

# DEATH PENALTY EXCEPTIONALISM AND ADMINISTRATIVE LAW

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## INTRODUCTION

In the world of capital punishment, the oft-repeated refrain “death is different” stands for the notion that when the state exercises its most awesome power—the power to take human life—every procedural protection should be provided.<sup>1</sup> Every safeguard should be met. Granted, doing so makes the death penalty cumbersome. And granted, it slows what

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1. See, e.g., *Beck v. Alabama*, 447 U.S. 625, 637 (1980) (“As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments. ‘Death is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality.’”) (quoting *Gardener v. Florida*, 430 U.S. 349, 357–58 (1977)); *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (because death is different, capital punishment may not be imposed unless “every safeguard is ensured”); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (“[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”).

Justice Blackmun famously called “the machinery of death.”<sup>2</sup> But when the stakes are literally life and death, the idea is that we ought to make sure that whatever the state does, it does right.

Scholars have lamented the way that this idea of death penalty exceptionalism has played out in the capital punishment context,<sup>3</sup> but in the administrative law context, “death is different” takes on a new meaning altogether. In the administrative law context, “death is different” means suspension of the rules that ordinarily apply to administrative decision-making. It means that when the state is carrying out its most solemn of duties, those subject to its reach receive not more protection, but less.

The place that most clearly illustrates the point is the execution setting. Prosecutors ask for death sentences, and judges and juries impose them, but the people who actually carry out those sentences are corrections department officials—administrative agency personnel. The execution setting stands at the crossroads of capital punishment and administrative law. This is where to look to see what happens when the two intersect.<sup>4</sup>

In this symposium contribution, I explore a little known nook of administrative law, examining how administrative law norms work in the execution setting—specifically, in the context of lethal injection.<sup>5</sup> What I

2. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari) (“From this day forward, I shall no longer tinker with the machinery of death.”).

3. For critiques of the Supreme Court’s “death is different” jurisprudence, see, e.g., Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARVARD L. REV. 355, 397–402 (1995); Deborah W. Denno, “*Death Is Different*” and Other Twists of Fate, 83 J. CRIM. L. & CRIMINOLOGY 437 (1992); Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980); William S. Geimer, *Death at any Cost: A Critique of the Supreme Court’s Recent Retreat from its Death Penalty Standards*, 12 FLA. ST. U. L. REV. 737 (1985).

4. This is not to say that the execution setting is the only place where administrative law and capital punishment intersect. For another prominent example, see Marah Stith McLeod, *Does the Death Penalty Require Death Row? The Harm of Legislative Silence*, 77 OHIO ST. L.J. 525 (2016) (discussing administrative law in the context of death row); see also Richard A. Bierschbach, *The Administrative Law of the Eighth (and Sixth) Amendment*, in THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT 118–32 (2020) (exploring administrative law norms in the context of the Sixth and Eighth Amendments more generally).

5. For all practical purposes, the lethal injection context is the execution context. Every executing state employs lethal injection as the sole or at least primary execution method, and executions by lethal injection are how the vast majority of executions have been conducted in the modern era of the death penalty—that is, since 1976. See generally DEATH PENALTY INFORMATION CENTER, OVERVIEW OF LETHAL INJECTION PROTOCOLS, at <https://deathpenaltyinfo.org/executions/lethal-injection/overview-of-lethal-injection-protocols>.

find is death penalty exceptionalism turned on its head. Lethal injection statutes provide no guidance whatsoever to the corrections departments that must implement them. Prison personnel have no expertise in deciding what drugs to use or how to perform the procedure. And the usual administrative law devices that we rely on to bring transparency and accountability to the agency decision-making process are noticeably absent. The culmination of these irregularities is a world where lethal injection drug protocols are decided by Google searches and other decision-making processes that would be patently unacceptable in any other area of administrative law. In the execution context, death penalty exceptionalism means that the minimal standards that ordinarily attend administrative decision-making do not apply. Death is different, but in a perverse way.

In the pages that follow, I substantiate this claim first by examining lethal injection statutes and the lack of guidance they give to prison administrators. Next I turn to a bedrock assumption of administrative law—agency expertise—and show that when it comes to lethal injection, corrections department personnel do not have any. Finally, I explore how death penalty exceptionalism plays out in the context of administrative norms like accountability and transparency, discussing the secrecy surrounding lethal injection and administrative law’s role in maintaining it. I close with a few thoughts about the implications of this state of affairs for both the death penalty and administrative law, concluding that the result is not good for either.

## I. LETHAL INJECTION STATUTES

The discussion starts, as it must, with state lethal injection statutes because they are the mechanism by which states adopted lethal injection. In addition, they contain the instructions that state legislatures gave to state departments of correction (DOCs) for implementing it. To understand administrative law’s application to these statutes, it is first important to understand how remarkably little these statutes say.

Lethal injection statutes are shockingly short. In Alabama, for example, the lethal injection statute simply says: “A death sentence shall be executed by lethal injection” unless the inmate elects otherwise.<sup>6</sup> The statutes in Florida, Virginia, Tennessee, South Carolina, Missouri, and Utah use the same or similar wording, specifying nothing more than “lethal injection” as the state’s method of execution.<sup>7</sup> The statutes in seventeen

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6. ALA. CODE § 15-18-82.1(a) (2018).

7. *See, e.g.*, FLA. STAT. § 922.105(1) (2005) (“A death sentence shall be executed by lethal injection unless the person sentenced to death affirmatively elects to be executed by electrocution.”); VA. CODE ANN. § 53.1-234 (2016) (“The Director, or the assistants appointed by him, shall at the time named in the sentence...cause the prisoner under sentence of death to be electrocuted or injected with a lethal substance, until he is dead.”); TENN. CODE ANN. § 40-23-114 (2014)

other states use more words but they are no more specific. In Texas, Oklahoma, Ohio, Georgia, Kentucky, and a dozen other states, the lethal injection statutes state only that executions are to occur “by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such a convict is dead,” with slight variations in the wording here and there.<sup>8</sup> In each of these examples, the state statute says nothing more than: “*We want lethal injection.*”

For the record, saying more than this is not an impossible feat for a legislative body. A handful of state legislatures (six to be exact) have done it. Three states—Mississippi, Oregon, and Wyoming—have legislatively authorized the traditional three-drug protocol.<sup>9</sup> Two others, Montana and

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(“For any person who commits an offense for which the person is sentenced to the punishment of death, the method for carrying out this sentence shall be by lethal injection.”); S.C. CODE ANN. § 24-3-530 (1995) (“A person convicted of a capital crime and having imposed upon him the sentence of death shall suffer the penalty by electrocution or, at the election of the person, lethal injection”); MO. REV. STAT. § 546.720 (2007) (“The manner of inflicting the punishment of death shall be by the administration of lethal gas or by means of the administration of lethal injection.”); UTAH CODE ANN. § 77-18-5.5(1)(a) (2015) (“When a defendant is convicted of a capital felony and the judgment of death has been imposed, lethal intravenous injection is the method of execution.”).

8. See, e.g., TEX. CODE CRIM. PROC. ANN. art. 43.14 (West 2014) (“Whenever the sentence of death is pronounced against a convict, the sentence shall be executed...by intravenous injection of a substance or substances in a lethal quantity sufficient to cause death and until such convict is dead.”); OKLA. STAT. tit. 22, § 1014 (2016) (“The punishment of death shall be carried out by the administration of a lethal quantity of a drug or drugs until death.”); OHIO REV. CODE ANN. § 2949.22 (West 2001) (“[A] death sentence shall be executed by causing the application to the person, upon whom the sentence was imposed, of a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death. The application of the drug or combination of drugs shall be continued until the person is dead.”); GA. CODE ANN. § 17-10-38 (2010) (“All persons who have been convicted of a capital offense and have had imposed upon them a sentence of death shall suffer such punishment by lethal injection. Lethal injection is the continuous intravenous injection of a substance or substances sufficient to cause death into the body of the person sentenced to death until such person is dead.”); KY. REV. STAT. ANN. § 431.220 (West 1998) (“[E]very death sentence shall be executed by continuous intravenous injection of a substance or combination of substances sufficient to cause death. The lethal injection shall continue until the prisoner is dead.”). For more examples, see LA. STAT. § 15:569 (2010); ARIZ. REV. STAT. ANN. § 13-757 (2019); KAN. STAT. ANN. § 22-4001(a) (1999); NEV. REV. STAT. § 176.355 (2015); CAL. PENAL CODE § 3604(a) (West 2016); IND. CODE § 35-38-6-1(a) (2018); WASH. REV. CODE § 10.95.180 (1996); NEB. REV. STAT. § 83-964 (2009); IDAHO CODE § 19-2716 (2009); N.C. GEN. STAT. § 15-188 (2013); S.D. CODIFIED LAWS § 23A-27A-32 (2008).

9. The traditional three-drug protocol calls for a barbiturate to render the inmate insensate, followed by a paralytic to induce paralysis, followed by

Pennsylvania, have legislatively chosen a two-drug protocol.<sup>10</sup> And one state—Arkansas—has legislatively chosen a one-drug protocol, the same protocol that veterinarians use to euthanize pets.<sup>11</sup> State legislatures *can* do more than just choose lethal injection. They can provide the most basic contours of what that means by deciding the number of drugs in the protocol and the type of drugs to use. By and large, they just have not done so.

Curiously, states *have* done so in the animal euthanasia context. When it comes to animal euthanasia, most states have a law on the books specifying the drugs that can be used, or at least the drugs that cannot be.<sup>12</sup> This brings to mind one of the great ironies of the traditional three-drug

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potassium chloride to stop the heart and induce death. *See* MISS. CODE ANN. § 99-19-51 (2011) (“The manner of inflicting the punishment of death shall be by the sequential intravenous administration of a lethal quantity of the following substances: (a) an appropriate anesthetic or sedative; (b) a chemical paralytic agent; and (c) potassium chloride, or other similarly effective substance, until death is pronounced....”); OR. REV. STAT. § 137.473 (2017) (“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 substance sufficient to cause death.”); WYO. STAT. ANN. § 7-13-904 (2012) (“When a sentence of death is imposed by the court in any criminal case, the punishment of death shall be executed by the administration of a continuous intravenous injection of a lethal quantity of an ultra-short-acting barbiturate, alone or in combination with a chemical paralytic agent and potassium chloride, or other equally effective substance or substances sufficient to cause death, until death is pronounced....”).

10. The two-drug protocol omits the third drug, sodium chloride, which is used to stop the heart. Interestingly, the protocols in both of these states actually employ the three-drug protocol instead. *See* MONT. CODE ANN. § 46-19-103(3) (1999) (“The punishment of death must be inflicted by administration of a continuous, intravenous injection of a lethal quantity of an ultra-fast-acting barbiturate in combination with a chemical paralytic agent until a coroner or deputy coroner pronounces that the defendant is dead.”); 61 PA. CONS. STAT. § 4304 (2009) (“The death penalty shall be inflicted by injecting the convict with a continuous intravenous administration of a lethal quantity of an ultrashort-acting barbiturate in combination with chemical paralytic agents approved by the department until death is pronounced by the coroner.”); Eric Berger, *Lethal Injection and the Problem of Constitutional Remedies*, 27 YALE L. & POL’Y REV. 259, 303 (2009) (“Several state statutes...refer only to a barbiturate and paralytic, leaving out reference to potassium chloride, even though the protocol in practice does include potassium.”).

11. The one-drug protocol is an overdose of a barbiturate. *See* ARK. CODE ANN. § 5-4-617(a)–(c) (2019).

12. For a detailed discussion of these statutes, see Ty Alper, *Anesthetizing the Public Conscience: Lethal Injection and Animal Euthanasia*, 35 FORDHAM URB. L.J. 817 (2008). A detailed listing of the statutes themselves appears at *id.*, appendix II.

lethal injection protocol—it uses a paralytic that most states prohibit for use in putting down pets.<sup>13</sup> But the point here is less about the substance of these animal euthanasia statutes and more about the fact that these statutes have substance. They designate the drugs. Indeed, over a dozen death penalty states have both a generic lethal injection statute that says nothing about the drugs *and* a specific animal euthanasia statute that specifies the drugs that can, or cannot, be used in animal euthanasia.<sup>14</sup>

This dichotomy has not escaped the attention of death row inmates, who have used it to support some innovative legal arguments. In a case from Tennessee, for example, a death row inmate sought to capitalize on the fact that the state’s lethal injection statute did not specify the drugs to be used, while the state’s animal euthanasia statute did, prohibiting the use of a paralytic because it increased the risk of a torturous death.<sup>15</sup> The inmate wanted his death to be governed by the animal euthanasia statute, so he argued that he was “nonlivestock” under the state’s Nonlivestock Animal Humane Death Act—he was an animal, after all, and he was not livestock—which in turn allowed him to argue that he could not be executed with the three-drug protocol because the protocol used a paralytic, and a paralytic was prohibited by the Act. The court rejected the claim, finding no evidence that the state legislature had intended for the animal euthanasia statute to apply to humans.<sup>16</sup> *Fair enough*. But the fact that the inmate’s best bet was to sue as a member of the “nonlivestock” class is a testament to the intellectually embarrassing reality that the induction of death in animals has received way more legislative attention and care than the induction of death in humans, who (at least in theory) have constitutional rights protecting them from being executed any way the state wants.

To be fair, state legislatures may have good reason for writing generic lethal injection statutes, even as they write specific statutes for animal euthanasia. Legislatures might want to give state DOCs flexibility to change lethal injection drugs as supplies become unavailable.<sup>17</sup> Or they may not feel as though they have the expertise to decide even the most basic

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13. For a more detailed discussion, see *id.* at 839–44.

14. *See id.*

15. *See* Abdur’Rahman v. Bredesen, No. M2003-01767-COA-R3-CV, 2004 Tenn. App. LEXIS 643, at \*6 (Tenn. Ct. App. Oct. 6, 2004) (“Abdur’Rahman asserts . . . that the inclusion of Pavulon in the Department’s three-drug lethal injection protocol violates the Nonlivestock Animal Humane Death Act . . . . He asserts that he is a ‘nonlivestock animal’ . . . and therefore cannot be included in the lethal injection protocol because TENN. CODE ANN. §§ 44-17-303(c) prohibits the use of ‘a neuromuscular blocking agent’ for the purpose of euthanizing nonlivestock animals.”).

16. *See id.* at \*6–8.

17. *See* Eric Berger, *Death Penalty Administration: A Response to Alexandra Klein’s Nondelegating Death*, 82 OHIO ST. L. J. ONLINE 9, 14 (2020).

contours of a lethal injection protocol.<sup>18</sup> Or they may view choosing lethal injection as policy-making, and all other choices as falling on the implementation side of the line, which has traditionally been considered the realm of agency decision-making.<sup>19</sup> Or they may just surmise that just choosing lethal injection is specific enough given that this is all they have done with execution methods like hanging, electrocution, and death by firing squad.

These are all cogent explanations, and they all have cogent responses. By and large, the question is whether we *want* corrections departments to have the flexibility to make up lethal injection protocols on the fly; whether we think corrections departments operating in the shadows have any more expertise than legislatures operating under the public eye; whether we recognize the number of drugs in the protocol as a policy choice in its own right; and whether we view lethal injection as different from other execution methods in light of the fact that the choice of drugs also determines the manner of death.<sup>20</sup> In addition, one might reasonably question whether lethal injection statutes that say next to nothing are a reflection of *any* of these considerations, as opposed to just plain inattention and the ability to reap the political benefits of signaling support for humane executions without having to figure out what that actually means.<sup>21</sup>

An in-depth discussion of these issues would take more time and space than is warranted here, so I save a more fulsome discussion for another day.<sup>22</sup> Here I simply acknowledge that *why* state legislatures have passed generic lethal injection statutes is a story of its own. Legislatures do

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18. *See id.*

19. *See id.*

20. Hanging uses a rope, the electric chair uses electricity, the firing squad uses bullets, and the gas chamber uses cyanide gas. Lethal injection uses drugs, and unlike other execution methods, the particular drug combination that it uses determines how an inmate dies. A one-drug protocol kills by a barbiturate overdose, for example, while a three-drug protocol kills by inducing cardiac arrest. *See supra* notes 9-11. The only comparable execution method would be the gas chamber, and there state statutes did not say ‘*use any gas, just figure this out yourselves*’—they made clear that execution by gas chamber meant execution using cyanide gas. *See Gomez v. U.S. Dist. Ct. for the N. Dist. of Ca.*, 503 U.S. 653 (1992) (denying certiorari to claim that “execution by cyanide gas was cruel and unusual punishment”); *id.* at 657 (J. Stevens, dissenting to denial of certiorari and discussing “the California statute requiring execution by cyanide gas [] enacted in 1937”); *Gray v. Lucas*, 463 U.S. 1237 (1983) (denying certiorari to claim that “death by cyanide” is cruel and unusual); *id.* at 1240-47 (J. Marshall, dissenting to denial of certiorari and discussing state statutes authorizing death by cyanide gas).

21. The lack of legislative history or hearings suggests the latter. For an extended discussion, see CORINNA BARRETT LAIN, *LETHAL INJECTION: WHY WE CAN’T GET IT RIGHT AND WHAT IT SAYS ABOUT US* (book-in-progress, on file with author).

22. *See LAIN, supra* note 21.

what they do for a reason, sometimes several of them. But in the context of the current discussion, what matters is not the reason, but rather the result.

The result is a sea of generic lethal injection statutes that delegate every aspect of lethal injection—what is to be injected and how—to corrections department personnel. Some state statutes do so explicitly, providing that “such execution procedure shall be determined and supervised” by the DOC, while others do not even say that much, delegation being the inevitable result of a statute that says next to nothing.<sup>23</sup> Either way, the point is that these statutes leave every iota of lethal injection decision-making to prison personnel. From the number of drugs in the protocol, to the type of drugs used, to the qualifications of the executioners—these and a host of other decisions that determine whether lethal injection is torturous or humane are left for prison personnel to figure out for themselves, with no guidance from the legislature on the front side and no guidelines by which to judge their decisions on the backside. Lethal injection is not just grossly under-regulated by state legislatures. In the vast majority of states, it is not regulated by the legislature *at all*.

This brings me to the administrative law implications of these generic lethal injection statutes, and specifically, to the non-delegation doctrine. In theory, the non-delegation doctrine forbids the wholesale delegation of legislative power, requiring that any delegation of legislative authority be accompanied by an “intelligible principle” to guide agency decision-making.<sup>24</sup> At the federal level, the non-delegation doctrine is notoriously lax (at least for now).<sup>25</sup> But at the state level, where lethal

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23. *See, e.g.*, DEL. CODE ANN. Tit. 11, § 4209(f) (2002) (“Punishment by death shall, in all cases, be inflicted by intravenous injection . . . and such execution procedure shall be determined and supervised by the Commissioner of the Department of Correction.”); CAL. PENAL CODE § 3604(a) (West 2016) (“The punishment of death shall be inflicted by the administration of a lethal gas or by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, by standards established under the direction of the Department of Corrections and Rehabilitation.”); IDAHO CODE § 19-2716 (2009) (“The director of the Idaho department of correction shall determine the procedures to be used in any execution.”).

24. *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (requiring that Congress “lay down by legislative act an intelligible principle to which the person or body authorized [to exercise the delegated authority] is directed to conform” and holding that so long as this is done, “such legislative action is not a forbidden delegation of legislative power.”); *accord* *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001); *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (“The constitutional question is whether Congress has supplied an intelligible principle to guide the delegee’s use of discretion.”).

25. Justice Gorsuch’s dissent in *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting), joined by Chief Justice Roberts and Justice Thomas, suggests some interest in enforcing the doctrine with renewed vigor going forward (“While it’s been some time since the Court last held that a statute improperly delegated the



injection statutes are found, the doctrine is more robust and “alive and well” (to quote the title of one prominent article on the issue).<sup>26</sup>

Yet even if that were not the case—even if states required no more than an “intelligible principle” to guide agency decision-making—it is hard to see how these lethal injection statutes pass muster. It may well be the case that legislatures pass generic statutes that delegate vast swaths of decision-making to agencies all the time. Indeed, I assume for the purposes of discussion that this is true. But it is one thing to delegate vast amounts of decision-making to an agency, and quite another to delegate *the entire thing*. What, pray tell, is the “intelligible principle” guiding the implementation of lethal injection when all the statute says is “*lethal injection*”?

This was the Arkansas Supreme Court’s point when it struck down the state’s lethal injection statute on non-delegation grounds in 2012. “A statute that, in effect, reposes an absolute, unregulated, and undefined discretion in an administrative agency . . . is an unlawful delegation of legislative powers,” the Court stated.<sup>27</sup> It then went on to say:

It is evident to this court that the legislature has abdicated its responsibility and passed to the executive branch, in this case the ADC [Arkansas Department of Corrections], the unfettered discretion to determine all protocol and procedures, most notably the chemicals to be used, for a state execution. The [statute] fails to provide reasonable guidelines for the selection of chemicals to be used during lethal injection and it fails to provide any general policy with regard to the lethal-injection procedure.<sup>28</sup>

This is why Arkansas is one of the six states that do not have a generic lethal injection statute. Its judiciary required the legislature to actually legislate, and the legislature chose a one-drug protocol.

Notably, Arkansas is the only state in the Union to have invalidated a lethal injection statute on non-delegation grounds, despite plenty of inmates trying. As Alex Klein notes in her work in this area, some state courts have rejected these challenges on the notion that corrections

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legislative power to another branch—thanks in no small measure to the intelligible principle misadventure—the Court has hardly abandoned the business of policing improper legislative delegations.”).

26. Jason Iuliano and Keith Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 NOTRE DAME L. REV. 619 (2017). For a taxonomy of the various state non-delegation doctrines, see generally Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167 (1999).

27. *Hobbs v. Jones*, 412 S.W.3d 844, 852 (Ark. 2012).

28. *Id.* at 854.

department officials are better qualified to make drug decisions (a point I will turn to in short order).<sup>29</sup> Other courts say that the Eighth Amendment’s “cruel and unusual punishments” clause provides its own limit on agency choices, which is true, but also proves too much—the Eighth Amendment always applies, so if that is enough to satisfy the doctrine, the doctrine will always be satisfied.<sup>30</sup> Still other courts say that defining the basic contours of lethal injection is something that legislatures cannot “practically or efficiently” do for themselves, apparently unaware of the fact that legislatures have done it and survived just fine.<sup>31</sup>

It may well be that the implications of a robust non-delegation doctrine more generally are quietly driving these decisions,<sup>32</sup> but whatever the reason, what matters (again) is the result. Outside of Arkansas, the non-delegation doctrine has had nothing to say about state lethal injection statutes, despite the fact that these statutes fail to guide agency decision-making in any way. Non-delegation claims fail even though lethal injection statutes would appear to fit the doctrine like a glove.

Such broad delegations of legislative power might not be so worrisome if those on the receiving end of the delegation—prison administrators—had the know-how to implement lethal injection. But they do not. Why that is so, and what happens as a result, is the point I turn to next.

## II. AGENCY EXPERTISE

The entire premise of the modern administrative state rests on a claim about institutional competency, and underlying that claim is an assumption of agency expertise.<sup>33</sup> However problematic broad delegations

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29. See Alexandra L. Klein, *Nondelegating Death*, 81 OHIO ST. L.J. 923, 955–62 (2020) (discussing non-delegation challenges in state courts and the reasons they have failed); see, e.g., *Sims v. State*, 754 So. 2d 657, 670 (Fla. 2000); *State v. Ellis*, 799 N.W.2d 267, 289 (Neb. 2011); *Ex parte Granviel*, 561 S.W.2d 503, 515 (Tex. Crim. App. 1978)).

30. See Klein, *supra* note 29, at 955–62 (discussing non-delegation challenges in state courts and the reasons they have failed); see, e.g., *Cook v. State*, 281 P.3d 1053, 1056 (Ariz. Ct. App. 2012).

31. See Klein, *supra* note 29, at 955–62 (discussing non-delegation challenges in state courts and the reasons they have failed); see, e.g., *Ex parte Granviel*, 561 S.W.2d at 514.

32. See Berger, *supra* note 17, at 12–13.

33. See James O. Freedman, *Expertise and the Administrative Process*, 28 ADMIN. L. REV. 363, 365 (1976) (“The premise that administrative agencies have a substantive expertise in their areas of regulatory responsibility was readily accepted by the courts and has become the basis of a considerable body of administrative law . . . .”); Sidney A. Shapiro, *The Failure to Understand Expertise in Administrative Law: The Problem and the Consequences*, 50 WAKE FOREST L. REV. 1097, 1097 (2015) (“Expertise plays a starring role in administrative law.

of legislative power may be, those concerns have thus far been offset by the notion that agencies bring to the table something that legislatures cannot— informed decision-making based on expertise. Expertise is by and large the *raison d'être* of an agency's existence.<sup>34</sup> It is also a primary reason that courts defer to the decisions that administrative agencies make.<sup>35</sup>

As already noted, most states have a lethal injection statute that explicitly or implicitly delegates the implementation of lethal injection to the state corrections department, which means that responsibility for developing the protocol to execute an inmate falls to whoever is in charge of the DOC.<sup>36</sup> The person in charge of the state DOC—the DOC director, or commissioner in some states—has no training or expertise remotely relevant to lethal injection. Neither do the corrections department officials who work under these department heads. Corrections department personnel may be experts in prison discipline and security, but lethal injection is a medical procedure (of sorts) and these people have about as much knowledge of what it takes to perform a medical procedure as your average person on the street. And that is just the procedure itself. Then there are the drugs that the procedure administers. Knowledge of what drugs to use for lethal injection requires expertise in the field of anesthesiology (or at least pharmacology), and corrections department officials do not have that either.

Of course, it would not matter that corrections department officials do not have expertise if they could *get* it—if they could get an anesthesiologist or perhaps some other doctor in the know to tell them what drugs to use. But that is a problem in its own right. Medical ethics have long prohibited use of the healing arts for the induction of death, so doctors are rightly reticent to help in the first place,<sup>37</sup> and that is especially true of

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Congress establishes administrative agencies and often gives them substantial discretion because it lacks the expertise and political agreement to resolve the policy issues that are likely to arise under a statutory scheme.”); Wendy E. Wagner, *A Place for Agency Expertise: Reconciling Agency Expertise with Presidential Power*, 115 COLUM. L. REV. 2019, 2023 (2015) (“Although the hypertechnicality of agency rules is a more recent phenomenon, the basic concept that the agencies should preside over specialized information is hard-wired into the design of the administrative state.”).

34. See Freedman, *supra* note 33, at 363.

35. See generally Wagner, *supra* note 33, at 8. For an example, see *Lightborne v. McCollum*, 969 So. 2d. 326, 352 (Fla. 2007) (adopting a “presumption of deference” that “the methodology and the chemicals to be used are matters best left to the Department of Corrections”).

36. See *supra* note 23 and accompanying text.

37. See AMERICAN MEDICAL ASSOCIATION, CODE OF MEDICAL ETHICS OPINION 9.7.3 (2016) (“An individual’s opinion on capital punishment is the personal moral decision of the individual. However, as a member of a profession dedicated to preserving life when there is hope of doing so, a physician must not participate in a legally authorized execution.”). This is not to say that states never get doctors to oversee the execution process; they do. But doctors are reticent to

anesthesiologists. Anesthesiologists have to be board-certified to have practice privileges in hospitals, and the American Board of Anesthesiology has threatened to revoke the certification of any member who assists in lethal injection in any way, including advising.<sup>38</sup> As a result, corrections department officials have an exceedingly difficult time getting specialists to advise them on how to kill with drugs.<sup>39</sup>

The result is what Justice Stevens lamented in his concurrence in *Baze v. Reez*, the Supreme Court's 2008 lethal injection case: "Drugs [are] selected by unelected Department of Corrections officials with no specialized knowledge and without the benefit of expert assistance or guidance."<sup>40</sup> Lethal injection scholar Debby Denno, who was watching the *Baze* trial, later wrote about the oddity of listening to the testimony of prison officials who were on the one hand articulate and professional, and on the other, palpably ignorant of the procedure they were in charge of

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participate and most front line executions are paramedics. For a more extended discussion of the point, see generally Ty Alper, *The Truth About Physician Participation in Lethal Injection Executions*, 88 N.C. L. REV. 11 (2009); LAIN, *supra* note 21, chapter 9 ("Doctors Don't Want to Share Their Expertise") (on file with author).

38. See *Anesthesiologists and Capital Punishment*, AM. BOARD OF ANESTHESIOLOGY (May 2014), [https://theaba.org/pdfs/Capital\\_Punishment.pdf](https://theaba.org/pdfs/Capital_Punishment.pdf) ("[I]t is the ABA's position that an anesthesiologist should not participate in an execution by lethal injection and that violation of this policy is inconsistent with the Professional Standing criteria required for ABA Certification and Maintenance of Certification in Anesthesiology or any of its subspecialties. As a consequence, ABA certificates may be revoked if the ABA determines that a diplomate participates in an execution by lethal injection.").

39. For a time, states employed the services of anesthesiologist Mark Dershwitz. Dershwitz served as a testifying expert for 22 states over the course of a decade, but one suspected that he did more than just testify, and that suspicion was confirmed in 2014, when he was caught advising Ohio on its protocol in the wake of the botched execution of Dennis McGuire. Dershwitz denied it, but emails told a different story, and he found himself at risk of losing his board certification with the ABA. An announcement from Dershwitz withdrawing from the field followed shortly thereafter, and requests for comment were met by the statement: "As requested by the American Board of Anesthesiology, I do not discuss lethal injection in any venue." For the full story, see Ben Crair, *Exclusive Emails Show Ohio's Doubts About Lethal Injection*, THE NEW REPUBLIC (Aug. 17, 2014), <https://newrepublic.com/article/119068/exclusive-emails-reveal-states-worries-about-problematic-execution>; *Expert Witness in U.S. Execution Cases Will No Longer Defend States' Methods*, THE GUARDIAN (Aug. 20, 2014), <https://www.theguardian.com/world/2014/aug/20/expert-witness-execution-cases-quits-ohio>; Annie Waldman, *Key Expert in Supreme Court Lethal Injection Case Did His Research on Drugs.com*, PROPUBLICA (Apr. 28, 2015), <https://www.propublica.org/article/key-expert-in-supreme-court-lethal-injection-case-did-research-drugs.com>.

40. *Baze v. Rees*, 553 U.S. 35, 74–75 (2008) (Stevens, J., concurring).

administering.<sup>41</sup> Those officials were “the victims of legislatures’ statewide romance with lethal injection—the details of which are left to the imagination of ill-informed prison personnel,” Denno wrote, adding that “[t]his process does not seem fair to those on the lowest level of the political hierarchy, much less to the inmates who bear the brunt of such an irresponsible degree of delegation.”<sup>42</sup>

A decade later, nothing has changed. In 2017, for example, lethal injection litigation in Tennessee led to a hearing that featured the testimony of two top corrections department officials. The state’s DOC commissioner, who had ostensibly chosen the drugs in the state’s lethal injection protocol, did not know the difference between sodium thiopental, a barbiturate, and midazolam, a benzodiazepine.<sup>43</sup> Those are two different classes of drugs with two very different properties.<sup>44</sup> And the warden, described by one media observer as “alarmingly ill-informed,” did not know the details of the lethal injection procedure he was responsible for administering, and had no idea what to do in the event a contingency might arise.<sup>45</sup> Time and again, corrections department officials have demonstrated a shocking lack of understanding of the drugs in the lethal injection protocols that they are responsible for administering—and this is what they say *after* they have been prepped for testimony on the witness stand.

To be clear, this lack of expertise is not entirely prison administrators’ fault. Law Professor Eric Berger, who has both litigated lethal injection as a practicing attorney and now writes about it as a scholar, makes an important point in this regard. Reflecting on his experience with the prison officials he encountered as a litigator, he writes:

I did not come away with the impression that the responsible state officials were vicious people who enjoyed inflicting pain. Nor did I think that they had made the decision to ignore the Constitution and get away with what

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41. See Deborah W. Denno, *Death Bed*, 124 TRI-QUARTERLY J. 141, 160 (2006).

42. *Id.* at 150.

43. See Liliana Segura, “*Our Most Cruel Experiment Yet: Chilling Testimony in a Tennessee Trial Exposes Lethal Injection as Court-Sanctioned Torture*,” THE INTERCEPT (Aug. 5, 2018), <https://theintercept.com/2018/08/05/death-penalty-lethal-injection-trial-tennessee/>.

44. See Christine L.H. Snozek, *CNS Depressants: Benzodiazepines and Barbiturates*, in TOXICOLOGY CASES FOR THE CLINICAL AND FORENSIC LABORATORY 209-217 (2020), <https://books.google.com/books?id=n8i2DwAAQB AJ&pg=PA209&lpg=PA209&dq=Christine+L.H.+Snozek,+Toxicology+Cases+for+the+Clinical+and+Forensic+Laboratory&source=bl&ots=PitfrEbOZO&sig=ACfU3U0pmwmj4s0Ih1k2WFpyTtR8MGz4g&hl=en&sa=X&ved=2ahUKEwj4vMu h6a3tAhVSEVkfHSHzACgQ6AEwBnoECACQAg#v=onepage&q&f=false>.

45. Segura, *supra* note 43.

they could. Rather, I think the state had given some employees a difficult task for which they were mostly poorly qualified.<sup>46</sup>

Prison personnel were “out of their depth,” Berger writes—they were “tasked with an extremely difficult job without the training or resources to even know where to begin.”<sup>47</sup>

What, then, do prison administrators do when they cannot access the expertise to figure out lethal injection for themselves? Anyone familiar with the workplace saying “sh\*\* rolls downhill”<sup>48</sup> knows the answer: they pass the job to someone else. They outsource it, if only because that is the only thing they know to do.

Perhaps the best example of this phenomenon is what Oklahoma DOC officials did when their state legislature passed the first lethal injection statute in the country, and they found themselves tasked with devising the first lethal injection protocol to go with it. These officials did not know what to do, so they turned to the man who had advised the legislature—Jay Chapman, the state medical examiner, who once referred to himself as “an expert in dead bodies but not an expert in getting them that way.”<sup>49</sup> Chapman, as lethal injection scholar Ty Alper has written, “gave the matter about as much thought as you might put in developing a protocol for stacking dishes in a dishwasher.”<sup>50</sup> Chapman just came up with the protocol. *In a day. Off the top of his head.* “I didn’t do any research,” Chapman later stated, adding, “I just knew from having been placed under anesthesia myself, what was needed.”<sup>51</sup>

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46. Eric Berger, *Lethal Injection, Politics, and the Future of the Death Penalty: The Death Penalty and Lethal Injection: The Executioners’ Dilemmas*, 49 U. RICH. L. REV. 731, 758 (2015).

47. *Id.*

48. Yes, that is actually a thing. URBAN DICTIONARY, <https://www.urbandictionary.com/define.php?term=shit%20rolls%20down%20hill> (last visited Dec. 8, 2020). See also TANDEM SPRING, “*Shit Rolls Downhill*” *But What If There Was No “Shit” and No “Hill”?*, (Mar. 28, 2016), <https://www.tandemspring.com/shit-rolls-downhill-but-what-if-there-was-no-shit-and-no-hill/> (“Think of the common workplace phrase ‘Shit rolls downhill.’ Which, if you’re not familiar with it, simply means that the lowest ranking person in an organization nearly always gets stuck doing the task nobody wants to do.”).

49. Max Kutner, *Meet A. Jay Chapman, “Father of the Lethal Injection,”* NEWSWEEK (May 1, 2017), <https://www.newsweek.com/jay-chapman-inventor-lethal-injection-arkansas-592506>.

50. Ty Alper, *What Do Lawyers Know About Lethal Injection*, 1 HARV. L. & POL’Y REV. (Online) (Mar. 3, 2008), <https://www.law.berkeley.edu/files/dpc/2008.Alper.harvardlawandpolicy.pdf>.

51. Jamie Fellner & Sarah Tofte, *So Long As They Die: Lethal Injections in the United States*, 18 HUMAN RIGHTS WATCH 1, 15 (2006), <https://www.hrw.org/reports/2006/us0406/> [hereinafter HUMAN RIGHTS WATCH].

DOC officials in other states did not know any more about lethal injection than the Oklahoma DOC did, so the easiest thing for them to do when their legislatures passed lethal injection statutes was just to copy Oklahoma's protocol, which is exactly what they did. "In developing a lethal injection protocol, [the Kentucky DOC] did not conduct any independent scientific or medical studies or consult any medical professionals concerning the drugs and the dosage amounts to be injected into the condemned," the trial court in *Baze* concluded, adding, "Kentucky appears to be no different from any other state."<sup>52</sup> Chapman was right in saying of the 37 states that ended up adopting his three-drug protocol: "I guess they just blindly followed it."<sup>53</sup> Across the country, state DOC officials carelessly copied a protocol that had been carelessly designed in the first place. But given the enormity of task thrust upon them and the dearth of qualifications to go with it, it is hard to imagine what else these corrections department officials were going to do.

A second example of the sort of outsourcing that has taken place as a result of DOC officials' lack of expertise highlights the vulnerability of these officials to fraudsters who pose as experts willing to solve their problems for a fee. In the 1980s, state DOCs around the country began commissioning the services of a man who professed to be able to tell them how to conduct lethal injection—Fred Leuchter.<sup>54</sup> Leuchter was a Holocaust denier who sold state DOCs a lethal injection "machine" that guesstimated lethal doses of the drugs based on what he had read about pigs.<sup>55</sup> Even after Leuchter's fake credentials came to light—his degree was in history, not engineering as he had claimed—and Leuchter was charged with criminal fraud, wardens shunned him in public but continued to ask him for advice on the sly, so desperate were they for someone, *anyone*, who could tell them how to conduct an execution by lethal injection.<sup>56</sup>

For those who are thinking, *that was the '80s, surely they have this figured out now*, think again. In 2006, lethal injection litigation in Missouri revealed that the state DOC director had delegated the details of the state's lethal injection protocol to a doctor who had been sued for malpractice twenty times and had his practice privileges revoked at two hospitals.<sup>57</sup> In

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52. *Baze v. Rees*, No. 04-CI-01094, 2005 WL 5797977, at \*6 (Ky. Cir. Ct. Div. I. July 8, 2005).

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

54. See STEPHEN TROMBLEY, THE EXECUTION PROTOCOL: INSIDE AMERICA'S CAPITAL PUNISHMENT INDUSTRY 74, 77, 86 (2002).

55. *See id.*

56. *See Denno, supra* note 41, at 148.

57. *See* Nick Welsh, *The Death Penalty Is Experiencing Technical Difficulties*, THE PACIFIC STANDARD, June 14, 2017, <https://psmag.com/social-justice/the-death-penalty-is-experiencing-technical-difficulties-48729>.

his deposition, the doctor explained that the DOC director “ha[d] no background in medicine” and thus was “totally dependent on me advising him what could and should and will be done.”<sup>58</sup> This was a particularly acute problem because the doctor, who had presided over 54 executions in Missouri by this time, was dyslexic and “sometimes transpose[d] numbers.”<sup>59</sup> “I am dyslexic and so . . . it’s not unusual for me to make mistakes,” he stated under oath.<sup>60</sup> Astoundingly, the state of Missouri doubled-down on the doctor,<sup>61</sup> fighting tooth and nail to keep him as its executioner. The state lost that litigation battle when a federal court ruled that the doctor could not “participate in any manner, at any level in the state of Missouri’s lethal injection process.”<sup>62</sup> The doctor went on to serve as an executioner for Arizona and the federal government.<sup>63</sup>

The latest trend in lethal injection outsourcing is exemplified by what happened behind the scenes of Oklahoma’s botched execution of Clayton Lockett in 2014. Readers may remember the highly publicized debacle—the execution was an agonizing 43 minutes long and featured Lockett writhing on the gurney, mumbling in a semi-coherent fashion, and repeatedly lurching against the restraints. Officials closed the blinds as execution witnesses looked on in horror; Lockett had awakened in the midst of his own execution, and the result was a grotesque display.<sup>64</sup>

What readers may not know is how Oklahoma came to choose the drugs that it used in that execution, and that is where the outsourcing comes into play. Oklahoma’s protocol at the time gave the warden “sole

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58. Taylor v. Crawford, No. 05-4173-CV-C-FJG, 2006 WL 1779035, at \*5 (W.D. Mo. June 26, 2006).

59. *Id.*

60. *Id.*

61. See Taylor v. Crawford, 487 F.3d 1072, 1077 (8th Cir. 2007) (“Director Crawford indicated that he was confident in Dr. Doe I’s competence and expected that he would continue working in the execution process.”).

62. Taylor v. Crawford, No. 05-4173-CV-C-FJG, 2006 WL 1779035 (W.D. Mo. Sept. 12, 2006).

63. See Henry Weinstein, *Doctor Barred By State Helps U.S. Executions*, L.A. TIMES (Nov. 15, 2007), <https://www.latimes.com/archives/la-xpm-2007-nov-15-na-johndoe15-story.html> [<https://perma.cc/UN9Z-Q3DM>]; M. Kiefer, *Doctor Banned from Executions in Mo. Now in Ariz.*, THE ARIZONA REPUBLIC (July 24, 2008), <http://archive.azcentral.com/arizonarepublic/news/articles/2008/07/24/20080724deathpenaltydoc0724.html> [<https://perma.cc/67R9-PU9U>].

64. For a detailed account of Lockett’s botched execution, see Ziva Branstetter, *Eyewitness Account: A Minute-by-Minute Look at What Happened During Clayton Lockett’s Execution*, THE TULSA WORLD (May 1, 2014), [https://tulsaworld.com/news/state/eyewitness-account-a-minute-by-minute-look-at-what-happened/article\\_f7764efc-d036-11e3-af7e-0017a43b2370.html?\\_dc=322276439517.73645](https://tulsaworld.com/news/state/eyewitness-account-a-minute-by-minute-look-at-what-happened/article_f7764efc-d036-11e3-af7e-0017a43b2370.html?_dc=322276439517.73645) [<https://perma.cc/8J2W-PNSP>].



discretion” as to which drugs to use,<sup>65</sup> but that was just the process on paper. The warden did not know anything about lethal injection drugs, so she was in no position to choose which drugs to use. The people who actually made that decision were the lawyer for the Oklahoma DOC and a lawyer in the state Attorney General’s office.<sup>66</sup> “I didn’t write that policy. I didn’t choose those drugs,” the warden would later tell investigators. “I was just—I’m told the drugs that’s gonna be used.”<sup>67</sup>

Of course, these lawyers were not anesthesiologists either, so how did they determine that midazolam, a benzodiazepine, was an appropriate substitution for pentobarbital, a barbiturate, when the state’s existing stockpile of pentobarbital ran dry? “I did my own research, I looked online, you know. Went past the wikileaks, wiki leaks or whatever it is,” DOC general counsel Mike Oakley told investigators.<sup>68</sup> The internet had said that midazolam “would render a person unconscious,” Oakley stated, adding, “That’s what we needed . . . so we thought it was okay.”<sup>69</sup>

Oakley had read somewhere on the internet that midazolam could render a person unconscious and thought that this made it an appropriate substitution for pentobarbital—which means that he did not know they were different classes of drugs, did not know why that was important, and did not know that there are different levels of unconsciousness, one that will render a person insensate to pain and one that will not.<sup>70</sup> Had he done nothing more than read the FDA warning label for the drug, he would have known that midazolam is not approved for use as the sole anesthetic in a painful

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65. See Cary Aspinwall & Ziva Branstetter, *Execution of Clayton Lockett Described as ‘a Bloody Mess,’ Court Filing Shows*, THE TULSA WORLD (Dec. 14, 2014), [https://tulsaworld.com/news/local/execution-of-clayton-lockett-described-as-a-bloody-mess-court-filing-shows/article\\_a4b70b76-84f7-5ebd-a5f3-044c205d474a.html](https://tulsaworld.com/news/local/execution-of-clayton-lockett-described-as-a-bloody-mess-court-filing-shows/article_a4b70b76-84f7-5ebd-a5f3-044c205d474a.html) [<https://perma.cc/G3LW-CJ97>].

66. See *id.*

67. Joint Appendix – Volume II at 15, *Glossip v. Gross*, 576 U.S. 863 (2015) (No. 14-7955), (transcript of recorded interview of Anita Trammell by Trooper Jason Hold and Trooper Kevin Logan). For the full interview, see *DPS Interview of OSP Warden Anita Trammell*, THE TULSA WORLD (Mar. 16, 2015), [https://tulsaworld.com/dps-interview-of-osp-warden-anita-trammell/pdf\\_7b6599c0-60dd-5df4-a1c5-9184dbc3c90e.html](https://tulsaworld.com/dps-interview-of-osp-warden-anita-trammell/pdf_7b6599c0-60dd-5df4-a1c5-9184dbc3c90e.html) [<https://perma.cc/9Q4J-2NFC>].

68. Plaintiff’s Proposed Findings of Fact & Conclusions of Law, *Warner v. Gross*, No. CIV-14-0665-F, 2014 U.S. Dist. LEXIS 181271, at \*6 (W.D. Okla. Dec. 22, 2014) (quoting recorded interview of Mike Oakley and citing to DPS interview p.1543.).

69. *Id.*

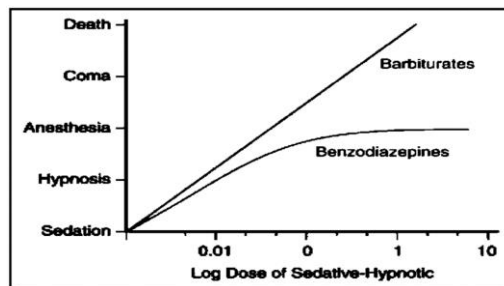
70. See American Society of Anesthesiologists, *Continuum of Depth of Sedation: Definition of General Anesthesia and Levels of Sedation/Analgesia* (Oct. 23, 2019), <https://www.asahq.org/standards-and-guidelines/continuum-of-depth-of-sedation-definition-of-general-anesthesia-and-levels-of-sedationanalgesia> [<https://perma.cc/UB73-NAAF>].

procedure.<sup>71</sup> Had he called a local pharmacy, he could have at least learned that midazolam and pentobarbital are different classes of drugs and that those classes have different properties, one that would produce anesthesia and one that would not.<sup>72</sup> Had he picked up the most basic pharmacology textbook (the University of Oklahoma College of Medicine is right in town), he would have seen graphs showing that midazolam cannot render a person insensate, and he would have understood that it had everything to do with its class as a drug.<sup>73</sup> Oakley did none of these things. He did not even keep a record of the websites he relied on in choosing the drug that the state

71. See Midazolam Injection, USP, [https://www.accessdata.fda.gov/drugsatfda\\_docs/label/2017/208878Orig1s0001bl.pdf](https://www.accessdata.fda.gov/drugsatfda_docs/label/2017/208878Orig1s0001bl.pdf) [https://perma.cc/L3LR-DEEX] (indications and usage at p. 15).

72. Midazolam is in the benzodiazepine class of drugs, a class that includes Valium and Xanax and is known for its use in treating anxiety. Pentobarbital is in the barbiturate class of drugs, a class known for its use in inducing anesthesia. Barbiturates are much more potent than benzodiazepines. For a layman's primer, see *What's the Difference Between Benzodiazepines and Barbiturates?* <https://www.springboardcenter.org/whats-the-difference-between-benzodiazepines-and-barbiturates/> [https://perma.cc/FUF5-UFXU].

73. Consider, for example, this graph from a leading pharmacology textbook:



**Figure 19.3.** Dose response curves of barbiturates and benzodiazepines. The barbiturates exhibit a linear dose response effect. . . . Benzodiazepines exhibit a ceiling effect . . . Benzodiazepines administered by either route [oral or IV administration] do not produce anesthesia.

GEORGE M. BRENNER & CRAIG STEVENS, PHARMACOLOGY 212 (5th ed. 2017); see also LAURENCE L. BRUNTON ET AL., GOODMAN & GILMAN'S THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 403 (11th ed. 2005) ("The benzodiazepines do not produce the same degrees of neuronal depression produced by barbiturates and volatile anesthetics . . . . The clinical literature often refers to the "anesthetic" effects and uses of certain benzodiazepines, but the drugs do not cause a true general anesthesia . . . and immobility sufficient to allow surgery cannot be achieved.").

would use to end an inmate's life.<sup>74</sup> What lawyer, in what world of professional competence, does this?

As just mentioned, Oakley did not act alone; he was working with a lawyer in the state AG's office. That lawyer was John Hadden, and Hadden's contribution was reading a transcript of expert testimony on midazolam from litigation over its use in executions in Florida.<sup>75</sup> One might plausibly justify Oklahoma's decision to use midazolam based on Florida's decision to use midazolam, except for the fact that Florida was using 500 mg of midazolam, while the protocol that Hadden and Oakley wrote only called for 100 mg.<sup>76</sup> So did the lawyers think that using one-fifth the dosage of the drug did not matter, or did they just not notice that they were using one-fifth the dosage of the drug? The possibility that two lawyers could not even copy a dosage right is almost unfathomable. But the possibility that they would choose a dosage that was one-fifth that of the protocol they were copying—particularly when the drug at issue is the one that is supposed to render the inmate unconscious—is equally hard to fathom. The incompetence is breath-taking either way.

In the wake of Lockett's botched execution, condemned inmates challenging Oklahoma's protocol claimed that the DOC's decision-making was akin to "an approach one might expect of a high school student who waited until the last moment to write a term paper—not the approach one should expect of the State engaging in the taking of human life."<sup>77</sup> Whether even high school students would have done better is an open question, but one can say at least this: the sloppy decision-making of the state's attorneys in this case would not satisfy the duty of care in any area of the practice of law. *Not one.*

Having shared the various ways that corrections departments delegate the task of determining lethal injection protocols, I now pause to

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74. See Transcript of Preliminary Injunction Hearing at 148–49, Warner v. Gross, 776 F.3d 721 (10th Cir. 2015) (No. CIV-14-655-F) (direct examination of Michael Oakley) ("Q. And you may not remember this, but do you remember specifically what pharmaceutical or pharmacy sites that you went to on the internet for your own research? A. "I don't remember.").

75. See Joint Appendix – Volume II at 4–5, Glossip v. Gross, 576 U.S. 863 (2015) (No. 14-7955), (transcript of recorded interview of Anita Trammell by Trooper Jason Hold and Trooper Kevin Logan). Oakley told investigators that they did not reach out to the expert themselves for a consult because "as far as the dosage and the amounts that he testified to, he wasn't going to say anything different on the witness stand here," which makes Oklahoma's adoption of midazolam at a dosage that is 20% of what Florida was using all the more unfathomable.

76. See Aspinwall & Branstetter, *supra* note 65.

77. Appellants' Opening Brief at 58–59, Warner v. Gross, 776 F.3d 721 (10th Cir. 2015) (No. 14-6244). And yet, the Supreme Court upheld the Oklahoma lethal injection protocol, just one execution away from being the second most executing state in the country. See Glossip v. Gross, 576 U.S. 863 (2015).

offer a few observations about it. First and most discretely, Oklahoma is one of the most executing states in the country (or at least it was, until mishaps like the botched Lockett execution forced it to put executions on hold).<sup>78</sup> This is an example of what lethal injection decision-making looks like in a state that ostensibly knows what it is doing. Imagine what it looks like in a state that does not.

Second, the sort of decision-making that we saw in Oklahoma is not unusual. We know from lethal injection litigation that as states have had to revise their lethal injection protocols, lawyers have taken on the task of figuring out what drugs to use.<sup>79</sup> One gets the sense that prison officials, who are all too well aware of their own shortcomings in this area, are (as others have surmised) “relieved to rid themselves of this assignment.”<sup>80</sup> But lawyers are no more qualified to be making decisions about lethal injection protocols than corrections department personnel.<sup>81</sup> Lawyers lack medical expertise too.

Third and finally, the lack of expertise that marks the agency decision-making process also marks the product of that process—the protocols themselves. Oklahoma’s problematic protocol is one illustration of the point, but others abound. Two states, for example, had lethal injection protocols in 2004 and 2006 that called for half the dose of the anesthetic to be administered at the start of the execution process and the other half at the end, *after* administration of the drug that induces cardiac arrest, and death.<sup>82</sup> “It is nonsensical to administer any drug, and especially an anesthetic drug, to a dead person,” an anesthesiologist later said of the protocol, adding that the DOC “cannot possibly understand the function of the drugs if it believes this order of drug administration is appropriate.”<sup>83</sup>

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78. In the modern death penalty era, Oklahoma has conducted more executions than all but two other states, despite the fact that it has not conducted an execution since 2015. In the modern era, Texas has executed 569 people. Virginia has executed 113. Oklahoma has executed 112. *See Executions by State and Region Since 1976*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976> [<https://perma.cc/7FSW-Q87L>].

79. *See* Alper, *supra* note 50.

80. Berger, *supra* note 46, at 751.

81. *See* Alper, *supra* note 50.

82. *See* Affidavit of Marvin Polk, North Carolina Department of Corrections Warden of Central Prison at 2, *Rowsey v. Beck*, No. 5:04-CT-04-Bo (E.D.N.C. Jan. 6, 2004) (describing protocol used in all 18 executions he has presided over in North Carolina); *see also* Declaration of Mark J. S. Heath, M.D., at 17, *Patton v. Jones*, No. 5:06-cv-00591-F (W.D. Okla. July 27, 2006) (describing Oklahoma lethal injection protocol).

83. Declaration of Mark J. S. Heath, M.D., *supra* note 82, at 4 (summary of opinions). Dr. Heath’s discussion of the point later in the document is worth repeating here:

As another example, Tennessee's original lethal injection protocol just cut and pasted "lethal injection" over its prior references to "electrocution," resulting in a lethal injection protocol that instructed executioners to shave the inmate's head and have a fire extinguisher handy.<sup>84</sup> In the world of computer science, the acronym GIGO—garbage in, garbage out—comes to mind.<sup>85</sup> The quality of what goes into a decision-making process has a material effect on the quality of what comes out of it, and lethal injection is no exception to the rule.

These are the consequences of the dearth of agency expertise, a problem no less acute today than it was forty years ago when lethal injection was adopted. When it comes to lethal injection, there are no experts. There are just people who do not know what they are doing trying their best to get the job done.

As Eric Berger observes, "Administrative law issues get to the heart of what is wrong with many states' lethal injection procedures."<sup>86</sup> Thus far, I have pointed to problems of delegation and expertise. I turn to the problem of transparency next.

### III. TRANSPARENCY

Transparency is one of the "hallmarks of American administrative law."<sup>87</sup> Agencies are staffed with unelected administrative personnel who are not directly politically accountable, and transparency serves as a counterweight to this deficiency, ensuring that the public at least has access to information about what agencies are doing.<sup>88</sup> If people do not know what

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The ODOC [Oklahoma Department of Corrections] protocol calls for the administration of thiopental *after* [emphasis in original] the administration of two doses of potassium chloride. As soon as the potassium chloride perfuses the inmate's heart, his heart will stop beating and his circulation will stop. He will be dead. It is senseless to administer anesthetic to a dead person. That the ODOC does not understand that its second dose of anesthetic can serve no purpose in ameliorating pain suggests, once again, that the ODOC does not understand the lethal injection process.

*Id.* at 17.

84. See Segura, *supra* note 43.

85. See GIGO, TECH TERMS (Mar. 4, 2015), <https://techterms.com/definition/gigo> [<https://perma.cc/Z7D6-ZGX6>] ("Stands for 'Garbage In, Garbage Out.' GIGO is a computer science acronym that implies bad input will result in bad output.").

86. Berger, *supra* note 10, at 326.

87. William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADMIN. L. REV. 171, 171 (2009).

88. See Berger, *supra* note 17, at 16 ("Agency transparency is also an important factor in determining agency accountability. If agencies operate in secret,

agencies are doing, they cannot very well petition their representatives to do something about it. In this way, transparency provides an opportunity for accountability that agencies otherwise lack.

The importance of transparency in administrative law is clear from the various rules that promote it. State administrative procedure acts (APAs), like their federal counterpart, require agencies to provide notice of proposed actions that they are considering, as well as an opportunity for public comment, absent narrow exceptions.<sup>89</sup> In short, they require some modicum of transparency in the decision-making process, while creating an opportunity for agencies to get input from the public and outside experts. In addition, state APAs impose record-keeping requirements on agencies so that their decision-making is subject to public scrutiny and judicial review.<sup>90</sup> State Freedom of Information Acts (FOIAs) likewise promote transparency and government accountability by providing access to agency records, again absent narrow exceptions.<sup>91</sup> Each of these devices works to promote transparency in the agency decision-making process, providing citizens with information about what administrative agencies are doing and the reasoning behind the decisions that they make.

Yet here again, these features of administrative law are conspicuously absent in the context of lethal injection. Far from the transparency that marks the ordinary administrative decision-making process, state corrections departments devise lethal injection protocols entirely outside the purview of the public eye. The public does not see how decisions about lethal injection are made, so aside from a select few

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the people and their elected representatives cannot know what government is doing. Inadequate transparency, thus, undermines political accountability.”); Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision-Making*, 91 B.U. L. REV. 2029, 2065 (2011) (“Governmental accountability is premised on popular monitoring of governmental activities; if the people cannot know what their government is doing, accountability is severely compromised. The risk of inadequate transparency is heightened in the agency setting, where officials are usually unelected and where the layers of bureaucracy and technical nature of the subject matter often shield a department’s affairs from public scrutiny.”).

89. See State Administrative Procedure Acts differ across states, obviously, but one can get a sense of their provisions from the Uniform Law Commission’s Model Administrative Procedure Act, which contains provisions on public access, record-keeping, and notice-and-comment requirements. See NAT’L CONF. OF COMM’RS OF UNIF. STATE LAWS, MODEL STATE ADMINISTRATIVE PROCEDURE ACT, REVISED (2010), <https://www.uniformlaws.org/committees/community-home?CommunityKey=f184fb0c-5e31-4c6d-8228-7f2b0112fa42> [https://perma.cc/Q5V D-DL39].

90. See *id.*

91. For a collection of state FOIAs, see NATIONAL FREEDOM OF INFORMATION COALITION, STATE FREEDOM OF INFORMATION LAWS, at <https://www.nfoic.org/coalitions/state-foi-resources/state-freedom-of-information-laws>.

people—the lawyers litigating lethal injection claims, a handful of investigative journalists, and a random law professor here and there—no one knows just how bad the decision-making actually is.

States thwart transparency in the lethal injection context in several ways. First, a number of states exempt their corrections department from the reach of the state APA, while others exempt their corrections department from the reach of the APA at least when it comes to lethal injection.<sup>92</sup> To the extent that corrections departments are not subject to the APA's requirements in devising lethal injection protocols, they are not subject to the notice-and-comment process that serves as the primary mechanism by which agency action is exposed to public scrutiny, or to the record-keeping requirements that force them to show their work.<sup>93</sup> Nothing to see means nothing to challenge other than the APA exemptions themselves, and those have mostly failed.<sup>94</sup>

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92. *See, e.g.*, VA. CODE ANN. § 2.2-4002(B)(9) (exempting agency action from the APA when it relates to “[i]nmates of prisons or other such facilities or parolees therefrom”); TENN. CODE ANN. § 4-5-102(12)(B)(vi) (2011) (exempting agency action relating to inmates in a correctional facility from the definition of a “Rule” under the state APA); 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” under the state APA); WASH. REV. CODE § 34.05.030(1)(c) (state APA does not apply to the department of corrections with respect to persons in the department’s custody or subject to their jurisdictions); CAL. PENAL CODE § 3604.1(a) (“The Administrative Procedure Act shall not apply to standards, procedures, or regulations promulgated” by state department of corrections regarding method of execution). For an insightful comment about corrections department regulations as “a kind of no man’s land” of administrative regulation more generally, see Giovanna Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329 (2009).

93. This also means that state corrections departments are deprived of the public comment procedure that at least in theory could provide valuable input, a harm of its own given the agency’s lack of expertise.

94. *See, e.g.*, *Hill v. Owens*, 738 S.E.2d 56, 59–60 (Ga. 2013) (compliance with state APA in promulgating lethal injection protocol is not required); *Abdur'Rahman v. Bredesen*, 181 S.W.3d 292, 311 (Tenn. 2005) (interpreting the state APA to not govern lethal injection); *Conner v. North Carolina Council of State*, 716 S.E.2d 836, 845–46 (N.C. 2011) (holding that North Carolina’s lethal injection protocol is not subject to the APA); *Porter v. Commonwealth*, 661 S.E.2d 415, 432–33 (Va. 2008) (holding that Virginia’s lethal injection protocol is not subject to the state APA); *Jackson v. Danberg*, No. 07M-09-141 (RRC), 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, Hightower v. Donald*, No. 2007CV135682, 2007 WL 4355844, at \*4 (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 Corr.*, 278 S.W.3d 193, 198 (Mo. 2009) (upholding statutory exemption); *Brown v. Vail*, 237

Second, states have cut access to information about agency decision-making in the context of lethal injection in other ways. One searches in vain, for example, for regulations governing the process by which a lethal injection protocol is chosen. There is no established process, and thus the decision-making that occurs is off-grid and in the shadows from the start.<sup>95</sup>

Moreover, even when there happens to be a record of how a lethal injection protocol was chosen, DOCs routinely resist sharing it, citing security exemptions under the state's FOIA.<sup>96</sup> For example, in the wake of its 2013 botched execution of William Happ, the Florida DOC refused to answer questions about how it decided to use midazolam as the first drug in

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P.3d 263, 270 (Wash. 2010) (lethal injection protocol is not a “rule” under the state APA and thus compliance with APA is not required). *But see* *Bowling v. Kentucky Dep’t of Corr.*, 301 S.W.3d 478, 488 (Ky. 2009) (lethal injection protocol is an administrative regulation subject to the state APA); *Evans v. State*, 914 A.2d 25, 79-80 (Md. 2006) (also stands for the proposition that lethal injection protocol is an administrative regulation subject to the state APA).

95. *See* Leonidas G. Koniaris et. al, *Inadequate Anesthesia in Lethal Injection for Execution*, 365 THE LANCET 1361, 1412 (Apr. 16-22, 2005) (noting that neither Virginia nor Texas, states that account for nearly half of the nation’s executions, has a record of how it developed its execution protocol); *Editorial: Virginia’s Execution Dilemma*, RICHMOND TIMES-DISPATCH, March 3, 2016, at A12. (“In any event, capital-punishment foes do make a good point when they note that the choice of lethal-injection drugs is entirely up to the discretion of the department’s director. The cocktail is spelled out neither in state law nor in regulation. In fact, even the process by which the cocktail is chosen is not spelled out by regulation.”).

96. Some states exempt information about lethal injection from FOIA by statute. *See, e.g.*, ARK. CODE ANN. § 5-4-617(i)(1)(C) (2013) (“[A] person shall not disclose in response to a request under the Freedom of Information Act of 1967...[d]ocuments, records, or information that concern the procedures [regarding lethal injection and its implementation].”); *see also* Eric Berger, *Gross Error*, 91 WASH. L. REV. 929, 965 (2016) (“Many states design and implement their lethal injection procedures behind a veil of secrecy, which makes it extremely difficult for inmates to know how they will be executed. . . . Indeed, some states have passed lethal injection secrecy laws that deem execution procedures a state secret, sometimes explicitly exempting them from state Freedom of Information Act inquiries.”) (citing state statutes in Arkansas, Louisiana, Oklahoma, South Dakota, and Tennessee); Reporters Comm. for Freedom of the Press, *Lethal Secrecy: State Secrecy Statutes Keep Execution Information From the Public*, 38 THE NEWS MEDIA & THE LAW (Spring 2014), [https://www.rcfp.org/wp-content/uploads/2019/01/Spring\\_2014.pdf](https://www.rcfp.org/wp-content/uploads/2019/01/Spring_2014.pdf) [<https://perma.cc/43XD-9RB8>] (“In denying requests for information regarding the identity of drug and medical suppliers involved in executions, many states rely on existing exceptions to their public information acts, such as protections for individuals’ physical safety, certain law enforcement and prosecutorial information, and information related to ‘biological agents or toxins.’”).



its three-drug protocol, which it had piloted on Happ.<sup>97</sup> “Those decisions are exempt from public record because they could impact the safety and security of inmates and officers who are involved in that process,” the DOC spokesperson said.<sup>98</sup> It is a mystery how knowing the *process* by which a drug was chosen could pose a threat to safety or security, but that’s what the public was left with—that and a lot of questions. Did the Florida DOC review the relevant pharmacological literature? Did it consider other readily available, less risky alternatives to the protocol it chose? Why did it not just choose the protocol used for animal euthanasia? With no records or regulations to review, the answer is nobody knows.

Third, the more recent phenomenon of delegating the decision-making process to lawyers places a blanket of secrecy over the entire drug selection process. Having lawyers involved in the drug selection process means that the process is protected from disclosure under the attorney-client privilege and attorney work product doctrine.<sup>99</sup> It means that the entire drug selection process is hermetically sealed from scrutiny—exempt from even the court-ordered discovery process. Critics say this is the very point.<sup>100</sup>

Fourth and finally, state corrections department officials employ informal measures to prevent public scrutiny of their lethal injection processes. A prime example is what happened when Louisiana’s chief legal counsel for the DOC reached out to the Texas DOC for guidance on lethal injection in 2003.<sup>101</sup> Lacking access to experts, state DOCs have historically gone to each other for advice, and Texas, being the nationwide leader in executions, has played an outsized role in this regard. Over time, numerous state corrections department officials have consulted the Texas DOC in developing their own lethal injection protocols,<sup>102</sup> and lethal injection litigation in Louisiana showed what these sorts of consultations look like. In the Louisiana litigation, the state’s counsel for the DOC testified that when she reached out to Texas, the warden refused to advise her over the phone, explaining that “he didn’t say these things on the phone that he would rather say in person.” That phone call led to a trip to Texas, and when Louisiana’s counsel and her entourage met with the warden, he “asked if

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97. See Tasneem Nashrulla, *What 13 States Aren’t Telling You About How They Execute Prisoners*, BUZZFEED NEWS (June 16, 2014), <https://www.buzzfeednews.com/article/tasneemnashrulla/what-13-states-are-not-telling-you-about-how-they-kill-peopl> [https://perma.cc/7Z52-EQ4M].

98. *Id.*

99. See Alper, *supra* note 50.

100. See *id.* (discussing the “‘stick a lawyer in the room’ strategy” in states’ quest for lethal injection secrecy).

101. See HUMAN RIGHTS WATCH, *supra* note 51, at 16.

102. At the very least, state corrections department officials from Colorado, Florida, Indiana, Kentucky, Missouri, Tennessee, Washington, and Wyoming have consulted with Texas corrections department officials about lethal injection. See HUMAN RIGHTS WATCH, *supra* note 51, at 16, n.52.

any of us had tape recorders, if any of us were wired” before discussing his approach to lethal injection.<sup>103</sup> The Texas warden’s approach to lethal injection on the merits is a story of its own<sup>104</sup>—but here the point is the lengths to which Texas officials went to keep their information secret.

We have glimpses of the steps that state DOCs take to protect their decision-making processes from scrutiny—the lack of information is more than just exemption from state APA requirements and a lack of records and regulations. But by and large, the best indication of these efforts is their success. Outside of the litigation context, which has slowly chipped away at the wall of secrecy that state DOCs have built, the result is a complete blackout of information.

It is worth noting that the measures that corrections departments take to protect their decision-making processes occur against a backdrop of secrecy in the lethal injection context more generally. Secrecy as to drug suppliers.<sup>105</sup> Secrecy as to executioners’ basic qualifications.<sup>106</sup> Secrecy as to the protocols themselves.<sup>107</sup> “[T]he only overarching constant appears to

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103. *Id.* at 16.

104. For the rest of the story, see LAIN, *supra* note 21.

105. See Robin Konrad, *Behind the Curtain: Secrecy and the Death Penalty in the United States*, DEATH PENALTY INFO. CTR. (Nov. 20, 2018), <https://files.deathpenaltyinfo.org/legacy/files/pdf/SecrecyReport.pdf> [<https://perma.cc/Y3FF-GCLA>]; see also *infra* note 106.

106. See *id.*; Dahlia Lithwick, *The Capital Punishment Cover-Up*, SLATE MAG. (Feb. 3, 2015), <https://slate.com/news-and-politics/2015/02/capital-punishment-cover-up-virginia-hides-all-information-relating-to-the-execution-process.html> [<https://perma.cc/HYL2-5SGD>] (“Amid the recent rash of high-profile screw-ups in executions, new cover-up measures have been passed in more than a dozen states, allowing departments of corrections to increasingly refuse to disclose where their drugs come from, how and if they were tested, and whether corrections officers are qualified to administer them correctly.”); *Death Penalty Due Process Review Project, Report on Resolution 108B*, AM. BAR ASS’N 1 (2015), <https://www.in.gov/ipdc/files/ABA%20Report%20-%20Execution%20protocol%200-108B.pdf> [<https://perma.cc/U58R-F6J9>] (“In the modern era of capital punishment, secrecy has surround many aspects of the imposition of a death sentence in the United States. States have sought to shield not just the identities of executioners and other members of the execution team, but the details of those individuals’ basic qualifications, pertinent information about the drug formulas used in lethal injections, and the protocols that instruct how the execution is to be carried out.”); see also *infra* note 107.

107. See *supra* notes 95–96; Berger, *supra* note 10, at 304 (“Many states’ refusal to disclose the details of their own procedures compounds the problem. As recently as October 2007, only six lethal injection states provided what Professor Denno termed ‘complete’ public protocols, and even those protocols did not give details about important information such as the qualifications and training of the execution team members. . . . Relatedly, states also routinely resist discovery in an effort to divulge as little information about the method by which they plan to execute . . .”).

be states' desire for secrecy regarding execution practices," writes Debby Denno of the multitude of changes swirling around lethal injection. However problematic lethal injection might be, she says, "states are unwavering in their desire to conceal this disturbing reality from the public."<sup>108</sup>

In recent years, the problem has only grown worse. As several good government groups have noted, states in the last several years have "intensified their efforts to obscure information regarding the development and implementation of lethal injection protocols."<sup>109</sup> This move, as Eric Berger has noted, is largely a reflection of the fact that revealing such information would "highlight[] the failed processes and delegations by which the protocol was adopted."<sup>110</sup> Having seen for ourselves what those delegations and decision-making processes are, it only makes sense that DOCs would try to hide them. *I would. Wouldn't you?*

All this is to say that when it comes to transparency in the agency decision-making process, lethal injection turns the rules on their head. Instead of public disclosures, notice-and-comment procedures, and record-keeping requirements, we see exemptions, obfuscation, and secrecy, rendering information about how a state DOC arrived at a lethal injection protocol notoriously hard to come by.

The implications are profound. No transparency means no public scrutiny to trigger outrage over these decision-making processes so that democracy can do its thing. And no record-keeping or other rule-making requirements mean no processes for inmates to challenge, and no records by which courts can determine whether a DOC's decision-making was

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108. Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L.J. 1331, 1382 (2014).

109. THE CONST. PROJECT'S DEATH PENALTY COMM., IRREVERSIBLE ERROR: RECOMMENDED REFORMS FOR PREVENTING AND CORRECTING ERRORS IN THE ADMINISTRATION OF CAPITAL PUNISHMENT 141 (2014) (quoting Denno, *supra* note 108, at 1382); *Death Penalty Due Process Review Project, Report on Resolution 108B*, *supra* note 106, at 1 ("[T]he past few years have been particularly noteworthy, as many states have increased efforts to cloak their execution procedures in secrecy. Many states have passed statutes that broaden the categories of information that will be kept confidential, exempting information about execution practices and procedures from public disclosure requirements and exempting departments of corrections from the public rulemaking requirements of administrative procedures act laws. The result of this troubling trend is that many jurisdictions have made secret information that may have once been readily available concerning their execution procedures, and other states are trying to do so. The American Bar Association is concerned about this movement toward increased secrecy and regressive policies surrounding the processes by which prisoners are executed by lethal injection, particularly given the gravity of the authority exercised by state and federal governments in the execution of prisoners.").

110. Berger, *supra* note 10, at 304.

arbitrary and capricious (and from what we know, there is a good chance that it was).<sup>111</sup>

This, in turn, further entrenches problematic decision-making in the lethal injection context. Corrections department officials (and shadow, non-DOC decision-makers) can design protocols without serious consideration of the issues that minimally competent decision-making requires.<sup>112</sup> If no one knows what the DOC is doing, it can pretty much do what it wants. Lack of transparency is in large part how we got into this mess. And it is a large part of the reason we cannot manage to get out of it.

### CONCLUSION

Having made three observations about how administrative law norms play out in the lethal injection context, I close with a few thoughts about the implications of my analysis. First are the implications for executions by lethal injection. Lethal injection today is more unreliable than at any other time in its forty-plus years of existence.<sup>113</sup> Drug shortages have forced innovation, and innovation has led to problematic protocols. Botched executions have many causes, but problematic protocols and executioner incompetence are at the top of the list, and both lie at the feet of state DOCs. The perverse way that administrative law norms play out in the lethal injection context is partly to blame for this state of affairs. Torturous deaths at the hands of the state are a predictable result of the unlimited discretion that DOCs have to make decisions about matters decidedly outside their area of expertise, particularly when no one is watching.

Next are the implications for the death penalty more broadly. As noted at the beginning of this essay, “death is different” is supposed to mean *more* protections for those subject to the ultimate punishment, more protections when the stakes are literally life and death. Yet where the rubber actually hits the road—where death sentences come to full fruition as state executions—the opposite is true. How can it be that where the death penalty is most concrete, the protections are most ephemeral? The way that administrative law norms work in the execution context speaks volumes

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111. For a strong argument that such obfuscation denies condemned inmates access to the courts and other due process guarantees, see Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 B.C. L. REV. 1367, 1367 (2014).

112. See *Death Penalty Due Process Review Project, Report on Resolution 108B*, *supra* note 106, at 12 (“[P]rocedures that are created in secrecy and maintained without transparency are far more likely to be ill-conceived and poorly or inconsistently administered.”).

113. See Denno, *supra* note 108, at 1380 (“The lethal injection procedure is more dangerous and inconsistent than ever, and the result is a perpetual effort by states to maintain secrecy at a time when transparency is most paramount.”).

about the strength of our commitment to ensuring that when the state takes life, it does its job right.

Then there are the implications for administrative law. I am not an administrative law scholar. I came to administrative law because the death penalty brought me here—because administrative law is an integral part of the story of why executions by lethal injection in this country are so messed up. But even from an outsider's view, it seems to me that a perverted version of death penalty exceptionalism is no better for administrative law than it is for the death penalty itself. The execution context shows state legislatures abdicating responsibility with blanket delegations of legislative power. And this apparently passes muster. It shows agency decision-making that is breathtakingly incompetent, a reflection of the fact that DOCs have been delegated authority that is clearly and unequivocally outside their area of expertise. This, too, apparently passes muster. And it shows that despite all the talk about the importance of transparency and accountability in the agency decision-making process, in the end, that is all it is—talk.

Administrative law scholars might soothe themselves with the fact that this is death penalty exceptionalism—*oh that's just how administrative norms play out when executions are at stake*. But the way that administrative law norms work in the execution context also says something about the strength of our commitment to those norms more broadly. It shows that the bedrock principles and fundamental assumptions of administrative law can be suspended whenever the state wants. Indeed, it shows that they can be suspended even when the state exercises its most awesome and consequential power—when the state takes human life.

In the end, when the death penalty meets administrative law, administrative law norms get sullied and the death penalty loses the one comfort one might otherwise have: that when the state takes human life, it takes extra care to do it right. In the administrative law context, death penalty exceptionalism turns “death is different” on its head. And I cannot help but conclude, standing at the intersection of these two great bodies of law, that the result is not good for either.