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## THE EXECUTIONERS' DILEMMAS

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## THE EXECUTIONERS' DILEMMAS

*Eric Berger* \*

## INTRODUCTION

When people learn that I study lethal injection, they are usually curious to know more (or at least they are polite enough to ask questions). Interestingly, the question that arises most often—from lawyers, law students, and laypeople—is why states behave as they do. In the wake of botched executions and ample evidence of lethal injection's dangers, why do states fail to address their execution procedures' systemic risks? Similarly, why do states so vigorously resist requests to disclose their execution procedures' details?

This symposium essay takes a stab at answering these questions. In the interest of full disclosure, I should admit that I first came to these cases as a litigator challenging the constitutionality of the procedures in question.<sup>1</sup> During these cases, I became convinced—and remain convinced—that some states (perhaps many) do not devote sufficient care to their lethal injection procedures and that consequently those procedures can create a substantial risk of serious pain in violation of the Eighth Amendment's prohibition on cruel and unusual punishment.<sup>2</sup> Though many states' procedures have changed in important ways in the past few

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1. While in private practice, I worked on Michael Taylor's lethal injection challenge in the Western District of Missouri and the United States Court of Appeals for the Eighth Circuit, and Clarence Hill's case in the Supreme Court of the United States. See Brief for Petitioner, *Hill v. McDonough*, 547 U.S. 573 (2006) (No. 05-8794), 2006 WL 558284; Taylor v. Crawford (No. 05-4173-CV-C-FJG), 2006 WL 1779035 (W.D. Mo. June 26, 2006).

2. U.S. CONST. amend. VIII.

years, the recent record of mistakes and botched executions supports this conclusion.<sup>3</sup>

Scholarship in this area aptly documents lethal injection's risks, so I will only briefly summarize those dangers here.<sup>4</sup> Instead, this essay ponders why states insist on carrying on as they always have when the problems seem so egregious. I admit that my contribution here is speculative; it is impossible to know for certain what drives state officials' behavior. (Even if we were to ask state officials, it is doubtful they would all give a fully candid answer. Some of them might not even know themselves.) I also fully concede that motivations differ from state to state, and even from official to official. Politicians, correctional officials, and execution team members all likely have different motives for their behavior.<sup>5</sup> States may also keep their procedures secret for one reason and refuse to revise them for other reasons. Finally, I acknowledge that some states are more careful than others, and that while there are surely bad actors, there are also responsible officials who work hard to create safe and painless execution methods.

That all said, some states do not design careful execution procedures, and to the extent such states often vigorously deny that anything is wrong and fight to keep their procedure details a secret, this article seeks to explore the many reasons behind such behavior. Execution team members and department of corrections officials face various pressures that often make them prioritize

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3. See *infra* Part I.

4. See Eric Berger, *Lethal Injection and the Problem of Constitutional Remedies*, 27 YALE L. & POL'Y REV. 259, 260–62 (2009) [hereinafter Berger, *Remedies*] (explaining how certain lethal injection procedures create a substantial risk of excruciating pain); Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 B.C. L. REV. 1367, 1371–72 (2014) [hereinafter Berger, *Secrecy*]; Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L.J. 1331, 1335–39 (2014) [hereinafter Denno, *Chaos*] (discussing the history of lethal injection in the U.S. and the lack of medical testing of lethal injection); Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 59 (2007) [hereinafter Denno, *Quandary*] (discussing the need for a humane method of execution); Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocuting and Lethal Injection and What it Says About Us*, 63 OHIO ST. L.J. 63, 65–69 (2002) [hereinafter Denno, *Paradox*] (concluding that justice does not exist with the current methods of execution).

5. For ease of presentation, I organize my discussion by type of explanation rather than kind of state official. Some explanations apply to various levels of state actors. However, as I indicate in places, some explanations help clarify certain governmental actors' behaviors better than others.

factors other than execution safety.<sup>6</sup> Of course, it is impossible in a short symposium contribution to fully explore all the states' reasons, but given the disconnect between lethal injection's critics and state officials' behavior, it is a valuable exercise.

Part I briefly summarizes lethal injection's risks, states' efforts to keep key details of their procedures secret, and states' refusal to address the systemic risks posed by those procedures. Part II explores potential reasons for state behavior, offering epistemic, structural, strategic, and political explanations. Part III concludes by noting that this analysis likely is relevant beyond the lethal injection setting and can help us better understand official motivations when states violate constitutional rights in other areas as well.

## I. THE PROBLEM

The dangers of lethal injection have been well rehearsed elsewhere, so I will offer only a short summary here.<sup>7</sup> In the past two years, there have been botched executions in South Dakota (Eric Robert), Oklahoma (Michael Lee Wilson and Clayton Lockett), Arizona (Joseph Wood), and Ohio (Dennis McGuire).<sup>8</sup> The failures

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6. A "safe" execution or drug in the lethal injection context is one that does not pose a substantial risk of serious pain, thereby complying with the Eighth Amendment standard announced by the Supreme Court in *Baze v. Rees*. See 553 U.S. 35, 52 (2008) (plurality opinion). Obviously, to the extent the drugs are used to cause the death of a human being, they are not "safe" in the common sense of the word. See Berger, *Secrecy*, *supra* note 4, at 1382–87.

7. For a more comprehensive review of recent problems, see Denno, *Chaos*, *supra* note 4, at 1341 (discussing how states have not attempted to medically improve on lethal injection procedures that are consistently problematic). See also Berger, *Secrecy*, *supra* note 4, at 1371.

8. See Erik Eckholm, *Arizona Takes Nearly 2 Hours to Execute Inmate*, N.Y. TIMES, July 23, 2014, at A1 [hereinafter Eckholm, *Arizona*] (discussing how Joseph Wood gasped repeatedly and took nearly two hours to die after being injected); Erik Eckholm, *One Execution Botched, Oklahoma Delays the Next*, N.Y. TIMES (Apr. 29, 2014), <http://www.nytimes.com/2014/04/30/us/oklahoma-executions.html> [hereinafter Eckholm, *Botched*] (discussing how Clayton Lockett twitched, gasped, called out, "Oh man," mumbled, shook his foot, and raised up off the gurney after being injected); Dana Ford & Ashley Fantz, *Controversial Execution in Ohio Uses New Drug Combination*, CNN (Jan. 17, 2014, 1:01 PM), <http://www.cnn.com/2014/01/16/justice/ohio-dennis-mcguire-execution/> (discussing how Dennis McGuire gasped, snorted deeply multiple times, and appeared to be choking after being injected); Jason Hancock, *Execution Secrecy Draws Criticism in Missouri*, KAN. CITY STAR (Feb. 7, 2014, 12:00 PM), [http://www.joliejustus.com/execution\\_secrecy\\_draws\\_criticism\\_in\\_missouri](http://www.joliejustus.com/execution_secrecy_draws_criticism_in_missouri) (discussing how Michael Lee Wilson cried out, "I feel my whole body burning" after being injected with pentobarbital); Steve Young, *Execution: South Dakota Delivers Eric Robert His Death Wish*, ARGUSLEADER.COM (Oct. 16, 2012), <http://archive.ar>

have occurred in one-drug, two-drug, and three-drug procedures, and they have sometimes been gruesome. Clayton Lockett, for instance, twitched and gasped, while a prison official called out “Man . . . something’s wrong.”<sup>9</sup> He then mumbled, shook his foot, and started convulsing violently, trying to rise up off the gurney.<sup>10</sup> Prison officials subsequently discovered a “vein failure” because “the line had blown.”<sup>11</sup> During Joseph Wood’s execution, the inmate gasped over 600 times and took nearly two hours to die.<sup>12</sup>

To lethal injection’s critics, these recent botches are confirmation of a problem they have long known to exist. Many states retain the three-drug procedure, which contains two drugs that cause excruciating pain in people who are inadequately anesthetized.<sup>13</sup> The procedure uses an anesthetic (usually thiopental or pentobarbital), a paralytic inhibiting muscle movement (usually pancuronium bromide or vecuronium bromide), and potassium chloride, which induces cardiac arrest and stops the heart.<sup>14</sup> It is undisputed that potassium chloride causes agonizing pain as it sears its way through the veins to the heart.<sup>15</sup> It is furthermore undisputed that the paralytic masks such pain.<sup>16</sup> Because pancuronium bromide paralyzes the diaphragm, it also causes the terrifying sensation of suffocation.<sup>17</sup> The constitutionality of the three-drug procedure therefore depends primarily on whether the first

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gusleader.com/article/20121016/NEWS/310160016/Execution-South-Dakota-delivers-Eric-Robert-his-death-wish (discussing how Eric Robert gasped and snorted heavily, turned purple, and took twenty minutes to die).

9. See Eckholm, *Botched*, *supra* note 8.

10. See *id.*; Greg Botelho & Dana Ford, *Oklahoma Stops Execution After Botching Drug Delivery; Inmate Dies*, CNN (Oct. 9, 2014, 2:55 PM), <http://www.cnn.com/2014/04/29/us/oklahoma-botched-execution/>.

11. See Botelho & Ford, *supra* note 10; Eckholm, *Botched*, *supra* note 8.

12. See Eckholm, *Arizona*, *supra* note 8; *Arizona Botches Execution of Joseph Wood*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/node/5828> (last visited Feb. 27, 2015).

13. See Denno, *Chaos*, *supra* note 4, at 1359 (providing a chart listing fourteen states retaining some version of the three-drug protocol).

14. See *id.* at 1333–34, 1349, 1359. As Professor Denno’s study shows, there is substantial variation in procedures among the states. *Id.* at 1359.

15. See *Harbison v. Little*, 511 F. Supp. 2d 872, 883 (M.D. Tenn. 2007); Mark Dershwitz & Thomas K. Henthorn, *The Pharmacokinetics and Pharmacodynamics of Thiopental as Used in Lethal Injection*, 35 FORDHAM URB. L.J. 931, 931 (2008).

16. *Harbison*, 511 F. Supp. 2d at 883–84.

17. See *Baze v. Rees*, 553 U.S. 35, 55 (2007) (plurality opinion); *Harbison*, 511 F. Supp. 2d at 883–84.

drug, the anesthetic, takes proper effect.<sup>18</sup> If it does, the inmate is fully anesthetized within two-and-one-half minutes.<sup>19</sup> If it does not, the paralyzed inmate may seem peaceful while experiencing the dual agony of suffocation and intense burning throughout his body.<sup>20</sup>

It is bad enough that many states still employ a procedure using drugs that indisputably cause excruciating pain in the improperly anesthetized.<sup>21</sup> It is far worse that states' unqualified personnel considerably heighten the procedure's dangers.<sup>22</sup> The list of mistakes that states have made is astounding. States have misunderstood the drugs, believing, for instance, that they ought to be injected in rapid succession, not realizing that the anesthetic requires a couple of minutes to take effect.<sup>23</sup> Of course, if the other drugs are injected before the anesthetic has taken effect, the inmate will suffer excruciating pain but be paralyzed and therefore appear peaceful.

States have also had serious problems setting the catheter connecting the intravenous ("IV") line with the inmates' veins. If the IV line is improperly set, the drugs will not all be delivered successfully into the vein but will instead infiltrate, leaking into surrounding tissues.<sup>24</sup> Infiltration itself is excruciating, and it can also result in inadequate anesthesia.<sup>25</sup> Some states' failure to employ qualified personnel to set the IV line heightens the risk of infiltration,<sup>26</sup> as does the fact that states do not always provide their execution teams with the proper equipment to safely set the catheter.<sup>27</sup> Catheter problems contributed substantially to the

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18. See Ty Alper, *Anesthetizing the Public Conscience: Lethal Injection and Animal Euthanasia*, 35 *FORDHAM URB. L.J.* 817, 818–20 (2008).

19. See Henthorn Expert Report at ¶ 24, *Taylor v. Crawford* (No. 05-4173), 2006 WL 1236660 (W.D. Mo. June 26, 2006) [hereinafter Henthorn Report] (explaining the speed with which thiopental takes effect).

20. See Dershwitz & Henthorn, *supra* note 15, at 933–36.

21. As of 2014, fourteen states still retained some version of the three-drug protocol. See Denno, *Chaos*, *supra* note 4, at 1359.

22. See Berger, *Remedies*, *supra* note 4, at 270.

23. See *id.* at 268 (noting that Missouri executioners injected drugs as quickly as possible because they incorrectly believed the prisoner would be unconscious within fifteen seconds); see also Deposition of Larry Crawford at 130, *Taylor*, 2006 WL 1779035.

24. See Berger, *Remedies*, *supra* note 4, at 270.

25. *Id.*

26. See Berger, *Secrecy*, *supra* note 4, at 1377, 1433.

27. See OKLA. DEP'T OF PUB. SAFETY, *The Execution of Clayton D. Lockett: Executive Summary* 16, <http://www.dps.state.ok.us/Investigation/14-0189SI%20Summary.pdf> (last

botched executions of Clayton Lockett in Oklahoma and Angel Diaz in Florida.<sup>28</sup>

States also have had difficulty accurately assessing the inmate's anesthetic depth, believing an inmate to be unconscious when he was not.<sup>29</sup> As a result, states have sometimes injected the second and third drugs before an inmate was sufficiently anesthetized.<sup>30</sup> Further compounding all these problems, states often fail to provide sufficient oversight, transparency, and contingency plans for their procedures.<sup>31</sup> These failures collectively heighten the risk that lethal injection will result in excruciating pain.

In theory, the switch in several states from a three-drug protocol to a one-drug protocol should mitigate these problems by eliminating the drugs that create a risk of pain. In reality, though, states have had difficulty finding safe drugs. For example, in response to recent drug shortages, many states have sought drugs from compounding pharmacies. Compounding pharmacies usually mix small quantities of drugs to order, but because they elude many Food and Drug Administration ("FDA") regulations, their products are rarely evaluated for safety and effectiveness.<sup>32</sup> Compounding pharmacies also often use active pharmaceutical ingredients from complex and unsecured supply chains that can be diverted through "grey markets," making it impossible to verify whether the ingredients conform to FDA requirements.<sup>33</sup> It is also not uncommon for compounding pharmacies' ingredients to be

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visited Feb. 27, 2015) [hereinafter *Lockett Execution Report*] (noting that the staff did not have access to a long enough catheter to attempt a femoral insertion but that the staff attempted femoral access anyway).

28. Berger, *Secrecy*, *supra* note 4, at 1433.

29. See Eckholm, *Botched*, *supra* note 8; Ford & Fantz, *supra* note 8 (noting that after Lockett had been declared unconscious, the state administered the second and third drugs, at which point Lockett began gasping and bucking on the gurney).

30. See *Lockett Execution Report*, *supra* note 27, at 11–12, 25.

31. See Berger, *Remedies*, *supra* note 4, at 272 (noting that some states have inconsistent procedures, poor recordkeeping, and no contingency plans to address problems that may arise).

32. See Berger, *Secrecy*, *supra* note 4, at 1382.

33. See John L. Chollet & Michael J. Jozwiakowski, *Quality Investigation of Hydroxyprogesterone Caproate Active Pharmaceutical Ingredient and Injection*, 38 DRUG DEV. IND. PHARM. 540, 543 (2012) (noting that many sources of active pharmaceutical ingredients were "brokers who import and repack drugs" and who had neither registered with nor been inspected by the FDA); see also Declaration of Larry D. Sasich at ¶ 12, Taylor v. Apothecary Shoppe, LLC (No. 14-CV-063) 2014, WL 631664 (N.D. Okla. Feb 18, 2014) [hereinafter Sasich Declaration].

misabeled, resulting in final products that are not what they purport to be.<sup>34</sup>

Compounding pharmacies perform an important service by mixing small batches of drugs to order, but they are licensed to dispense drugs, not to manufacture them.<sup>35</sup> Consequently, they often lack the basic infrastructure necessary to produce, for instance, sterile, potent, and safe injectable pentobarbital, which many lethal injection states now use in either one-drug or three-drug procedures.<sup>36</sup> Moreover, FDA pharmacy inspections have found, with alarming frequency, that compounding pharmacies and similar facilities purporting to produce sterile drug products did not follow procedures designed to prevent microbiological contamination of those products.<sup>37</sup> In short, many compounding pharmacies' practices exacerbate the risk that their products will be seriously impure, contaminated, sub-potent, super-potent, or otherwise flawed.<sup>38</sup> Unsurprisingly, problems with compounded

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34. See Editorial, *Compounding Pharmacies Need FDA Oversight*, WASH. POST (Oct. 16, 2012), [http://www.washingtonpost.com/opinions/compounding-pharmacies-need-fda-oversight/2012/10/16/12e5ee78-17af-11e2-9855-71f2b202721b\\_story.html](http://www.washingtonpost.com/opinions/compounding-pharmacies-need-fda-oversight/2012/10/16/12e5ee78-17af-11e2-9855-71f2b202721b_story.html).

35. See Bette Hileman, *Drug Regulation*, C&EN, Apr. 12, 2004, at 24 (discussing the lack of regulation and capacities of compounding pharmacies).

36. See Denno, *Chaos*, *supra* note 4, at 1359; Jennifer Gudeman et al., *Potential Risks of Pharmacy Compounding*, 13 DRUGS IN R&D 1, 3 (2012) (explaining that some compounding pharmacies have expanded their activities beyond their technological capabilities and that "poor practices on the part of drug compounders can result in contamination or in products that do not possess the strength, quality, and purity required" for a safe drug); Mark Thomas et al., *I.V. Admixture Contamination Rates: Traditional Practice Site Versus a Class 1000 Cleanroom*, 62 AM. J. HEALTH-SYST. PHARM. 2386, 2386 (2005) (finding the contamination in compounded medication even when technicians compounded it in sterile environments, such as a cleanroom); Sasich Declaration, *supra* note 33, at ¶ 12.

37. See DEP'T OF HEALTH & HUM. SERVS., INSPECTION FOR ABRAMS ROYAL PHARMACY (Dec. 20, 2013) [hereinafter *Pharmaceutical Safety Overview*], available at <http://www.fda.gov/downloads/AboutFDA/CentersOffices/OfficeofGlobalRegulatoryOperationsandPolicy/ORA/ORAElectronicReadingRoom/UCM379743.pdf>.

38. Berger, *Secrecy*, *supra* note 4, at 1384; see Sasich Declaration, *supra* note 33, at ¶ 12; Phil Johnson & Gregg Jones, *Pharmacist Compounding of Analgesic Medication: The Risk of a Little-Known Practice*, 84 J. FLA. M.A. 13, 14 (1997) (discussing how compounded products are never tested as rigorously as a commercial product); *2006 Limited FDA Survey of Compounded Drug Products*, FDA, <http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/PharmacyCompounding/ucm204237.htm> (last visited Feb. 27, 2015) (noting at least 240 instances of illness and death associated with compounded drugs between 1990 and 2005); *Pharmaceutical Safety Overview*, *supra* note 37.



drugs have caused public health emergencies,<sup>39</sup> and have also played a role in recent botched executions.<sup>40</sup>

Despite these botches and dangers, states often act as though there is no problem. Indeed, states repeatedly deny that their lethal injection procedures pose a risk of pain.<sup>41</sup> They similarly refuse to conduct a careful, systematic review of their procedures' dangers.<sup>42</sup> This is not to say that states never change their procedures. On the contrary, they change them frequently.<sup>43</sup> But these changes often do not make the procedures safer. For example, after Ohio experienced serious problems with its three-drug procedure, it designed a convoluted two-part protocol, which included a back-up plan requiring the team to inject an overdose of two drugs never before used in executions.<sup>44</sup> Though experts warned that these back-up drugs, hydromorphone and midazolam "could

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39. See Todd Wallack, *Victims of Tainted Drug Face Long Wait for Relief*, BOS. GLOBE (Oct. 2, 2013), <http://www.bostonglobe.com/metro/2013/10/01/new-england-compounding-victims-still-waiting-for-compensation-year-after-meningitis-outbreak/3zUCXAnXtTC21Yg4AQR3tI/story.html> (discussing contaminated steroids from a Massachusetts compounding pharmacy that recently caused fungal meningitis in approximately 750 people, at least sixty-four of whom died).

40. See Sasich Declaration, *supra* note 33, at ¶¶ 61–63; Hancock, *supra* note 8; Elliot C. McLaughlin, *Appeals Court Stays Texas Execution After Intellectual Disability Claim*, CNN (May 14, 2014, 8:07 AM), <http://www.cnn.com/2014/05/13/justice/texas-execution-robot-james-campbell/> (noting that Luis Villegas "complained of a burning sensation during his April execution" in Texas using compounded pentobarbital); *South Dakota Covers Up Source of 'DIY' Death Penalty Drugs Ahead of Execution*, REPRIEVE (Oct. 30, 2012), [http://www.reprive.org.uk/press/2012\\_10\\_30\\_South\\_Dakota\\_execution\\_drugs/](http://www.reprive.org.uk/press/2012_10_30_South_Dakota_execution_drugs/); Young, *supra* note 8.

41. See, e.g., Ben Brumfield et al., *No Evidence Arizona Execution Botched, Corrections Chief Says*, CNN (Sept. 8, 2014, 7:15 AM), <http://www.cnn.com/2014/07/24/justice/arizona-execution-controversy/index.html> (discussing the denial by the director of the Arizona Department of Corrections that Joseph Wood suffered during his execution); Josh Levs et al., *Oklahoma's Botched Lethal Injection Marks New Front in Battle Over Executions*, CNN (Sept. 8, 2014, 7:16 AM), <http://www.cnn.com/2014/04/30/us/oklahoma-botched-execution/index.html> (discussing Oklahoma Governor Mary Fallin's declaration that Lockett was declared unconscious prior to his execution); Stephanie Mencimer, *Arizona's Terrible Lethal Injection Track Record*, MOTHER JONES (Aug. 1, 2014, 5:00 AM), <http://www.motherjones.com/politics/2014/08/arizonas-terrible-lethal-injection-track-record> (discussing the Arizona Corrections Chief's statement that the execution of Robert Comer was accomplished with "careful planning," even though they hired a doctor who Arizona knew had been banned from participating in executions in Missouri).

42. See, e.g., *Lethal Injection: Texas Switches to New Drug as Next Execution Approaches*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/lethal-injection-texas-switches-new-drug-next-execution-approaches> (last visited Feb. 27, 2015).

43. See Denno, *Chaos*, *supra* note 4, at 1335.

44. See *id.* at 1357.

produce a slow, lingering death” and induce a state of confusion and extreme psychological anguish, the state still stuck with it.<sup>45</sup>

If anything, the constant changes make lethal injection all the more unpredictable, as states’ execution procedures often differ dramatically not only from state to state but within the same state.<sup>46</sup> Indeed, some states swerve haphazardly from one procedure to another, reacting to mistakes or botches by attempting quick fixes that leave other problems unaddressed. Oklahoma, for instance, hastily revised its procedure after the botched execution of Michael Lee Wilson, only to botch Clayton Lockett’s execution just a few months later.<sup>47</sup> The State then changed its procedure again, but rather than taking the time to do so carefully, it rushed to complete the revision to continue executions as expeditiously as possible.<sup>48</sup> Though serious questions remained about its new procedure, on January 15, 2015, Oklahoma executed Charles Warner, who called out from the gurney, “My body is on fire.”<sup>49</sup> Two days later, the Supreme Court granted certiorari in *Glossip v. Gross* to review Oklahoma’s approach.<sup>50</sup>

Other states, without any better idea of how to proceed, simply imitate other states’ procedures, without regard to those states’ records. For example, after contaminated compounded drugs contributed to a botched execution in South Dakota, Pennsylvania announced it would also use the same kind of compounded drugs.<sup>51</sup> Similarly, despite serious problems in Arizona with midazolam, Alabama, Ohio, Oklahoma, and other states have recently revised their procedures to include midazolam.<sup>52</sup> Thus, as Pro-

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45. See *Cooney v. Strickland*, 604 F.3d 939, 942–43 (6th Cir. 2010); Denno, *Chaos*, *supra* note 4, at 1357.

46. See Denno, *Chaos*, *supra* note 4, at 1335.

47. See Berger, *Secrecy*, *supra* note 4, at 1386.

48. See ASSOC. PRESS, *State Prepares to Resume Executions, But Questions Linger*, MUSKOGEE PHX. (Oct. 5, 2014, 12:03 AM), [http://www.muskogeephoenix.com/news/oklahoma\\_news/article\\_e26c0b36-4c4c-11e4-8666-17ea756064ce.html](http://www.muskogeephoenix.com/news/oklahoma_news/article_e26c0b36-4c4c-11e4-8666-17ea756064ce.html) [hereinafter *Questions Linger*].

49. Dana Ford, *Oklahoma Executes Charles Warner*, CNN (Jan. 16, 2015, 6:13 AM), <http://www.cnn.com/2015/01/15/us/oklahoma-execution-charles-frederick-warner/>.

50. *Warner v. Gross*, 776 F.3d 721 (10th Cir. Jan. 12, 2015), *cert. granted sub nom.*, *Glossip v. Gross*, 83 U.S.L.W. 3625 (U.S. Jan. 23, 2015) (No. 14-7955).

51. See Denno, *Chaos*, *supra* note 4, at 1376–77; Young, *supra* note 8.

52. See ASSOC. PRESS, *Judge Allows Okla. to Continue Executions After Botched Case; Opponents Had Argued Against New Protocol*, BOS. GLOBE, Dec. 23, 2014, at A7, 4; Tim Lockette, *Stay Upheld for Death Row Inmate Thomas Arthur*, ANNISTON STAR, Jan. 6, 2015, at 3.

fessor Deborah Denno contends, despite the “continuous tinkering,” states have failed to grapple with lethal injection’s most troubling aspects, such as underqualified executioners, a lack of medical expertise, and a “failure to account for the difficulties with injecting inmates whose drug-use histories diminish the availability of usable veins.”<sup>53</sup>

The problem, then, is often not that states refuse to modify their procedures, but rather that in so doing they often fail to address lethal injection’s systemic dangers.<sup>54</sup> Rather than deliberately and carefully designing a new procedure, they often rush to address crises created by drug shortages and botched executions in the hopes of resuming executions without significant delay.<sup>55</sup> If anything, as Professor Denno argues, “As states’ desperation increases, so does their tolerance for risk.”<sup>56</sup>

It is important to acknowledge that there may be exceptions to this mostly dismal record. For example, though many states have had difficulty finding safe drugs, the switch in some states to a one-drug procedure should, in theory, make lethal injection safer. Relatedly, whereas most states fight vigorously to conceal the details of their procedures, Delaware’s Department of Justice found that the Department of Corrections violated the State’s Freedom of Information Act by denying a reporter’s request for access to the procedure.<sup>57</sup> Additionally, several states do not have a record of visibly botched executions.

Nevertheless, it is important to remember that while some states have behaved better than others, many states have revised their procedures because they thought that they had no choice, not because they have voluntarily sought ways to improve their procedures. For example, Ohio was the first state to switch to a one-drug protocol, but it did so because a court ordered this rem-

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53. Denno, *Chaos*, *supra* note 4, at 1335.

54. *See, e.g., id.* at 1337; Kate Brumback, *Georgia to Use Compounding Pharmacy; State Needs Drug for Man’s Execution*, AUGUSTA CHRON., July 12, 2013, at B6.

55. *See, e.g., Questions Linger*, *supra* note 48 (describing Oklahoma’s efforts to put in place a new procedure following botches in time to conduct an execution in November 2014 even though, as a critic pointed out, it was “an awfully short time”).

56. Denno, *Chaos*, *supra* note 4, at 1336.

57. *See* Freedom of Information Act Appeal Concerning Department of Correction, Del. Op. Att’y Gen. 11-IIB14, 2011 WL 4062225, at \*1 (2011); Denno, *Chaos*, *supra* note 4, at 1380.

edy.<sup>58</sup> Similarly, when a state badly botches an execution, it often feels pressure to revise the procedure.<sup>59</sup> Drug shortages have also forced states to modify their procedures in recent years.<sup>60</sup> These changes have not necessarily made things better. To the extent states frequently now turn to compounding pharmacies, they may in fact make the procedures more dangerous.<sup>61</sup> In short, though the point can be overstated, on the whole, states have oftentimes tried to keep secret and defend even the sketchiest lethal injection procedures.

## II. EXPLANATIONS

Numerous explanations help shed light on state officials' behavior. Admittedly, this analysis is largely speculative. It is impossible to get into the executioner's head, and motives likely differ from person to person and from state to state. Additionally, some explanations speak to both state secrecy and state intransigence (i.e., unwillingness to modify seriously flawed procedures), whereas some speak to just one or the other. In short, the theories offered here do not purport to explain every instance of state behavior in lethal injection. Instead, they try to shed some general light on why states in this area so often seem to disregard constitutional concerns.

### A. *Epistemological Explanations*

Perhaps the most straightforward explanation is that state officials simply believe that their execution procedures are safe.<sup>62</sup> Many executions appear unproblematic, and states likely believe

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58. See *State v. Rivera* (No. 04CR065940) 2008 WL 2784679, at \*6 (Ohio Ct. Com. Pl. June 10, 2008) (“[T]he use of two drugs in the lethal injection protocol (pancuronium bromide and potassium chloride) creates an unnecessary and arbitrary risk that the condemned will experience an agonizing and painful death.”); Denno, *Chaos*, *supra* note 4, at 1354 (discussing *Rivera*).

59. See Andrew Welsh-Huggins, *Botched Execution Could Renew ‘Cruel’ Challenges*, OKLA. DAILY, May 1, 2014, at 1.

60. See Kevin Sack, *Shortage of Widely Used Anesthetics Is Delaying Executions in Some States*, N.Y. TIMES, Sept. 30, 2010, at A23.

61. See Berger, *Secrecy*, *supra* note 4, at 1384; Denno, *Chaos*, *supra* note 4, at 1366 (discussing the risks associated with compounding pharmacies).

62. Cf. *Baze v. Rees*, 553 U.S. 35, 62 (2008) (plurality opinion) (“The firing squad, hanging, the electric chair, and the gas chamber have each in turn given way to more humane methods, culminating in today’s consensus on lethal injection.”).

that if an execution seems peaceful, then it must be painless. Some officials may then conclude that if nothing seems amiss, then nothing is.

States, in fact, might have many reasons for believing that their lethal injection procedures are safe—some more justifiable than others. States using a one-drug procedure with an overdose of a barbiturate anesthetic might reason that a drug that only anesthetizes cannot cause pain, even if things do not proceed perfectly. Of course, because compounding pharmacies do not always use proper procedures to manufacture such drugs,<sup>63</sup> even these theoretically “safe” drugs can behave in unpredictable ways.<sup>64</sup> As explained above, many compounding pharmacies’ practices heighten the risk that their drugs will cause pain because they are dangerously contaminated, impure, or otherwise flawed.<sup>65</sup> Nevertheless, states may honestly believe that these drugs cannot cause pain, especially given that inmates challenging the three-drug procedure have themselves argued that a one-drug approach would be safer.<sup>66</sup>

Many states may also believe their procedures are safe because they have received some expert advice telling them that they are. Perhaps most prominently, Dr. Mark Dershwitz, an anesthesiologist and pharmacologist at the University of Massachusetts, has repeatedly testified on behalf of states’ lethal injection procedures.<sup>67</sup> Other experts, of course, disagree. One prominent expert, in fact, thought it “very unlikely that any other medical experts who are familiar with these drugs will be willing to support” some

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63. See Berger, *Secrecy*, *supra* note 4, at 1382–83; Denno, *Chaos*, *supra* note 4, at 1370 (“As concern grew that some pharmacies were exceeding the scope of traditional compounding practices, the FDA issued reports in 2003 and 2006 revealing the discovery of compounded drugs that failed safety and efficacy tests, as well as serious illnesses and deaths that had occurred in association with compounded drugs.”).

64. See Berger, *Secrecy*, *supra* note 4, at 1383–84; J.H. Perrin, *Comments on Drugs Difficult to Compound and the Quality of Chemicals to Be Used in Compounding*, 25 DRUG DEV. & INDUS. PHARM. 553, 555 (1999) (explaining that compounded drugs for intravenous use should never be released without testing for sterility, pyrogens, and chemical analyses).

65. See Berger, *Secrecy*, *supra* note 4, at 1432–33.

66. See, e.g., Brief for Petitioners at 51, 57, *Baze*, 553 U.S. 35 (No. 07-5439).

67. Cf. Andrew Welsh-Huggins, *States’ Leading Lethal Injection Expert Ends Role*, CHARLESTON GAZETTE, Aug. 21, 2014, at P5A (reporting that Mark Dershwitz, who testified on behalf of many states in lethal injection litigation, terminated his role when Ohio mistakenly divulged that it had contacted him with information about a problematic execution).

of the states' designed procedures.<sup>68</sup> Nevertheless, a credible expert on their side may be enough to convince many state officials that they need not worry too much about what they are doing.

Some officials may also believe their executions are safe, because they do not know enough to think otherwise. Simply put, many state politicians, officials, and execution team members do not understand the drugs and their risks. Arizona, for instance, understood its drugs so poorly that it injected fifteen separate doses of the drug cocktail into Joseph Wood.<sup>69</sup> For years Missouri injected the drugs of its three-drug procedure in rapid succession, not realizing that the anesthetic required two-and-one-half minutes to take effect.<sup>70</sup>

Other officials may understand in the abstract that lethal injection poses risks but nevertheless fall prey to the heuristic bias that *their* state will not experience problems.<sup>71</sup> Lethal injection, if properly implemented and administered, is not inherently unsafe. Officials may, therefore, reassure themselves that everything will proceed smoothly. In fact, this reassurance may prevent some officials from attending to important details that can minimize the risk of excruciating pain.

Relatedly, even if some states realize that their procedures pose substantial risks of pain, they may lack the expertise to revise the procedure meaningfully. Lethal injection is a complicated procedure that requires expertise at several steps along the way. To do it right, states need to take care that they select the right drugs, find a safe and reliable drug provider, prepare the chemi-

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68. See *id.* (quoting Dr. Mark Heath, a Columbia University anesthesiologist).

69. See Tom Dart, *Arizona Inmate Joseph Wood Was Injected 15 Times with Execution Drugs*, GUARDIAN (Aug. 2, 2014, 10:40 AM), <http://www.theguardian.com/world/2014/aug/02/arizona-inmate-injected-15-times-execution-drugs-joseph-wood>; Tierney Sneed, *Can the Death Penalty Survive Lethal Injection?*, U.S. NEWS (Aug. 7, 2014, 12:01 AM), <http://www.usnews.com/news/articles/2014/08/07/can-the-death-penalty-survive-lethal-injection>.

70. See Defendant Crawford's Answers to Plaintiffs' First Interrogatories at 9, *Taylor v. Crawford* (No. 05-4173), 2006 WL 1779035 (W.D. Mo. June 26, 2006) (containing an explanation by the Department of Corrections Director that lethal injection drugs are injected in rapid succession); Henthorn Report, *supra* note 19, at 7.

71. See generally Daniel P. Forbes, *Are Some Entrepreneurs More Overconfident Than Others?*, 20 J. BUS. VENTURING 623, 626 (2005) (describing the overconfidence bias); Paul C. Price et al., *Perceived Event Frequency and the Optimistic Bias: Evidence for a Two-Process Model of Personal Risk Judgments*, 38 J. EXPERIMENTAL SOC. PSYCHOL. 242, 242-43 (2002) (explaining that people typically demonstrate an optimism bias when they judge their risk of experiencing a negative event and believe their risk to be lower than the risk their peers face).

cals properly, insert the catheter correctly into the inmate's veins, accurately monitor the inmate's consciousness, and more.<sup>72</sup> State departments of corrections ("DOCs") not only lack the expertise to perform most of these steps but may even lack the expertise to know where to find the correct experts. Moreover, even when states know enough to approach the right people, those people may be very reluctant to involve themselves in the business of killing people.<sup>73</sup> In other words, the states' epistemological deficits may impede them both from recognizing and correcting problems.

In fairness, it is important to acknowledge that some states might be correct that their procedures are safe.<sup>74</sup> Several states have executed people without botches in recent years.<sup>75</sup> Of course, it is impossible to know what an inmate feels during an execution. Moreover, states that continue to use pancuronium bromide or similar paralytics do not deserve the benefit of the doubt, because they deliberately use a drug that masks any pain the inmate might feel.<sup>76</sup> To this extent, the absence of visible botches is hardly conclusive evidence that these states have not had problems. Nevertheless, it is possible that many—perhaps even most—apparently unproblematic executions are, in fact, painless, as they are supposed to be. To this extent, the absence of visible botches in some states is an indication (albeit non-determinative) that those states' procedures are smoother.

While it seems likely that some state officials honestly believe that their states' procedures are safe, it is important to emphasize that this epistemological explanation only goes so far. Indeed, there are many instances in which states have recognized problems and yet have decided to proceed anyway.<sup>77</sup> For example, a report in Ohio revealed that Ohio prison officials had been concerned about the drug combination used for Dennis McGuire but

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72. See Berger, *Secrecy*, *supra* note 4, at 1427.

73. See Matt McCarthy, *What's the Best Way to Execute Someone?*, SLATE (Mar. 27, 2014, 11:44 PM), [http://www.slate.com/articles/health\\_and\\_science/medical\\_examiner/2014/03/death\\_penalty\\_drugs\\_lethal\\_injection\\_executions\\_are\\_so\\_bad\\_that\\_it\\_s\\_time.html](http://www.slate.com/articles/health_and_science/medical_examiner/2014/03/death_penalty_drugs_lethal_injection_executions_are_so_bad_that_it_s_time.html).

74. See Denise Grady, *Three-Drug Protocol Persists for Lethal Injections, Despite Ease of Using One*, N.Y. TIMES, May 2, 2014, at A16.

75. See *id.*

76. Dershwitz & Henthorn, *supra* note 15, at 931.

77. See, e.g., Denno, *Chaos*, *supra* note 4, at 1356 n.159 (discussing Ohio's botched execution of Rommel Broom, the first inmate to survive a lethal injection procedure, despite the record of inept executions).

used it anyway, only to botch his execution.<sup>78</sup> Similarly, despite numerous reports about the dangers of compounded drugs, states press forward with executions relying on such drugs without subjecting them to chemical testing that might identify flaws.<sup>79</sup> In short, states may not always fully appreciate the risks their execution procedures create, but they sometimes do and still refuse to alter their behavior.

## B. *Structural Explanations*

Another set of explanations is structural. These explanations stem from the nature of state governments and the incentives that help govern state official behavior. As with the other explanations, these likely do not each apply to each official in each state. Nevertheless, they help provide a sense of another set of issues that may shape officials' actions.

### 1. State Sovereignty

As a general matter, states usually do not like being told what to do. States prize their sovereignty and strongly resist outside efforts to encroach upon their prerogative to set and implement policy.<sup>80</sup> Accordingly, their natural inclination is often to fight anyone who contends that they must change their practices.<sup>81</sup> Indeed, whether pressures come from the federal government, in-

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78. See Alan Johnson, *Prison Official Had Predicted Ohio's Troubling Execution*, COLUM. DISPATCH (Aug. 19, 2014, 4:44 AM), <http://www.dispatch.com/content/stories/local/2014/08/19/execution-scenario-had-been-predicted.html> (discussing an e-mail sent by the former chief legal counsel for the Ohio Department of Rehabilitation and Correction speculating that the drug combination Ohio planned to use would result in "the condemned gasping for air in hyperventilating fashion").

79. See Berger, *Secrecy*, *supra* note 4, at 1419–21 (discussing the possibility of chemical testing); Denno, *Chaos*, *supra* note 4, at 1360–61, 1365–66 (discussing the shortage of lethal injection drugs and the risks of compounding pharmacies).

80. See generally Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1521 (1994) (exploring the politics of federalism); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 78 (1988) (arguing that as republican governments, states should enjoy discretion to run their governments as autonomous units without outside interference).

81. See generally Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258–59 (2009) (discussing "uncooperative federalism" when states resist federal policies that intrude on pre-existing state policies).



terest groups, or death row inmates, states often resist external efforts to change the way they do things.<sup>82</sup>

None of this is to say that state politicians and officials should necessarily concede to outside efforts to change their practices. States sometimes have very good reason to resist external interference in their affairs.<sup>83</sup> Nevertheless, states also sometimes reflexively resist external advice or pressure, even when it may be wiser to reconsider their current policies. In other words, states' zealous protection of their sovereignty, however justifiable in some contexts, may in other contexts sometimes lead to an obdurate refusal to revise questionable practices.<sup>84</sup>

This obduracy may be especially commonplace in the context of prisons, where states have grown very accustomed to operating in secrecy and receiving great deference from courts.<sup>85</sup> DOCs, indeed, are often successful in fending off lawsuits and other external meddling.<sup>86</sup> As a result, states may be disinclined to consider

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82. See, e.g., *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. \_\_\_, 132 S. Ct. 2566, 2601 (2012) (discussing state objection to federal Medicaid expansion even though the federal government paid the entire amount in the early years and no less than 90% after 2016); *New York v. United States*, 505 U.S. 144, 149, 151, 154 (1992) (objecting to the federal program regulating how states handle radioactive waste even though states had requested the federal plan for disposing of such waste); *South Dakota v. Dole*, 483 U.S. 203, 205, 211 (1987) (objecting to the federal plan raising the minimum drinking age that threatened to withhold 5% of federal highway funds from states that did not comply).

83. Cf. Jack M. Beermann, *The Public Pension Crisis*, 70 WASH. & LEE L. REV. 3, 31, 84 (2013) (noting the severity of the public pension crisis on state and local governments and the need for states to find creative ways to save money); Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 402 (1985) ("[I]f there is some genuine room for noninstrumental participation in American political life, it can realistically exist only on the local level.").

84. See Thomas O. McGarity, *Regulating Commuters to Clear the Air: Some Difficulties in Implementing a National Program at the Local Level*, 27 PAC. L.J. 1521, 1523 (1996) (discussing limited progress in air quality in the face of states' resistance to the implementation of the Clean Air Act).

85. See Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, tit. VIII, 110 Stat. 1321; *Turner v. Safley*, 482 U.S. 78, 90-91 (1987) (noting that "courts should be particularly conscious of the 'measure of judicial deference owed to corrections officials'" and upholding a rule barring inmate-to-inmate correspondence) (quoting *Pell v. Procunier*, 417 U.S. 817, 827 (1974)); Eric Berger, *Deference Determinations and Stealth Constitutional Decision Making*, 98 IOWA L. REV. 465, 485-87 (2013) (discussing courts' practices of deferring to state prisons).

86. See, e.g., *Rhodes v. Chapman*, 452 U.S. 337, 362 (1981) (Brennan, J., concurring) ("[C]ourts have been especially deferential to prison authorities 'in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.'" (quoting *Bell v. Wolfish*, 441 U.S. 520, 547 (1979)); *Procunier v. Martinez*, 416 U.S. 396, 404-05 (1974), *overruled in part by Thornburgh v. Abbott*, 490 U.S. 401, 413-14 (1989) ("[F]ederal courts have adopted

outside criticism about lethal injection because they are used to insulating their prison systems from external review.<sup>87</sup>

To this extent, secrecy and intransigence can work hand in hand. If states are not transparent about the details of their execution procedures, inmates lack the necessary information to mount a serious Eighth Amendment challenge to the procedure.<sup>88</sup> Relatedly, without detailed information about states' procedures, outsiders have a hard time explaining precisely why those procedures may be dangerous. Secrecy, then, helps preserve the state's sovereign prerogative to administer its own execution procedures.

A related factor is that states are understandably sensitive to costs. States may believe that modifying their lethal injection procedures would cost them money, because they will have to buy new drugs, rethink their procedures' details, and potentially hire and train new personnel. The death penalty is already extremely expensive,<sup>89</sup> and states may resist constant calls for revisions that may cost even more, especially given that capital inmates will continue to challenge even the safest procedures. Relatedly, states may sometimes lack the resources to focus on improving lethal injections because other issues demand correctional officials' more immediate attention.<sup>90</sup>

Of course, litigation is a large reason for capital punishment's high price tag, so states' resistance to external advice may, para-

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a broad hands-off attitude toward problems of prison administration. . . . [T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government.”).

87. See *infra* note 98 and accompanying text.

88. See Berger, *Secrecy*, *supra* note 4, at 1372.

89. See Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117, 118 (2010) (discussing how the cost of the death penalty has increased in the modern era and has been a prominent issue causing states to reconsider restricting the death penalty); Richard C. Dieter, *Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty*, DEATH PENALTY INFO. CTR. (1994), <http://www.deathpenaltyinfo.org/node/599> (“Death penalty cases are much more expensive than other criminal cases and cost more than imprisonment for life with no possibility of parole.”).

90. See, e.g., Martha Stoddard, *Jon Bruning Says Other Crises Have 'Diverted' State from Resolving Lethal Injection Problems*, OMAHA.COM (Oct. 28, 2014, 1:00 AM), [http://www.omaha.com/news/crime/jon-bruning-says-other-crises-have-diverted-state-from-resolving/article\\_a2e13833-6364-510e-8557-0c10e5d69d90.html](http://www.omaha.com/news/crime/jon-bruning-says-other-crises-have-diverted-state-from-resolving/article_a2e13833-6364-510e-8557-0c10e5d69d90.html) (explaining that a Nebraska state prison sentencing fiasco diverted official money and attention from improving lethal injection).

doxically, sometimes cost them more than acquiescence would.<sup>91</sup> That said, states, as already noted, often protect themselves from these additional litigation costs by keeping their procedures a secret, thereby depriving inmates of the opportunity to mount a successful challenge. To this extent, state obduracy can resist the expense of changing execution procedures and state secrecy can keep litigation costs down by insulating those procedures from meaningful judicial review.<sup>92</sup>

## 2. Administrative Structures

It is important to remember that the most important decisions about lethal injection are made not by state legislatures but by administrative agencies, usually DOCs. To be sure, in some states, legislatures designate the drugs for lethal injection by statute.<sup>93</sup> In most death penalty states, however, the legislature delegates authority to make such determinations to DOCs.<sup>94</sup> More importantly, even where the legislature selects the drugs, DOCs design and implement the procedures' details.<sup>95</sup> Accordingly, state executive officials necessarily make crucial decisions that determine the nature and safety of lethal injection.

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91. See, e.g., LEGIS. AUDITOR, STATE OF NEV., PERFORMANCE AUDIT: FISCAL COSTS OF THE DEATH PENALTY (2014) (concluding that case costs of pursuing the death penalty average three times more than non-death penalty cases due to procedural safeguards); PETER A. COLLINS ET AL., SEATTLE UNIV., AN ANALYSIS OF THE ECONOMIC COSTS OF SEEKING THE DEATH PENALTY IN WASHINGTON STATE 4 (2015) (indicating that average trial level defense and prosecution costs are 2.8 to 4.2 times more expensive in death penalty cases than non-death penalty cases).

92. See Berger, *Secrecy*, *supra* note 4, at 1411.

93. See, e.g., OR. REV. STAT. § 137.473 (Cum. Supp. 2014) (“The punishment of death shall be inflicted by the intravenous administration of a lethal quantity of an ultra-short-acting barbiturate in combination with a chemical paralytic agent and potassium chloride or other equally effective substances sufficient to cause death.”).

94. See, e.g., ALA. CODE § 15-18-82.1 (2011 Repl. Vol.) (“A death sentence shall be executed by lethal injection, unless the person sentenced to death affirmatively elects to be executed by electrocution.”); ARIZ. REV. STAT. § 13-757(A) (2009) (“The penalty of death shall be inflicted by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, under the supervision of the state department of corrections.”).

95. See, e.g., Letter from Michael D. Crews, Sec’y of the Fla. Dep’t of Corr., to Rick Scott, Governor of Fla. (Sept. 9, 2013), available at <http://www.deathpenaltyinfo.org/documents/FLExecProtocol.pdf> (discussing the Department of Corrections’ responsibility of implementing lethal injection procedures in Florida); Berger, *Secrecy*, *supra* note 4, at 1391 nn.164, 165 (citing two manuals published by state DOCs).

The institutional structures of DOCs, therefore, substantially shape the states' attitudes towards lethal injection. Like many administrative agents, DOC officials can suffer from tunnel vision, prioritizing narrow agency objectives more than broader social or constitutional values.<sup>96</sup> Indeed, like other administrative agencies, DOCs typically have narrow statutory mandates, which do not always include a broad commitment to the rule of law and constitutional norms.<sup>97</sup>

If anything, DOCs may be even more prone to tunnel vision than other administrative agencies, because state administrative law often exempts DOCs from ordinary administrative accountability mechanisms, such as state Administrative Procedure Acts and Freedom of Information Acts.<sup>98</sup> As a result, the institutional incentives of DOCs in the death penalty context are likely to focus more on carrying out executions expeditiously and less on Eighth Amendment norms.<sup>99</sup> States' willingness to procure lethal drugs from any willing source, including sketchy fly-by-night overseas

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96. See Berger, *Secrecy*, *supra* note 4, at 1408–09; Stephen Breyer, *The Executive Branch, Administrative Action, and Comparative Expertise*, 32 *CARDOZO L. REV.* 2189, 2195 (2011); Henry P. Monaghan, *First Amendment “Due Process,”* 83 *HARV. L. REV.* 518, 523 (1970).

97. See Glen Staszewski, *Statutory Interpretation as Contestatory Democracy*, 55 *WM. & MARY L. REV.* 221, 257 (2013) (“[A]dministrative discretion has always been feared on the grounds that agencies might adopt ‘tunnel vision.’ . . .”).

98. See ARK. CODE ANN. § 5-4-617(g) (2013) (“The procedures [regarding lethal injection and its implementation] are not subject to disclosure under the Freedom of Information Act of 1967.”); MO. REV. STAT. § 536.010(6)(k) (2000) (exempting a “statement concerning only inmates of an institution under the control of the department of corrections” from the definition of a “rule”); S.D. CODIFIED LAWS § 23A-27A-31.2 (2014) (classifying as “confidential” the “name, address, qualifications, and other identifying information relating to the identity of any person or entity supplying or administering the intravenous injection substance or substances” and treating disclosure of such information as a misdemeanor); TENN. CODE ANN. § 10-7-504(h)(1) (2014) (treating records identifying individuals or entities “directly involved in the process of executing a sentence of death . . . as confidential [and stating that they] shall not be open to public inspection”); *Id.* § 4-5 102(12)(G) (2011) (exempting “[s]tatements concerning inmates of a correctional . . . facility” from the definition of a “rule”); *Jackson v. Danberg* (No. 07M-09-141), 2008 WL 1850585, at \*1 (Del. Super. Ct. Apr. 25, 2008) (holding that Delaware’s lethal injection protocol is not subject to state APA); *Order Denying Temporary Restraining Order And/Or Stay at 4*, *Hightower v. Donald* (No. 2007CV135682), 2007 WL 4355844, at \*2 (Ga. Super. Ct. July 16, 2007) (“[T]he promulgation of these protocols regarding lethal injection by the [Georgia] Department of Corrections are not subject to the requirements of the APA.”); *Middleton v. Mo. Dep’t of Corrs.*, 278 S.W.3d 193, 198 (Mo. 2009) (en banc) (holding that an execution protocol is not a rule and is therefore not subject to the state APA); *Abdur’Rahman v. Bredeesen*, 181 S.W.3d 292, 311 (Tenn. 2005) (interpreting the Tennessee Uniform Administrative Procedure Act so as not to reach lethal injection).

99. See Berger, *Secrecy*, *supra* note 4, at 1374.

dealers, strongly suggests that their primary goal is to carry out executions, not to ensure that their execution procedures are safe.<sup>100</sup> Similarly, the continued use of paralytics helps demonstrate that some states are more concerned with the appearance than the reality of their executions.

The institutional hierarchy of state governments may also help explain state behavior in this area. Executions are a grisly business, and many state officials simply may not want to deal with it themselves. Some officials, then, may want to pass the responsibility to others, delegating the procedure to independent contractors or to prison guards and officials who lack the training and expertise to administer the procedures correctly.<sup>101</sup>

Remarkably, these delegations often provide for no accountability. For example, Missouri for years delegated its execution procedure to a doctor, who lowered the amount of anesthetic and made other changes to the procedure without the knowledge of correctional authorities.<sup>102</sup> Missouri delegated “total discretion” over its procedure to this doctor and did not oversee his actions.<sup>103</sup> As a result, the State did not know that this doctor’s dyslexia made him unsure as to how much anesthetic he had prepared for executions.<sup>104</sup> Nor did it check the execution log to learn that the drug doses had varied between executions.<sup>105</sup> Nevertheless, even though state officials did virtually nothing to oversee this doctor’s decisions, it vigorously resisted all efforts to inquire into its execution methods.<sup>106</sup>

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100. See James Gibson & Corinna Barrett Lain, *Death Penalty Drugs & the International Moral Marketplace*, 103 GEO. L.J. (forthcoming 2015) (manuscript at 10), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2524124](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2524124); Owen Bowcott, *London Firm Supplied Drugs for U.S. Executions*, GUARDIAN (Jan. 6, 2011, 12:45 PM), <http://www.theguardian.com/world/2011/jan/06/london-firm-supplied-drugs-us-executions>.

101. Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2083 (2011) [hereinafter Berger, *Norms*].

102. Taylor v. Crawford (No. 05-4173-CV-C-FJG), 2006 WL 1779035, at \*7 (W.D. Mo. June 26, 2006); Transcript of Testimony of John Doe No. 1 at 96–98, Taylor, 2006 WL 1779035 [hereinafter Doe Deposition].

103. See Taylor, 2006 WL 1779035, at \*7.

104. See *id.* (“John Doe I also testified that he felt that he had the authority to change or modify the formula as he saw fit. It is apparent that he has changed and modified the protocol on several occasions in the past.”); Doe Deposition, *supra* note 102, at 25 (“I am dyslexic and so . . . it’s not unusual for me to make mistakes.”).

105. See Taylor, 2006 WL 1779035, at \*7; Berger, *Remedies*, *supra* note 4, at 305.

106. See, e.g., Defendant’s Response to Motion to Compel Discovery at 6, Clemons v.

From a human perspective, it is understandable that individual officials would not want to engage closely with lethal injection if they do not have to. Presumably, even some strong supporters of capital punishment feel uneasy ending another human being's life. Moreover, lethal injection falls far outside the expertise of most DOC and prison officials, so many such officials may be relieved to rid themselves of this assignment. However, states delegation practices can make lethal injection more dangerous because the people implementing the procedure often lack the expertise to do their tasks well.

Relatedly, delegation can also insulate lethal injection from much needed revision. After all, the prison employees and independent contractors who frequently implement lethal injection may not have the institutional authority to make changes to the procedure themselves, even if they recognize problems. In other words, even if the agents recognize problems, they may think they lack the legal or political authority to make major changes.

Oklahoma's protocol, for example, vests entire discretion in the prison warden to deal with problems that may arise.<sup>107</sup> During the botched execution of Clayton Lockett, initial attempts to insert the catheter into various veins failed.<sup>108</sup> The responsible physician, therefore, attempted to set the catheter in the femoral vein, even though he did not have the proper sized catheter to access it.<sup>109</sup> Perhaps if this doctor had played a larger role in designing and administering the procedure, he would have prepared for this contingency in advance. Alternatively, if the Oklahoma protocol had not vested entire discretion in the warden, perhaps this doctor could have halted the execution until the proper equipment became available. Instead, the doctor proceeded, even though he had never before attempted femoral access with such a short catheter.<sup>110</sup>

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Crawford (No. 07-4129-CV-C-FJG), 2008 WL 2783233 (W.D. Mo. July 15, 2008); Berger, *Remedies*, *supra* note 4, at 305.

107. See ANITA TRAMMELL, OKLA. ST. PENITENTIARY, PROCEDURES FOR THE EXECUTION OF OFFENDERS SENTENCED TO DEATH 15–18 (2014).

108. See *Lockett Execution Report*, *supra* note 27, at 15–16.

109. *Id.* at 16 (noting that attempts to find a “needle/catheter” between 1¼ inches and 2½ inches failed and that the largest available was only 1¼ inches).

110. See *id.*

State secrecy likely exacerbates these institutional problems. The physician and paramedic who attempted to set the catheter in Lockett's execution proceeded anonymously.<sup>111</sup> Accordingly, public disclosure of the botch would not immediately reflect badly on them, because the general public did not know their names.<sup>112</sup> However, these individuals were, of course, known within the prison, and presumably felt pressure from public officials to proceed with the execution, even when IV access was difficult to secure. Perhaps if the officials publicly responsible for the procedure were the same people who implemented the procedure's difficult steps (such as setting the catheter), states would be more likely to make revisions to guard against such botches.

Secrecy coupled with delegation, thus, makes it easier for states to hide who is truly responsible. Though high-level officials are ostensibly responsible for execution procedures, they usually are not the actual people mixing the drugs, setting the catheter, and monitoring an inmate's consciousness. Of course, no official wants to see an execution botched on her watch, but when so many aspects of a procedure are delegated down an institution's hierarchy, it may be easier for officials to tell themselves that particular issues are not their responsibility.<sup>113</sup> The problem always lies at someone else's feet.

### 3. The Structure of Constitutional Tort Law

It is finally worth briefly noting that state officials and execution team members likely will not face legal repercussions if the lethal injection procedures they design and implement cause suffering. First, because many states still use paralytics as part of their procedures, inmates might feel pain that observers cannot detect.<sup>114</sup> Second, even when inmates seem to have suffered,

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111. See TRAMMELL, *supra* note 107, at 8, 14.

112. A lawsuit filed by Clayton Lockett's family has since identified the doctor by name. See Complaint at 7, *Estate of Lockett v. Fallin et al.*, No. CIV-14-1119-HE (W.D. Okla. Oct. 13, 2014).

113. Cf. Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1078 (2011) ("When authority is allocated down within an agency, . . . [this will] reduce the political responsiveness of agency decisionmaking.").

114. See Suzanne C. Beyea, *Addressing the Trauma of Anesthesia Awareness*, 81 AORN 603, 603 (2005).

states often claim that they did not.<sup>115</sup> While these objections may seem implausible, it is hard to prove that an inmate felt pain because he is deceased and obviously cannot testify as to his experience. Third, were an inmate's family to bring an action against a state or state officials to recover for a botched execution, immunity doctrines would likely protect the state and its officials from money damages.<sup>116</sup> More specifically, state sovereign immunity prohibits monetary awards against the state in the absence of a statute waiving or abrogating such immunity, and qualified immunity would make it difficult to recover monetary damages from responsible state officials.<sup>117</sup> To this extent, the structure of constitutional tort law permits state officials to operate in this area without worrying too much about serious personal consequences if things go awry.

While most state officials will not deliberately cause harm, they also operate in a world knowing that their mistakes will likely not subject them to serious legal consequences. Moreover, because states (understandably) keep the identity of their lethal injection teams a secret, many participants in lethal injection administration also do not risk public embarrassment. To be sure, high-level officials, such as prison wardens and directors of DOCs, may receive some public criticism for botched executions, but they often are not directly involved in the administration of lethal drugs and therefore can plausibly deflect the blame.<sup>118</sup>

### C. *Strategic Explanations*

States also have strategic reasons for acting the way they do. Viewed through this lens, states resist disclosing or revising their

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115. See Botelho & Ford, *supra* note 10.

116. The families of Dennis McGuire and Clayton Lockett are currently suing state officials for their botched executions in Ohio and Oklahoma, respectively. See generally Complaint, McGuire v. Mohr, No. 14-cv-00093 (S.D. Ohio Jan. 24, 2014); Complaint, *In re Lockett*, No. CIV-14-1119-HE (W.D. Okla. Oct. 13, 2014) (showing that the families of Lockett and McGuire are suing their respective states for violating the Eighth Amendment during the respective executions).

117. See U.S. CONST. amend. XI; Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding that "government officials performing discretionary functions, generally are shielded from [civil] liability [so long as] their conduct does not violate clearly established statutory or constitutional rights"); Edelman v. Jordan, 415 U.S. 651, 664 (1974) (limiting *Ex Parte Young* to prospective, rather than retrospective, relief).

118. Indeed, as noted above, these officials may even have an incentive to delegate the procedure to other people. See *supra* Part II.B.2.



execution procedures to help them defend lawsuits today, ward off more litigation tomorrow, preserve the death penalty more generally, and protect state fiscal concerns. As with the other explanations, these motives can interact with each other and with other categories of explanations.

### 1. Litigation Strategy

Inmates frequently bring suits under 42 U.S.C. section 1983 challenging lethal injection procedures on Eighth Amendment grounds.<sup>119</sup> States predictably try to fend off such lawsuits. State secrecy is an especially effective litigation tactic. Because states often withhold many important details of their lethal injection procedures, inmates bringing section 1983 actions often lack important information bearing on the risk of pain. Without such information, it is impossible to establish that the procedure in question creates a substantial risk of serious pain, because both the lawyers and the judge lack crucial facts. Of course, if courts compelled states to turn over such details during the course of discovery, then secrecy would not be an effective litigation tactic. However, courts rarely require states to make such disclosures, so state secrecy has in fact proven to be a successful litigation strategy thus far.<sup>120</sup>

Some state officials may also refuse to substantially rethink their lethal injection procedures as part of a broader strategy to persuade courts that there is nothing wrong with them. Were states to concede the flaws in their procedures, courts may take inmates' Eighth Amendment challenges seriously. As things stand, courts very rarely rule against states in these cases.<sup>121</sup> From the perspective of litigation strategy, the states have good reason to continue pretending that nothing is wrong.

In fairness, many states may also believe that the inmates' Eighth Amendment challenges are bogus.<sup>122</sup> To this extent, states may feel like their litigation strategies are justified methods of trying to discourage frivolous litigation that consumes state time

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119. See 42 U.S.C. § 1983 (2012).

120. See Berger, *Secrecy*, *supra* note 4, at 1371, 1373.

121. See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1606 (2003).

122. See *supra* Part II.A. *But see supra* notes 77–79 and accompanying text.

and money. The fact that prison inmates litigate various issues frequently through habeas and section 1983 actions likely further adds to the states' belief that lethal injection challenges ought not to be taken seriously.<sup>123</sup> Indeed, by painting lethal injection actions as frivolous, states signal to courts that they should not spend much time on them. Of course, courts owe inmates an independent review of the issues, but, to date, states often have successfully persuaded courts that inmates' objections to their lethal injection procedures are not worthy of anything beyond the most minimal judicial resources.<sup>124</sup>

## 2. Preserving the Death Penalty

State officials also care about preserving capital punishment more generally. This consideration helps explain both state intransigence and state secrecy. State politicians and correctional officials may resist modifying their procedures, and in particular the drugs they use, because they fear that changes may jeopardize their ability to carry out executions at all. It can be difficult for states to find a readily and consistently available supply of drugs.<sup>125</sup> Sometimes, states are forced to change drugs because they can no longer get their old drugs, but when states have access to a particular drug source, they usually resist changes because an alternative can be difficult to find.<sup>126</sup> Moreover, many drugs also have expiration dates, so states cannot stockpile the drugs for use in future years.<sup>127</sup>

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123. See Schlanger, *supra* note 121, at 1557 (“In 1995, prison and jail inmates brought about 40,000 new lawsuits in federal court—nearly a fifth of the federal civil docket.”).

124. See, e.g., *Felder v. Johnson*, 180 F.3d 206, 215 (5th Cir. 1999) (describing the claim that the state’s lethal injection procedures violated the Eighth Amendment as “border[ing] on the legally frivolous”); *Fitzpatrick v. Bradshaw*, No. 1:06-cv-356, 2008 WL 7055605, at \*62 (S.D. Ohio 2008) (dismissing the claim as “without merit”); *Murphy v. Sirmons*, 497 F. Supp. 2d 1257, 1292–94 (E.D. Okla. 2007) (rejecting the lethal injection claim as “frivolous”); Berger, *Secrecy*, *supra* note 4, at 1387, 1425.

125. See Denno, *Chaos*, *supra* note 4, at 1366 (noting the “quandary” states face of having to use compounding pharmacies as a result of drug shortages).

126. See *id.* at 1362–66; Gibson & Lain, *supra* note 100 (manuscript at 12–14).

127. See, e.g., Ed Pilkington, *Georgia Rushes Through Executions Before Lethal Injection Drugs Expire*, GUARDIAN (Feb. 22, 2013, 12:35 AM), <http://www.theguardian.com/world/2013/feb/21/georgia-executions-lethal-injection-drug-pentobarbital> (discussing Georgia’s hasty execution of Andrew Allen Cook “amid a legal scramble to carry out capital sentences before its supply of lethal injection drugs reach[ed] its expiry date”).

States also fear that disclosing information about their lethal injection procedures, especially the names of their drug providers, will jeopardize their ability to carry out executions at all. Major pharmaceutical companies in recent years have stopped providing drugs to states for use in executions.<sup>128</sup> As a result, states have had to turn to other sources for their drugs, especially compounding pharmacies.<sup>129</sup> Inmates object that because compounding pharmacies escape many FDA regulations, their products often have not been evaluated for effectiveness and safety.<sup>130</sup> There is voluminous scientific evidence about the risks posed by some compounded drugs,<sup>131</sup> but states, for their part, worry that pressure on compounding pharmacies might scare them away, further drying up viable lethal drugs.

To this extent, states promote secrecy so as to insulate compounding pharmacies from external pressure and harassment that may dissuade them from continuing to supply drugs for executions.<sup>132</sup> Pharmacies, for their part, want to avoid bad publicity linking them with executions. For example, in February 2014, a

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128. Berger, *Secrecy*, *supra* note 4, at 1380–81; Denno, *Chaos*, *supra* note 4, at 1360–65.

129. Berger, *Secrecy*, *supra* note 4, at 1382. “[U]nlike ‘Big Pharma’ manufacturing facilities, [compounding pharmacies] are subject to less rigorous, consistent regulation.” *Id.*; see also 21 U.S.C. § 353(a) (2012) (providing exceptions from other regulations for compounded drugs meeting certain requirements); Denno, *Chaos*, *supra* note 4, at 1367; Gibson & Lain, *supra* note 100 (manuscript at 18) (discussing the differences between “Big Pharma” drugs and compounded drugs).

130. See, e.g., Plaintiff’s Motion for Temporary Restraining Order and Preliminary Injunction at 1–2, *Taylor v. Apothecary Shoppe, LLC* (No. 14-CV-063-TCK-TLW), 2014 WL 631664 (N.D. Okla. Feb. 18, 2014) (challenging the compounding pharmacy’s alleged provision of drugs for lethal injection).

131. See Berger, *Secrecy*, *supra* note 4, at 1382–84; Denno, *Chaos*, *supra* note 4, at 1369–71 (summarizing FDA reports regarding the risks of compounding pharmacies).

132. See *Editorial: Greg Abbott Switches Position on Death Row Drugs Sources*, STAR-TELEGRAM (June 1, 2014, 9:31 AM), <http://www.star-telegram.com/opinion/editorials/article3860246.html>; Gary Grado, *State Secret: Arizona Tries to Conceal Identity of Firm That Makes Chemical for Lethal Injections*, ARIZ. CAPITOL TIMES (Oct. 14, 2013, 7:52 AM), <http://azcapitoltimes.com/news/2013/10/14/state-secret-arizona-tries-to-conceal-identity-of-firm-that-makes-chemical-for-lethal-injections/> (discussing the backlash, hate mail, and harassment received by compounding pharmacies); Brandi Grissom, *TDCJ Refuses to Return Execution Drugs to Pharmacist*, TEX. TRIB. (Oct. 7, 2013), <https://www.texastribune.org/2013/10/07/tdcj-refuses-return-execution-drugs-pharmacist/> (describing hate mail a compounding pharmacy received after it became public that it had provided drugs to Texas for use in executions); Ed Pilkington, *Texas Accuses Anti-Death Penalty Charity Reprive of Fomenting Violence*, GUARDIAN (Mar. 28, 2012, 12:36 PM), <http://www.theguardian.com/world/2012/mar/28/death-penalty-texas-reprive> (noting the intimidation and harassment of manufacturers of drugs used in lethal injections).

compounding pharmacy sued by a death row inmate opted to settle the case, agreeing not to provide drugs for executions but also refusing to acknowledge that it had ever planned to do so.<sup>133</sup> Recognizing that many pharmacies want to avoid public relations problems, states believe secrecy helps them protect their remaining drug sources and thereby preserve capital punishment more generally.

#### D. *Political Explanations*

A final set of explanations for state behavior in this area is political. Prominent public officials, in particular, can use their actions and statements about lethal injection to signal that they are tough on crime.<sup>134</sup> Relatedly, state officials may want to signal to victims' families and the public in general that they are doing everything they can to carry out justice expeditiously. Indeed, state officials frequently remind the public of the victim's suffering at the time of executions, even after botched executions.<sup>135</sup> This political explanation might have more resonance in states like Texas and Oklahoma where support for the death penalty is very strong, but even in other states, some state officials likely feel that they have an obligation to the public to carry out lawfully imposed sentences. Indeed, Democratic politicians in some states may feel additional pressure to support capital punishment to burnish their anti-crime credentials and dispel concerns that they are not sufficiently tough for public office.<sup>136</sup>

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133. See Gibson & Lain, *supra* note 100 (manuscript at 19); ASSOC. PRESS, *Tulsa Pharmacy Agrees Not to Provide Execution Drug*, CBS NEWS (Feb. 17, 2014, 11:32 PM), <http://www.cbsnews.com/news/oklahoma-pharmacy-agrees-not-to-provide-drug-for-execution/>.

134. See John Caniglia, *Lawmakers Seek Alternatives to Lethal Injection, As Death Penalty Becomes Mired in Litigation*, CLEVELAND.COM (Feb. 24, 2014, 7:27 AM), [http://www.cleveland.com/metro/index.ssf/2014/02/state\\_lawmakers\\_seek\\_alternati.html](http://www.cleveland.com/metro/index.ssf/2014/02/state_lawmakers_seek_alternati.html).

135. See Erik Eckholm, *IV Misplaced in Oklahoma Execution, Report Says*, N.Y. TIMES, Sept. 4, 2014, at A14.

136. See, e.g., Peter Applebome, *The 1992 Campaign: Death Penalty; Arkansas Execution Raises Questions on Governor's Politics*, N.Y. TIMES (Jan. 25, 1992), <http://www.nytimes.com/1992/01/25/us/1992-campaign-death-penalty-arkansas-execution-raises-questions-governor-s.html> (describing then-presidential candidate and Governor of Arkansas Bill Clinton's decision to withhold executive clemency for the controversial execution of Ricky Ray Rector so as not to appear soft on crime); Gregory Kline, *State Democrats Are Soft on Crime*, BALT. SUN (Feb. 13, 2014, 8:36 AM), <http://www.baltimoresun.com/news/opinion/oped/bs-ed-red-maryland-0214-20140213-story.html> (lambasting Governor O'Malley who recently abolished the death penalty in Maryland for being soft on crime).

Elected officials also may resist careful appraisal of their procedures, because such appraisal may require substantially new procedures, which would take time to implement. Some changes require legislation, which obviously can be time consuming. Even changes that do not require a new statute can require states to procure new drugs, find new personnel, and design and practice new procedures. Victims' families and some members of the public are already frustrated that the period between sentencing and execution is so long,<sup>137</sup> and state officials often do not want to add to this frustration.<sup>138</sup>

It is even possible that some officials are so callous that they do not care whether their execution procedures cause pain. It is doubtful that this explanation is correct often, but it is possible that the occasional official sees a painful death as part of the retribution the condemned deserves. Perhaps more likely is the possibility that some state officials do not intend to cause the inmate pain but also feel that given the inmate's terrible crime, they ought not spend excessive time and resources designing the safest execution procedures.<sup>139</sup>

### III. CONCLUSION: THE EXECUTIONERS' DILEMMAS

When I litigated the constitutionality of Missouri's lethal injection procedure in 2006 and 2007,<sup>140</sup> I did not come away with the

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137. See TRACY L. SNELL, U.S. DEP'T OF JUST., CAPITAL PUNISHMENT, 2012-STATISTICAL TABLES 14 (2014), available at <http://www.deathpenaltyinfo.org/documents/cp12st.pdf> (noting the mean lapse in time between sentencing and execution for inmates in 2012 was just under sixteen years); see also Adam Liptak, *Lifelong Death Sentences*, N.Y. TIMES, Nov. 1, 2011, at A16 ("[Five] percent of the 5826 death sentences imposed from 1973 to 1995 were carried out in those years.").

138. See, e.g., Michael Smerconish, *Death Sentences Too Often Punish Victim's Family—Not the Killer*, DALL. MORNING NEWS (Aug. 3, 2014, 8:08 PM), <http://www.dallasnews.com/opinion/latest-columns/20140803-death-sentences-too-often-punish-victims-family--not-the-killer.ece>.

139. Cf. Tina Rosenberg, *The Deadlist D.A.*, N.Y. TIMES (July 16, 1995), <http://www.nytimes.com/1995/07/16/magazine/the-deadliest-da.html?pagewanted=all> (statement by Philadelphia District Attorney) ("I've looked at all those sentenced to be executed. No one will shed a tear. Prison is too good for them. They don't deserve to live. I represent the victim and the family. I don't care about killers.").

140. See *Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007); *Taylor v. Crawford*, No. 05-4173-CV-C-FJG, 2006 WL 1779035 (W.D. Mo. June 26, 2006); Eric Berger, *Thoughts on LB 36: Problems with the Proposed Bill to Institute Lethal Injection in Nebraska*, 1 NEB. L. REV. BULL. 14, 15 (2009), <http://lawreviewbulletin.unl.edu/wp-content/uploads/2009/03/berger1.pdf>.

impression that the responsible state officials were vicious people who enjoyed inflicting pain.<sup>141</sup> Nor did I think that they had made the decision to ignore the Constitution and get away with what they could. Rather, I think the State had given some employees a difficult task for which they were mostly poorly qualified. Some of the participants may have been overconfident or even arrogant. Some were careless. Still others were probably out of their depth, tasked with an extremely difficult job without the training or resources to even know where to begin. On the whole, though, these were people trying to do a job that the state had decided was important and had assigned to them.

To be sure, the precise motives of the various state actors differ. Each class of actors confronts separate incentives, pressures, and problems. Generally speaking, politicians, such as governors and elected attorneys general, may reap most of the political benefits (and bear most of the political risks) from refusing to alter lethal injection because this stance, usually oblivious to the details of lethal injection, signals that they are tough on crime.<sup>142</sup> Correctional officials, used to operating without oversight, may seek to avoid attention by delegating the matter down the prison bureaucracy or by outsourcing aspects of the procedure altogether.<sup>143</sup> Prison employee execution team members may just want to follow orders within the ordinary chain of command. The commonality, though, may be that while most of these people probably approve of capital punishment in theory, few relish the actual business of killing.

If anything, the problems with lethal injection may not be because the procedure's participants are vicious people who want to inflict pain on "the worst of the worst," but because not enough qualified people have the stomach for it.<sup>144</sup> In state after state, the practice has been for correctional officials to delegate the procedure down the agency hierarchy or outsource it entirely.<sup>145</sup> From a human perspective, it is entirely understandable that most people

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141. See *supra* Part II.A (explaining that state officials may be convinced by experts that procedures are safe and may not truly understand the drugs and their risks). This impression is based on a combination of trial testimony, depositions, discovery documents, and various interactions from the litigation. *Id.*

142. See *supra* note 136 and accompanying text.

143. See *supra* notes 98, 101 and accompanying text.

144. See Denno, *Paradox*, *supra* note 4, at 66.

145. See Berger, *Norms*, *supra* note 101, at 2039.

would not want to take responsibility for the procedure themselves. This collective reluctance, however, is part of the problem. States have had trouble finding qualified people to design and implement their procedures, and individuals' reluctance to take charge of lethal injection has made it still harder for states to systematically address their procedures' dangers and to improve them in meaningful ways.

Relatedly, to the extent lethal injection procedures sometimes cause excruciating pain, many participants can (perhaps fairly) claim that other members of the execution team bear more responsibility for those problems. Indeed, whether deliberately or not, states often design execution procedures in ways that shield participants' consciences from the feeling that they themselves were personally responsible for the killing.<sup>146</sup> When the firing squad was commonplace, states frequently used multiple sharp shooters and gave many of them blanks.<sup>147</sup> Lethal injection involves many team members,<sup>148</sup> thereby dividing responsibility in a way that might seem to avoid pinning moral accountability on any single person. Indeed, some states' procedures use multiple IV lines coming from a different room.<sup>149</sup> Even within state bureaucracies, numerous people have partial responsibility over lethal injection. Such structures help to obstruct change.

This is not to excuse the mistakes these officials have made. On the contrary, many state officials deserve serious criticism for the way they have handled lethal injection,<sup>150</sup> but it is also important to recognize the dilemmas these officials face. Indeed, various pressures make it hard for officials to take proactive steps to improve the safety and transparency of lethal injection. While there is compelling evidence that lethal injection poses serious risks, state officials with inadequate information make decisions based

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146. See Michael J. Osofsky, Albert Bandura & Philip G. Zimbardo, *The Role of Moral Disengagement in the Execution Process*, 29 L. & HUM. BEHAV. 371, 385 (2005).

147. See LOUIS J. PALMER, JR., *THE DEATH PENALTY IN THE UNITED STATES: A COMPLETE GUIDE TO FEDERAL AND STATE LAWS* 242 (2d ed. 2014) ("The use of blanks is done so that the firing squad team will not know who actually killed the prisoner.").

148. Kevin Bonsor, *Methods of Execution Have Changed With the Times*, USA TODAY (May 10, 2001, 2:36 PM), <http://usatoday30.usatoday.com/news/science/stuffworks/2001-05-10-lethal-injection.htm>.

149. *Id.*

150. *Taylor v. Crawford* (No. 05-4173-CV-C-FJG), 2006 WL 1779035, at \*7-\*8 (W.D. Mo. June 26, 2006) (finding the execution procedure unconstitutional).

on structural, strategic, and political concerns that might not be readily apparent to outsiders. Collectively, states' practices make executions more dangerous than they need to be, but given their resources, knowledge, institutional obligations, and political constraints, the collective behavior of state actors, while hardly commendable, is understandable.

Indeed, even the execution team member who genuinely wants to encourage her state to substantially rethink its lethal injection procedure faces sizable obstacles. If she voices her concerns, she may risk angering political officials, her own administrative bosses, and even the general public. If this team member lacks a medical background, she may doubt her own ability to make fixes that meaningfully improve the safety of lethal injections. If she does have a medical background, she may worry that helping to improve the procedure may jeopardize her own standing in the medical community and risk her medical license and livelihood.<sup>151</sup> If she has qualms about capital punishment more generally, she may also try to remove herself from the team rather than try to improve the procedure. A well-intentioned execution team member might, in other words, realize that a serious problem exists, but not know how to go about fixing it. Moreover, even if such a person were confident in her abilities to improve the system, she may lack the legal authority, political clout, or professional flexibility to make the necessary changes.

It is worth emphasizing that these pressures likely transcend the lethal injection setting and help explain official behavior in other contexts. The particulars would differ, of course, but when state officials take actions that violate people's rights (or risk violating people's rights), they may not set out to do so. Instead, a confluence of institutional pressures, epistemic limitations, strategic calculations, and political factors likely contribute to official behavior. Officials may end up disrespecting important constitutional values, but more often than not, they likely feel various pressures to select the route they have chosen. To acknowledge

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151. See Welsh-Huggins, *supra* note 67. Dr. Dershwitz, for instance, decided to stop testifying in lethal injection cases because he feared that the medical community may take action against him. *Id.*



these dilemmas is not to excuse constitutional violations, but rather to recognize that officials' jobs can be difficult and can present situations with seemingly no good options.

Of course, all this is speculative and general. State officials' behaviors differ from case to case, and no theory can fully explain official behavior in all instances. Nevertheless, when criticizing official governmental behavior, especially behavior that infringes on constitutional rights, we should remember that state officials usually act as they do for a reason. These reasons often do not justify their behavior, but they can help us better understand why states have bungled lethal injection so badly.