

CHALLENGES TO THE “KILLING STATE”:
EIGHTH AMENDMENT CONCERNS
IN *WARNER V. GROSS*

Sarah Willey*

I. INTRODUCTION

“That today most executions in the United States are not newsworthy suggests that the killing state is taken for granted.”¹ Author and Professor Austin Sarat theorizes that the law “must find ways of distinguishing state killing from the acts to which it is a supposedly just response and to kill in such a way as not to allow the condemned to become an object of pity and, in so doing, to appropriate the status of the victim.”² Where executions were once public displays of state power, they now take place far from the public view, hiding “behind prison walls in . . . carefully controlled situation[s].”³ But the State cannot hide from the inevitable—there is “violence inherent in taking human life.”⁴

Using drugs meant for individuals with medical needs to carry out executions is a misguided effort to mask the brutality of executions by making them look serene and peaceful—like something any one of us might experience in our final moments. But executions are, in fact, nothing like that. They are brutal,

* Sarah Willey is a 2017 J.D. Candidate at Oklahoma City University School of Law. She would like to thank her family for their never-ending love, support, and encouragement. She would also like to thank the editors and the members of the Oklahoma City University Law Review for all of their assistance and patience during this process.

1. Austin Sarat, *Killing Me Softly: Capital Punishment and the Technologies for Taking Life*, in PAIN, DEATH, AND THE LAW 43, 46 (Austin Sarat ed., 2001) (footnote omitted) “If there is any issue at all left to the public debate about capital punishment it is a debate about *how* the state kills.” *Id.*

2. *Id.* at 47.

3. *Id.* at 50.

4. Corinna Barrett Lain, *The Politics of Botched Executions*, 49 U. RICH. L. REV. 825, 839 (2015).

savage events, and nothing the state tries to do can mask that reality. Nor should it. If we as a society want to carry out executions, we should be willing to face the fact that the state is committing a horrendous brutality on our behalf.

. . . [I]f we are willing to carry out executions, we should not shield ourselves from the reality that we are shedding human blood.⁵

“[O]f the approximately one thousand executions carried out from 1980 to 2010 by lethal injection, more than [seven] percent were botched.”⁶ That rate is “more than double the botch rate of more antiquated execution methods like hanging and electrocution.”⁷ Beginning in 2014, a myriad of allegedly botched executions has drawn public attention to lethal injection protocols in the United States.⁸ For example, Oklahoma made national headlines when it executed Clayton Lockett in “what may have been the worst lethal injection in U.S. history.”⁹ News of Lockett’s botched execution prompted “the White House press secretary [to] issue[] a statement: ‘We have a fundamental standard in this country that even when the death penalty is justified, it must be carried out humanely—and I think everyone would recognize that this case fell short of that standard.’”¹⁰

During the execution of Clayton Lockett, “[e]xecutioners pushed an [intravenous] catheter straight through a vein in [his] groin, so that the

5. *Wood v. Ryan*, 759 F.3d 1076, 1102–03 (9th Cir.) (citations omitted) (Kozinski, C.J., dissenting from the denial of rehearing en banc), *vacated mem.*, 135 S. Ct. 21 (2014).

6. AUSTIN SARAT ET AL., GRUESOME SPECTACLES: BOTCHED EXECUTIONS AND AMERICA’S DEATH PENALTY 120 (2014); *see also* Lain, *supra* note 4, at 825–26.

7. Lain, *supra* note 4, at 825–26; *see also* Austin Sarat et al., *Lethal Injection Leads to the Most Botched Executions*, DAILY BEAST (Apr. 30, 2014, 7:20 AM), <http://www.thedailybeast.com/articles/2014/04/30/lethal-injection-leads-to-the-most-botched-executions.html> [<https://perma.cc/JL4C-QJMH>] (“[E]xecutions by lethal injection are botched at a higher rate than any of the other methods employed since the late-19th century, [seven] percent.”).

8. *See generally* Lain, *supra* note 4, at 827–36 (discussing four botched executions in early 2014).

9. Ben Crair, *2014 Is Already the Worst Year in the History of Lethal Injection*, NEW REPUBLIC (July 23, 2014), <http://www.newrepublic.com/article/118833/2014-botched-executions-worst-year-lethal-injection-history> [<http://perma.cc/9G9A-4CUR>].

10. Lain, *supra* note 4, at 832 (quoting Josh Levs et al., *Oklahoma’s Botched Lethal Injection Marks New Front in Battle over Executions*, CNN (Sept. 8, 2014, 7:16 AM), <http://www.cnn.com/2014/04/30/us/oklahoma-botched-execution/> [<http://perma.cc/B226-EEVC>]).

drugs filled his tissue and not his bloodstream.”¹¹ Lockett’s infamous execution eventually led the public to question Oklahoma’s protocol for injection executions.¹² After Lockett’s death, several prisoners awaiting execution in Oklahoma filed a complaint against the Oklahoma Department of Corrections (“ODC”) under 42 U.S.C. § 1983,¹³ alleging (among other things) that the use of midazolam violated the Eighth Amendment.¹⁴ Consequently, in *Warner v. Gross*, the Tenth Circuit Court of Appeals assessed whether Oklahoma’s use of midazolam in its protocol for lethal injections was a violation of the Eighth Amendment’s prohibition on cruel and unusual punishment.¹⁵

The Tenth Circuit held that the U.S. District Court for Western District of Oklahoma properly denied the preliminary injunction sought by the inmates in Oklahoma, as the inmates “failed to establish a likelihood of success on the merits of their claims.”¹⁶ Ultimately, the court determined that the district court did not commit clear error in finding that the inmates failed to establish that the use of midazolam, either by its inherent characteristics or by negligent administration, created a substantial risk of the alleged side effects.¹⁷ The United States Supreme Court affirmed the Tenth Circuit’s decision on two separate bases.¹⁸ The Court determined that “the prisoners failed to identify a known and available alternative method of execution that entails a lesser risk of pain,” and the Court noted that “the District Court did not commit clear error when it found that the prisoners failed to establish that Oklahoma’s use of a massive dose of midazolam in its execution protocol entails a substantial risk of severe pain.”¹⁹

Some proponents argue that lethal injection not only serves as a deterrent but also as a more humane system of capital punishment than

11. Crair, *supra* note 9.

12. See generally Lain, *supra* note 4, at 830–33, 837 (discussing the political fallout from the botched execution of Clayton Lockett in Oklahoma).

13. See generally 42 U.S.C. § 1983 (2012).

14. See *Warner v. Gross*, 776 F.3d 721, 726 (10th Cir.), *aff’d sub nom.* *Glossip v. Gross*, 135 S. Ct. 2726 (2015).

15. See *id.* at 726–36. See generally U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

16. *Warner*, 776 F.3d at 724.

17. See *id.* at 726–36 (“In this case, there is no question that the district court actually performed its gatekeeper role and applied the proper standards in doing so.”).

18. *Glossip*, 135 S. Ct. at 2731.

19. *Id.*

other alternatives.²⁰ Yet others—often the survivors of a tragedy and the families of the victims—comment on how the system is perhaps *too* humane.²¹ For instance, one survivor of the Oklahoma City bombing remarked on the execution of Timothy McVeigh, stating that “death by injection is ‘*too good*’ for McVeigh.”²² Another individual, “an emergency worker who helped remove bodies from the Murrah building,” said that “*conventional methods* should [not] be used.”²³ However, a discussion about the morality of capital punishment is beyond the scope of this Comment. Rather, this Comment explores the history, facts, and legal arguments surrounding *Warner*; and it considers the Eighth Amendment ramifications of Oklahoma’s protocol for lethal injection.

Part II of this Comment examines the history of lethal injection and analyzes how the American legal system has addressed the issue of capital punishment as a whole. Part III outlines the facts and procedural history of *Warner*. Part IV examines the Tenth Circuit’s reasons for affirming the denial of the inmates’ motion for a preliminary injunction. Part IV also asserts that the decision in *Warner* conformed to the legal principles previously outlined by the Supreme Court in *Baze v. Rees*²⁴ but neglected to consider important aspects of other Eighth Amendment jurisprudence—particularly, the ideas articulated in the Court’s line of proportionality cases. Indeed, instead of relying on the two-pronged *Baze* test, the Tenth Circuit should have adopted a more flexible standard (similar to the standard applied in the proportionality cases invoking the Eighth Amendment²⁵) that “reflect[s] the public attitude toward” lethal injection by considering the changing “perceptions of standards of decency.”²⁶ Part IV also suggests—as seemingly demonstrated by the Supreme Court’s decision in *Glossip*—the judicial system is untroubled by leaving protocol decisions regarding lethal injection to the legislature,

20. See Sarat, *supra* note 1, at 44–46.

21. See *id.* at 47.

22. *Id.* (emphasis added) (quoting *Those Left Grief-Stricken by Bombing Cry for Vengeance*, ST. LOUIS POST-DISPATCH, June 4, 1997, at 10A [hereinafter *Cry for Vengeance*]).

23. *Id.* (emphasis added) (quoting *Cry for Vengeance*, *supra* note 22).

24. *Baze v. Rees*, 553 U.S. 35 (2008) (plurality opinion).

25. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion) (noting that an analysis of the Eighth Amendment must include “an assessment of contemporary values” and emphasizing that the punishment must not be excessive in terms of pain and proportionality).

26. *Id.*

which currently allows prison systems to establish protocol independently.²⁷ Therefore, it seems like courts are willing to require that a punishment be proportional to the severity of the crime but are unwilling to restrict questionable execution protocols.²⁸ Part V provides a brief discussion of some recent developments that reaffirm the need for reform.

II. THE HISTORY AND DEVELOPMENT OF CAPITAL PUNISHMENT AND THE CHALLENGES TO LETHAL INJECTION

A. Challenges to Capital Punishment Prior to the Development of Lethal Injection

The Supreme Court rarely hears challenges on the constitutionality of a specific execution method.²⁹ In fact, the Court issued only two definitive rulings on such challenges during a span of approximately 130 years.³⁰ In 1878, it answered a challenge to the constitutionality of a firing squad in *Wilkerson v. Utah*;³¹ but it did not issue a ruling on another direct constitutional challenge until 2008, when Kentucky's three-drug protocol for lethal injection was challenged in *Baze*.³² In *Wilkerson*, the Supreme Court determined that death by firing squad was not cruel or unusual—partly because it was a customary method also utilized to punish military offenses.³³ The Court noted, however, that it is hard “to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted;

27. See *Glossip v. Gross*, 135 S. Ct. 2726, 2732 (2015) (“While methods of execution have changed over the years, [t]his Court has *never* invalidated a State’s chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment.” (alteration in original) (emphasis added) (quoting *Baze*, 553 U.S. at 48)), *aff’g sub nom. Warner v. Gross*, 776 F.3d 721 (10th Cir. 2015); see also Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocutation and Lethal Injection and What It Says About Us*, 63 OHIO ST. L.J. 63, 66, 69 (2002) (“[P]rison officials are wrongfully delegated a degree of discretion for which they have no training and knowledge.”).

28. See *infra* Part II.

29. See Katie Roth Heilman, Comment, *Contemplating “Cruel and Unusual”: A Critical Analysis of Baze v. Rees in the Context of the Supreme Court’s Eighth Amendment “Proportionality” Jurisprudence*, 58 AM. U. L. REV. 633, 638 (2009).

30. See *id.* (“Prior to its decision in *Baze*, the last time the Supreme Court squarely considered the constitutionality of a specific execution method was in [1878].”).

31. *Wilkerson v. Utah*, 99 U.S. 130, 130–33 (1878).

32. *Baze*, 553 U.S. at 40–41, 47.

33. *Wilkerson*, 99 U.S. at 134–35.

but it is safe to affirm that punishments of torture, . . . and all others in the same line of unnecessary cruelty, are forbidden.”³⁴

In 1890, the Supreme Court addressed, but did not issue a definitive ruling on, the constitutionality of another execution procedure in *In re Kemmler*.³⁵ In that case, rather than deciding whether New York’s electrocution procedures were constitutional, the Court “decided that the Eighth Amendment would not apply to the states.”³⁶ After losing on appeal, “William Kemmler became the first person in the country to be electrocuted. . . . [He] was executed in a day of confusion and horror, suffering a slow demise of burning flesh and ashes.”³⁷ The Supreme Court noted in *In re Kemmler* that “[p]unishments are cruel when they involve torture or a lingering death, but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life.”³⁸ One scholar suggests that the events surrounding *In re Kemmler* indicate “that political and financial forces outweighed the purported humanitarian concerns” about the method of execution in New York.³⁹ Specifically, the “financial competition between Thomas Edison and George Westinghouse concerning whose current would dominate the electrical industry,” coupled with the then-governor’s denunciation of hanging executions, may have affected the outcome of the case.⁴⁰

B. *Baze v. Rees: The First Major Challenge to Lethal Injection*

It was not until 2008, in *Baze v. Rees*, that the Supreme Court addressed the first major challenge to lethal injection; specifically, the Court considered whether the protocol for lethal injection in Kentucky was tantamount to cruel and unusual punishment.⁴¹ At the time, Kentucky used sodium thiopental, pancuronium bromide, and potassium

34. *Id.* at 135–36.

35. *In re Kemmler*, 136 U.S. 436, 438–49 (1890).

36. Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 *FORDHAM L. REV.* 49, 62 (2007); *see also In re Kemmler*, 136 U.S. at 446–47.

37. Denno, *supra* note 36 (footnote omitted).

38. *In re Kemmler*, 136 U.S. at 447.

39. Denno, *supra* note 27, at 71–72.

40. *Id.*

41. *Baze v. Rees*, 553 U.S. 35, 40–41, 47 (2008) (plurality opinion); *see also SARAT ET AL.*, *supra* note 6, at 121.

chloride—the same three drugs that at least thirty states used, including Oklahoma.⁴² The “[p]etitioners in [*Baze*—each convicted of double homicide—acknowledge[d] that the lethal injection procedure . . . w[ould] result in a humane death” when properly administered.⁴³ However, the risk of improper administration was the basis of their claim.⁴⁴ Their argument was “that the lethal injection protocol [was] unconstitutional under the Eighth Amendment . . . because of the risk that the protocol’s terms might not be properly followed, resulting in significant pain.”⁴⁵

The Supreme Court’s decision in *Baze* was a fractured one.⁴⁶ “[S]even Justices agreed that Kentucky’s lethal injection protocols [were] constitutional,” but there was no clear majority.⁴⁷ In fact, “[s]ix Justices . . . concurred in the judgment [and] wrote separate opinions.”⁴⁸ The plurality noted that prior “cases recognize[d] that subjecting individuals to a risk of future harm—not simply actually inflicting pain—can qualify as cruel and unusual punishment.”⁴⁹ In order “to prevail on such a claim there must be a ‘substantial risk of serious harm,’ an ‘objectively intolerable risk of harm’ that prevents prison officials from pleading that they were ‘subjectively blameless for purposes of the Eighth Amendment.’”⁵⁰

42. *Baze*, 553 U.S. at 44; see also *Warner v. Gross*, 776 F.3d 721, 724–25 (10th Cir.), *aff’d sub nom. Glossip v. Gross*, 135 S. Ct. 2726 (2015).

The first drug, sodium thiopental (also known as Pentothol), is a fast-acting barbiturate sedative that induces a deep, comalike unconsciousness when given in the amounts used for lethal injection. The second drug, pancuronium bromide (also known as Pavulon), is a paralytic agent that inhibits all muscular-skeletal movements and, by paralyzing the diaphragm, stops respiration. Potassium chloride, the third drug, interferes with the electrical signals that stimulate the contractions of the heart, inducing cardiac arrest.

Baze, 553 U.S. at 44 (citations omitted).

43. *Baze*, 553 U.S. at 41.

44. See *id.*

45. *Id.*

46. See *id.* at 39; see also Heilman, *supra* note 29, at 647 (“[T]he Court was sharply divided as to the appropriate standard for evaluating the constitutionality of lethal injection.”).

47. Heilman, *supra* note 29, at 647.

48. *Id.*; see also *Baze*, 553 U.S. at 40–63 (plurality opinion); *id.* at 63–71 (Alito, J., concurring); *id.* at 71–87 (Stevens, J., concurring); *id.* at 87–93 (Scalia, J., concurring); *id.* at 94–107 (Thomas, J., concurring); *id.* at 107–13 (Breyer, J., concurring).

49. *Id.* at 49 (plurality opinion).

50. *Id.* at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846 & n.9 (1994)).

In *Baze*, the Court determined that “[s]imply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of ‘objectively intolerable risk of harm’ that qualifies as cruel and unusual.”⁵¹ Thus, an inmate must not only demonstrate that “the lethal injection protocol in his or her state poses a ‘substantial risk of serious harm’ or an ‘objectively intolerable risk of harm’” but also that “a feasible alternative . . . could be readily implemented and would ‘significantly reduce a substantial risk of severe pain.’”⁵² According to the Court, “the first drug in the three-drug protocol must render the inmate unconscious to avoid an unacceptable risk that the inmate would be aware as he died by suffocation.”⁵³ The Court ultimately concluded that Kentucky’s three-drug protocol did not constitute cruel and unusual punishment under the Eighth Amendment; the challengers themselves conceded that—when followed properly—Kentucky’s protocol did not raise constitutional concerns “because . . . proper administration of the first drug, sodium thiopental, eliminates any meaningful risk that a prisoner would experience pain” during the remainder of the execution.⁵⁴ In *Warner*, however, the petitioners challenged whether midazolam, the anesthetic used as the first drug in Oklahoma’s protocol, actually induced unconsciousness and eliminated the risk of pain.⁵⁵

C. Capital Punishment and Eighth Amendment Proportionality

Despite an apparent reluctance to address the constitutionality of certain execution methods, the Supreme Court has willingly addressed the proportionality of the death penalty.⁵⁶ In doing so, the Court has

51. *Id.* (quoting *Farmer*, 511 U.S. at 846).

52. SARAT ET AL., *supra* note 6, at 121 (quoting Harvey Gee, *Eighth Amendment Challenges After Baze v. Rees: Lethal Injection, Civil Rights Lawsuits, and the Death Penalty*, 31 B.C. THIRD WORLD L.J. 217, 217 (2011)).

53. Joel B. Zivot, *Lethal Injection: States Medicalize Execution*, 49 U. RICH. L. REV. 711, 712 (2015).

54. *Baze*, 553 U.S. at 41, 49.

55. *Warner v. Gross*, 776 F.3d 721, 726–27 (10th Cir.), *aff’d sub nom.* *Glossip v. Gross*, 135 S. Ct. 2726 (2015).

56. *See generally* *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion). For a detailed summary of death-penalty proportionality cases, see Heilman, *supra* note 29, at 640–42.

interpreted “the [Eighth] Amendment . . . in a flexible and dynamic manner.”⁵⁷ Specifically, the Court has emphasized that the core of the Eighth Amendment “is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.”⁵⁸ Over time, two analytical paths for proportionality have evolved from the Court’s application of the Eighth Amendment⁵⁹: (1) “proportionality prohibits the arbitrary and capricious imposition of punishment by requiring procedural safeguards to guide the discretion of sentencing authorities”;⁶⁰ and (2) “the culpability of a class of offenders [should align] with the severity of a penalty.”⁶¹

For example, in *Coker v. Georgia*, the Court determined that the death penalty was “grossly disproportionate and excessive punishment for the crime of rape.”⁶² “[P]ublic opinion, legislative judgments, and the response of juries” all factored into the decision.⁶³ In *Gregg v. Georgia*, a foundational death-penalty case, the Court highlighted the fluidity of the Eighth Amendment.⁶⁴ There, in yet another fractured death-penalty opinion, the plurality noted, “It is clear from . . . precedent[] that the Eighth Amendment has not been regarded as a static concept. As Mr. Chief Justice Warren said, in an oft-quoted phrase, ‘[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.’”⁶⁵ In *Gregg*, the Court further explained that “an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment.”⁶⁶ Therefore, the Court will “look to objective indicia that reflect the public attitude toward a given sanction.”⁶⁷ The Court continued to limit the reach of the death penalty in a series of

57. *Gregg*, 428 U.S. at 171.

58. *Id.* (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)).

59. Suchitra Paul, Note, *Toward a Uniform Standard of Decency: Connecticut’s Prospective Capital Punishment Repeal and the Eighth Amendment*, 10 Nw. J.L. & SOC. POL’Y 280, 296–310 (2015).

60. *Id.* at 297.

61. *Id.* at 302.

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

63. Heilman, *supra* note 29, at 641.

64. *See Gregg v. Georgia*, 428 U.S. 153, 170–73 (1976) (plurality opinion).

65. *Id.* at 172–73 (third alteration in original) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

66. *Id.* at 173.

67. *Id.*

cases—notably, *Atkins v. Virginia*⁶⁸ and *Roper v. Simmons*⁶⁹—where “the Court held the death penalty to be a disproportionate punishment for crimes committed by the mentally retarded or juveniles, respectively.”⁷⁰

There is, however, a contradiction in the Supreme Court’s treatment of the Eighth Amendment. “[T]he Court has repeatedly emphasized that the meaning of the Eighth Amendment,” at least in the context of proportionality, “changes as society evolves.”⁷¹ Yet the Court appears reluctant to apply this same line of reasoning to cases concerning execution methods.⁷² As previously mentioned, “the Court has viewed the Eighth Amendment ‘in a flexible and dynamic manner.’”⁷³ The lack of jurisprudence in the area of execution methods is due to the “extremely vague nature of lethal injection statutes,” and it has created a system where “prison officials have far too much discretion in administering injections.”⁷⁴ Indeed, most states do not have statutes that outline procedures for lethal injection, so corrections departments design and implement their own protocols.⁷⁵ Astonishingly, “[o]nly nine states specify the quantities of lethal injection chemicals they use.”⁷⁶ In the other states, “[l]egislatures delegate death to prison personnel and executioners who are not qualified to devise a lethal injection protocol, much less carry one out.”⁷⁷ One commentator has observed that “by refusing to acknowledge the problems with execution methods, the Court does not question the death penalty process itself. Moreover, states have aided this result through their systematic efforts to change to a new execution method whenever it seems likely that their current method is constitutionally vulnerable.”⁷⁸

68. See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the death penalty is unconstitutional when imposed as a punishment for the mentally disabled).

69. See *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005) (holding that the death penalty is unconstitutional when imposed “on offenders who were under the age of [eighteen] when their crimes were committed”).

70. Heilman, *supra* note 29, at 641–42.

71. *Id.* at 649.

72. See *id.*

73. Denno, *supra* note 27, at 75 (quoting *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989), *abrogated by Roper*, 543 U.S. 551).

74. *Id.* at 116.

75. James R. Wong, Comment, *Lethal Injection Protocols: The Failure of Litigation to Stop Suffering and the Case for Legislative Reform*, 25 TEMP. J. SCI. TECH. & ENVTL. L. 263, 271 (2006).

76. *Id.*

77. Denno, *supra* note 27, at 66.

78. *Id.* at 70–71.

D. The Development of Lethal Injection and Its Roots in Oklahoma

New York was the first state to consider lethal injection as an execution method.⁷⁹ In the mid-1880s, New York's governor appointed a commission to find a more civilized alternative to hanging.⁸⁰ The "commission rejected [lethal injection], in part because of the medical profession's belief that, with injection, the public would begin to link the practice of medicine with death."⁸¹ Almost a century later, Oklahoma ushered in a new era of state executions when it officially adopted lethal injection in 1977.⁸² "Since then, however, every state that uses the death penalty except Nebraska has adopted lethal injection as its default method . . . of execution."⁸³

Senator Bill Dawson and Representative Bill Wiseman had a hand "in the development of Oklahoma's lethal injection statute"—both men sponsored the bill.⁸⁴ Echoing the history of *In re Kemmler*, "the motivation behind the origins of the specific lethal injection procedure . . . was linked with improving the humaneness and cost of executions, as well as the palatability of the death penalty."⁸⁵ Specifically, the decision to allow lethal injection stemmed mostly from the Oklahoma State Legislature's and Senator Dawson's pursuit for a cheaper execution alternative.⁸⁶ Lethal injection was proposed to avoid either fixing the old electric chair, a project that would cost approximately \$62,000, or building a new gas chamber, which would have cost around \$300,000.⁸⁷ On the other hand, "the cost of execution by injection [was] only about \$10"—a price that proved to be rather convincing for the Oklahoma State Legislature.⁸⁸

Senator Dawson and Representative Wiseman not only had some

79. See Denno, *supra* note 36, at 64.

80. See *id.* at 62.

81. *Id.* at 64.

82. See Denno, *supra* note 27, at 92 ("In May 1977, Oklahoma became the first state to adopt lethal injection and by 1981, five states had adopted it").

83. Note, *A New Test for Evaluating Eighth Amendment Challenges to Lethal Injections*, 120 HARV. L. REV. 1301, 1301–02 (2007).

84. Denno, *supra* note 36, at 65 & n.96.

85. Denno, *supra* note 27, at 95–97; see also Ellen Kreitzberg & David Richter, *But Can It Be Fixed? A Look at Constitutional Challenges to Lethal Injection Executions*, 47 SANTA CLARA L. REV. 445, 453 (2007).

86. See Denno, *supra* note 27, at 95–97; Kreitzberg & Richter, *supra* note 85, at 453.

87. Denno, *supra* note 27, at 95; Kreitzberg & Richter, *supra* note 85, at 453.

88. Denno, *supra* note 36, at 71 (quoting Robert Moore, *Doctor As Executioner: The Argument over Death by Injection*, NEW PHYSICIAN, Sept. 1980, at 21, 23).

seemingly persuasive economic arguments on their side but also some valuable attention from the medical field.⁸⁹ Medical societies refused to participate in the development of a more humane execution method, so Dawson and Wiseman “consulted with A. Jay Chapman, then chief medical examiner for Oklahoma.”⁹⁰ “Chapman had no relevant expertise, did not consult any other medical professionals, and later expressed concern about the protocol’s proper administration.”⁹¹ For the lethal injection, he proposed using a mixture of sodium thiopental, a type of barbiturate, and chloral hydrate, a chemical paralytic.⁹² “With the assistance of Dr. Stanley Deutsch, head of the Department of Anesthesiology at The University of Oklahoma Health Sciences Center, a proposal was made to Oklahoma’s Legislature to perform executions using a lethal injection of [a type of] barbiturate combined with a neuromuscular blocking drug.”⁹³ Indeed, Deutsch offered similar suggestions for two types of drugs: a barbiturate and a paralytic.⁹⁴ Overall, despite a lack of expertise, Chapman was the chief architect of the “three-drug ‘cocktail’: sodium thiopental as the barbiturate sedative, to induce unconsciousness; pancuronium bromide as a neuromuscular blocking agent, to induce paralysis; and potassium chloride, to induce cardiac arrest.”⁹⁵

“In spite of Deutsch’s suggestions, Wiseman and Dawson decided to leave the statutory language vague in order to accommodate the development of new and better drug technologies in the future.”⁹⁶ “No committee hearings, research, or expert testimony was presented prior to

89. *See id.* at 65–70.

90. *Id.* at 66.

91. Heilman, *supra* note 29, at 643.

92. Denno, *supra* note 36, at 66–67 & n.106; *see also* DORLAND’S *ILLUSTRATED MEDICAL DICTIONARY* 182 (28th ed. 1994) (defining *barbiturate* as “any of a class of sedative-hypnotic agents derived from barbituric acid or thiobarbituric acid and classified into long-, intermediate-, short-, and ultrashort-acting classes”); *id.* at 1704 (defining *thiopental sodium* as “an ultra-short-acting barbiturate, administered intravenously to produce general anesthesia of brief duration, for induction of anesthesia prior to administration of other anesthetics, to supplement regional anesthesia, as an anticonvulsive, and for narcoanalysis in psychiatric disorders”).

93. Kreitzberg & Richter, *supra* note 85, at 453.

94. *See* Denno, *supra* note 36, at 68.

95. Kreitzberg & Richter, *supra* note 85, at 453–54 (footnote omitted); *see also* Denno, *supra* note 36, at 68 (“By all accounts, then, Chapman was the major, if not the primary, creator of lethal injection.”).

96. SARAT ET AL., *supra* note 6, at 117.

final passage of the bill.”⁹⁷ Stated differently, there was “no oversight of any kind.”⁹⁸ In essence, the legislation “delegat[ed] to Oklahoma prison officials . . . all critical decisions regarding the implementation of lethal injection.”⁹⁹ The proposed statute, including the broad language regarding lethal injection, was successfully passed by the Oklahoma State Legislature, “bec[oming] law on May 10, 1977.”¹⁰⁰

However, in Oklahoma, the death-penalty statute now provides a hierarchy of alternative execution methods in case the execution method in effect, which is currently lethal injection, is declared unconstitutional.¹⁰¹ The alternative methods are enumerated in the following order: (1) nitrogen hypoxia; (2) electrocution; and (3) firing squad.¹⁰² The statute was recently amended to include nitrogen hypoxia;¹⁰³ specifically, the amendment was approved on April 17, 2015¹⁰⁴—almost a year after the execution of Clayton Lockett. Oklahoma ranks its alternative execution methods “in terms of their relative humaneness.”¹⁰⁵ In other words, the “constitutional substitutes ([i.e., nitrogen hypoxia,] electrocution and firing squad) are considered more inhumane or problematic than lethal injection.”¹⁰⁶ Oklahoma, as indicated by its history of lethal injection, tends to value economical and dependable procedures over humane punishment¹⁰⁷—a preference that seems to have reappeared in *Warner*.

III. WARNER V. GROSS

A. *Background*

As previously mentioned, Oklahoma’s protocol for lethal injection had, for many years, involved three drugs: (1) sodium thiopental; (2)

97. Kreitzberg & Richter, *supra* note 85, at 453.

98. Brief for the Fordham University School of Law, Louis Stein Center for Law and Ethics as *Amicus Curiae* in Support of Petitioners at 22, *Baze v. Rees*, 553 U.S. 35 (2008) (No. 07-5439), 2007 WL 3407041, at *22.

99. *Id.* at 19, 2007 WL 3407041, at *19.

100. Kreitzberg & Richter, *supra* note 85, at 454.

101. See OKLA. STAT. tit. 22, § 1014 (2011 & Supp. 2015).

102. *Id.* at § 1014(B)–(D).

103. See Death Penalty, ch. 75, sec. 1, § 1014(B), 2015 Okla. Sess. Laws 244, 244.

104. H. JOURNAL, 55th Leg., 1st Reg. Sess. 977 (Okla. 2015).

105. Denno, *supra* note 27, at 94–95.

106. *Id.* at 95.

107. *Id.*

pancuronium bromide; and (3) potassium chloride.¹⁰⁸ “[S]odium thiopental . . . , is a fast-acting barbiturate sedative that induces a deep, comalike unconsciousness when given in the amounts used for lethal injection.”¹⁰⁹ “[P]ancuronium bromide . . . , is a paralytic agent that inhibits all muscular-skeletal movements and, by paralyzing the diaphragm, stops respiration.”¹¹⁰ The final drug in the process, “[p]otassium chloride, . . . interferes with the electrical signals that stimulate the contractions of the heart, inducing cardiac arrest.”¹¹¹

Oklahoma’s troubles with its lethal injection protocol began in 2010 when its supply of sodium thiopental—the drug used in the first phase of the protocol for lethal injection—dried up.¹¹² Hospira, the only manufacturing company “approved by the FDA to make sodium thiopental,” halted production after “[t]he Food and Drug Administration discovered that some of the drugs . . . were contaminated and in April 2010 sent the manufacturer . . . a warning letter.”¹¹³ For a brief period, Oklahoma used pentobarbital—a drug used to treat insomnia in humans and to euthanize animals—as a replacement for sodium thiopental.¹¹⁴

Lundbeck, “a Copenhagen-based company,” served as the source of pentobarbital for lethal injections in Oklahoma.¹¹⁵ However, the European media and Lundbeck’s shareholders put pressure on Lundbeck to eventually restrict its supply of pentobarbital (and other drugs used in lethal executions), and “*The Lancet* published an open letter urging the company to stop supplying executions.”¹¹⁶ A study that was previously published in the same journal “gave credible evidence that some inmates

108. *Warner v. Gross*, 776 F.3d 721, 724 (10th Cir.), *aff’d sub nom. Glossip v. Gross*, 135 S. Ct. 2726 (2015).

109. *Id.* (second alteration in original) (quoting *Baze v. Rees*, 553 U.S. 35, 44 (2008) (plurality opinion)).

110. *Id.* (second alteration in original) (quoting *Baze*, 553 U.S. at 44).

111. *Id.* at 725 (quoting *Baze*, 553 U.S. at 44).

112. *See id.* (“Since approximately 2010, the State of Oklahoma has been unable to obtain sodium thiopental, either commercially manufactured or compounded, for use in executions.”).

113. Jeffrey E. Stern, *The Execution of Clayton Lockett*, ATLANTIC, June 2015, at 71, 72, <http://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/> [<http://perma.cc/XAH4-FU78>].

114. *Id.* at 73; *see also Warner*, 776 F.3d at 725 (“Although the State of Oklahoma was able, for a short time, to obtain and utilize an alternative barbiturate, pentobarbital, during executions, that drug has also become unavailable to the State of Oklahoma for use in its executions.”).

115. Stern, *supra* note 113, at 73.

116. *Id.* at 73–74.

were suffering excruciating pain during executions.”¹¹⁷ Specifically, the study examined levels of sodium thiopental in executed prisoners in four states: Arizona, Georgia, North Carolina, and South Carolina.¹¹⁸ The study found that “without adequate amounts of anesthesia, prisoners that are put to death using the standard three-drug protocol ‘would experience asphyxiation, a severe burning sensation, massive muscle cramping, and finally cardiac arrest.’”¹¹⁹ Most disturbingly, the study found that “toxicology reports from forty-nine executed inmates showed that forty-three of them (88%) had levels of Thiopental, the anesthetic, lower than required for surgery, and twenty-one of them (43%) had concentrations in their blood that were consistent with awareness.”¹²⁰ The study ultimately concluded that “[f]ailures in protocol design, implementation, monitoring and review might have led to the unnecessary suffering of at least some of those executed.”¹²¹ After the publication of the open letter and the receipt of threats from shareholders, Lundbeck stopped its suppliers from selling drugs used in lethal injections to prisons; therefore, pentobarbital and sodium thiopental had both become unavailable for use in executions.¹²²

Unable to obtain sodium thiopental or pentobarbital, some states (including Oklahoma) turned to another drug—midazolam.¹²³ Florida used midazolam as an alternative sedative in October 2013, and Ohio used the drug a few months later.¹²⁴ Several companies manufactured midazolam, so it was easy to obtain; however, “some experts argue[d] that, unlike sodium thiopental and pentobarbital, midazolam [could not] produce the deep, coma-like state needed to guarantee [the inmate] feels no pain.”¹²⁵ Midazolam, a drug often used for treating anxiety, was not approved for stand-alone use as an “anesthetic for a painful procedure.”¹²⁶ At the time, Mike Oakley was the general counsel for the

117. Note, *supra* note 83, at 1304.

118. Wong, *supra* note 75, at 269–70.

119. *Id.* at 269 (quoting Leonidas G. Koniaris et al., *Inadequate Anaesthesia in Lethal Injection for Execution*, 365 LANCET 1412, 1412 (2005)).

120. *Id.* (citing Koniaris et al., *supra* note 119, at 1412–14).

121. Koniaris et al., *supra* note 119, at 1414.

122. See Stern, *supra* note 113, at 73.

123. See *id.* at 73–76; see also Warner v. Gross, 776 F.3d 721, 725 (10th Cir.), *aff’d sub nom.* Glossip v. Gross, 135 S. Ct. 2726 (2015).

124. Stern, *supra* note 113, at 75–76.

125. *Id.* at 75.

126. Reply Brief for Petitioners at 6–7, *Glossip*, 135 S. Ct. 2726 (No. 14-7955), 2015 WL 1869750, at *6–7.

ODC.¹²⁷ Oakley recommended that the state use midazolam despite reports that an inmate in Florida had “appeared to remain conscious longer than offenders given sodium thiopental or pentobarbital.”¹²⁸ Ohio had a similar experience with one of its executions—the inmate “snorted, heaved, clenched one of his fists, and gasped for air.”¹²⁹

B. Facts and Procedural History

1. Clayton Lockett’s Execution

Clayton Lockett’s execution was scheduled for April 29, 2014, at six o’clock in the evening¹³⁰—he “was the first Oklahoma state prisoner to be executed using midazolam as part of the lethal injection execution protocol.”¹³¹ For fifty-one minutes, the execution team tried unsuccessfully to locate a good vein before deciding that “[a] catheter [would be] inserted into Mr. Lockett’s groin.”¹³² The team injected him with midazolam and believed that he was unconscious, so the executioners proceeded to inject part of the potassium chloride.¹³³ “Shortly after the injection of part, but not all, of the potassium chloride, however, Lockett began to move and speak.”¹³⁴

During the execution, the intravenous (“IV”) access, which had taken more than a dozen attempts to establish, dislodged.¹³⁵ Consequently, the “midazolam was pumped into Lockett’s tissue instead of his vein.”¹³⁶ “The team stopped administration of the remaining potassium chloride and attempted, unsuccessfully, to insert the IV into Lockett’s left femoral vein.”¹³⁷ After multiple attempts to establish a proper connection, the executioners determined that “Lockett had no viable veins left through

127. Stern, *supra* note 113, at 75.

128. *Id.* at 75–76.

129. *Id.* at 76.

130. *Id.* at 72, 75.

131. Warner v. Gross, 776 F.3d 721, 725 (10th Cir.), *aff’d sub nom. Glossip*, 135 S. Ct. 2726.

132. Eric Eckholm & John Schwartz, *Timeline Describes Frantic Scene at Oklahoma Execution*, N.Y. TIMES (May 1, 2014), http://www.nytimes.com/2014/05/02/us/oklahoma-official-calls-for-outside-review-of-botched-execution.html?_r=0 [<http://perma.cc/EE3J-W2L6>].

133. See Warner, 776 F.3d at 725.

134. *Id.*

135. See *id.* at 725–26; see also Stern, *supra* note 113, at 80.

136. Stern, *supra* note 113, at 80.

137. Warner, 776 F.3d at 725.

which to obtain IV access.”¹³⁸ The execution team “terminated the execution process approximately [thirty-three] minutes after the midazolam was first injected,” but Lockett was pronounced dead about ten minutes later—even though the protocol was never completed.¹³⁹

Although prison officials originally concluded that a heart attack was the cause of death, an independent autopsy revealed that Lockett “died from ‘judicial execution by lethal injection.’”¹⁴⁰ The autopsy also showed that “the concentration of midazolam in [his] blood was greater than the concentration required to render an average person unconscious.”¹⁴¹ In sum, “Lockett was the first Oklahoma state prisoner to be executed using midazolam as part of the lethal injection execution protocol.”¹⁴²

2. Lower Courts: The Western District of Oklahoma and the Tenth Circuit

In the wake of Clayton Lockett’s execution, “Charles Warner, Richard Glossip, John Grant, and Benjamin Cole . . . were among a group of twenty-one Oklahoma death-row inmates who filed [the] 42 U.S.C. § 1983 lawsuit challenging the constitutionality of the State of Oklahoma’s lethal injection protocol.”¹⁴³ The inmates “sought a preliminary injunction to prevent their executions until the district court could rule on the merits of their claim.”¹⁴⁴ The motion was filed in the U.S. District Court for the Western District of Oklahoma on November 10, 2014.¹⁴⁵

The plaintiffs alleged eight counts—two of which were relevant on appeal.¹⁴⁶ The plaintiffs’ first contention was that the use of midazolam was a violation of the Eighth Amendment’s prohibition against cruel and unusual punishment.¹⁴⁷ Specifically, the plaintiffs claimed that

138. *Id.*

139. *Id.*

140. Josh Sanburn, *Oklahoma Death Row Inmate Died from Lethal Injection, Not Heart Attack*, TIME (Aug. 28, 2014), <http://time.com/3211135/clayton-lockett-autopsy-lethal-injection/> [<http://perma.cc/TWY3-7WWM>] (quoting OFFICE OF THE MED. EXAM’R, SW. INST. OF FORENSIC SCIS., AUTOPSY REPORT 11 (2014), <http://www.deathpenaltyinfo.org/documents/LockettAutopsyReport.PDF> [<http://perma.cc/LQ2E-FPFH>]).

141. *Warner*, 776 F.3d at 726.

142. *Id.* at 725.

143. *Id.* at 723.

144. *Id.* at 723–24.

145. *Id.* at 727.

146. *Id.* at 726.

147. *See id.* at 726–27.

midazolam “include[ed] an alleged ceiling effect (i.e., a certain dosage level beyond which incremental increases in dosage would have no corresponding incremental effect).”¹⁴⁸ In addition, the plaintiffs argued that the drug was not an appropriate anesthetic because of “an alleged risk of paradoxical reactions (such as agitation, involuntary movements, hyperactivity, and combativeness).”¹⁴⁹ They also claimed that “there [was] a substantial risk that midazolam will, as exemplified by the Lockett execution, be negligently administered and thus result in an inmate consciously experiencing the painful effects of the second and third drugs utilized in the execution protocol.”¹⁵⁰

The plaintiffs’ second contention concerned the use of “untried drugs of unknown provenance” and the use of “untested procedures.”¹⁵¹ Specifically, they alleged that those practices constituted “a program of biological experimentation on captive and unwilling human subjects.”¹⁵² The plaintiffs “further allege[d] that there is no ‘scientifically sound expectation that these experiments w[ould] succeed in producing an execution that does not inflict severe pain, needless suffering, or a lingering death.’”¹⁵³

Ultimately, “the district court concluded that plaintiffs failed to establish a likelihood of success on the merits.”¹⁵⁴ The plaintiffs did not “establish any of the [other] prerequisites to a grant of preliminary injunctive relief.”¹⁵⁵ According to the district court, the plaintiffs “would [not] suffer any non-speculative irreparable harm” without the grant of an injunction.¹⁵⁶ “Finally, the court conclude[d] that entry of a preliminary injunction would not be in the public interest,” and it denied the motion for injunctive relief.¹⁵⁷

Furthermore, the district court noted that Oklahoma’s newly adopted

148. *Id.* at 726.

149. *Id.* at 726–27.

150. *Id.* at 727.

151. *Id.* (quoting Record on Appeal vol. 1, at 979, *Warner*, 776 F.3d 721 (No. 14-6244)).

152. *Id.* (quoting Record on Appeal, *supra* note 151).

153. *Id.* (quoting Record on Appeal, *supra* note 151).

154. *Id.*

155. *Id.* (alteration in original) (quoting Record on Appeal vol. 3, *supra* note 151, at 930).

156. *Warner v. Gross*, No. CIV-14-0665-F, 2014 WL 7671680, at *1 (W.D. Okla. Dec. 22, 2014) (denying plaintiffs’ motion for preliminary injunction), *aff’d*, 776 F.3d 721 (10th Cir. 2015), *aff’d sub nom.* *Glossip v. Gross*, 135 S. Ct. 2726 (2015).

157. *Id.*

protocol for lethal injections—established in the aftermath of Clayton Lockett’s execution—was significant to the case.¹⁵⁸ The district court found that the new protocol was “‘noticeably more detailed’ in terms of the ‘procedures for establishing IV access to the offender’s cardiovascular system, the procedure for administering the chemicals, and the procedures for dealing with mishaps or unexpected contingencies.’”¹⁵⁹ The Tenth Circuit explained that “[t]he new protocol gives the Director of Oklahoma’s Department of Corrections . . . ‘four alternatives with respect to the combination of drugs to be used in the lethal injection process.’”¹⁶⁰ Based on the revised protocols and the evidence concerning the effects of midazolam, the district court—applying the *Baze* standard—found no constitutional violation.¹⁶¹

After the denial of the motion for a preliminary injunction, the plaintiffs appealed and “filed an emergency motion for stay of execution.”¹⁶² On appeal, the Tenth Circuit affirmed the district court’s opinion, holding that the “plaintiffs . . . failed to establish a likelihood of success on the merits of their claims.”¹⁶³ The court reached this conclusion after assessing the two major issues presented on appeal: (1) whether the plaintiffs established that the use of midazolam violated the Eighth Amendment, either by the drug’s inherent characteristics or by negligent administration; and (2) whether the district court erred in relying on certain expert testimony regarding the effects of midazolam.¹⁶⁴

First, the Tenth Circuit agreed with the district court’s application of the relevant constitutional principles, affirming the district court’s conclusion that the use of midazolam did not violate the Eighth Amendment.¹⁶⁵ In making that decision, the Tenth Circuit (like the district court) relied on the constitutional standards articulated in *Baze*.¹⁶⁶ The plaintiffs, seeking to persuade the court, highlighted four major flaws in the district court’s application of *Baze*.¹⁶⁷ However, as discussed

158. See *Warner*, 776 F.3d at 726.

159. *Id.* (quoting Record on Appeal vol. 3, *supra* note 151, at 870).

160. *Id.* (quoting Record on Appeal vol. 3, *supra* note 151, at 874).

161. *Id.* at 730.

162. *Id.* at 727.

163. *Id.* at 724.

164. See *id.* at 729, 733; see also *infra* Section IV.C (discussing the expert testimony of Dr. Roswell Lee Evans).

165. See *Warner*, 776 F.3d at 732.

166. See *id.*

167. The arguments asserted by the plaintiffs were as follows:

According to plaintiffs, “[t]he district court misapplied *Baze* in four key

in more detail below, the Tenth Circuit quickly dismissed these arguments.¹⁶⁸ The court ultimately sided with the district court and agreed that Oklahoma's revised protocol for lethal injection was "facially constitutional when measured by the principles promulgated in *Baze*."¹⁶⁹ The court also determined that the district court did not err in its reliance on the expert testimony regarding the effects of midazolam.¹⁷⁰ Finally, the court determined that the inmates had not "establish[ed] a significant possibility of success on the merits of [their claims]"; as a result, they were not entitled to a preliminary injunction or a stay of execution.¹⁷¹

3. U.S. Supreme Court

The U.S. Supreme Court granted certiorari soon after the previously mentioned decision was issued by the Tenth Circuit.¹⁷² However, after being denied a stay of execution, Charles Warner was executed on January 15, 2015.¹⁷³ Without the lead petitioner, the case proceeded under the name *Glossip v. Gross*.¹⁷⁴ The Supreme Court announced its decision on June 29, 2015.¹⁷⁵ "For two independent reasons, [it] affirm[ed]" the Tenth Circuit.¹⁷⁶ The Court found that the petitioners "failed to identify a known and available alternative method of execution that entails a lesser risk of pain, a requirement of all Eighth Amendment

ways." First, they argue[d], the district court "decided that [plaintiffs] could not succeed because they failed to present an alternative remedy." "Second," plaintiffs argue[d], the district court "improperly assumed that the grounds asserted in this case were similar to those asserted in *Baze*, therefore skewing the court's risk assessment." "Third," plaintiffs argue[d], the district court "determined that any potential risk was cured by three factors built into the [revised] protocol." Lastly, plaintiffs argue[d] that the district court "failed to consider evolving standards of decency in its analysis."

Id. at 731 (first, third, and sixth alterations in original) (citations omitted) (quoting Appellants' Opening Brief at 37, *Warner*, 776 F.3d 721 (No. 14-6244)).

168. *See id.* at 731–33.

169. *Id.* at 730 (quoting Record on Appeal vol. 3, *supra* note 151, at 916).

170. *See id.* at 734–36.

171. *Id.* at 736.

172. *See Glossip v. Gross*, 135 S. Ct. 2726 (2015), *aff'g sub nom. Warner*, 776 F.3d 721.

173. *Id.* at 2734–36; *see also Stern*, *supra* note 113, at 83.

174. *See Glossip*, 135 S. Ct. at 2736 ("Oklahoma executed Warner on January 15, 2015, but we subsequently voted to grant review and then stayed the executions of Glossip, Cole, and Grant pending the resolution of this case.").

175. *Id.* at 2731.

176. *Id.*

method-of-execution claims.”¹⁷⁷ The Court also determined that “the District Court did not commit clear error when it found that the petitioners failed to establish that Oklahoma’s use of a massive dose of midazolam in its execution protocol entails a substantial risk of severe pain.”¹⁷⁸

IV. THE LEGAL ARGUMENT IN *WARNER V. GROSS*

As previously mentioned, the Tenth Circuit affirmed the district court’s decision, finding “that all of [the plaintiffs’] challenges lack[ed] merit.”¹⁷⁹ First, the court highlighted the high burden and the standards that must be met to obtain a preliminary injunction.¹⁸⁰ The court also referred to *Baze* in an effort to demonstrate, among other things, that the concept of capital punishment does not violate the Constitution and that “the Supreme Court ‘has never invalidated a State’s chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment.’”¹⁸¹ Similarly, the court relied on *Pavatt v. Jones*¹⁸² to demonstrate, among other things, the notion that the plaintiffs would need to prove “that the risk is substantial when compared to the known and available alternatives” in order to obtain a stay of execution.¹⁸³

The Tenth Circuit also addressed the plaintiffs’ argument that the district court’s reliance on arbitrary expert testimony amounted to an abuse of discretion and produced factual findings that were clearly erroneous.¹⁸⁴ The court “review[ed the] district court’s decision to deny [the] preliminary injunction under a deferential abuse of discretion standard.”¹⁸⁵ “Under this standard, [the court] examine[d] the district court’s legal determinations de novo, and its underlying factual findings for clear error.”¹⁸⁶ Therefore, the court “will find an abuse of discretion if the district court denied the preliminary injunction on the basis of a

177. *Id.*

178. *Id.*

179. *See Warner v. Gross*, 776 F.3d 721, 731 (10th Cir.), *aff’d sub nom. Glossip*, 135 S. Ct. 2726.

180. *See id.* at 728.

181. *Id.* (quoting *Baze v. Rees*, 553 U.S. 35, 48 (2008) (plurality opinion)).

182. *Pavatt v. Jones*, 627 F.3d 1336 (10th Cir. 2010).

183. *Warner*, 776 F.3d at 732 (quoting *Pavatt*, 627 F.3d at 1339).

184. *Id.* at 733.

185. *Id.* at 727.

186. *Id.* at 727–28 (quoting *Citizens United v. Gessler*, 773 F.3d 200, 209 (10th Cir. 2014) (internal quotation marks omitted)).

clearly erroneous factual finding or an error of law.”¹⁸⁷

The Tenth Circuit also engaged in a de novo review to determine whether the district court applied the correct legal standard in admitting the challenged expert testimony.¹⁸⁸ If, as here, “the district court performed its gatekeeper role and applied the proper legal standard, [the Tenth Circuit] then review[s] for abuse of discretion the district court’s decision to admit or exclude testimony.”¹⁸⁹ The court “will ‘reverse only if the district court’s conclusion is arbitrary, capricious, whimsical or manifestly unreasonable or when . . . the district court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.’”¹⁹⁰

A. *The High Burden for a Preliminary Injunction*

In part three of the opinion, the Tenth Circuit addressed the applicable legal standard for a preliminary injunction.¹⁹¹ “A preliminary injunction is an ‘extraordinary and drastic remedy.’”¹⁹² “A plaintiff . . . must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”¹⁹³ The plaintiffs’ motion for a stay of execution had to meet to the same legal requirements.¹⁹⁴ Discernably, the high standard required for a preliminary injunction was critical to the resolution of the case at every level of adjudication.¹⁹⁵ As previously mentioned, the Tenth Circuit—applying that high standard—affirmed the district court’s ruling “that [the] plaintiffs failed to establish a significant possibility of success on the merits of [their claims].”¹⁹⁶

187. *Id.* at 728.

188. *Id.* at 733.

189. *See id.*

190. *Id.* at 733–34 (quoting *United States v. Avitia-Guillen*, 680 F.3d 1253, 1256 (10th Cir. 2012) (internal quotation marks omitted)).

191. *See id.* at 727–28.

192. *Id.* at 728 (quoting *Munaf v. Geren*, 553 U.S. 674, 689 (2008)).

193. *Id.* (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

194. *See id.* (“A motion for stay pending appeal is subject to the exact same standards.”).

195. *See, e.g., Glossip v. Gross*, 135 S. Ct. 2726, 2737 (2015), *aff’g sub nom. Warner*, 776 F.3d 721.

196. *Warner*, 776 F.3d at 736.

B. *When Lethal Injection Will Not Constitute Cruel and Unusual Punishment*

1. The Tenth Circuit's Analysis of *Baze* and the Eighth Amendment

The Tenth Circuit primarily focused on *Baze* to make a determination in *Warner*.¹⁹⁷ *Baze* “established a two-part test for assessing the constitutionality of a lethal injection protocol.”¹⁹⁸ This two-part test requires courts (1) to consider whether the protocol involves a “substantial risk of serious harm” and (2) to determine whether that risk is an “objectively intolerable risk of harm.”¹⁹⁹ As Justice Alito noted in *Glossip*, “[t]he challenge in *Baze* failed both because the . . . inmates did not show that the risks they identified were substantial and imminent and because they did not establish the existence of a known and available alternative method of execution that would entail a significantly less severe risk.”²⁰⁰

Applying the relevant constitutional principles from *Baze*, the Tenth Circuit determined “‘that there must be a means of carrying . . . out’ capital punishment and that ‘[s]ome risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure.’”²⁰¹ The court explained that to show the risk of future harm is cruel and unusual, “the conditions presenting the risk must be ‘sure or very likely to cause serious illness and needless suffering,’ and give rise to ‘sufficiently imminent dangers.’”²⁰² Furthermore, the court noted that a stay of execution should *not* be granted *unless* the prisoner established that the protocol for lethal injection “creates a demonstrated risk of severe pain”²⁰³ and that “the risk is substantial when compared to the known and available alternatives.”²⁰⁴

197. *See id.* at 728–29.

198. Rose Carmen Goldberg, *Safe and Effective for Human Executions? Glossip v. Gross and the Eighth Amendment Bar Against Off-Label Drug Lethal Injection*, 68 STAN. L. REV. ONLINE 1, 5 (2015); *see also* *Baze v. Rees*, 553 U.S. 35, 50, 53 (2008) (plurality opinion).

199. *Glossip*, 135 S. Ct. at 2737 (quoting *Baze*, 553 U.S. at 50); *see also* Goldberg, *supra* note 198, at 6.

200. *See Glossip*, 135 S. Ct. at 2737 (citation omitted).

201. *Warner*, 776 F.3d at 728–29 (alterations in original) (quoting *Baze*, 553 U.S. at 47).

202. *Id.* at 729 (quoting *Baze*, 553 U.S. at 50).

203. *Id.* at 732.

204. *Id.* (quoting *Pavatt v. Jones*, 627 F.3d 1336, 1339 (10th Cir. 2010)).

As previously noted, the plaintiffs highlighted four major flaws in the district court's application of *Baze*.²⁰⁵

According to plaintiffs, “[t]he district court misapplied *Baze* in four key ways.” First, they argue[d], the district court “decided that [plaintiffs] could not succeed because they failed to present an alternative remedy.” “Second,” plaintiffs argue[d], the district court “improperly assumed that the grounds asserted in this case were similar to those asserted in *Baze*, therefore skewing the court’s risk assessment.” “Third,” plaintiffs argue[d], the district court “determined that any potential risk was cured by three factors built into the [revised] protocol.” Lastly, plaintiffs argue[d] that the district court “failed to consider evolving standards of decency in its analysis.”²⁰⁶

However, the Tenth Circuit rejected these challenges to the district court’s analysis; it determined that “[t]he constitutional principles announced in *Baze* . . . were not confined to claims of negligent administration of lethal injection protocols.”²⁰⁷ Therefore, the court determined that *Baze* “appli[ed] to all challenges to ‘a State’s chosen procedure for carrying out a sentence of death.’”²⁰⁸

The plaintiffs asserted that the requirement to prove “‘known and available alternatives[.]’ is inapplicable when the challenge at issue concerns the inherent characteristics of a drug proposed to be used as part of the lethal injection protocol.”²⁰⁹ As previously mentioned, the Tenth Circuit looked to its recent decision in *Pavatt v. Jones*—a case that involved a challenge to Oklahoma’s use of pentobarbital (i.e., another alternative barbiturate).²¹⁰ In *Pavatt*, the plaintiff’s expert witness asserted that the appropriate anesthetic dosage was unknown and that “there was insufficient data to allow the ODC to determine the proper amount of pentobarbital to use as part of its protocol.”²¹¹ Nevertheless, the Tenth Circuit found that the facts presented in *Pavatt* “support[ed]

205. *See id.* at 731.

206. *Id.* (first, third, and sixth alterations in original) (citations omitted) (quoting Appellants’ Opening Brief, *supra* note 167).

207. *Id.* at 732.

208. *Id.* (quoting *Baze v. Rees*, 553 U.S. 35, 48 (2008) (plurality opinion)).

209. *Id.* (quoting *Baze*, 553 U.S. at 61).

210. *See Pavatt v. Jones*, 627 F.3d 1336, 1337–38 (10th Cir. 2010).

211. *Id.* at 1339–40.

the district court's legal conclusion that [the plaintiff] failed to establish a substantial likelihood of success on the merits of his Eighth Amendment challenge to the ODC's revised protocol," which included the pentobarbital.²¹²

Importantly, in *Warner*, the Tenth Circuit was "bound by *Pavatt*, 'absent superseding en banc review or Supreme Court decisions.'"²¹³ Consequently, the court determined that the "plaintiffs [did] not identify any known and available alternatives."²¹⁴ But the court also noted that the "second *Baze* requirement is not outcome-determinative."²¹⁵ Therefore, since the plaintiffs failed to satisfy the first requirement,²¹⁶ the court held that "it [was] not even necessary in this case to 'reach the second step of the *Baze* test.'"²¹⁷ Thus, the court agreed with the district court's application of the test.²¹⁸

2. The Supreme Court's Analysis of *Baze* and the Eighth Amendment

The Supreme Court reiterated the requirements established by *Baze*, noting that the petitioners failed to meet all of those requirements.²¹⁹ Specifically, the petitioners failed to demonstrate that "any risk posed by midazolam is substantial when compared to known and available alternative methods of execution."²²⁰ They also "failed to establish that the District Court committed clear error when it found that the use of midazolam [would] not result in severe pain and suffering."²²¹

It is important to note that the petitioners' failure to identify an alternative drug was a very critical point.²²² The petitioners failed to demonstrate "a risk of pain so great that other acceptable, available

212. *Id.* at 1340.

213. *Warner*, 776 F.3d at 732 (quoting *Rezaq v. Nalley*, 677 F.3d 1001, 1012 n.5 (10th Cir. 2012)).

214. *Id.*

215. *Id.*

216. *See id.* ("[T]he plaintiffs have failed to establish that the use of midazolam in their executions, either because of its inherent characteristics or its possible negligent administration, creates a demonstrated risk of severe pain.")

217. *Id.* (quoting *Raby v. Livingston*, 600 F.3d 552, 560 (5th Cir. 2010)).

218. *Id.* at 733. *See generally* SARAT ET AL., *supra* note 6, at 120–21 (highlighting the requirements "[t]o successfully challenge lethal injection post-*Baze*").

219. *See* *Glossip v. Gross*, 135 S. Ct. 2726, 2736–38 (2015), *aff'g sub nom. Warner*, 776 F.3d 721.

220. *Id.* at 2737–38.

221. *Id.* at 2738.

222. *See id.*

methods must be used. Instead they argue[d] that they need not identify a known and available method of execution that presents less risk. But this argument is inconsistent with the controlling opinion in *Baze . . .*”²²³ Indeed, “the Eighth Amendment requires a prisoner to plead and prove a known and available alternative. Because petitioners failed to do this, the District Court properly held that they did not establish a likelihood of success on their Eighth Amendment claim.”²²⁴

Furthermore, in concluding that the district court did not commit clear error, the Supreme Court highlighted four major points.²²⁵ First, the Court emphasized the “clear error” standard of review and the deference given to the district court as the fact finder.²²⁶ Second, the Court noted that the burden of persuasion rested on the inmates.²²⁷ Third, the Court found it significant that midazolam had been reviewed by lower courts and that “numerous courts ha[d] concluded that the use of midazolam . . . [was] likely to render an inmate insensate to pain that might result from administration of the paralytic agent and potassium chloride.”²²⁸ Finally, the Court expressed an unwillingness to delve too deeply into a scientific controversy that it believed the judiciary would be ill-equipped to handle.²²⁹ Accordingly, the inmates had the burden to demonstrate that a substantial risk of severe pain existed, but they fell short of meeting that burden and “failed to establish that the District Court committed clear error when it found that the use of midazolam will not result in severe pain and suffering.”²³⁰

C. Expert Testimony Concerning Midazolam

1. The District Court’s Factual Findings and the Tenth Circuit’s Affirmance

The district court admitted and relied on the expert testimony of Dr. Roswell Lee Evans; as a result, it “found that ‘[t]he 500 milligram dosage of midazolam . . . [was] many times higher than a normal

223. *Id.* (citing *Baze v. Rees*, 553 U.S. 35, 61 (2008) (plurality opinion)).

224. *Id.* at 2739.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 2739–40.

229. *Id.* at 2740 (citing *Baze v. Rees*, 553 U.S. 35, 51 (2008) (plurality opinion)).

230. *Id.* at 2738; *see also id.* at 2740–44.

therapeutic dose of midazolam’ and ‘w[ould] result in central nervous system depression as well as respiratory arrest and cardiac [ar]rest.’²³¹ Additionally, the district court noted that “a 500 milligram dosage of midazolam ‘is highly likely to render the person unconscious and insensate during the remainder of the [lethal injection] procedure’ and that, ‘[c]onsequently, analgesia, from midazolam or otherwise, is not necessary.’²³² It is also important to note “that, according to the midazolam’s product label, ‘[t]he use of midazolam presents a risk of paradoxical reactions or side effects such as agitation, involuntary movements, hyperactivity, and combativeness.’²³³ Nevertheless, the district court found that there was a shortage of evidence to support the risk of a paradoxical reaction.²³⁴ The Tenth Circuit, in turn, gave deference to the district court’s findings and found no clear error.²³⁵

The “plaintiffs . . . argue[d] that the district court abused its discretion by relying on [the expert] testimony” regarding the effects of midazolam.²³⁶ However, the Tenth Circuit determined that “the district court actually performed its gatekeeper role and applied the proper standards in doing so.”²³⁷ Then, the court concluded that the district court did not abuse its discretion when it relied on and admitted the expert testimony of Dr. Evans.²³⁸

231. Warner v. Gross, 776 F.3d 721, 734 (10th Cir.), *aff’d sub nom. Glossip*, 135 S. Ct. 2726 (first, second, and fifth alterations in original) (quoting Record on Appeal vol. 3, *supra* note 151, at 892).

232. *Id.* at 734–35 (alterations in original) (quoting Record on Appeal vol. 3, *supra* note 151, at 893).

233. *Id.* at 735 (alteration in original) (quoting Record on Appeal vol. 3, *supra* note 151, at 894–95).

234. *See id.* (“Ultimately, the district court found that ‘[t]he evidence falls well short of establishing that the risk of a paradoxical reaction at a 500 milligram IV dosage presents anything more than a mere possibility in any given instance that midazolam will fail to deliver its intended effect.’” (alteration in original) (quoting Record on Appeal vol. 3, *supra* note 151, at 895)).

235. *See id.* (“After carefully examining the record on appeal, we are unable to say that any of these factual findings are clearly erroneous.”).

236. *Id.* at 733.

237. *Id.* at 734.

238. *See id.* (“Although plaintiffs point to what they perceive as a number of errors in Dr. Evans’ testimony, we conclude these errors were not sufficiently serious to render unreliable Dr. Evans’ testimony regarding the likely effect of a 500 milligram dose of midazolam, or to persuade us that the district court’s decision to admit Dr. Evans’ testimony amounted to an abuse of discretion.”).

2. The Supreme Court's Division

Dissenting in *Glossip*, Justice Sotomayor argued that the district court's decision to rely on the expert testimony was clearly erroneous because "Dr. Evans identified *no* scientific literature to support his opinion."²³⁹ Instead, "Dr. Evans' testimony seems to have been based on the Web site www.drugs.com."²⁴⁰ According to Justice Sotomayor, "[i]f anything, the Web site supported petitioners' contentions, as it expressly cautioned that midazolam '[s]hould not be used alone for maintenance of anesthesia."²⁴¹

In *Glossip*, the petitioners attacked the district court's factual findings on two separate bases.²⁴² First, they challenged midazolam's effectiveness as an anesthetic—especially when combined with the other two drugs in the protocol used by Oklahoma.²⁴³ Second, the petitioners asserted that the high dose of midazolam required by the protocol is irrelevant because the drug has a "ceiling effect" (i.e., a point at which "an increase in the dose administered will not have any greater effect on the inmate").²⁴⁴ Although the experts agreed on certain aspects of how the drug operated, their opinions diverged on these two critical issues.²⁴⁵

During oral argument, several Justices addressed the issue of Oklahoma's switch to midazolam—a switch that was, according to Justice Scalia, spurred by the abolitionist movement putting pressure on the drug manufacturing companies.²⁴⁶ Justice Breyer attempted to discredit this line of reasoning proffered by these other Justices, and he posited a larger question: "[I]f there is no method of executing a person that does not cause unacceptable pain, that, in addition to other things, might show that the death penalty is not consistent with the Eighth

239. *Glossip v. Gross*, 135 S. Ct. 2726, 2786 (2015) (Sotomayor, J., joined by Ginsburg, Breyer, and Kagan, JJ., dissenting) (emphasis added), *aff'g sub nom. Warner*, 776 F.3d 721.

240. *Id.*

241. *Id.* (second alteration in original) (quoting Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit app. H at 6519, *Glossip*, 135 S. Ct. 2726 (No. 14-7955)).

242. *Id.* at 2740 (majority opinion).

243. *Id.*

244. *Id.*

245. *See id.* at 2782–83 (Sotomayor, J., joined by Ginsburg, Breyer, and Kagan, JJ., dissenting).

246. *See* Transcript of Oral Argument at 14–17, *Glossip*, 135 S. Ct. 2726 (No. 14-7955).

Amendment.”²⁴⁷ Nevertheless, the majority—led by Justice Alito—found that even though the petitioners attacked parts of the expert testimony, the “petitioners [had] the burden of persuasion on this issue,” and the petitioners failed to present evidence that proved “that the use of midazolam [was] sure or very likely to result in needless suffering.”²⁴⁸

D. The Application and Limitations of Baze v. Rees

1. Consideration of the Evolving Standards in the Lower Courts

The “plaintiffs argue[d] that the district court ‘failed to consider evolving standards of decency in its analysis.’”²⁴⁹ Furthermore, the plaintiffs noted that “there [were] reports of prisoner movement in Florida,” where midazolam was used as the first drug in executions.²⁵⁰ The plaintiffs argued that “th[o]se facts alone render[ed] the defendants’ revised lethal injection protocol ‘objectively intolerable.’”²⁵¹ However, the Tenth Circuit promptly dismissed these challenges, and it determined that the district court’s ruling did not conflict with the ruling in *Baze*.²⁵²

It appears that the Tenth Circuit also relied on *Baze* to reject an ambiguity-based argument. The ambiguity, of course, results from the application of different standards to the two main types of challenges brought under the Eighth Amendment: (1) challenges to execution methods; and (2) proportionality challenges.²⁵³ If the question is a narrow one—focused on the constitutionality of each particular method, not on the constitutionality of the death penalty itself—then the Supreme Court

247. *Id.* at 21.

248. *Glossip*, 135 S. Ct. at 2739.

249. *Warner v. Gross*, 776 F.3d 721, 731 (10th Cir.) (quoting Appellants’ Opening Brief, *supra* note 167), *aff’d sub nom. Glossip*, 135 S. Ct. 2726.

250. *Id.* at 733 (quoting Appellants’ Opening Brief, *supra* note 167, at 45).

251. *Id.* (quoting Appellants’ Opening Brief, *supra* note 167, at 45).

252. *Id.* at 732–33.

253. *Compare id.* at 731–33, 736 (rejecting the plaintiffs’ “evolving standards of decency” analysis), *with Roper v. Simmons*, 543 U.S. 551, 560–63, 578–79 (2005) (discussing the “evolving standards of decency” analysis—as applied in *Atkins*—and holding that the death penalty is unconstitutional when imposed “on offenders who were under the age of [eighteen] when their crimes were committed.”), *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (applying the “evolving standards of decency” analysis and holding that the death penalty is unconstitutional when imposed as a punishment on the mentally disabled), *and Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion) (discussing the “evolving standards of decency” analysis with regard to the “excessiveness” of the punishment under the Eighth Amendment).

should consider evaluating methods in light of its proportionality jurisprudence. “[N]o court has reviewed the constitutionality of electrocution or lethal injection under modern Eighth Amendment standards that consider, as a substantial part of an ‘evolving standards of decency’ analysis, legislative trends and related information, such as public opinion and execution protocols.”²⁵⁴ In *Baze*, Justice Ginsberg noted the following in her dissent:

No clear standard for determining the constitutionality of a method of execution emerges from [past] decisions. Moreover, the age of the opinions limits their utility as an aid to resolution of the present controversy. The Eighth Amendment, we have held, “‘must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.’”²⁵⁵

Justice Ginsberg acknowledged the importance of a standard that can adapt and change alongside society’s perception of the meaning of the word *humane*; she also suggests that any standard promulgated by the Court should include the “evolving standards of decency” analysis that is fundamental to the line of proportionality cases.²⁵⁶ With that said, the Tenth Circuit should not have summarily dismissed the plaintiffs’ contention regarding the “evolving standards of decency” analysis.²⁵⁷

2. Evolving Standards, or Lack Thereof, in the Supreme Court

Despite receiving support from other Justices, the “evolving standards of decency” analysis was discredited by Justice Scalia—in his concurrence in *Glossip*.²⁵⁸ Justice Scalia argued that the Court is “eminently ill suited” for utilizing the “evolving standards of decency” analysis to interpret the Eighth Amendment.²⁵⁹ He also noted that “[t]ime and again, the People have voted to exact the death penalty as punishment for the most serious of crimes. Time and again, this Court

254. Denno, *supra* note 27, at 77.

255. *Baze v. Rees*, 553 U.S. 35, 115–16 (2008) (Ginsburg, J., dissenting) (quoting *Atkins*, 536 U.S. at 311–12).

256. *See id.*

257. *Warner*, 776 F.3d at 731–33, 736.

258. *See Glossip v. Gross*, 135 S. Ct. 2726, 2749 (2015) (Scalia, J., joined by Thomas, J., concurring), *aff’g sub nom. Warner*, 776 F.3d 721.

259. *Id.*

has upheld that decision.”²⁶⁰ For Justice Scalia, the precise problem with the “evolving standards of decency” analysis was that “a vocal minority of th[e] Court . . . ha[d] sought to replace the judgments of the People with their own standards of decency.”²⁶¹ However, prior cases call for a different conclusion.

In *Atkins*, the Court noted that the “evolving standards of decency” analysis should take into consideration as many *objective* factors as possible, and the “clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.”²⁶² The Court also noted in *Atkins* that “the Constitution contemplates that in the end [its] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”²⁶³ Therefore, “in cases involving a consensus, [the Court’s] own judgment is ‘brought to bear,’ by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators.”²⁶⁴

Moreover, in *Roper*, the Court noted that “the rejection of the juvenile death penalty in the majority of the States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice” is enough objective evidence to demonstrate “that today our society views juveniles . . . as ‘categorically less culpable than the average criminal.’”²⁶⁵ As of 2016, only thirty-one states utilize the death penalty, and the number of capital sentences has decreased dramatically—with forty-nine individuals sentenced to death in 2015.²⁶⁶ If thirty-one states do, in fact, constitute a consensus, then (as more and more states are reevaluating the efficacy of the death penalty) the Supreme Court *is* in a position to question the overall judgment.²⁶⁷

260. *Id.*

261. *Id.*

262. *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), *abrogated by Atkins*, 536 U.S. 304).

263. *Id.* at 312 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion)).

264. *Id.* at 313 (citation omitted) (quoting *Coker*, 433 U.S. at 597).

265. *Roper v. Simmons*, 543 U.S. 551, 567 (2005) (quoting *Atkins*, 536 U.S. at 316).

266. DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY (2016), <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> [<http://perma.cc/C4NK-XXGM>].

267. See Julie Bosman, *Nebraska Bans Death Penalty, Defying a Veto*, N.Y. TIMES (May 27, 2015), <http://www.nytimes.com/2015/05/28/us/nebraska-abolishes-death-penalty.html> [<http://perma.cc/C3US-5X87>] (“Nebraska . . . became the first conservative state in more than [forty] years to abolish the death penalty . . .”).

V. RECENT DEVELOPMENTS: REAFFIRMING THE NEED FOR REFORM

Richard E. Glossip was scheduled to be executed on September 30, 2015; however, he was granted a “37-day stay” after the ODC received the wrong drug for Glossip’s impending lethal injection.²⁶⁸ “[O]fficials realized [a mere] *two hours* before” the execution was scheduled to begin that their supplier sent potassium acetate—a drug that was not at issue in Glossip’s challenge to Oklahoma’s protocol for lethal injections—instead of potassium chloride²⁶⁹. The stay was intended to give the officials time “to determine whether potassium acetate . . . complied with the state’s court-approved protocols.”²⁷⁰

In fact, *all* of Oklahoma’s scheduled executions were delayed after the autopsy report for Charles Warner (one of the original petitioners in *Warner*) revealed that prison officials had used potassium acetate instead of potassium chloride.²⁷¹ “The autopsy contradicts the official execution log, initialed by a prison staffer, which says the state properly used potassium chloride . . .”²⁷² One researcher argues that despite being “from the same chemical family, potassium acetate is less concentrated than its chloride counterpart, and the acetate acts as a buffer; . . . [so] it would take 20% more potassium acetate to induce cardiac arrest.”²⁷³ Thus, it has been suggested that a “miscalculat[ion in] the necessary dosage” of potassium acetate is “a mistake that could have contributed to an extended, painful and possibly illegal execution.”²⁷⁴

268. Carol Cole-Frowe & Manny Fernandez, *Oklahoma Governor Grants Richard Glossip a Stay of Execution*, N.Y. TIMES (Sept. 30, 2015), <http://www.nytimes.com/2015/10/01/us/oklahoma-execution-richard-glossip.html> [<http://perma.cc/HGR7-M7FR>].

269. Manny Fernandez, *Delays as Death-Penalty States Scramble for Execution Drugs*, N.Y. TIMES (Oct. 8, 2015) (emphasis added), <http://www.nytimes.com/2015/10/09/us/death-penalty-lethal-injection.html> [<http://perma.cc/249P-8GNW>].

270. Cole-Frowe & Fernandez, *supra* note 268.

271. Sean Murphy, *Okla.’s Executions on Hold After Mix-Up*, BOS. GLOBE (Oct. 9, 2015), <https://www.bostonglobe.com/news/nation/2015/10/08/oklahoma-halts-executions-after-using-wrong-drug-inmate/QDH2ydYskU2ZYD7jlpexH/story.html> [<http://perma.cc/CG2G-BX2P>].

272. *Id.*

273. Alan Yuhas, *Untested Drugs, Secret Sources: The Controversy over Executions Rages On*, GUARDIAN (Oct. 1, 2015), <http://www.theguardian.com/world/2015/oct/01/execution-drugs-oklahoma-richard-glossip-virginia-alfredo-prieto> [<https://perma.cc/26NK-TVVT>].

274. *Id.*; see also Josh Sanburn, *Oklahoma’s Lethal Injection Problems Go from Bad to Worse*, TIME (Oct. 8, 2015), <http://time.com/4067071/oklahoma-lethal-injection-wrong-drug-charles-warner/> [<http://perma.cc/8CKZ-89RV>] (“The governor’s office and corrections officials say they’ve been advised by doctors that potassium acetate could be

Furthermore, in December 2015, “[t]he director of the [ODC] . . . [became] the second prominent corrections official in the state to step down . . . after multiple high-profile issues involving lethal injections in the state”; a warden at the penitentiary where the executions took place retired two months prior to the director’s decision to step down.²⁷⁵ Such recent developments raise even more questions about Oklahoma’s lethal injection protocol and demonstrate a disconcerting need for reform and transparency. Although potassium acetate was not the drug at issue in the challenge before the Tenth Circuit or the Supreme Court, the fact that the drug was used as a substitute calls into question Oklahoma’s entire protocol for lethal injection—and perhaps the system in its entirety. It is important to note, however, that the substitution of potassium acetate is only one small part of a longer list of malfeasance.

In October 2015, Oklahoma Attorney General Scott Pruitt said that “he will not request any executions until 150 days after” there has been a complete investigation of the botched execution of Charles Warner.²⁷⁶ That investigation is now complete. On May 19, 2016, “[a]n Oklahoma grand jury investigating botched execution procedures issued a blistering report . . . documenting a top-to-bottom failure to ensure the correct lethal injection drugs would be used.”²⁷⁷ “The report, running more than 100 pages, offered a stinging rebuke of state officials, especially those in the [ODC], for their handling of executions, which are currently [still] on hold in Oklahoma due to the troubles in the death chamber.”²⁷⁸ The

substituted for potassium chloride. The official protocol, however, doesn’t allow for it.”).

275. Mark Berman, *Oklahoma Corrections Director Resigns After Problems with Executions*, WASH. POST (Dec. 4, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/12/04/oklahoma-corrections-director-resigns-after-problems-with-executions/> [http://perma.cc/4JB8-K5XM].

276. William Wan, *Oklahoma Pushes All Executions to 2016 to Investigate Use of the Wrong Lethal Drug*, WASH. POST (Oct. 16, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/10/16/oklahoma-pushes-all-executions-to-2016-to-investigate-use-of-the-wrong-lethal-drug/> [http://perma.cc/5KS6-2NDR].

277. Tracy Connor, *‘Careless and Cavalier’: Grand Jury Issues Scathing Report on Botched Oklahoma Executions*, NBC NEWS (May 19, 2016, 11:04 PM), <http://www.nbcnews.com/storyline/lethal-injection/careless-cavalier-grand-jury-issues-scathing-report-botched-oklahoma-executions-n577281> [http://perma.cc/MAN5-M5UL]. For a copy of the entire report, see Interim Report Number 14, *In re* the Multicounty Grand Jury, No. GJ-2014-1 (Okla. Dist. Ct. May 19, 2016), <https://www.ok.gov/oag/documents/MCGJ%20-%20Interim%20Report%205-19-16.pdf> [https://perma.cc/75Y8-PHBT].

278. Jon Herskovitz & Heide Brandes, *Oklahoma Bungled Drugs Used in Executions: Grand Jury Report*, AOL (May 20, 2016, 9:52 AM), <http://www.aol.com/article/2016/05/20/oklahoma-bungled-drugs-used-in-executions-grand-jury-report/21380887/> [http://

investigation specifically “focused on the . . . execution of Charles Warner and the aborted . . . execution of Richard Glossip.”²⁷⁹ The findings of the investigation are truly startling, and they bolster this and the numerous other calls for reform. For example, the report notes that there was significant “confusion and carelessness in the execution process—from a pharmacist who ordered the wrong chemicals to a top state official who argued it didn’t matter and challenged a skeptic to ‘Google it.’”²⁸⁰ Ultimately, the report detailed several recommendations that include “a revamp of the protocol, more training and consideration of an entirely new execution method.”²⁸¹

Now that the investigation has concluded and the report has been presented to the public, once an execution protocol is designed in a manner that “prison officials say they are able to follow,” Attorney General Pruitt will almost certainly resume seeking and carrying out executions.²⁸² Moving forward, it is critical for state officials—in Oklahoma and throughout the United States—to seriously consider the recent developments related to lethal injection (and state execution in general) to ensure that there is *never* another “blistering report” with more than 100 pages dedicated to detailing a “top-to-bottom failure.”²⁸³

VI. CONCLUSION

By utilizing the principles articulated in *Baze*, the Tenth Circuit determined that midazolam is adequate for lethal injections. However, in doing so, the court ignored a significant aspect of Eighth Amendment jurisprudence—the “evolving standards of decency” analysis. The larger debate concerning the *morality* of capital punishment is a question that still remains (a question that is, however, beyond the scope of this Comment). As one researcher characterized it, “the fact that the state takes life . . . generates an anxious questioning within, and about, the ways state violence differs from the violence to which it is, at least in theory, opposed.”²⁸⁴ And at least one of the Supreme Court Justices

perma.cc/C74P-X22N].

279. Connor, *supra* note 277.

280. *Id.* (quoting Steve Mullins, former general counsel to Oklahoma Governor Mary Fallin).

281. *Id.*

282. Wan, *supra* note 276.

283. Connor, *supra* note 277.

284. Sarat, *supra* note 1, at 69.

shares a similar view; for instance, in his dissent in *Glossip*, Justice Breyer made an incredible statement: “[R]ather than try to patch up the death penalty’s legal wounds one at a time, I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution.”²⁸⁵ It is undeniable that the publicity surrounding the series of so-called botched executions has served as a platform for that very discussion. Therefore, by failing to recognize all aspects of the protections provided by the Eighth Amendment—and separating the concept of proportionality from the execution method—the legal system ignores the evolving standards of decency and fluidity. Consequently, the legal system has seemingly removed itself from the death-penalty debate at a critical point in time.

The Supreme Court—even prior to *Baze*—acknowledged the moral questions that surround lethal injection and capital punishment as a whole.²⁸⁶ In the plurality opinion, Chief Justice Roberts noted that “[r]easonable people of good faith disagree on the morality and efficacy of capital punishment, and for many who oppose it, no method of execution would ever be acceptable.”²⁸⁷ If what he articulated is true, and this is the system our country has adopted and intends to move forward with, then the pressing questions about the constitutionality of that system must be addressed. As Justice Blackmun said in *Callins v. Collins*, “The death penalty must be imposed ‘fairly, and with reasonable consistency, or not at all.’”²⁸⁸

285. *Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting), *aff’g sub nom.* *Warner v. Gross*, 776 F.3d 721 (10th Cir. 2015).

286. *See generally* *Baze v. Rees*, 553 U.S. 35 (2008) (plurality opinion).

287. *Id.* at 61.

288. *Callins v. Collins*, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting from denial of certiorari) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982)); *see also* Linda Greenhouse, *Death Penalty Is Renounced by Blackmun*, N.Y. TIMES (Feb. 23, 1994), <http://www.nytimes.com/1994/02/23/us/death-penalty-is-renounced-by-blackmun.html?pagewanted=all> [<https://perma.cc/3WDX-6Y6Y>].