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Unconstitutional Killing The Deadly Dilemma Surrounding Oklahoma's Lethal Injection Secrecy Statute

Martin McKown

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*Martin McKown**

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."[1]

I. INTRODUCTION

In *Lockett v. Evans*, the Oklahoma Supreme Court held that death row inmates are not entitled to know the sources of drugs to be used in their executions.[2] The controversial ruling came after two condemned prisoners, Clayton Lockett and Charles Warner, challenged an Oklahoma statute (Section 1015(B)),[3] which requires

* B.S., University of Texas at Tyler, 2009; J.D., Duquesne University School of Law, 2015. The author wishes to thank Dean Ken Gormley and Professor Ann L. Schiavone for their thoughtful advice and feedback.

1. Marbury v. Madison, 5 U.S. 137, 163 (1803) (Marshall, C.J.).
2. Lockett v. Evans, 330 P.3d 488, 491 (Okla. 2014).
3. OKLA. STAT. tit. 22, § 1015(B) (2012).

state officials to keep those sources confidential. Following that decision, the Oklahoma Department of Corrections (DOC) administered an untested cocktail of drugs to execute Lockett.[4] The execution went horribly awry when Lockett began to writhe, groan, and convulse on the gurney before dying from a heart attack more than forty minutes after the process began.[5] In the aftermath of Lockett's botched execution, Warner's execution was postponed pending an investigation into what went wrong.[6]

Lockett's bungled execution spurred heated debate across the country.[7] Undoubtedly, few events invigorate debate amongst the American public more than those relating to the death penalty.[8] As United States Supreme Court Chief Justice John Roberts opined, "[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."[9] This brief article does not wade into that discussion.[10] Rather, this article tackles the serious legal issues surrounding Section 1015(B) in light of the Oklahoma

4. Erick Eckholm, *One Execution Botched, State Delays the Next*, N.Y. TIMES, Apr. 30, 2014, A1.

5. *Id.* However, an independent autopsy stated that Lockett died from "judicial execution by lethal injection." 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/. Prison officials reported that the medical issues were caused when a "blood vein had collapsed, and the drugs had either absorbed into the tissue, leaked out or both." 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-foroutside-review-of-botched-execution.html?hp.

6. Eckholm, *supra* note 4. Prison officials previously planned to execute Warner on the same day and in the same manner as Lockett. Michael Winter, *Okla. Killer Dies after Botched Execution*, USA TODAY (Apr. 29, 2014), http://www.usatoday.com/story/news/nation/2014/04/29/oklahoma-executions-drugs-lethal-injection/8476389/. Had Warner's execution occurred that day, the executions of both Lockett and Warner would have been Oklahoma's first double execution since 1937. *Id.* Warner was eventually executed on January 15, 2015. Erik Eckholm, *Oklahoma Executes First Inmate Since Slipshod Injection in April*, N.Y. TIMES (Jan. 15, 2015), http://www.nytimes.com/2015/01/16/us/oklahoma-execution-charles-warner-lethal-injection.
html?_r=0.

7. Erik Eckholm & Motoko Rich, *Oklahoma Faces Sharp Scrutiny over Botched Execution*, N.Y. TIMES (Apr. 30, 2014), http://www.nytimes.com/2014/05/01/us/oklahoma-faces-sharp-scrutinyover-botched-execution.html?hp. The White House soon condemned those who administered Lockett's execution for falling short of humane standards. *Id.*

8. *See* Baze v. Rees, 553 U.S. 35 (2008) (plurality) (acknowledging the controversial nature of capital punishment).

9. *Id.* at 61.

10. This article does not analyze whether capital punishment is moral; nor does this article analyze whether Lockett and Warner deserved their death sentences. This article only analyzes the state constitutional issues surrounding Section 1015(B), but not out of pity for Lockett or Warner. This article was written to proactively promote transparency and public confidence in the judicial system given (1) the controversial nature of capital punishment, (2) the likelihood that issues pertaining to their case will reoccur, and (3) the relevance of these issues in states with similar provisions.

Constitution.[11] First, this article suggests that Section 1015(B) violates the condemned prisoner's due process rights required by the prohibition against cruel and unusual punishment under article II, section 9 of the Oklahoma Constitution.[12] Next, this article suggests that Section 1015(B) violates the presumption of open court access pursuant to article II, section 22 of the Oklahoma Constitution.[13] Ultimately, this article concludes that Section 1015(B) is unlawful under the Oklahoma Constitution.[14]

II. BACKGROUND

A. *The Convictions*

Lockett's conviction was a consequence of a series of monstrous events that occurred on June 3, 1999, when he attacked, kidnapped, shot, and murdered nineteen-year-old Stephanie Neiman in an attempt to rob the home of her friend, Bobby Bornt.[15] Lockett was charged with conspiracy, first degree burglary, assault with a dangerous weapon, forcible oral sodomy, first degree rape, kidnapping, robbery by force and fear, and first degree murder.[16] At trial, a jury found Lockett guilty on all counts and the court subsequently sentenced him to death.[17]

Separate from Lockett's conviction, Warner's conviction was a consequence of an equally horrific incident on August 22, 1997, when he raped and murdered his girlfriend's eleven-month-old daughter.[18] Warner was charged with first degree murder and first degree rape.[19] At trial, a jury found Warner guilty on both counts and, like Lockett, the court sentenced him to death.[20]

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11. *See infra* Part III.
12. *See infra* Part III.A.
13. *See infra* Part III.B.
14. *See infra* Part IV.
15. Lockett v. State, 53 P.3d 418, 421–22 (Okla. Crim. App. 2002).
16. *Id.* at 421. Lockett's accomplices included his best friend, Shawn Mathis, and cousin, Alfonzo Lockett. *Id.* The men also attacked and kidnapped Neiman's friend along with Bornt, and Bornt's nine-month-old son. *Id.* at 421–22. Lockett killed Neiman because she would not agree to keep from contacting the police. Ziva Branstetter, *Death Row Inmate Killed Teen Because She Wouldn't Back Down*, TULSA WORLD (Apr. 20, 2014), http://www.tulsaworld.com/news/courts/death-row-inmate-killed-teen-because-she-wouldn-tback/article_e459564b-5c60-5145-a1ce-bbd17a14417b.html?mode=story. Lockett shot Neiman twice, and ordered Mathis to bury Neiman while she was still breathing. *Id.* The other victims survived; however, the men also threatened to kill the other victims if they contacted police. *Lockett*, 53 P.3d at 422.
17. *Lockett*, 53 P.3d at 421.
18. Warner v. State, 144 P.3d 838, 856–57 (Okla. Crim. App. 2006).
19. *Id.* at 856.
20. *Id.* at 857.

B. The Civil Action

1. Basis and Outcome

On February 26, 2014, Lockett and Warner filed a civil action against the State in the Oklahoma County District Court.[21] The condemned prisoners challenged the constitutionality of Section 1015(B), which states: "The identity of all persons who participate in or administer the execution process and persons who supply the drugs, medical supplies or medical equipment for the execution shall be confidential and shall not be subject to discovery in any civil or criminal proceedings."[22] First, the prisoners argued this provision "violates their due process rights by denying them both notice of the process by which they will be executed and meaningful access to the courts to challenge that process."[23] Second, they argued that Section 1015(B) is unconstitutional "because it precludes judicial review of the Department of Corrections' lethal-injection procedures and violates the Supremacy Clause of the United States Constitution by blocking Plaintiffs' ability to vindicate their Eighth Amendment right against cruel and unusual punishment."[24] Accordingly, Lockett and Warner asked the court to stay their execution until the sources of the drugs to be used were disclosed.[25]

Weaving through a jungle of procedural obstacles, the case was eventually heard by the Oklahoma Supreme Court.[26] The high court ruled against the prisoners, and held Section 1015(B) constitutional by explaining:

> The challenged provision makes secret only the identity of the persons who carry out the execution and the identity of the persons who supply the drugs and medical equipment necessary to do so. The identity of the drug or drugs and the dosage of the drugs are not covered by the provision.[27]

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21. Lockett v. Evans, 2014 OK 33, ¶ 1 (Okla. 2014), *appeal denied*, 330 P.3d 488 (Okla. 2014).
22. *Id.*
23. *Id.* at ¶ 2 (internal quotation marks omitted).
24. *Id.* (internal quotation marks omitted). This article will only consider issues concerning Section 1015(B) in light of the Oklahoma Constitution. *See infra* Part III.
25. *Lockett*, 2014 OK 33, ¶ 2.
26. *See infra* Part II.B.2.
27. *Lockett*, 330 P.3d at 491.

In making that decision, the court considered whether the fundamental right of "access to the courts" rendered Section 1015(B) unconstitutional.[28] This right "requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers."[29] The court noted that right of access to the courts does not allow a prisoner to discover grievances, nor to litigate effectively once in court.[30] The court also noted that, to establish an access to the courts violation, a prisoner must demonstrate "actual injury—that is 'actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a claim.'"[31] Because Lockett and Warner did not demonstrate actual prejudice with respect to any contemplated challenges, the court ruled that Section 1015(B) did not violate their constitutional right of access to the courts.[32]

2. Procedural History

A short review of the history of the case illustrates the complex procedural thicket traversed by the condemned prisoners' claim.[33] Shortly after the case was filed in state court, the State removed the lawsuit to federal court.[34] Lockett and Warner subsequently amended their complaint to eliminate all federal issues, causing the federal court to remand the case.[35] Four days later, the state court dismissed the claim after finding that the court lacked jurisdiction.[36] The prisoners then appealed to the Oklahoma Supreme

28. *Id.*

29. Bounds v. Smith, 430 U.S. 817, 828 (1977).

30. *Lockett*, 330 P.3d at 491 (citing Lewis v. Casey, 518 U.S. 343, 354 (1996)).

31. *Id.* (quoting *Casey*, 518 U.S. at 348).

32. *Id.* Although he agreed with the result, Oklahoma Supreme Court Justice Steven Taylor characterized the prisoners' claim as "frivolous and not grounded in the law" in a terse dissent. *Id.* at 493 (Taylor, J., dissenting). He reasoned that "if they were being executed in the electric chair, they would have no right to know whether OG&E or PSO were providing the electricity . . . or if they were being executed by firing squad, they would have no right to know whether it be by Winchester or Remington ammunition." *Id. But see* Kimberly Newberry, *Secrecy in Lethal Injection: How the Oklahoma Courts are Supporting a Deadly Double Standard*, JURIST (June 1, 2014), http://jurist.org/dateline/2014/06/kimberly-newberry-lethal-injection.php (arguing "[t]he problem with drugs . . . is that it matters what substance a person puts in his body").

33. Justice Taylor opined that "[t]his case has traveled a very long and complete journey through full due process of law." Lockett v. Evans, 2014 OK 33, *5 (Okla. 2014) (Taylor, J., dissenting), *appeal denied*, 330 P.3d 488 (Okla. 2014). Although perhaps "complete," this article suggests the result of that "journey" was misguided. *See infra* Part III.

34. *Lockett*, 2014 OK 33, ¶ 3. On behalf of the DOC, Oklahoma's Office of the Attorney General removed the lawsuit to the United States District Court for the Western District of Oklahoma. *Id.*

35. *Id.* The amended complaint challenged the state's lethal injection protocol under the Oklahoma Constitution and the Oklahoma Administrative Procedures Act. *Id.* at ¶ 2–3.

36. *Id.* at ¶ 3.

Court by arguing that the lower court, in fact, had jurisdiction over the matter.[37] They also asked the Oklahoma Supreme Court to postpone their executions pending that appeal.[38]

The Oklahoma Supreme Court then split the case by requiring the Oklahoma County District Court to hear the merits of the lawsuit, and by transferring the postponement request to the Oklahoma Court of Criminal Appeals.[39] In a written brief to the Oklahoma Court of Criminal Appeals, the State acknowledged that, at that time, the DOC did not possess the drugs needed to administer executions.[40] That court therefore postponed the prisoners' executions for thirty days, giving the State time to obtain the necessary drugs or adopt another method.[41] Meanwhile, the Oklahoma County District Court struck down Section 1015(B), but denied most relief requested.[42]

Pending appeal of the district court's decision, the prisoners sought to postpone their executions for a second time in the Oklahoma Court of Criminal Appeals, which eventually denied that request for lack of jurisdiction.[43] The next day, the prisoners turned to the Oklahoma Supreme Court.[44] The Oklahoma Supreme Court retained the appeal on the merits, but once again attempted to

37. *Id.* at ¶ 4.

38. *Id.*

39. *Id.* at ¶ 5. Oklahoma's district courts are courts of general jurisdiction. OKLA. CONST. art. VII, § 7. Here, however, the Oklahoma County District Court erroneously denied "Plaintiffs' request for a temporary order, and request for a temporary injunction to stay the executions of the Plaintiffs after finding that jurisdiction for such matters lies with the Oklahoma Court of Criminal Appeals." *Lockett*, 2014 OK 33, ¶ 3 (internal quotation marks omitted). Further, Oklahoma has a complex judicial system with two independent courts of last resort: the Oklahoma Supreme Court and the Oklahoma Court of Criminal Appeals. OKLA. CONST. art. VII, § 4. The Oklahoma Supreme Court reviews all civil and constitutional matters. *Id.* The Oklahoma Court of Criminal Appeals reviews all criminal matters. *Id.* When an appeal is filed with the Oklahoma Supreme Court, that court may send the case to the state's intermediate appellate court, the Oklahoma Civil Court of Appeals. OKLA. CONST. art. VII, § 5. The court did not choose to do so here. *Lockett*, 2014 OK 33, ¶ 5.

40. *Lockett*, 2014 OK 33, ¶ 6.

41. *Id.* Additionally, the court dismissed the prisoners' actual postponement request as moot. *Id.*

42. *Id.* at ¶ 7. The district court held the provision unconstitutional "as a denial or barrier to Plaintiffs' right to access the Courts." *Id.* (internal quotation marks omitted); *see also* Lockett v. Evans, 330 P.3d 488, 489 (Okla. 2014).

43. *Lockett*, 2014 OK 33, ¶ 7. The Oklahoma Court of Criminal Appeals "determined that its authority to issue a stay of execution is limited to a pending action in which a death row inmate challenges the conviction or sentence of death." *Id.* (citing OKLA. STAT. tit. 22, § 1001.1(C) (2012)).

44. *Id.* at ¶ 8.

transfer the postponement request to the Oklahoma Court of Criminal Appeals.[45] When the Oklahoma Court of Criminal Appeals maintained its refusal to assume jurisdiction, the Oklahoma Supreme Court ultimately agreed to postpone the executions as it reviewed the case.[46]

C. Oklahoma's Lethal Injection Protocol

The federal government and at least thirty-five states use lethal injection for capital punishment.[47] Lethal injection protocol originated in Oklahoma after legislators sought a potentially more humane alternative to the electric chair in 1977.[48] At the time of Lockett's execution, the DOC used a three-drug combination to administer lethal injection.[49] Within this common combination, the first drug, midazolam, is intended to make the condemned prisoner unconscious.[50] The second, vecuronium bromide, stops the prisoner from breathing.[51] The third, potassium chloride, halts the prisoner's heartbeat.[52] Protocol called for the drugs to be injected in that order by an execution team consisting of three executioners, each injecting one of the drugs.[53] According to the DOC, when that

45. *Id.* A federal public defender who previously worked on the case criticized the courts for "playing hot potato with this case." Bailey Elise McBride, *Okla. High Court Splits Execution Stay Request*, WASH. TIMES (Mar. 13, 2014), http://www.washingtontimes.com/news/2014/mar/13/okla-sup-ct-sends-execution-stay-plea-to-occa/ (quoting Madeline Cohen) (internal quotation marks omitted).

46. *Lockett*, 2014 OK 33, ¶ 8. On the same day that the Oklahoma Court of Criminal Appeals refused to assume jurisdiction over the stay request, the DOC filed an appeal regarding the portion of the district court's decision that declared Section 1015(B) unconstitutional. *Id.* Accordingly, the DOC's contention placed the case within the Oklahoma Supreme Court's jurisdiction. *Id.*

47. *State by State Lethal Injection*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/state-lethal-injection (last visited Sept. 1, 2014) [hereinafter *State by State Lethal Injection*]. Those states include: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. *Id.* The United States Supreme Court noted that lethal injection is used "by every jurisdiction that imposes the death penalty." Baze v. Rees, 553 U.S. 35, 41 (2008). Of particular note, Connecticut, Maryland, and New Mexico have abolished the death penalty, but repeal does not affect current death row inmates. CONN. GEN. STAT. § 53a–46 (2012); MD CODE art. 27, § 71 (2012); N.M. STAT. § 31–14–1 (2012).

48. *Baze*, 553 U.S. at 42.

49. *Death Row*, OKLA. DEP'T OF CORRECTIONS, http://www.ok.gov/doc/Offenders/Death_Row/ (last visited June 28, 2014) [hereinafter *Death Row*].

50. *Id.* There is no standard design to lethal injection protocol; some jurisdictions use variations of the three-drug method, while others only use one or two drugs. *See State by State Lethal Injection*, *supra* note 47.

51. *See Death Row*, *supra* note 49.

52. *Id.*

53. *Id.*

protocol is administered, the execution team inserts intravenous lines in each arm of the prisoner.[54] The execution team then injects the drugs, in their respective order, using handheld syringes simultaneously into the two lines.[55] Prior to Lockett's execution, Oklahoma had executed 110 prisoners using some form of lethal injection.[56]

D. The Purpose of Section 1015(B)

In 2010, a nonprofit organization known as Reprieve launched a campaign against American pharmaceutical companies that supplied execution drugs to states.[57] The organization openly revealed the names of those companies to the public.[58] In response to public outcries deploring the companies for enabling states to administer the death penalty, many of the companies stopped selling lethal drugs to prisons, or placed strict limitations on purchasers using these drugs.[59] Thus, facing a shortage of drugs to administer the death penalty, the Oklahoma Legislature enacted Section 1015(B) to alleviate the discomfort experienced by pharmaceutical companies that provided lethal drugs.[60] While the legislature enacted the law for the purpose of insulating companies that supply execution drugs from public scrutiny, the law, in effect, also insulates those companies from judicial review and serves as a barrier to condemned prisoners who seek to challenge their planned executions.[61]

III. ANALYSIS

A. Due Process: Determining Cruel and Unusual Punishment

Beyond the procedural complications of the condemned prisoners' claim, the most obvious substantive issue is relatively straightforward: whether Section 1015(B) violates their due process rights to obtain information relevant to their impending executions.[62] Entities that provide execution drugs to the DOC may have critical in-

54. *Id.*
55. *Id.*
56. *Id.*
57. Newberry, *supra* note 32.
58. *Id.*
59. *Id.*
60. *Id.*
61. *See infra* Part III.
62. Oken v. Sizer, 321 F. Supp. 2d 658, 664 (D. Md. 2004). As a general principle, "[f]undamental fairness, if not due process, requires that the execution protocol that will regulate an inmate's death be forwarded to him in prompt and timely fashion." *Id.*

formation about the manufacturing location, pharmaceutical development, and chemical ingredients of those drugs.[63] In some instances, a condemned prisoner cannot challenge a protocol for violating the prohibition against cruel and unusual punishment without knowing this information.[64] Condemned prisoners should be entitled to that information as a matter of due process, which requires "an opportunity to receive notice of how one's rights will be affected and opportunity to respond and be heard."[65]

Article II, section 9 of the Oklahoma Constitution establishes the prohibition against cruel and unusual punishment.[66] Specifically, article II, section 9 states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted."[67] The language of this provision is almost identical to that of the Eighth Amendment to the United States Constitution, which states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel *and* unusual punishments inflicted."[68] Oklahoma courts have acknowledged that these provisions are nearly identical, and normally apply precedent from the United States Supreme Court to determine whether Oklahoma's use of lethal injection is cruel and unusual under the state constitution.[69] The United States Supreme Court has determined that the prohibition against cruel and unusual punishment requires

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63. Chester v. Beard, No. 1:08-CV-1261, 2012 WL 5386129, at *5 (M.D. Pa. Nov. 1, 2012) (finding that information surrounding these sources is relevant to substantive analysis of lethal injection protocol).

64. *Id.* Specifically, "understanding and evaluating the drugs used in a lethal injection protocol is an integral part of this constitutional analysis, and identifying where the drugs came from seems reasonably calculated to inform our understanding of this important issue." *Id.*

65. *Oken*, 321 F. Supp. 2d at 665.

66. OKLA. CONST. art. II, § 9.

67. *Id.* At least thirty-eight other states have comparable provisions: Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, and Wisconsin. *Constitutional Access to Justice Provisions*, NAT'L CTR. FOR STATE COURTS, http://www.ncsc.org/Topics/Judicial-Officers/Judicial-Administration/State Links.aspx?cat=Constitutional%20Access%20to%20Justice%20
Provisions (last visited Oct. 11, 2014).

68. U.S. CONST. amend. VIII (emphasis added). The only difference between the state and federal provisions is the conjunction that follows the word "cruel" and precedes the phrase "unusual punishment." The Eighth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. Baze v. Rees, 553 U.S. 35, 47 (2008).

69. Bryson v. Okla. Cnty. *ex rel.* Okla. Cnty. Det. Ctr., 261 P.3d 627, 633 (Okla. App. Div. 2 2011) (stating that "these provisions are identical"); *see also* Malicoat v. State, 137 P.3d 1234, 1236 (Okla. Crim. App. 2006) (citing Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002); Gregg v. Georgia, 428 U.S. 153 (1976)).

criminal punishments to comport with "evolving standards of decency that mark the progress of a maturing society."[70]

In other states where condemned prisoners have asserted that their state's lethal injection protocol violates the prohibition against cruel and unusual punishment, courts have struggled to confront those issues with uniformity.[71] Some courts have invalidated lethal injection protocols for violating the prohibition against cruel and unusual punishment.[72] For example, in *Morales v. Tilton*, the United States District Court for the Northern District of California evaluated California's lethal injection protocol, which included three drugs: sodium thiopental (also known as sodium pentothal) to induce unconsciousness, pancuronium bromide to induce paralysis, and potassium chloride to induce cardiac arrest.[73] The *Morales* court considered whether the protocol ensured that the condemned prisoner stay unconscious from the sodium thiopental when being exposed to the painful combination of pancuronium bromide and potassium chloride.[74] Ultimately, the *Morales* court quashed the state's lethal injection protocol because it lacked adequate reliability and transparency to ensure that the prisoner remained comatose so as to not violate the prohibition against cruel and unusual punishment.[75]

However, other courts have upheld similar lethal injection protocols.[76] One year after the *Morales* decision, the United States Court of Appeals for the Eighth Circuit considered a similar issue in *Taylor v. Crawford*.[77] In that case, the Eighth Circuit Court of Appeals evaluated Missouri's lethal injection protocol, which also utilized

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70. *Roper*, 543 U.S. at 561 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)) (internal quotation marks omitted). Federal law allows condemned prisoners to challenge a state's execution methods, such as lethal injection, under traditional habeas corpus principles. 28 U.S.C.A. § 2241 (2012). Additionally, federal law permits prisoners to challenge those same methods under 42 U.S.C. § 1983 (2012), which creates a civil cause of action for "deprivation of any rights, privileges, or immunities secured by the Constitution and laws," which includes the Eighth Amendment.

71. *Compare, e.g.*, Morales v. Tilton, 465 F. Supp. 2d 972, 981 (N.D. Cal. 2006) (rejecting a three-drug lethal injection protocol for violating the prohibition against cruel and unusual punishment), *with* Taylor v. Crawford, 487 F.3d 1072, 1085 (8th Cir. 2007) (approving a protocol with that same three-drug combination).

72. *See, e.g.*, *Morales*, 465 F. Supp. 2d at 981.

73. *See id.* at 975. Most jurisdictions use this protocol. *See id.*

74. *See id.* at 978. Both parties agreed that the contemplated dosage of pancuronium bromide and potassium chloride would cause unconstitutional painfulness if administered to a conscious person. *See id.*

75. *See id.* at 981.

76. *See, e.g.*, Taylor v. Crawford, 487 F.3d 1072, 1085 (8th Cir. 2007).

77. *See id.* at 1078–79 (citing *Morales*, 465 F. Supp. 2d at 973).

sodium thiopental, pancuronium bromide, and potassium chloride.[78] Unlike the *Morales* court, the Eighth Circuit Court of Appeals concluded that Missouri's lethal injection protocol did not violate the prohibition against cruel and unusual punishment because the procedure did not present a substantial foreseeable risk that unnecessary or wanton pain be inflicted on condemned prisoners.[79]

To address the divergent justifications of lower court rulings concerning lethal injection protocols, the United States Supreme Court considered the constitutionality of Kentucky's execution procedure in *Baze v. Reese*.[80] In that case, two condemned prisoners were sentenced to death after being convicted of capital murder in Kentucky.[81] Subsequently, the prisoners challenged Kentucky's lethal injection protocol, which is comprised of the common three-drug blend: sodium thiopental, pancuronium bromide, and potassium chloride.[82] The prisoners argued that the risk of pain from maladministration of the combination violated the prohibition against cruel and unusual punishment.[83] The prisoners also offered an alternative to replace the three-drug protocol, even though they conceded it was untested and not adopted by any state.[84]

In deciding the case, the court established a difficult standard for condemned prisoners seeking to challenge lethal injection protocols.[85] First, a condemned prisoner must show that the challenged protocol presents a risk that is "sure or very likely to cause serious illness and needless suffering, and give rise to sufficiently imminent dangers."[86] Second, the prisoner must offer an alternative protocol that would "be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain."[87] Ultimately, the court ruled against the prisoners for failing to show "that the risk

78. *See id.* at 1074.
79. *See id.* at 1085.
80. Baze v. Rees, 553 U.S. 35, 47 (2008).
81. *See id.* at 46.
82. *See id.* at 44.
83. *See id.* at 41. The prisoners conceded that Kentucky's protocol would be humane if carried out properly. *See id.* at 49.
84. *See id.* at 41. The new alternative consisted of a barbiturate-only protocol "used routinely by veterinarians in putting animals to sleep." *Id.* at 58.
85. *See* 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, 218 (2011).
86. *Baze*, 553 U.S. at 50 (quoting Helling v. McKinney, 509 U.S. 25, 33–35 (1993) (internal quotation marks omitted)).
87. *Id.* at 52.

of pain from maladministration of a concededly humane lethal injection protocol, and the failure to adopt untried and untested alternatives, constitute cruel and unusual punishment."[88]

In light of this decision, the Oklahoma Supreme Court created a potential inconsistency when it decided *Lockett*.[89] In that case, the Oklahoma Supreme Court held "that the secrecy provision of Section 1015(B) does not violate the inmates' constitutional right of access to the courts."[90] However, for condemned prisoners to demonstrate a claim to the courts, they must know the sources of lethal substances that will be used in their executions.[91] The failure of certain execution drugs to work properly may cause agonizing and excruciatingly painful deaths, which violates the prohibition against cruel and unusual punishment.[92] Additionally, if administered improperly, even legitimate lethal substances can cause death row inmates severe pain and distress. Sources of execution drugs may provide information regarding the purity, efficiency, and legitimacy of those drugs.[93] Thus, condemned prisoners challenging lethal injection protocol must know the sources of their potential execution drugs to contemplate a claim, and so that courts can accurately assess those claims, under the *Baze* standard.[94]

Mere knowledge of the names of the drugs to be used in an execution will not allow courts to sufficiently assess important questions concerning those drugs.[95] For instance, the full sources of lethal drugs should be revealed to allow courts, at a minimum, to con-

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88. *Id.* at 41.

89. *See* Lockett v. Evans, 330 P.3d 488, 490–91 (Okla. 2014).

90. *Id.* at 491.

91. *See* Chester v. Beard, No. 1:08-CV-1261, 2012 WL 5386129, at *5 (M.D. Pa. Nov. 1, 2012).

92. *See* Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 B.C. L. REV. 1367, 1414 (2014) (arguing that "[i]f the state plans to use compounded pentobarbital, for instance, the inmate can explain the dangers that the drug will be impure, tainted, or otherwise flawed and therefore painful").

93. For example, "without proper anaesthesia [sic], the administration of pancuronium bromide and potassium chloride, either separately or in combination, would result in a terrifying, excruciating death." Harbison v. Little, 511 F. Supp. 2d 872, 883 (M.D. Tenn. 2007), *vacated and remanded*, 571 F.3d 531 (6th Cir. 2009). Specifically, failure to administer the proper dose of sodium thiopental could cause a suffocation sensation from the injection of pancuronium bromide, which paralyzes the diaphragm, and extreme pain from the injection of potassium chloride. Baze v. Rees, 553 U.S. 35, 53 (2008).

94. *Baze*, 533 U.S at 50–52.

95. *See Chester*, 2012 WL 5386129, at *2. Important questions may arise concerning the chemical efficacy, potency, purity, or sterility of drugs at issue. *See id.* In *Chester*, the prisoners contended "that confirming the legitimacy and the *bona fides* of the supplier of these elements is a critical component of any substantive analysis of this death penalty protocol, since these supply source(s) in large measure may determine the quality and efficacy of the drugs used in this process." *Id.*

firm whether those drugs are approved by the Food and Drug Administration (FDA).[96] The FDA classification of execution drugs is relevant to judicial inquiries because the FDA guarantees the authenticity and potency of approved drugs, and courts may use this information to confirm the effects of those drugs.[97] Yet, Lockett and Warner did not even "know whether the drugs to be used in their executions were acquired legally."[98] Limiting prisoners from obtaining this crucial information, Section 1015(B) stands as a barrier to due process by preventing prisoners from asserting their rights under article II, section 9.[99]

Many other states have laws or policies that are similar to Section 1015(B).[100] These laws are especially troublesome given the gravity of capital punishment.[101] An offence as serious as a crime punishable by death is the transgression of a state exploiting that ultimate penalty.[102] The Framers of the Constitution knew this.[103] Thomas Jefferson, who did not entirely oppose capital punishment, feared giving its operation to "the eccentric impulses of whimsical, capricious designing m[e]n."[104] His concern was valid then.[105]

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96. *See* Nathan Koppel, *FDA Takes Stance on the Importation of Lethal-Injection Drugs*, WALL ST. J. (Jan. 4, 2011), http://blogs.wsj.com/law/2011/01/04/the-fda-takes-public-stance-on-the-importation-of-lethal-injection-drugs/. Although the FDA claims that "[r]eviewing substances imported or used for the purpose of state-authorized lethal injection clearly falls outside of FDA's explicit public health role," many lethal drugs are approved by the FDA for other purposes. *Id.* (internal quotation marks omitted).

97. *See id.* (referencing Megan McCracken, an attorney with the University of California, Berkeley, School of Law's Death Penalty Clinic).

98. Eliott C. McLaughlin, *Oklahoma Executions Back on, as Court Rules to Keep Lethal-Drug Sources Secret*, CNN (Apr. 24, 2014), http://www.cnn.com/2014/04/24/justice/oklahoma-court-execution-drugs/.

99. *Chester*, 2012 WL 5386129, at *5 (observing that "'[t]here is a "special danger" in permitting state governments to define the scope of their own privilege'") (citation omitted).

100. *See, e.g.*, ARIZ. REV. STAT. § 13-757(C) (2012); ARK. CODE § 5-4-617(g) (2012); FLA. STAT. § 945.10(1)(g) (2012); GA. CODE § 42-5-36(d)(2) (2012); LA. REV. STAT. 15:570(G) (2012); MO. STAT. § 546.720(2) (2012); S.D. CODIFIED LAWS § 23A-27A-31.2 (2012); TENN. CODE § 10-7-504(h)(1) (2012).

101. *See* Gardner v. Florida, 430 U.S. 349, 357 (1977) (plurality). The United States Supreme Court has "expressly recognized that death is a different kind of punishment from any other which may be imposed in this country" because "it is different in both its severity and its finality." *Id.*

102. Gregg v. Georgia, 428 U.S. 153, 229 (1976) (Brennan, J., dissenting). According to United States Supreme Court Justice William J. Brennan, Jr., "the State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings—a punishment must not be so severe as to be degrading to human dignity." *Id.*

103. *See* letter from Thomas Jefferson to Edmund Pendleton (Aug. 26, 1776), http://founders.archives.gov/documents/Jefferson/01-01-02-0210.

104. *Id.* According to Jefferson, "[d]eath might be inflicted for murder and perhaps for treason if you would take out of the description of treason all crimes which are not such in their nature." *Id.*

105. *See* Greg Tapocsi, Comment, *Three Steps to Death: The Use of the Drug Pavulon in the Lethal Injection Protocol Utilized Today Violates the Eighth Amendment's Protection*

Throughout the colonial history of the United States, judges "could choose from hanging, drowning, beheading, and burning as methods of execution."[106] The Eighth Amendment eliminated many of those methods after the American Revolution.[107] Nevertheless, Jefferson's concern remains valid; scientific and technological developments perpetually cater to the "whimsical, capricious designing man" in ways that the Framers may not have foreseen.[108] Statutes similar to Section 1015(B) leave open a door to the grave injustices that may occur through lethal injection—with no meaningful recourse.[109]

B. Presumptive Openness: A Need for Judicial Transparency

Aside from violating the constitutional guarantee afforded by the prohibition against cruel and unusual punishment, Section 1015(B) diminishes judicial integrity and public confidence in the execution process. Generally, the public and press have a right to access judicial records and proceedings.[110] This policy of transparency inspires public oversight of the judicial system, which in turn fosters confidence in the execution process. However, Section 1015(B) confines necessary public oversight of controversial lethal injection proceedings, diminishing public confidence in the execution process.

In 1980, the United States Supreme Court held that the right of the public and press to attend criminal proceedings is implied in the First Amendment.[111] Yet, even before that decision, Oklahoma courts had recognized a broad presumption of openness in criminal proceedings.[112] Article II, section 22 of the Oklahoma Constitution provides: "Every person may freely speak, write, or publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press."[113] Thus, by including this language, the

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Against Cruel and Unusual Punishment, 35 OHIO N.U. L. REV. 425, 428 (2009) (discussing the use of capital punishment in seventeenth century colonial America).

106. *Id.*

107. *Id.*

108. *See, e.g.*, Dawn Macready, *The "Shocking" Truth About the Electric Chair: An Analysis of the Unconstitutionality of Electrocution*, 26 OHIO N.U. L. REV. 781, 784 (2000). For example, the electric chair was first used in 1889—more than a century after the states ratified the Eighth Amendment. *Id.*

109. *See* Chester v. Beard, No. 1:08-CV-1261, 2012 WL 5386129, at *5 (M.D. Pa. Nov. 1, 2012).

110. OKLA. CONST. art. II, § 22.

111. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

112. *See* Lyles v. State, 330 P.2d 734 (Okla. 1958).

113. OKLA. CONST. art. II, § 22.

drafters of Oklahoma's Constitution afforded all individuals a presumption of openness in criminal proceedings to protect their basic and fundamental rights.[114] Recent trends in case law also suggest that the presumption of openness implied by the freedom of speech and press extends to civil proceedings.[115]

In *Lyles v. State*, the Oklahoma Criminal Court of Appeals considered the scope of this presumption.[116] In that case, a judge permitted television cameras in the courtroom during a criminal trial.[117] When the defendant appealed the trial judge's choice to allow cameras in court, the appellate court held that the trial judge did not abuse his discretion because Oklahoma courts must be open to every individual, including the press and public.[118] The appellate court reasoned that "freedom of speech and press is not a discriminate right, but the equal right of news gathering and disseminating agencies, subject only to the restrictions against abuse and injurious use to individual or public rights and welfare."[119]

Importantly, that court noted that openness in criminal proceedings "not alone affects the accused but the public also is interested in knowing how their servants, the judge, county attorney, sheriff, and court clerk conduct public business."[120] Therefore, Oklahoma courts have acknowledged that the presumption of openness is so important that it cannot be waived in cases involving public or community interest.[121] However, the Oklahoma Supreme Court's decision in *Lockett* ignored the presumption of openness guaranteed by

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114. *Lyles*, 330 P.2d at 739.

115. Reynolds v. Beacon Well Servs., Inc., 857 P.2d 74, 84 (Okla. 1993) (Wilson, J., dissenting) ("I would not deny litigants, nor the public in general, access to the judicial supervision and control of prospective jurors"); *see also* NBC Subsidiary (KNBC-TV), Inc. v. Superior Court, 980 P.2d 337, 358 (Cal. 1999) (concluding "that the constitutional right of access applies to civil as well as to criminal trials"). Although *Lockett* was a civil matter, the court acknowledged the criminal origins of the case. Lockett v. Evans, 330 P.3d 488, 490 (Okla. 2014). Indeed, Justice Taylor considered the case to be exclusively a "criminal matter." *Id.* at 493 (Taylor, J., dissenting); *see also* Lockett v. Evans, 2014 OK 33, *4 (Okla. 2014) (Taylor, J., dissenting), *appeal denied*, 330 P.3d 488. Whatever the case may be, the presumption of openness should apply because the public's interest in knowing the sources of execution drugs outweighs the DOC's need to conceal them. *Cf.* Ellyde Roko, *Executioner Identities: Toward Recognizing A Right to Know Who Is Hiding Beneath the Hood*, 75 FORDHAM L. REV. 2791, 2795 (2007) (arguing "that the right of the inmate and public to know the identity [of the executioner] outweighs the state and prison's speculative concerns on which the grounds for concealment are based").

116. *Lyles*, 330 P.2d at 739.

117. *Id.* at 738.

118. *Id.* at 745.

119. *Id.* at 739.

120. *Id.* at 740 (quoting Neal v. State, 192 P.2d 294, 297 (Okla. 1948)) (internal quotation marks omitted).

121. *Id.*

article II, section 22.[122] Pursuant to that case, the public, press, and condemned prisoners are not entitled to crucial information about the lethal injection drugs to be used in executions.[123]

Guided by article II, section 22, Oklahoma courts should unveil the sources of execution drugs because "the method of carrying out a death sentence by lethal injection is a matter of public interest and a matter on which the public should have the opportunity for input."[124] Public scrutiny of these sources would cause the DOC to evaluate the reliability of its lethal injection protocol, which would decrease the possibility of failed executions.[125] Laws that enshroud the sources of execution drugs in secrecy only frustrate the purpose of article II, section 22.

Citing similar concerns, in the neighboring state of Missouri, several news outlets have challenged that state's execution secrecy policy.[126] The lawsuit alleged that the Missouri Department of Corrections violated state and federal law by refusing to reveal "the composition, concentration, source, and quality of drugs used to execute inmates in Missouri."[127] According to the news outlets, publicly disclosing the sources of execution drugs "reduces the risk that improper, ineffective, or defectively prepared drugs are used; it allows public oversight of the types of drugs selected to cause death and the qualifications of those manufacturing the chosen drugs; and it promotes the proper functioning of everyone involved in the execution process."[128]

The judicial transparency that the media is championing in Missouri is fundamental to the American legal system. Judicial transparency allows attorneys to consult litigants, plan litigation, and advocate effectively on behalf of those clients. An attorney may choose to challenge the legality of a certain execution drug, or combination of drugs, that may turn out to be unlawful for the state to administer. However, without knowing relevant information concerning those drugs, the attorney cannot provide such counsel.

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122. Lockett v. Evans, 330 P.3d 488, 491 (Okla. 2014).

123. *Id.*

124. Dunlap v. Dep't of Corr., 303 P.3d 572, 577 (Colo. 2013).

125. California First Amendment Coal. v. Woodford, No. C-96-1291-VRW, 2000 WL 33173913, at *8 (N.D. Cal. July 26, 2000), *aff'd*, 299 F.3d 868 (9th Cir. 2002) (determining that an analogous regulation was adopted in California to limit information about lethal injections from reaching the media or public).

126. *See* Complaint, Guardian News & Media LLC v. Missouri Dep't of Corr., No. 14AC-CC00251 (Mo. Cir. Ct., Cole Cnty., May 15, 2014). The plaintiffs to that lawsuit included the Associated Press, Guardian News & Media LLC, and three Missouri newspapers. *Id.*

127. *Id.* at ¶ 4.

128. *Id.* at ¶ 77.

Thus, in the interest of administering justice, condemned prisoners should be offered details concerning their execution drugs.

In a broader sense, without this information, news outlets cannot properly fulfill their role as watchdogs of judicial ethics. This role is vital to democracy; it fosters public awareness of serious legal issues.[129] The authority of the states to adopt and administer the death penalty is a high power of justice, and transparency throughout the execution process is not expendable.[130] The media has a duty to investigate these types of issues and keep the public apprised of any potential wrongdoing by the state. Pursuant to article II, section 22, Oklahoma courts should allow the public, press, and condemned prisoners to know the sources of execution drugs.

IV. CONCLUSION

In a democratic society, the decision-making power of a state must, at times, yield to a criminal defendant's constitutional rights. The *Lockett* case presents such a situation.[131] Unquestionably, the terrible crimes of Lockett and Warner were inexcusable. However, the political elements and emotional undertones of the circumstances surrounding the *Lockett* case only distracts attention from significant issues concerning the manner in which the lives of the prisoners would be taken.

Serious issues emerge with respect to the condemned prisoners' claim when considered in light of the Oklahoma Constitution.[132] First, Section 1015(B) violates prisoners' due process rights to obtain information necessary for understanding and evaluating execution drugs under article II, section 9, which prohibits cruel and unusual punishment.[133] Second, the presumption of openness in judicial proceedings implied by article II, section 22 serves as a constitutional barrier to Section 1015(B), which conceals critical infor-

129. Miles v. Ruby Tuesday, Inc., 799 F. Supp. 2d 618, 623 (E.D. Va. 2011) (stating that "the mere fact of judicial transparency, by itself, enhances judicial accountability").

130. According to American Civil Liberties Union (ACLU) Executive Director Ryan Kiesel, "[m]ore than any other power, the exercise of the power to kill must be accompanied by due process and transparency." Press Release, *ACLU of Oklahoma's Statement in Response to Tuesday Night's Botched Execution in Oklahoma*, ACLU (Apr. 30, 2014), https://www.aclu.org/capital-punishment/aclu-oklahomas-statement-response-tuesday-nights-botched-execution-oklahoma.

131. *See* Lockett v. Evans, 2014 OK 33 (Okla. 2014), *appeal denied*, 330 P.3d 488 (Okla. 2014).

132. *See supra* Part III.

133. *See supra* Part III.A.

mation about execution drugs from the public, press, and condemned prisoners.[134] For those reasons, Section 1015(B) should be struck down as antithetical to constitutional principles.

134. *See supra* Part III.B.