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LETHAL INJECTIONS: PROTOCOL PLAGUED WITH SECRECY AND FLAWS USHERING IN THE NEW ERA OF BOTCHED EXECUTIONS

Willow Van Skyhawk

Throughout American history, the death penalty has been a controversial topic. The Eighth Amendment establishes a constitutional safeguard that protects individuals from cruel and unusual punishment.¹ However, society's evolving standards of decency determine what is cruel and unusual.² As the traditional methods of executions dissipated, lethal injection became America's primary method of execution.³ However, investigations into the protocol proposed by various state legislatures have led to serious concerns regarding this method.

Although the public views legal injection as the least cruel and unusual form of execution, lethal injection protocols are continuously abused.⁴ The Supreme Court has repeatedly

¹ U.S. CONST. amend. VIII.

² *Trop v. Dulles*, 356 U.S. 86, 87 (1958).

³ *Early History of the Death Penalty*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/early-history-of-the-death-penalty> (last visited Apr. 13, 2023).

⁴ *Id.*

upheld the constitutionality of lethal injections, but the standards the Court uses to evaluate an Eighth Amendment Challenge to lethal injections makes it virtually impossible to overturn the existing protocol.⁵ Additionally, the existing state protocols add a layer of protection to the lethal injection system that makes a successful constitutional claim exceedingly difficult.⁶ This governmental protection has allowed questionable protocols and botched executions to go unnoticed and unaddressed.⁷

This Note will discuss how the rise of lethal injections as the primary method of execution in the United States has plagued the country with botched executions and how various remedial measures fall short of adequately addressing the problem. Section I will illustrate the historical rise of lethal injections. Section II will show how the existing constitutional standards for lethal injection protocols have allowed botched executions to become more prevalent. Section III illustrates how the lack of medical and scientific participation, as well as the lack of drug supplies, contribute to botched executions.⁸ Section IV addresses existing state governments' attempts to address such concerns and how such remedial measures fall short of fixing these existing problems. Finally, Section V discusses whether the lethal injection system can exist without harm. Severe remedial measures must be implemented to address the existing concerns surrounding lethal injections, and society must decide how much it is willing to tolerate the inconsistency and potential harm of lethal injections.

I. HISTORY OF LETHAL INJECTIONS

The American penal system has utilized the death penalty as a means of punishment since the colonial period. □ Although the death penalty has existed since the beginning of the United States, how legislatures enact it has changed substantially over time. Hanging was the most common form

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ See generally Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L.J. 1331 (2014).

of execution until the end of the 19th century, when electrocution took over as the primary method of execution.⁹ At the time, the consensus was that electrocution was more humane and less painful than hanging.¹⁰ The consideration of lethal injections as a method of execution within the United States traces back to 1888 in the state of New York.¹¹ New York appointed a commission to evaluate the use of lethal injections as a form of execution, but the commission rejected the proposal.¹² New York's rejection of lethal injections as a primary method of execution was based in part on concerns of the public that the method would link the practice of medicine with death.¹³

The Supreme Court has interpreted the Eighth Amendment, which bars cruel and unusual punishment, to ban all means of executions that are "incompatible with the evolving standards of decency that mark the progress of a maturing society."¹⁴ Although the Court has not deemed any form of execution to be cruel and unusual, American society has historically rejected certain forms of execution and shifted its focus to one in particular: lethal injection.¹⁵ Despite the rejection of lethal injection in the late 1800s, lethal injection emerged as "America's favorite" form of execution during the late 1970s.¹⁶ Since 1976, there have been 1,387 executions by lethal injection.¹⁷ This significantly outnumbers any other method of execution in the United States.¹⁸ This is mainly because the public tends to view lethal injection as the least "cruel and unusual" execution method.

⁹ *Baze v. Rees*, 553 U.S. 35, 40-41 (2008).

¹⁰ *Malloy v. South Carolina*, 237 U.S. 180, 185 (1915).

¹¹ See Deborah W. Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death over the Century*, 35 WM. & MARY L. REV. 551, 573 (1994).

¹² *Id.*

¹³ *Id.*

¹⁴ *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

¹⁵ *Id.*

¹⁶ *Facts about the Death Penalty*, DEATH PENALTY INFO. CTR. (Aug. 29, 2023).

¹⁷ *Id.*

¹⁸ *Id.*

In 1977, an Oklahoma legislator asked the state's medical examiner to create a lethal injection protocol.¹⁹ Although the state medical examiner said that he did not have the expertise to fulfill such an order, he nevertheless began creating a lethal injection protocol.²⁰ The three-drug protocol recommended to the Oklahoma state legislature required the administration of an anesthetic or sedative, followed by a drug to paralyze the inmate, and finally a drug to stop the heart.²¹

Although the Oklahoma legislature adopted the three-drug lethal injection method, the potential hazards of execution by lethal injection were not ameliorated.²² Oklahoma's lethal injection procedure was neither medically nor scientifically tested on human beings before its enactment.²³ This resulted in serious implementation issues. For example, suppose the drugs used in the lethal injection process are not administered properly. In that case, the condemned has a substantial risk of suffering immense pain.²⁴ These risks are prominent because legislators, not medical professionals, pushed this flawed protocol. The lack of support from medical professionals allowed countless flaws to go unnoticed and remain prevalent over time.²⁵

II. THE CONSTITUTIONALITY OF LETHAL INJECTIONS

As issues involving the implementation of lethal injection arose, concerns regarding the constitutionality of lethal injections grew.²⁶ In 2008, the Supreme Court addressed these concerns in *Baze v. Rees*.²⁷ In *Baze*, the petitioners argued

¹⁹ Josh Sanburn, *Creator of Lethal Injection Method: 'I Don't See Anything That Is More Humane'*, TIME (May 15, 2014, 12:46 PM), <https://time.com/101143/lethal-injection-creator-jay-chapman-botched-executions/>.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Jim Killackey, *Execution Drug Like Anesthesia*, DAILY OKLAHOMAN, May 12, 1977.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Baze v. Rees*, 553 U.S. 35 (2008).

that Kentucky's lethal injection protocol was cruel and unusual punishment in violation of the Eighth Amendment because of the inherent risk that the protocol could be followed incorrectly.²⁸ In accordance with the Kentucky protocol, the first drug administered could suffocate the inmate, the second drug renders the inmate paralyzed, and the third drug could cause immense burning and pain.²⁹ In this plurality opinion, the Court upheld the constitutionality of Kentucky's lethal injection protocol.³⁰ The Court stated that the petitioners did not successfully establish that the first drug would be administered improperly, and, as a result, the petitioners failed to show that a substantial risk existed.³¹ The Court asserted that in order for a method of execution to be deemed cruel and unusual, the method must create an intolerable risk of harm.³²

The Court revisited the constitutionality of lethal injections in *Glossip v. Gross*.³³ In this case, the petitioners alleged one of the drugs used in the Oklahoma lethal injection protocol, "midazolam," constituted cruel and unusual punishment because this drug did not prevent extreme pain.³⁴ In this plurality opinion, the Court stated that in order to have a valid constitutional claim, a defendant must show that the method of execution poses a substantial risk of harm as compared to alternative methods of execution.³⁵ The Court decided that the petitioner failed to show that the drug in question caused extreme pain.³⁶ As such, lethal injection was once again deemed not cruel and unusual punishment as compared to other forms of execution.³⁷

In 2019, the Supreme Court recapitulated its stance on whether lethal injections violate the Eighth Amendment.³⁸ In *Bucklew v. Precythe*, the Court upheld the constitutionality of

²⁸ *Id.* at 40-41.

²⁹ Denno, *supra* note 8, at 1334.

³⁰ *Id.*

³¹ *Id.*

³² *Baze*, 553 U.S. at 40-41.

³³ *Glossip v. Gross*, 135 S. Ct. 2726 (2015).

³⁴ *Id.* at 867.

³⁵ *Id.* at 877.

³⁶ *Id.* at 867.

³⁷ *Id.*

³⁸ *Bucklew v. Precythe*, 139 S. Ct. 1112, 1125 (2019).

lethal injections for the third time in roughly a decade.³⁹ In *Bucklew*, the defendant challenged the lethal injection protocol of Missouri, arguing that because he had a pre-existing medical condition, the implementation of the protocol would constitute cruel and unusual punishment.⁴⁰ The Court responded to this claim by clarifying the burden necessary to bring a constitutional challenge to a lethal injection protocol.⁴¹ The Court stated that the “Baze-Glossip test” requires that, where there is a question of whether the state’s execution method is cruel and unusual punishment, “a prisoner must show a feasible and readily implemented alternative method of execution that would significantly reduce a substantial risk of severe pain and that the State has refused to adopt without a legitimate penological reason.”⁴² The Court reasoned that the defendant in this case did not meet this burden,⁴³ once again illustrating how the Court continues to uphold the constitutionality of lethal injections despite its negative qualities.

III. BOTCHED EXECUTIONS INVOLVING LETHAL INJECTION RISES

The primary issue concerning the use of lethal injection is botched executions, which “occurs when there is a breakdown in, or departure from, the ‘protocol’ for a particular method of execution.”⁴⁴ Botched executions are “those involving unanticipated problems or delays that caused, at least arguably, unnecessary agony for the prisoner or that reflect gross incompetence of the executioner.”⁴⁵ Botched executions comprise more than one-third of the total number of execution

³⁹ Eric Berger, *Courts Culture, and the Lethal Injection Stalemate*, 62 WM. & MARY L. REV. 1, 4 (2020).

⁴⁰ *Bucklew*, 139 S. Ct. at 1125.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 1119.

⁴⁴ *Botched Executions*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/botched-executions> (last visited Oct. 3, 2023).

⁴⁵ *Id.*

attempts in the United States.⁴⁶ The growth of and mere existence of botched executions indicates a flaw in the system that legislatures must address.

Lethal injections are more susceptible to botched executions than any other execution method.⁴⁷ As states struggle to establish appropriate medical protocols, find qualified individuals to administer lethal injections, and keep adequate supplies of lethal injection drugs, the constitutional concerns surrounding lethal injections increase. In *Glossip v. Gross*, Justice Stephen Breyer voiced such concerns in his dissent.⁴⁸ Justice Breyer stated that the increase in botched executions involving new drug protocols and anonymous drug sources sparked grave concerns as to whether current lethal injection procedures violate the Eighth Amendment.⁴⁹ For a proper evaluation of the constitutionality of a means of execution, there must be an examination of the “drugs, drug sources, and drug protocols” used during the lethal injection process.⁵⁰ Without such information, the concern for the impropriety of lethal injections grows, and legislatures continuously ignore the possibility of botched executions.

A. COPY AND PASTE PROTOCOL

Since Oklahoma approved its three-drug combination for lethal injections, thirty-seven states have followed its lead and have adopted the three-drug protocol.⁵¹ State officials approved this protocol in their respective states without conducting individual scientific research.⁵² The three-drug

⁴⁶ Juliana Kim, *More than a Third of Executions in 2022 were 'Botched,' a Report Finds*, NPR (Dec. 21, 2022), <https://www.npr.org/2022/12/21/1144188268/executions-2022-botched-lethal-injection>.

⁴⁷ AUSTIN SARAT, *GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA'S DEATH PENALTY* 177 (Stanford L. Books 2014).

⁴⁸ *Glossip*, 135 S. Ct. at 908 (Breyer, J., dissenting).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 90-120 (2002).

⁵² *Id.* at 97.

combination, which typically consists of (1) sodium thiopental, (2) pancuronium bromide, and (3) potassium chloride, became standard in Oklahoma and other lethal injection states.⁵³ Although the three-drug protocol spread across the states as the new norm, the issues involved with it were not addressed. Instead, states continued to pass the three-drug protocol without conducting any additional medical research or scientific investigation.⁵⁴ This has created an environment where botched executions have a significant likelihood of occurring.

Without further testing or examination of the risks associated with the existing protocol, officials ignore the dangers of lethal injections. Due to the failure to address the flaws associated with lethal injections, the existing dangers in their protocol continue to foster botched executions and further a flawed system. For example, there is a substantial risk of suffocation from failure to use the proper dose of sodium thiopental.⁵⁵ This suffocation can be hidden by the second drug in the lethal injection process because pancuronium paralyzes the inmate.⁵⁶ The third drug, potassium chloride, which stops the heart, has a great possibility of burning through the veins of the person injected as the drug makes its way to the heart.⁵⁷ As states adopted this lethal injection protocol, they failed to address these concerns.

Despite the flaws of this lethal injection protocol, the Supreme Court upheld its legitimacy in *Baze v. Rees*. The Court continued to uphold its legitimacy in its following opinions.⁵⁸ The inherent flaws associated with lethal injection protocols create an elevated risk for botched executions.⁵⁹ These risks can be ameliorated through increased medical and scientific research. However, state governments have failed to conduct further research before enacting their respective lethal injection policies.⁶⁰ Without prioritizing the medical and scientific

⁵³ *Id.* at 117.

⁵⁴ *Id.* at 97.

⁵⁵ *Baze*, 553 U.S. at 108.

⁵⁶ *Id.* at 53.

⁵⁷ *Id.* at 44.

⁵⁸ See *Bucklew*, 139 S. Ct. at 1125.

⁵⁹ See *Denno*, *supra* note 51, at 90.

⁶⁰ *Id.*

research of death penalty protocols, the flaws in the process cannot be fixed. Disregarding troublesome lethal injection protocols enables the system to conduct botched executions and leaves constitutional concerns unaddressed.

B. LACK OF MEDICAL PROFESSIONAL SUPPORT

Another reason the implementation of lethal injections is susceptible to botched executions is because those administering lethal injections are not trained medical professionals.⁶¹ Currently, only thirty-five states either require or permit physician participation in executions.⁶² Lethal injections require the administrator to insert drugs intravenously, measure the correct dosage of drugs, monitor vitals, and conduct many other tasks typically reserved for those in medical practice. However, in reality, individuals with no medical training or background are carrying out such tasks and overseeing the medical protocols.⁶³

In addition to the government's lack of mandate for the participation of medical professionals, there is also an ethical concern that prevents doctor oversight during the lethal injection process.⁶⁴ An ethical dilemma exists among medical professionals because many doctors believe that aiding in the administration of lethal injections constitutes a violation of their Hippocratic oath.⁶⁵ Physicians are bound to follow medical ethics, and many medical professionals fear that aiding in lethal injections would harm those whom doctors are supposed to help.⁶⁶ Several medical organizations support this sentiment as well. For example, the AMA's Code of Medical Ethics prohibits the involvement of physicians in executions.⁶⁷ The American

⁶¹ Lee Black & Robert. M. Sade, *Lethal Injection and Physicians: State Laws vs. Medical Ethics*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/lethal-injection-and-physicians-state-law-vs-medical-ethics> (last visited Oct. 3, 2023).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Michael North, *Greek Medicine*, U.S. NAT'L LIBR. OF MED. (Sept. 16, 2002), https://www.nlm.nih.gov/hmd/greek/greek_oath.html.

⁶⁶ *Id.*

⁶⁷ Black & Sade, *supra* note 61.

Nurses Association (“ANA”) also opposes the participation of nurses in lethal injection procedures.⁶⁸ The Code of Ethics for Nurses discusses the importance of nurses taking a firm stance against the death penalty.⁶⁹ The concerns about medical professionals participating in lethal injections are widespread throughout the medical community. This creates a real obstacle to ensuring legal injection protocols are followed properly.

In addition to the ethical concerns dissuading medical professionals from participating in the administration of lethal injections, the fear of public scrutiny exacerbates the problem.⁷⁰ Many doctors who would be qualified to administer lethal injections refrain from doing so out of fear of public recrimination.⁷¹ Public scrutiny could taint the reputation of a medical professional, impeding their medical practice and impacting their livelihood.⁷²

All of these obstacles prevent medical professionals from consistently overseeing the administration of lethal injections, which creates an increased risk of botched executions. The lethal injection procedure is inherently medical.⁷³ Without the oversight of medical professionals, individuals without proper qualifications are tasked with overseeing the administration of lethal injections and ensuring that proper protocols are followed.⁷⁴ The lethal injection process rests on the proper administration of medical procedures. However, those administering the protocols have no professional medical training. This major systematic flaw allows for increased error rates within the death penalty system.

⁶⁸ *Capital Punishment and Nurses’ Participation in Capital Punishment*, ANA CTR. FOR ETHICS AND HUMAN RIGHTS, <https://www.nursingworld.org/practice-policy/nursing-excellence/official-position-statements/id/capitalpunishment-and-nurse-participation-in-capital-punishment/> (last visited Apr. 13, 2023).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Black & Sade, *supra* note 61.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

C. LACK OF DRUGS

In addition to the lack of medical professional supervision in the administration of lethal injections, there is also a shortage of necessary drugs.⁷⁵ For executioners to properly administer lethal injections, the necessary drugs must be available. The unavailability of lethal injection drugs has led to a crossroads for state governments. States are left with two options: (1) stall lethal injection executions; or (2) continue lethal injection executions with drugs that have not been approved by the Food and Drug Administration (“FDA”).⁷⁶ Both options further community concerns surrounding lethal injections.

The shortage of drugs exists primarily because pharmaceutical companies do not want to be associated with lethal injections.⁷⁷ Public sentiment is a significant motivating factor, especially when the public’s consumption of a company’s products determines the company’s profit.⁷⁸ Over sixty healthcare companies firmly state their objection to lethal injections and actively prohibit their drugs from being used in lethal injection protocols.⁷⁹ One company that has placed distribution controls on their drugs is Janssen, a division of Johnson & Johnson.⁸⁰ Janssen stopped manufacturing the drug Etomidate because states were using the drug in their lethal injection protocols.⁸¹

Due to the lack of available lethal injection drugs, many states have placed a moratorium on executions.⁸² Opponents of the death penalty see these moratoriums as a sign that there will

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Industry Statements*, LETHAL INJECTION INFO. CTR., <https://lethalinjectioninfo.org/industry-statements/> (last visited Apr. 13, 2023).

⁸⁰ David Crow, *Johnson & Johnson Unit Speaks Out at Planned Death Row Drug Use*, FINANCIAL TIMES (Aug. 21, 2017), <https://www.ft.com/content/0e0aeb8-8694-11e7-bf50-e1c239b45787>.

⁸¹ *Id.*

⁸² *Id.*

be a shift away from executions as a method of punishment. However, the lack of available drugs does not prevent the death penalty from resuming, nor does it provide judicial assurance that executions are unconstitutional. Instead, the lack of available drugs has led to protocols being compromised, which inevitably increases botched executions.⁸³ Without the necessary supplies, it is impossible to ensure that lethal injections meet proper standards and protocols.

IV. STATE GOVERNMENT SOLUTIONS

A. ANONYMITY

In response to the growing concerns surrounding existing lethal injection protocols, many state governments have implemented remedial measures.⁸⁴ This effort has resulted in the involvement of medical professionals and pharmaceutical companies in lethal injections. To perform an execution by lethal injection, the government must have the available drugs. Many states have enacted secrecy laws to retain medical supplies and medical personnel for the administration of lethal injections.⁸⁵ Such laws are intended to promote the participation of medical personnel and pharmaceutical companies in the lethal injection process so those involved can avoid public scrutiny.

Secrecy statutes enacted by various state legislatures vary in the forthcomingness of the information.⁸⁶ Some states have general state disclosure acts, while others have special statutes making the parties involved in executions virtually unidentifiable.⁸⁷ As the trend of shielding those involved in the lethal injection process grows, so does the trend of hiding the existing lethal injection protocols themselves.⁸⁸ Following the nationwide study conducted by legal scholar Deborah Denno,

⁸³ Black & Sade, *supra* note 61.

⁸⁴ *Id.*

⁸⁵ Kelly A. Mennemeier, *A Right to Know How You'll Die: A First Amendment Challenge to State Secrecy Statutes Regarding Lethal Injection Drugs*, 107 J. CRIM. L. & CRIMINOLOGY 443, 460 (2017).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

the number of states that fully disclose their lethal injection protocols decreased from nineteen in 2001 to six in 2005.⁸⁹ This trend of secrecy only cements concerns with lethal injection because legislatures hide their existing policies, which result in botched executions, from the public.

Great opposition exists to state legislatures passing secrecy laws.⁹⁰ One such organization that has voiced its opposition to secrecy laws is the American Bar Association (“ABA”).⁹¹ The ABA adopted a resolution in 2015 that encouraged all jurisdictions imposing the death penalty to publish their execution protocols.⁹² Publishing the protocols enables public review and encourages public comments on proposed protocols and execution procedures.⁹³ Those in opposition to the secrecy laws argue that they insulate parties involved in lethal injections from public scrutiny and accountability.⁹⁴

Laws preventing the publication of the drugs and protocols used in lethal injection processes harms those on death row and the public because, as accountability decreases, botched lethal injections increase. Those promoting the implementation of state secrecy laws argue that the laws are necessary to protect medical professionals from harassment and scrutiny.⁹⁵ However, the ABA dismisses this argument because there have been not previously documented credible or verified threats to the safety of drug manufacturers.⁹⁶ Additionally, state legislatures could “narrowly tailor” their protective measures to censor the names of those administering lethal injections without hiding existing protocols from prisoners and the public.⁹⁷ Secrecy laws allow protocols to go unchecked, which only increases the likelihood that botched executions will occur. Thus, the “solution” of secrecy laws has

⁸⁹ Denno, *supra* note 51, at 65.

⁹⁰ *Id.*

⁹¹ Mennemeier, *supra* note 85, at 460.

⁹² *Id.* at 461.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 462.

⁹⁶ *Id.*

⁹⁷ *Id.*

only furthered the dangers and strengthened the concerns surrounding lethal injections.

B. COMPOUNDING PHARMACIES

States have also attempted to ameliorate the lack of drugs available for lethal injections by using compounding pharmacies as a source of execution drugs.⁹⁸ Compounding pharmacies combine or alter drugs to meet the specific needs of an individual patient.⁹⁹ Compounding pharmacies can act like drug manufacturers and produce substantial amounts of drugs that are similar to commercially available drugs.¹⁰⁰ Instead of waiting for FDA-approved drugs to become available, states have begun to use compounding pharmacies to create new versions of the drugs used in lethal injection protocols.¹⁰¹ Although procuring drugs from compounding pharmacies allows lethal injections to continue, this state remedial action has raised additional concerns because these new drug concoctions lack reliability and certification.

Although state pharmacy boards must license compounding pharmacies, the FDA does not approve of the drugs produced by compounding pharmacies.¹⁰² Compounding pharmacies do not have to register with the FDA, nor do they have to inform the FDA of the drugs they are manufacturing.¹⁰³ Additionally, compounding pharmacies may, but are not required, to gain accreditation from the Pharmacy Compounding Accreditation Board (“PCAB”).¹⁰⁴ The PCAB requires pharmacies that seek accreditation to “use high-quality chemicals and equipment, give pharmacists and technicians regular training, test products for quality, and have

⁹⁸ *Compound Pharmacies and Lethal Injections*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/lethal-injection/compounding-pharmacies> (last visited Apr. 13, 2023).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

an effective recall mechanism in place.”¹⁰⁵ This lack of regulation allows states to produce lethal injection drugs without disclosing the actual drugs used.

Compounding pharmacies provide increased opportunity for botched executions, as the drugs manufactured contain an increased likelihood of being unreliable, expired, or dangerous.¹⁰⁶ For example, in 2012, South Dakota switched to a one-drug protocol obtained from a compounding pharmacy.¹⁰⁷ This drug was later found to be contaminated with fungus after an “inmate began snoring and remained open-eyed as he was executed.”¹⁰⁸ In 2015, both the FDA and Oklahoma Board of Pharmacy discovered that an Oklahoma compounding pharmacy had violated almost 2,000 state guidelines.¹⁰⁹ In 2018, investigative reporter Chris McDaniel uncovered that Texas obtained its execution drugs from a compounding pharmacy previously cited in the past eight years by the Texas State Board of Pharmacy for forty-eight violations. Such violations included carrying stock drugs, using inadequate procedures for cleaning hands and changing gloves, and using improper protocols for preparing IV solutions.¹¹⁰

The “remedial measure” of state governments using compounding pharmacies only created additional concerns with lethal injection protocols. Without proper oversight, lethal injection drugs have a greater opportunity to contravene health regulations and existing protocols. The use of compounding pharmacies allows states to continue administering lethal injections when they might not otherwise. However, the use of compounding pharmacy drugs compromises health and safety standards and increases the risk of botched executions. Additionally, not requiring compounding pharmacies to meet standards or report their drug concoctions only further heightens the veil of secrecy.

V. CAN THE LETHAL INJECTION SYSTEM BE FIXED?

¹⁰⁵ *Id.*

¹⁰⁶ Berger, *supra* note 39, at 4.

¹⁰⁷ Denno, *supra* note 8, at 1376.

¹⁰⁸ *Id.*

¹⁰⁹ Berger, *supra* note 39, at 4.

¹¹⁰ *Compound Pharmacies and Lethal Injections*, *supra* note 98.

There are real problems surrounding current lethal injection protocols. Identifying these problems is one thing – offering a solution is an entirely different task. Although there have been efforts to fix lethal injection flaws, most have fallen short. Previous state acts to remedy inconsistencies did not go far enough. To effectively address the flaws in the system, we must identify how some of the biggest issues began and how these flaws have led to an age of botched executions.

We must reevaluate the existing state protocols to identify the potential inconsistencies effectively. According to a Death Penalty Information Center study, “35% of executions attempted in 2022 were botched due to incompetence, failure to follow procedures, or deficiencies in the execution protocol.”¹¹¹ Instead of using the pre-existing lethal injection protocol, states should conduct medical and scientific research on administering lethal injections through their specific state process. Some states have begun these efforts. For example, both Florida and Ohio conducted highly publicized botched executions, and both states appointed commissions to research the existing lethal injection protocols to remedy the botched executions.¹¹²

A continued concern surrounding lethal injection protocols is whether the specific drugs used in the lethal injection process are appropriate. For example, potassium chloride could cause immense pain and burning, while the sedative, pancuronium bromide, could render the person paralyzed.¹¹³ This lethal injection protocol is especially concerning considering potassium chloride is not acceptable for veterinarians to administer to animals that are not anesthetized.¹¹⁴ Greater restrictions on animal anesthetization than in human execution illustrates a grave flaw in the system. Although further medical research and testing would not

¹¹¹ Christopher Durocher, *High Court Death Penalty Ruling Presents a Troubling Future*, LAW360 (Mar. 10, 2023), <https://www.law360.com/articles/1584120/high-court-death-penalty-ruling-presents-a-troubling-future>.

¹¹² See Deborah W. Denno, *The Lethal Injection Quandary: How Medicine has Dismantled the Death Penalty*, 76 *FORDHAM L. REV.* 49, 118 (2007).

¹¹³ *Id.* at 55-56.

¹¹⁴ *Id.* at 76.

alleviate all concerns with the current lethal injection drug protocols, it would provide a necessary safeguard.

The lack of medical participation in lethal injections has also led to an increased number of botched executions.¹¹⁵ State legislatures addressed this concern by passing secrecy laws.¹¹⁶ Although anonymity provides a layer of protection for medical professionals to participate in the lethal injection process, it hides existing protocols from the public. Limited anonymity is a solution to this concern. Withholding lethal injection protocols from the public can foster a corrupt system. If states that utilize lethal injection publicly publish their standards, there is a greater chance that courts could evaluate their constitutionality. Limiting the anonymity in secrecy laws to the names of those who wish to remain anonymous would diminish the chances of improper procedures continuing. If a botched execution does occur, the court may evaluate the procedure itself while the specific person is shielded from public scrutiny. Although this solution is imperfect, it provides an additional safeguard for evaluating protocols.

One issue surrounding lethal injection protocols that is extremely hard to remedy is the lack of drugs to perform the executions. The state's solution of using compounding pharmacies to make drug concoctions for lethal injection has many issues.¹¹⁷ Not using FDA-approved drugs and reputable pharmaceutical distribution agencies increases the chance for error in the lethal injection process.¹¹⁸ Compromising the quality of lethal injection drugs by using forced mixtures treats those on death row like lab rats. Botched executions only arise when states do not follow proper protocols and administer questionable drugs. State governments should be required to issue only reputable drugs certified in their efficiency for the lethal injection process.

The increased number of difficulties in obtaining lethal injection drugs may require the abandonment of lethal injection as the primary means of execution. Administering lethal injections is impossible without medical participation and the necessary drugs. Although increased medical research,

¹¹⁵ Berger, *supra* note 39, at 4.

¹¹⁶ *Id.*

¹¹⁷ *Compound Pharmacies and Lethal Injections*, *supra* note 98.

¹¹⁸ *Id.*

transparency, and regulations may alleviate some of the problems surrounding the death penalty, the “perfect execution” cannot be guaranteed. As the Supreme Court acknowledged in *Baze* and *Glossip*, the Constitution does not bar all risk of pain in executions.¹¹⁹ Instead, there is some deference afforded to the state so that a defendant may only bring an Eighth Amendment challenge if the risk of pain associated with the method is “substantial when compared to a known and available alternative.”¹²⁰ However, when this is the standard for appealing the use of an execution method, many concerns go unaddressed. When the existing protocols lack medical research and testing, how can one argue that the pain is *substantial* when the public is unaware of its effects? How can one argue they have a substantial risk of suffering cruel and unusual punishment when legislatures do not produce the questionable policies that allow compounding pharmacies to supply non-FDA-approved drugs? Additionally, when the courts shield those administering or providing the lethal injection drugs from public scrutiny, how can the enactment of the protocol be properly analyzed?

There is also an increase in international pressure for the United States to abandon its use of capital punishment completely.¹²¹ There are 170 countries that have abolished the death penalty or simply do not practice it.¹²² The countries that still enforce the death penalty often struggle from inherent or systematic arbitrariness in its application.¹²³ The United States’ closest allies in Europe and North America reject the death penalty. This cohesive sentiment is beginning to shine a light on the system’s most concerning aspects.¹²⁴ Such international concerns highlight the increased risk of arbitrariness and the potential hazards in American’s system.

¹¹⁹ *Bucklew*, 139 S. Ct. at 1125.

¹²⁰ *Id.*

¹²¹ *International Influence on the Death Penalty in the U.S.*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/international-influence-on-the-death-penalty-in-the-u-s> (last visited Apr. 16, 2023).

¹²² *Key Facts*, PENAL REFORM INT’L, <https://www.penalreform.org/issues/death-penalty/key-facts/> (last visited Apr. 16, 2023).

¹²³ *Id.*

¹²⁴ *International Influence on the Death Penalty in the U.S.*, *supra* note 121.

An execution method must comport with society's evolving standards of decency.¹²⁵ Although the Court has offered its deference to some questionable lethal injection protocols, society must condemn the existing inconsistencies and possible harm.¹²⁶ Lethal injection as an execution method will always be plagued with concern and error. Properly administering lethal injections requires scientific certainty and a lack of human error. Guaranteeing both is impossible. Increased transparency about existing protocols and methods will aid in limiting botched executions, but it will not always prevent mistakes and misapplications. Similarly, increased research and regulations will provide standards and increase consistency, but it cannot guarantee death without pain. As it is today, the state-regulated system of lethal injection is flawed. The system protects against valid Eighth Amendment claims in a way that insulates the system from attack. Lethal injections should not continue until legislatures implement reforms to address serious concerns and harmful protocols. Without complete reconstruction of lethal injection protocols, this execution method not only produces botched executions but also promotes a botched system.

VI. CONCLUSION

The growth of concern surrounding the use of lethal injection is not a modern sentiment but one that has existed since its implementation. Lethal injections surpassed all other means of execution in the United States because various state legislatures blindly passed lethal injection protocols.¹²⁷ Despite existing concerns regarding lethal injections, the Supreme Court has continuously upheld its constitutionality. The courts skew the standard for asserting an Eighth Amendment claim against an existing lethal injection protocol to protect the state. The existing protocols, lack of medical personnel, and lack of available drugs contribute to increasing botched executions in the United States.¹²⁸ The rise in botched executions has alerted state governments that reforms are necessary. However, the

¹²⁵ *Trop*, 356 U.S. at 10.

¹²⁶ *Id.*

¹²⁷ *Early History of the Death Penalty*, *supra* note 3.

¹²⁸ *Denno*, *supra* note 8.

state remedial measures designed to address such concerns, such as anonymity and compounding pharmacies, have only created *more* issues.¹²⁹

Although there are remedial measures that state governments can take to address the existing concerns surrounding lethal injection, there is no solution that will eliminate all potential harm. As the lethal injection protocols stand today, to allow continued use of lethal injection would be inhumane. The international trend of eliminating the death penalty has shown that the concern of lethal injection protocols is not unique to the United States.¹³⁰ If the United States also wishes to eliminate the use of lethal injections, the American public must condemn them. A means of execution must comport with the societal standards of evolving decency.¹³¹ For the government to abandon existing lethal injection protocols, society must denounce its use. If it does not, constitutional challenges will continue to fall short, and botched executions will stain the American penal system for years to come.

¹²⁹ *Id.*

¹³⁰ *International Influence on the Death Penalty in the U.S.*, *supra* note 121.

¹³¹ *Early History of the Death Penalty*, *supra* note 3.