keep-lethal-injection-drugs-from-u-dot-s-dot-prisons>.

scrambling for drugs, and they’re changing their protocols rapidly and carelessly.”²¹

While the new protocols vary among states and are still in their infancy, certain trends are emerging as states try to right the ship as quickly as possible. One common thread connecting nine states, all of which are dealing with similar problems, is the emergence of laws that make confidential certain information concerning the processes involved in creating, distributing, and administering the lethal injection drugs.²² These laws, Lethal Injection Secrecy Laws, have generated a lot of criticism.²³ Important to this Comment, these laws have also given rise to a number of constitutional challenges brought by prisoners on death row seeking to delay or terminate their executions.²⁴

At the heart of each constitutional challenge is a claim that the state’s secrecy law violates the Eighth Amendment and the Due Process Clause by depriving the challenger of information needed to show that the execution will be “cruel and unusual.” Reviewing courts have generally upheld the laws, but the majority opinions tend to leave some doubt about the constitutional questions.²⁵

-
21. Fernandez, *supra* note 20. Denno also notes that “[w]e have seen more changes in lethal injection protocols in the last five years than we have seen in the last three decades.” *Id.*
 22. These nine states are as follows: Arizona, Florida, Georgia, Louisiana, Missouri, Ohio, Oklahoma, South Carolina, and Texas. ARIZ. REV. STAT. ANN. § 13-757 (2009); FLA. STAT. ANN. § 945.10 (West Supp. 2015); GA. CODE ANN. § 42-5-36 (West 2014); LA. REV. STAT. ANN. § 15:570 (Supp. 2015); MO. ANN. STAT. § 546.720 (West 2007); OHIO REV. CODE ANN. §§ 2949.221–.222 (2015); OKLA. STAT. tit. 74, § 85.10 (2014); S.C. CODE ANN. § 24-3-580 (2010). Texas does not have a specific law but will not disclose information about pharmacies as part of the safety exemption to public information laws.
 23. *See, e.g.*, Zink v. Lombardi, No. 14-1388, 2014 U.S. App. LEXIS 3602, at *7 (8th Cir. Feb. 25, 2014) (Bye, J., dissenting) (“Missouri has again, at the eleventh hour, amended its procedure and again is ‘using [a] shadow pharmac[y] hidden behind the hangman’s hood’ and ‘copycat pharmaceuticals’ to execute another death row inmate.”) (internal citations omitted); Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 B.C. L. REV. 1367 (2014) (arguing that secrecy laws violate the due process that is implicit in the Eighth Amendment); Nathaniel A.W. Crider, Note, *What You Don’t Know Will Kill You: A First Amendment Challenge to Lethal Injection Secrecy*, 48 COLUM. J.L. & SOC. PROBS. 1 (2014) (arguing that secrecy laws violate a First Amendment public right of access to government information).
 24. *See, e.g.*, Sells v. Livingston, 750 F.3d 478 (5th Cir. 2014); *In re Lombardi*, 741 F.3d 888 (8th Cir. 2014); Sepulvado v. Jindal, 729 F.3d 413 (5th Cir. 2013); Schad v. Brewer, No. CV-13-2001, 2013 U.S. Dist. LEXIS 145387 (D. Ariz. Oct. 7, 2013); Owens v. Hill, 758 S.E.2d 794 (Ga. 2014); Lockett v. Evans, 380 P.3d 488 (Okla. 2014).
 25. *See, e.g.*, Hill, 758 S.E.2d at 800 (suggesting that Georgia’s secrecy law may be unconstitutional if applied to a case that came closer to meeting

This Comment is divided into three sections. Part I tells the story of Lethal Injection Secrecy Laws and further explains what the laws do. Part II examines a sampling of the constitutional challenges to state secrecy laws. Part III posits that the Supreme Court standards used by lower courts to uphold the laws are incompatible with the constitutional questions raised by the challenges. Part III ultimately concludes that the Supreme Court should intervene, both to slow the haphazard spread of the secrecy laws and to give lower courts (and states) guidance on the unique constitutional issues the laws present.

I. THE STORY BEHIND LETHAL INJECTION SECRECY LAWS

This Part is intended to provide the backstory of Lethal Injection Secrecy Laws while highlighting an analogy to Oklahoma’s process in creating the original protocols over thirty years ago. It also hints at a theory driving the focus of this Comment: when it comes to the death penalty, the states do not function as the “laboratories of democracy” that is the genius of our federal system.²⁶ Instead, states act more like mechanics tasked with keeping the “machinery of death” operational.²⁷

In the face of mounting political pressure, pharmaceutical manufacturers have been refusing to provide states with some of the most common drugs used in lethal injection protocols. For example, in 2009, Hospira, Inc. ceased domestic production of sodium thiopental due to a material supply problem.²⁸ For years, Hospira had been the sole supplier of the anesthetic, the first drug injected in multiple states’ three-drug

the Eighth Amendment standard articulated in *Baze v. Rees*, 553 U.S. 35 (2008)); *Lombardi*, 741 F.3d at 896 (deciding the Eighth Amendment claim based on plaintiffs’ failure to show that the state had available alternative methods of execution, not based on the substance of whether secrecy laws might otherwise be unconstitutional); *Sepulvado*, 729 F.3d at 417 (concluding that petitioner failed to meet the standard for injunction on his due process claim against Louisiana’s secrecy law without addressing the merits of a possible underlying Eighth Amendment claim).

26. This popular phrase is derived from former Supreme Court Justice Louis Brandeis’s dissenting opinion in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).
27. The phrase “machinery of death” comes from a well-known dissent from former Supreme Court Justice Harry Blackmun, in which Blackmun wrote, “From this day forward, I no longer shall tinker with the machinery of death.” *Callins v. Collins*, 510 U.S. 1141, 1145 (Blackmun, J., dissenting) (1994). The phrase also appears in the title of a book that equates capital punishment to a mechanical system. *MACHINERY OF DEATH: THE REALITY OF AMERICA’S DEATH PENALTY REGIME* (David R. Dow & Mark Dow eds., 2002).
28. Denno, *supra* note 19, at 1360.

protocol.²⁹ The company originally planned to continue production at a plant in Italy but faced pressure from increasingly tough export laws in Europe and threat of prosecution from Italian authorities.³⁰ Consequently, Hospira announced that it would no longer produce sodium thiopental.³¹ Although it was not necessarily identified as such at the time, this became a watershed moment for lethal injection protocols; it was the first sign that the thirty-year-old protocols might be failing.³²

As mentioned above, the European Union has implemented measures that regulate the export of drugs commonly associated with lethal injections, such as sodium thiopental and pentobarbital.³³ These

-
29. *See* *Beaty v. FDA*, 853 F. Supp. 2d 30, 34 (D.D.C. 2012) (explaining why some states began to search for overseas suppliers of thiopental). The incredible extent of those states’ desperation to find a new supplier of thiopental is illustrated by the fact that the FDA came down on the states for trying to import the anesthetic, “misbranded” and “unapproved,” from a company, Dream Pharma, that ran its business in the back of a driving school in London. *See id.* at 34; *see also* Bill Rankin, *Georgia’s High Court to Take Look at Lethal-Injection Secrecy Law*, ATLANTA J. CONSTITUTION (Feb. 14, 2014), <http://www.ajc.com/news/news/state-regional-govt-politics/georgias-high-court-to-take-look-at-lethal-injecti/ndPSr/> (explaining that “[i]n 2011, Drug Enforcement Administration officials seized Georgia’s supply of sodium thiopental after lawyers for a condemned inmate accused the state of improperly importing the drug from England”).
30. *See* Denno, *supra* note 19, at 1360–61 (noting that the Italian authorities were primarily concerned with “prevent[ing] the drug from ‘being diverted to departments of corrections for use in capital punishment procedures’”).
31. Press Release, Hospira, Inc., Hospira Statement Regarding Pentothal™ (Sodium Thiopental) Market Exit (Jan. 21, 2011), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=175550&p=irol-newsArticle_print&ID=1518610. (“Hospira announced today it will exit the sodium thiopental market and no longer attempt to resume production of its product, Pentothal™. Hospira had intended to produce Pentothal at its Italian plant. In the last month, we’ve had ongoing dialogue with the Italian authorities concerning the use of Pentothal in capital punishment procedures in the United States—a use Hospira has never condoned.”).
32. *See* Denno, *supra* note 19, at 1361 (explaining that “[t]he shortage of sodium thiopental led prison officials to seek out questionable alternative sources of the drug throughout the world” and that “[s]uch practices raised concerns that prisoners may be injected with drugs that are impure, expired, unsafe, or ineffective”).
33. *See* Press Release, European Comm’n, Comm’n Extends Control over Goods Which Could Be Used for Capital Punishment or Torture (Dec. 20, 2011), *available at* http://europa.eu/rapid/press-release_IP-11-1578_en.pdf (“[T]rade of certain anaesthetics, such as sodium thiopental, which can be used in lethal injections, to countries that have not yet abolished the death penalty, will be tightly controlled.”); Kitamura & Narayan, *supra* note 20 (“[T]he European Commission amended its o-

regulations are important to the story because some of the major producers of those drugs are based in Europe. Perhaps the most important of these producers is a Danish pharmaceutical company, Lundbeck, Inc. Lundbeck has been a particularly critical cog in the states’ “machinery of death” because it is the only producer of injectable pentobarbital in the world.³⁴ Pentobarbital is the most common drug in state lethal injection protocols; “[f]ourteen states have used pentobarbital in executions”; five states have added pentobarbital to their protocols; and one state, Colorado, lists pentobarbital as a backup anesthetic.³⁵ In January 2011, Lundbeck announced that it would no longer sell pentobarbital to states for use in executions and that it would forbid buyers from reselling it to states that would use it for lethal injection.³⁶

States subsequently scrambled to keep scheduled executions going. Ohio switched to a two-drug cocktail of midazolam (a sedative and anti-seizure drug) and hydromorphone (a painkiller derived from morphine) in time to execute Dennis McGuire in January 2014.³⁷ Despite receiving a warning from at least one prominent anesthesiologist that the drugs would produce gasping for air and “a terrible, arduous,

called Torture Goods Regulation . . . to impose export controls on pentobarbital as well as sodium thiopental.”).

34. *Lundbeck, the Sole Producer of Lethal Injection Drug, Announces It Is Blocking Supply to U.S. Execution Chambers*, DEATH PENALTY NEWS (July 1, 2011), <http://deathpenaltynews.blogspot.com/2011/07/lundbeck-sole-producer-of-lethal.html>.
35. *State by State Lethal Injection*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/state-lethal-injection> (last visited Mar. 1, 2015).
36. Press Release, H. Lundbeck A/S, Lundbeck Overhauls Pentobarbital Distribution Program to Restrict Misuse (Jan. 7, 2011), *available at* <http://investor.lundbeck.com/releasedetail.cfm?ReleaseID=605775>. The American Pharmacists Association, following in the footsteps of the European Union and the ethical codes that doctors must agree to follow, recently issued a declaration that says that pharmacists should refuse to produce drugs for use in lethal injection cocktails. The declaration states as follows: “The American Pharmacists Association discourages pharmacist participation in executions on the basis that such activities are contrary to the role of pharmacists as providers of health care.” M. Spinnler, *APhA House of Delegates Adopts Policy Discouraging Pharmacist Participation in Execution* (Mar. 30, 2015), *available at* <http://www.pharmacist.com/apha-house-delegates-adopts-policy-discouraging-pharmacist-participation-execution>.
37. See Ed Pilkington, *Ohio Executes Inmate Using Untried, Untested Lethal Injection Method*, THE GUARDIAN, Jan. 16, 2014, <http://www.theguardian.com/world/2014/jan/16/ohio-executes-inmate-untried-untested-lethal-injection-method> (explaining that “Ohio’s recourse to the midazolam-hydromorphone combination was forced by a shortage of pentobarbital”).

tormenting execution,” Ohio proceeded with McGuire’s execution.³⁸ The execution lasted about twenty-five minutes, and McGuire “struggled, gasped, and choked for several minutes” before his death.³⁹ The botched execution prompted Ohio to announce that it would no longer use the two-drug mixture and (per court order) would suspend pending executions until it could develop protocols using pentobarbital or sodium thiopental.⁴⁰ As a result, Ohio went back to the drawing board, unwilling to risk another botched execution but unable to obtain the anesthetics necessary for a single-drug protocol.

Like Ohio, Oklahoma experimented with a new combination of drugs in response to the shortages. On April 29, 2014, Oklahoma injected Clayton Lockett with three drugs: midazolam, vecuronium bromide (a muscle relaxant), and potassium chloride (an anticonvulsant and sedative).⁴¹ This particular combination of drugs was administered in dosages that had never been used before in the United States.⁴² The experiment proved disastrous, as Lockett’s execution took forty-three minutes and caused Lockett to writhe and grunt; Lockett even sat up and said, “Man . . . something’s wrong.”⁴³ A lawyer for another death row inmate equated Lockett’s execution to being “tortured to death.”⁴⁴ The event led a number of states to suspend executions, and President Obama subsequently called for a federal review of lethal injection protocols.⁴⁵

-
38. Ben Crair, *Exclusive Emails Show Ohio’s Doubts About Lethal Injection*, NEW REPUBLIC, Aug. 17, 2014, <http://www.newrepublic.com/article/119068/exclusive-emails-reveal-states-worries-about-problematic-execution> (revealing that the state received advanced warning from Dr. Mark Heath, an anesthesiologist at Columbia University).
 39. Mark Berman, *The Recent History of States Scrambling to Keep Using Lethal Injections*, WASH. POST, Feb. 19, 2014, <http://www.washingtonpost.com/news/post-nation/wp/2014/02/19/the-recent-history-of-states-scrambling-to-keep-using-lethal-injections/>.
 40. See Berman, *supra* note 20.
 41. Katie Fretland, *Oklahoma Execution: Clayton Lockett Writhes on Gurney in Botched Procedure*, THE GUARDIAN, Apr. 30, 2014, <http://www.theguardian.com/world/2014/apr/30/oklahoma-execution-botched-clayton-lockett>.
 42. See *id.* (noting that in employing a similar method, Florida has used five times the amount of midazolam).
 43. See Josh Levs et al., *Oklahoma’s Botched Lethal Injection Marks New Front in Battle Over Executions*, CNN, <http://www.cnn.com/2014/04/30/us/oklahoma-botched-execution/> (last updated Sept. 8, 2014, 7:16 AM).
 44. Fretland, *supra* note 41.
 45. *US President Obama Calls for Death Penalty Review*, BBC NEWS, May 2, 2014, <http://www.bbc.com/news/world-us-canada-27265443>. The disastrous Lockett execution also led to criticism about the drug Midazolam, the subject of a lawsuit and stay of execution order granted by the Supreme Court in *Glossip v. Gross*, 135 S. Ct. 1197 (2015).

Critics and commentators have attributed these and other recent failures in lethal injection protocols to the haste with which the protocols were developed. Many have described the states’ collective approach as experimentation.⁴⁶ This experimentation with various combinations of drugs have yielded poor results, with prisoners either experiencing pain or, at the very least, manifesting the appearance of pain by making sounds or gestures. As a result of these failures, states have largely retreated to the drugs that they know will (1) work and (2) bring less attention to their procedures. The tried-and-true execution drugs are the anesthetics, mostly pentobarbital and sodium thiopental.⁴⁷ With the largest suppliers of anesthetics withholding their stock, states have struggled to find a sustainable supply.

To solve this problem, states have turned to compounding pharmacies to make the drugs.⁴⁸ This is unusual because compounding pharmacies normally operate in a niche market within the giant world of mass-produced pharmaceuticals. Generally speaking, compounding pharmacies do not *produce* drugs at all. Instead, they exist to alter drugs to fit the needs of particular patients.⁴⁹ For example, if a patient is unable to take medicine that is mass-produced as a gelatin tablet, be it because the patient cannot take drugs orally or because the patient is allergic to a nonessential ingredient in the mass-produced version, a compounding pharmacy will combine the basic ingredients of the drug into a form that the patient can take without problem.⁵⁰ Compounding pharmacies can thus produce the anesthetics that the states need for lethal injections by purchasing the raw chemical ingredients and combining them in state-regulated laboratories.

Compounding pharmacies seem like a simple solution to the states’ drug problems. The issue, however, is a bit more complicated. First, because compounding pharmacies are not federally regulated, there is a significant amount of concern about the sterility of the drugs that

46. See, e.g., Victor Li, *Nationwide Lethal-Injection Drug Shortage Forces States to Experiment with Executions*, ABA JOURNAL, May 1, 2014, http://www.abajournal.com/mobile/article/nationwide_lethal_injection_drug_shortage_forces_states_to_experiment_with_.

47. See HUMAN RIGHTS WATCH, *supra* note 10, at 21–28 (arguing that the three-drug protocol subjects prisoners to unnecessary pain and that the best choice among poor choices is for states to stick to using lethal doses of anesthetics without additional drugs).

48. See Fernandez, *supra* note 20 (noting that the states are responsible for overseeing and regulating compound pharmacies, not the FDA).

49. See *Compounding and the FDA: Questions and Answers*, FDA, <http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/PharmacyCompounding/ucm339764.htm> (last updated Dec. 16, 2014).

50. *Id.*

they compound.⁵¹ Second, compounding pharmacies object to the negative publicity associated with producing drugs that will be used to kill people—even people adjudged guilty of heinous crimes.⁵² Perhaps in order to induce compounding pharmacies to supply them with sodium thiopental or pentobarbital—or perhaps in order to protect their protocols from further criticism—states are becoming ever more discreet.

Historically, states have sought to protect the identities of executioners, both for the sake of the executioners’ safety and psychological wellbeing.⁵³ But with Lethal Injection Secrecy Laws, states have recently turned that narrow interest into something else entirely. Lethal Injection Secrecy Laws prohibit anyone from disclosing the identities of any person or business involved in the process of manufacturing, distributing, or administering lethal injection drugs. Often this blackout is enforceable by threat of civil action.⁵⁴

-
51. See Denno, *supra* note 19, at 1336–37 (noting a “disturbing trend” of compounding pharmacies selling large-scale batches of medicine without having to meet federal regulation standards, and, in essence, “act[ing] like large-scale pharmaceutical companies while hiding behind small-scale pharmacy licenses”). Professor Denno also cites a CDC report documenting an outbreak of fungal meningitis in Massachusetts that killed sixty-four people, which traced the outbreak back to a compounding pharmacy. *Id.* at 1337 (citing *Multistate Outbreak of Fungal Meningitis and Other Infections—Case Count*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Oct. 23, 2013), <http://www.cdc.gov/hai/outbreaks/meningitis-map-large.html>).
52. See Tracy Connor, *Missouri: We Found Another Pharmacy to Supply Execution Drugs*, NBC NEWS (Feb. 19, 2014), <http://www.nbcnews.com/storyline/lethal-injection/missouri-we-found-another-pharmacy-supply-execution-drugs-n34226> (noting that some compounding pharmacies refused to sell anesthetics to Missouri because of concerns about the “negative publicity and legal hassles”).
53. See Ellyde Roko, *Executioner Identities: Toward Recognizing a Right to Know Who Is Hiding Beneath the Hood*, 75 *FORDHAM L. REV.* 2791, 2796 (“Although the method of execution has changed in the United States since the inception of capital punishment, each method has required an executioner. Generally, the stigma associated with the job of the executioner has made the position undesirable. Therefore, throughout history, the executioner has been hooded—both literally and figuratively.”).
54. Sub. H.B. 663 § 2949.221(F), 130th Gen. Assemb., Reg. Sess. (Oh. 2014) (“Any person, employee, former employee, or individual whose identity and participation in a specified activity is disclosed in violation of this division has a civil cause of action against any person who discloses the identity and participation in the activity in violation of this division. In a civil action brought under this division, the plaintiff is entitled to recover from the defendant actual damages, punitive or exemplary damages upon a showing of a willful violation of this division, and reasonable attorney’s fees and court costs.”).

Ohio’s secrecy law is illustrative of the secrecy laws in other states.⁵⁵ It can be broken down into three major parts.⁵⁶ The first part prohibits disclosure of identifying information of all parties who participate in the process of manufacturing, distributing, and administering lethal injection drugs.⁵⁷ The law justifies this policy on its face: confidentiality is imperative for the protection of all involved parties.⁵⁸ The second part creates a civil cause of action against anyone who violates this prohibition.⁵⁹ Lastly, part three forbids licensing boards from taking disciplinary action against physicians who oversee the lethal injection process.⁶⁰

Laws and policies that protect against the disclosure of certain information regarding the particulars of executions are relatively common.⁶¹ But Lethal Injection Secrecy Laws are worth closer analysis for two reasons. First, the scope of secrecy laws is much greater than necessary to serve the interest of protecting those directly involved in the execution process; secrecy laws make the entire lethal injection operation covert, a fact that raises constitutional questions that are the subject of Part II below. Second, Lethal Injection Secrecy Laws did not develop and evolve slowly over time, moving from state to state as the “laboratories of democracy” figured out how to solve a social problem.⁶² Instead, most of the secrecy laws came out in a short window.⁶³ This sort of desperation to keep the wheels of death row rolling is reminiscent of the way the original three-drug protocol was first instituted in Oklahoma. The three-drug protocol spread like wildfire into other states, which did little more than copy and paste Oklahoma’s protocols

-
55. *Cf. id.* § 2949.221 (Ohio’s secrecy law); S.B. 36, 88th Leg. Assemb., Reg. Sess. (S.D. 2013) (South Dakota’s secrecy law); S.B 154, 108th Gen. Assemb., Reg. Sess. (Tenn. 2013) (Tennessee’s secrecy law).
56. For an easy-to-read breakdown of H.B. 663, including the state interests that the law purports to further, see Dennis M. Papp, *Bill Analysis: Am. H.B. 663, Ohio Legislative Serv. Comm’n, available at* <http://www.lsc.ohio.gov/analyses130/h0663-ph-130.pdf> (last visited Mar. 16, 2015).
57. Sub. H.B. 663 § 2949.221(B), 130th Gen. Assemb., Reg. Sess. (Oh. 2014).
58. *See id.* § 2949.221.
59. *Id.* § 2949.221(F).
60. *Id.* § 2949.221(E).
61. *See* JOHN D. BESSLER, DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA 151 (1997) (noting states with laws that explicitly protect executioners’ identities).
62. *See* Berger, *supra* note 23, at 1380–81 (noting that states have been willing to “take[] increasingly creative and legally dubious steps to procure drugs” ever since 2010, when Hospira first decided to stop selling to states).
63. *See supra* note 21 and accompanying text.

into their books.⁶⁴ In contrast to those original protocols, however, secrecy laws make it almost impossible for the public to stay informed about lethal injection procedures.

The following Part discusses the primary constitutional concern with secrecy laws. Specifically, Part II analyzes two approaches that lower federal courts have used to uphold secrecy laws in the face of constitutional challenges under the Eighth Amendment and the Due Process Clause.

II. THE CONSTITUTIONAL CONCERNS WITH LETHAL INJECTION SECRECY LAWS

This Part describes the main constitutional problem with Lethal Injection Secrecy Laws: the laws violate a combination of the Due Process Clause of the Fourteenth Amendment and the prohibition on cruel and unusual punishment explicit in the Eighth Amendment. Secrecy laws generally preclude challengers from receiving any discovery from the state about the process of creating the drugs to be used in the forthcoming execution, including the credentials of all the people involved in this process.⁶⁵ Thus, the central constitutional question amounts to this: how can a challenger show that his or her execution is likely to violate the Eighth Amendment without the ability to be informed of the credentials of those involved in the process of making and administering the drugs?⁶⁶

Courts and commentators have expressed diverging opinions about the interests of the states that the laws purport to protect.⁶⁷ What has

64. Fordham Amicus Brief, *supra* note 2, at 34.

65. *See, e.g.*, Sub. H.B. 663 § 2949.221(B)(1)–(2), 130th Gen. Assemb. Reg. Sess. (Ohio 2014) (prohibiting disclosure “by any person, state agency, governmental entity, board, or commission or any political subdivision as a public record” or “by or during any judicial proceeding”).

66. *See, e.g., In re Lombardi*, 741 F.3d 888, 895 (8th Cir. 2014) (inquiring whether the means of carrying out capital punishment violate the Eighth Amendment); *Sepulvado v. Jindal*, 729 F.3d 413, 416–17 (5th Cir. 2013) (observing, but not ruling on, *Sepulvado*’s Eighth Amendment claims); *Owens v. Hill*, 758 S.E. 2d 794, 800 (Ga. 2014) (contemplating the potential existence of “a case in which the information shielded by the statute were the only essential missing link for the plaintiff in his or her proof of an Eighth Amendment claim”).

67. *Compare Owens v. Hill*, 758 S.E.2d 794, 805–06 (Ga. 2014) (identifying one particular state interest as the need to protect pharmaceutical companies and execution-procedure participants from harassment in order to ensure that people remain willing to participate in the procedures), *with* Editorial, *Openness in Executions*, 38 *The News Media and the Law* vol. 2 (2014) (noting generally the “public’s right to know . . . what’s being done in its name” in regards to lethal injection), *available at*

not been questioned, however, is arguably the most fundamental part of any constitutional analysis: the standard to be applied. Lower courts have uniformly relied on a substantive standard from the 2008 Supreme Court case *Baze v. Rees*⁶⁸ to uphold secrecy laws in the face of petitioners’ Eighth Amendment and due process claims.⁶⁹ The *Baze* standard makes it so that a petitioner must show that the execution procedure to which he will be subjected poses “a substantial risk of serious harm.”⁷⁰ Many courts apply an even more strenuous version of this standard, requiring petitioners to show the existence of “known and available alternatives” to the proffered method of execution in addition to the risk of serious harm.⁷¹ Regardless of whether a lower court applies the more strenuous test, petitioners cannot rely on speculation about the effect of protocols when they frame their challenges.

Petitioners’ inability to rely on speculation is the keystone of most of the lower courts’ responses to the Eighth Amendment and due process arguments against secrecy laws.⁷² Because the secrecy laws prevent the petitioners from getting the information that they would need to make out a less-searching Eighth Amendment claim, the *Baze* standard basically functions as a total bar. And without their substantive, underlying Eighth Amendment claim, petitioners have nothing on which to base their due process claims.

The following subsections will provide two examples of how courts have used *Baze* to uphold state secrecy laws. Part II.A describes the case *In re Lombardi*,⁷³ involving a discovery order issued by a district court mandating that the state reveal the identity of a compounding

<http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-spring-2014/openness-executions>.

68. 553 U.S. 35 (2008).
69. See, e.g., *Hill*, 758 S.E. 2d at 803 (finding that the death row inmate’s “factual assertions fall far short of satisfying the [*Baze*] legal standard”); *Sepulvado*, 729 F.3d at 417 (finding that Louisiana’s one-drug protocol was a legal means of execution under the *Baze* standard).
70. *Id.* at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)).
71. See, e.g., *In re Lombardi*, 741 F.3d 888, 899–900 (8th Cir. 2014) (Bye, J., dissenting) (noting a disagreement regarding the scope of the *Baze* standard, specifically the available-alternatives prong).
72. See, e.g., *id.* (issuing writ of mandamus preventing discovery of information covered by Missouri’s secrecy law on account of the inmate’s failed Eighth Amendment claim); *Hill*, 758 S.E.2d 794 at 803 (finding that speculative factual assertions regarding possible threats failed to support an injunction) (Ga. 2014); *Wellons v. Commissioner, Ga. Dept. of Corrections*, 754 F.3d 1260 (11th Cir. 2014) (affirming district court on the grounds that the inmate failed meet Eighth Amendment standard and so had no substantive grounds on which to base his due process claim).
73. 741 F.3d 888 (8th Cir. 2014).

pharmacy, and a subsequent successful petition to the Eighth Circuit for a writ of mandamus to prevent that order from going through. The Eighth Circuit held that the substantive Eighth Amendment claim underlying the discovery order could not meet the *Baze* standard and so could not be used to justify the discovery order.⁷⁴ Part II.B looks at a case out of the Supreme Court of Georgia, *Owens v. Hill*.⁷⁵ In *Hill*, the court took a notably different path to reach the same conclusion as the Eighth Circuit.

A. *In re Lombardi*

In *In re Lombardi*, an en banc panel of the Eighth Circuit Court of Appeals issued a writ of mandamus in favor of petitioner George Lombardi, Director of Missouri Department of Corrections.⁷⁶ Lombardi requested the writ after a lower federal court entered a discovery order that would have forced Lombardi to reveal to the plaintiffs, a group of death row inmates, the identities of (1) the physician who prescribed the lethal injection drug (pentobarbital) to be used in the prisoners’ executions; (2) the pharmacist in charge of compounding the pentobarbital; and (3) the name of “the laboratory that tests the chemical for potency, purity, and sterility.”⁷⁷ The writ of mandamus negated that discovery order.

The plaintiffs had asserted that Missouri’s use of compounded pentobarbital was likely to produce “severe pain” in violation of the Eighth Amendment.⁷⁸ In contrast, Lombardi argued that Missouri law provided the state with an evidentiary privilege that protected the identities of the physician, the pharmacist, and the laboratory.⁷⁹ In support, he contended that each of these entities was a member of the state’s “execution team” and therefore was covered under the privilege statute.⁸⁰ According to the Director, Missouri had an interest in protecting their identities because compounding pharmacies might refuse to provide the state its supply of pentobarbital if the sale came at the risk of public disclosure of the pharmacy’s name.⁸¹ Stated another

74. *Id.* at 896.

75. 758 S.E.2d 794 (Ga. 2014).

76. *Id.* at 889–90.

77. *Id.* at 893.

78. *Id.* at 895.

79. *Id.* at 894.

80. The term “execution team” was the state Department of Corrections’ designation of the group consisting of the physician who prescribed the drug, the pharmacist who compounded the drug, and the laboratory who tested the drug. *Id.*

81. *See id.* (“[D]isclosure [of the name of the compounding pharmacy], [the Director of the Missouri Department of Corrections] contends, would

way, the state’s interest in protecting the identity of the compounding pharmacy was to keep the “machinery of death” up and running.

The court found that the plaintiffs failed to show that Missouri’s use of a compounding pharmacy was likely to create a substantial risk of severe pain “when compared to the known and available alternatives.”⁸² In other words, the plaintiffs lost on their Eighth Amendment claim because they did not show that death by lethal injection of compounded pentobarbital would be less humane than death by “lethal gas, electrocution, or firing squad.”⁸³ And without the Eighth Amendment claim, the plaintiffs lacked an underlying basis for their due process claim. In effect, the court held that the plaintiffs should have lost on the merits of their substantive Eighth Amendment claim and so they were not entitled to a discovery order that infringed on important state interests; forcing the state to reveal that information could undercut the state’s ability to carry out their executions.

The Eighth Circuit’s application of *Baze* is worth discussion for two reasons. First, the court’s interpretation of *Baze* is questionable; other circuits have held that plaintiffs cannot be forced to show “known and available” alternative methods of execution.⁸⁴ Second (and more important), the court’s analysis is ignorant of its own circularity; how can a plaintiff possibly show that Missouri’s protocol “creates a substantial risk of severe pain” when the state withholds the information needed to make that claim? If states are free to keep this information a secret, then the Eighth Amendment is reduced to an after-the-fact method for the families of the executed person to recover; it does nothing to keep individuals free from “cruel and unusual punishments” at the hands of the states.

B. Owens v. Hill

Another prime example of the impossible circularity that the *Baze* standard creates for challengers is evident in *Owens v. Hill*. Unlike *In re Lombardi*, *Hill* involved a direct constitutional challenge to Georgia’s lethal injection secrecy law.⁸⁵ And unlike the evidentiary privilege

trigger collateral consequences that would prevent the Director from obtaining the lethal chemicals necessary to carry out the capital punishment laws of the State. He cites, as an example, a letter dated October 2013 from a compounding pharmacy in Texas that demanded the Texas Department of Criminal Justice return a supply of compounded pentobarbital sold for use in executions, because of a firestorm, including constant inquiries from the press.”) (internal quotations omitted).

82. *Id.* at 895–96.

83. *Id.* at 895.

84. *See e.g., id.* at 899–900 (Bye, J., dissenting) (noting the diverging approaches taken in other circuits).

85. 758 S.E.2d 794, 796 (Ga. 2014).

asserted in *Lombardi*,⁸⁶ Georgia’s secrecy law provides explicit protection for the names of the people and entities that take part in the state’s execution procedures, including the manufacturers of the lethal drugs.⁸⁷ In other words, *Hill* centered on a direct constitutional challenge to a clear law, without any of the procedural peculiarities present in *Lombardi*.

In *Hill*, plaintiff Clarence Hill argued that Georgia’s secrecy law violated the Due Process Clause of the Fourteenth Amendment and the prohibition on “cruel and unusual punishments” in the Eighth Amendment by depriving him of the information needed to show that Georgia’s use of compounded lethal injection drugs gave rise to a substantial risk of severe pain.⁸⁸ Hill won in the local superior court, which enjoined the state Department of Corrections from using its supply of compounded drugs to execute him.⁸⁹ The local superior court was reversed on appeal. The Georgia Supreme Court held that Hill had “failed to show that obtaining the requested information would allow him to make a colorable [Eighth Amendment] claim [under *Baze v. Reese*].”⁹⁰ The court reasoned that Hill’s concern about the potential lack of sterility of compounded drugs, as compared with those manufactured by an FDA-regulated producer, was meaningless in the context of his sentence.⁹¹ The court even mocked Hill’s expert witness on this point: “Particularly unpersuasive is Hill’s expert’s testimony that certain contaminants also could have the following effect: ‘Their blood pressure would drop precipitously, and ultimately it’s possible that they could die.’”⁹² The court went on to surmise that “[s]uch a side effect obviously would be shockingly undesirable in the practice of medicine, but it is certainly not a worry in an execution.”⁹³

The court spent little time on Hill’s arguments that the potency of the anesthetic might be too weak or that improper pH levels could cause

86. See *supra* notes 79–80 and accompanying text.

87. See GA. CODE ANN. § 42-5-36(d)(2) (2014) (providing that “identifying information of any person or entity” participating in activities surrounding execution procedures “shall not be subject to disclosure” and “shall be classified as a confidential state secret”).

88. See *Hill*, 758 S.E.2d at 801 (noting Hill’s argument “that he was denied identifying information about the manufacturer of his execution drug that might have allowed additional clarity to the claim”).

89. See *id.* at 797 (noting that “[t]he Superior Court granted injunctive relief, which it described in various ways including as a stay of execution”).

90. *Id.* at 804.

91. See *id.* at 802 (holding that Hill’s claims alleged “symptoms that are irrelevant to a person being executed”).

92. *Id.*

93. *Id.*

severe pain. According to the court, “Hill’s expert gave no clear indication regarding the level of risk involved, and each of these possible complications appears to be unlikely to occur.”⁹⁴ Because Hill’s claim was reduced to speculation about these potential problems, the court concluded that it did not meet the *Baze* standard for the Eighth Amendment.⁹⁵ Because the claim failed under *Baze*, Hill was “not entitled to access to the courts.”⁹⁶ The dissent in *Hill* points out the irony that the majority seems to miss:

The majority reasons that Hill has not shown the statute to be unconstitutional under the present circumstances because his claims regarding the specific drug that the State will use to execute him are merely speculative. Admittedly, speculative claims regarding deficiencies in an execution drug are insufficient to sustain a claim of cruel and unusual punishment. . . . However, the speculation permeating Hill’s claims arises solely from the State’s unwillingness, in light of the secrecy statute, to disclose information that would allow him to make more specific claims.⁹⁷

Unfortunately, the dissenting justices were unwilling to take their analysis further and identify the culprit for this confusing circularity: the *Baze* standard.

The next Part follows through with the argument that the *Baze* standard is an inappropriate vehicle to use for analyzing the due process and Eighth Amendment challenges to secrecy laws. This is the case because *Baze* was not meant to tackle the due process element inherent in these challenges. Part III also sums up the argument that the states are not acting like “laboratories of democracy” when it comes to lethal injection protocols. For those reasons, this final Part concludes that the Supreme Court should intervene in order to (1) slow the train of botched executions that states have had in the last two years as they adopt new protocols and (2) provide lower courts with more appropriate standards for the challenges to secrecy laws.

94. *Id.*

95. *See id.* at 804 (finding that “Hill’s factual assertions fall far short of satisfying the legal standard applied under the Eighth Amendment, which involves a showing of a ‘substantial risk of serious harm’ that is ‘sure or very likely to cause serious illness and needless suffering’”) (quoting *Baze v. Rees*, 553 U.S. 35, 49–50 (2008)).

96. *Id.* at 804 (quoting *Whitaker v. Livingston*, 732 F.3d 465, 467 (5th Cir. 2013)).

97. *Id.* at 807 (Benham, J., dissenting).

III. A BRIEF ARGUMENT FOR SUPREME COURT INTERVENTION

On January 15, 2015, the Supreme Court denied Charles Warner’s petition for a stay of execution.⁹⁸ In a dissent from the denial, Justice Sotomayor, joined by three other justices, reasoned that the Supreme Court should have granted the stay because of the convincing and ever-growing body of science suggesting that midazolam is not effective as an anesthetic and thus should never be used as the first drug in a multiple-drug lethal injection cocktail.⁹⁹ Midazolam certainly has been a problem-child drug for the states, but there is an underlying issue that Justice Sotomayor’s dissent largely ignores. Justice Sotomayor does, however, hint at this issue at the end of her dissent when she points to the “[s]tates’ increasing reliance on new and scientifically untested methods of execution.”¹⁰⁰

Ordinarily, when the Supreme Court denies a petition for a stay (or denies certiorari) on a novel question of law, it can rely on a laboratories-of-democracy argument.¹⁰¹ Even when a petition raises an important question of constitutional interpretation, the Supreme Court can always let it play out in the states before it decides on the best solution. It is my contention in this Comment that this is not an appropriate issue on which to take such a laissez-faire approach. This is true for two reasons.

First, the states are not acting as laboratories of democracy when it comes to developing execution protocols. “Democracy” implies democratic involvement, and in the case of execution protocols, there is little, if any, democratic involvement. This is true, in part, because states tend to leave discretion in the hands of state departments of

98. See *Warner v. Gross*, 134 S. Ct. 824, 827–28 (2015) (Sotomayor, J., dissenting). Consequently, Warner was subsequently executed, and witnesses to the execution claimed that Warner said “[m]y body is on fire” as the lethal drugs entered his system. Dana Ford, *Oklahoma Executes Charles Warner*, CNN (Jan. 16, 2015), <http://www.cnn.com/2015/01/15/us/oklahoma-execution-charles-frederick-warner/>.

99. See *Warner*, 134 S. Ct. at 827 (Sotomayor, J., dissenting) (finding “evidence suggesting that midazolam cannot constitutionally be used as the first drug in a three-drug lethal injection protocol”). The Supreme Court has, since Charles Warner’s botched execution, granted certiorari on this very issue and issued a stay of execution for those Oklahoma death row prisoners who were scheduled to be executed by a cocktail containing Midazolam. *Glossip v. Gross*, 135 S. Ct. 1197 (2015).

100. *Id.* at 828.

101. See *Lackey v. Texas*, 514 U.S. 1045, 1047 (1995) (Stevens, J., respecting denial of certiorari) (“Often, a denial of certiorari on a novel issue will permit the state and federal courts to ‘serve as laboratories in which the issue receives further study before it is addressed by this Court.’” (quoting *McCray v. New York*, 461 U.S. 961, 963 (1983))).

correction. The state departments of correction then have a singular focus: continuing to execute prisoners. They do so however they can, many times just quickly copying the procedures of any state that succeeds in pulling one off.¹⁰² For example, states like Ohio, Georgia, and Oklahoma are turning to hasty experiments that are resulting in painful deaths.¹⁰³ The spread of death penalty secrecy has proven to be much like the spread of the original three-drug protocols out of Oklahoma. The states are making an end-run around a problem (lack of drugs) by avoiding confrontation and turning to solutions (compounding pharmacies or new drugs) that are relatively unknown. If history is an accurate indication of what the future holds, states will likely stick with this formula for years to come—unless the Supreme Court intervenes.

Second, the lower courts have been left to wrestle with how to apply Supreme Court standards that simply do not fit the constitutional questions raised by secrecy laws. The *Baze* standard for the Eighth Amendment simply is not tailored to handle challenges to laws that conceal information. The “substantial risk of serious harm” standard only allows courts to look one step down the road. It answers the question of how courts should respond to claims based on what *might happen during an execution*. It does not answer the question raised by Eighth Amendment challenges to secrecy laws, which is how courts should respond to claims based on prisoners *not knowing—and not being able to find out—what might happen during an execution*. In other words, it does not properly address a *due process* claim that is based on an underlying Eighth Amendment claim.

Lower courts seem to recognize the circularity of the due process and Eighth Amendment problems, but most have sidestepped the issue by holding that the Eighth Amendment claim underlying the due process claim is not strong enough to trigger due process rights.¹⁰⁴ Courts dismiss the Eighth Amendment arguments as speculative, but it is the secrecy laws that cause the speculation.¹⁰⁵ The conundrum, at its essence, is that the *Baze* standard does not address the due process element at all, making it an ill fit for challenges to secrecy laws.

For the reasons outlined and briefly discussed in this Comment, the Supreme Court needs to intervene and give lower courts guidance on the constitutional issues relevant to Death Penalty Secrecy Laws. It is time that the lower courts stop trying to apply tests that do not fit the issues. Secrecy laws are new, but like the original lethal injection

102. *See supra* note 18.

103. *See supra* text accompanying notes 37–45.

104. *See supra* notes 66–69 and accompanying text. Other courts have sidestepped the Eighth Amendment issue by holding that the due process claim is not strong enough to stand alone. *See supra* note 24 and accompanying text.

105. *See supra* text accompanying note 97.

protocols developed over thirty years ago, they are spreading quickly. And given the states’ demonstrated unwillingness to scientifically test those original protocols, or alter the protocols in response to botched executions, it is probable that the secrecy laws will remain in place until another “broken electric chair” spurs change. Given the fundamental nature of the constitutional questions that these challenges to secrecy laws raise, the Supreme Court should speak up sooner rather than later.

Harrison Blythe[†]

† J.D. 2015, Case Western Reserve University School of Law. I would like to thank Professor Michael Benza for continually updating me on this ever-evolving area of the law. I would also like to thank the team of attorneys and support staff at the Federal Defenders Office in Cleveland, Ohio, for giving me the experience of seeing firsthand the cruelty and injustice inherent to a system of state-sponsored killing. And finally, I would like to say thank you and I love you to my family: Mom, Dad, Liz, Melissa, Nino, and the boys.