2015

The Politics of Botched Executions

Corinna Barrett Lain

University of Richmond Law School, clain@richmond.edu

Follow this and additional works at: http://scholarship.richmond.edu/law-faculty-publications

Part of the Criminal Procedure Commons, and the Law Enforcement and Corrections Commons

Recommended Citation


This Article is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.
THE POLITICS OF BOTCHED EXECUTIONS

Corinna Barrett Lain *

For decades now, America’s death penalty has been beset by serious problems in its administration, but what has finally gotten the public’s attention is a spate of botched executions in the first half of 2014. “2014 is Already the Worst Year in the History of Lethal Injection” one headline blared after a fourth execution went awry in July. With fallout from botched executions named one of the “Top 10 Stories of 2014,” there can be little doubt: the death penalty is once again in the spotlight, and botched executions are what put it there. Botched executions—executions beset by unanticipated problems or delays, often resulting in unnecessary pain for the condemned—are nothing new. Austin Sarat’s timely book, Gruesome Spectacles, chronicles over a century of them. Indeed, Sarat’s research shows that the botch rate for executions by lethal injection is over 7%, more than double the botch rate of more antiquated

* Professor of Law and Associate Dean of Faculty Development, University of Richmond School of Law. Thanks to Jim Gibson for comments on an early draft, Cate Gray and Zack MacDonald for excellent research assistance, and to the University of Richmond Law Review for a fabulous symposium issue.


4. AUSTIN SARAT, GRIEVEOUS SPECTACLES: BOTCHED EXECUTIONS AND AMERICA’S DEATH PENALTY 5 (2014) [hereinafter SARAT, GRIEVEOUS SPECTACLES].
execution methods like hanging and electrocution. And it has been that way for decades.

Although botched executions are hardly new, having to manage the public relations nightmare that has followed these increasingly high profile events is new, and tells a story of its own. What are the politics of botched executions? Officials have lowered the blinds so witnesses could not see what was happening in the execution chamber, called for an “independent review” by a non-independent agency, minimized concerns by comparing the execution to the condemned’s crimes, and even denied that a botched execution was botched in the first place. He died, didn’t he?

In this symposium essay, I explore the politics of botched executions, discussing state responses to the latest round of executions gone wrong and the ways in which those responses matter. Part I recounts four botched executions in 2014 and the state responses that accompanied them. Part II makes three observations about those responses—one about states’ fealty to the death penalty, one about backlash politics and the scope of the public relations problem, and one about the changing cultural construct of lethal injection in the United States. Part III explores how state responses to botched executions (or the lack thereof) might impact the constitutionality of lethal injection itself. In the end, the recent spate of botched executions may prove true the old adage about politics making perfect.

I. 2014 Botched Executions

The year 2014 included four botched executions. The injection of Michael Clayton Lockett and sentenced to death in Oklahoma was designed to be a convenience store robbery and a lethal injection procedure that was aesthetically used to produce a more usual sodium thiopental knockdown. Whether the pentobarbital dosage or because of the pounding pharmacology and have been knew. What we knew the execution by lethal injection of a condemned to experience cramping, and can’t any the execution to be ended.

And that brings me to the execution to be ended, his last words, tell...
And it has to do with having to manage the pressures that are increasing in the system. What have lowered the threshold of what is happening in the execution process. A "pre-execution review" by a non-execution in charge of reviewing the execution process denied that a botched execution occurred. He died, didn't he?

And that brings us back to Wilson. When the warden ordered the execution to begin, Wilson uttered what he thought would be his last words, telling his mother, sister, and fiancee, "I love the..."
world. Love my daughters for me. I'm going to miss you always."

But those were not his last words. Twelve seconds into the execution, he uttered what would be his last words instead: "I feel my whole body burning."

As a sociopolitical phenomenon, what is perhaps most notable about the public reaction to Wilson's botched execution is that there wasn't one. *Time Magazine* reported the details of the botched execution on its website the next day, and the Associated Press reported Wilson's last words in passing, without mentioning that the execution had been botched. But otherwise, the word was mum. The media did not mention it, the public was not outraged by it, the state had nothing to say about it. It was a non-event.

Until the following week. That's when the second botched execution of 2014 occurred—Ohio's botched lethal injection of Dennis McGuire on January 16. McGuire was convicted and sentenced to death for the rape and murder of a woman who was eight months pregnant. Ohio used an untested, two-drug lethal injection protocol consisting of the sedative midazolam and painkiller hydromorphone, which his attorneys had argued would cause an agonizing, terror-filled death. History appears to have proven them right. A typical execution by lethal injection takes between two to ten minutes. McGuire's execution took twenty-six, the longest in Ohio's history.

This time, the comments permeated that of Wilson's botched execution. Two botched executions in less than a month left the state needing to comment on the executions. No comment about Wilson's execution, no comment about the state needing to comment on the executions. No comment about the use of midazolam and hydromorphone to tend to the execution's intended effect.

If these had been the public's short attention span, it's possible that Ohio's botched executions might have been underplayed. But the public followed the story of the second botched execution, and it's clear that Ohio's botched executions have repercussions far beyond the execution chamber and that Ohio might need to reconsider its use of midazolam and hydromorphone.

---

16. Alter, supra note 11.
17. Lyman, supra note 14.
18. See Alter, supra note 11.
22. SARAT, GRUESOME SPECTACLES, supra note 4, at 118.
longest in Ohio’s history. During the execution, McGuire gasped, choked, and repeatedly clenched his fists. Experts concluded that he likely suffered from a phenomenon known as “air hunger”—the struggle to satisfy the body and mind’s urge to breathe.

This time, the press was on it. Details of McGuire’s final moments permeated the web, sometimes accompanied by recognition of Wilson’s botched execution the week beforehand. Two weeks, two botched executions. Death penalty opponents seized on the opportunity to make hay, and state prison officials found themselves needing to move from their initial position of “no comment” on the execution. A spokesperson told the press, “The Department [of Corrections] remains confident... that the inmate was completely unconscious and felt no pain,” while stating that future executions would use higher dosages of midazolam and hydromorphone to “reaffirm” that the drugs would have their intended effect.

If these had been the only botched executions of 2014, the public’s short attention span almost certainly would have kept con-


28. See Strauss, supra note 27 (quoting death penalty opponents and noting the prison’s “no comment” position).

cerns from mounting. But they weren't the only ones. Two more botched executions followed in 2014, and they were more gruesome, more salacious, yet.

April 29, 2014, marks the moment that the public became truly transfixed by a botched execution. That's the date that Oklahoma executed Clayton Lockett (or at least tried). Lockett was convicted and sentenced to die for the murder, rape, kidnapping, and robbery of a young woman who was shot twice and then buried alive.

The pending execution had already brought high drama. Oklahoma had initially refused to disclose the drugs that it would use in Lockett's execution, and even after relenting on that point, it steadfastly refused to disclose their source, citing a recently passed state law protecting the anonymity of lethal injection drug suppliers. Lockett's attorneys challenged the law and a district court ruled it unconstitutional, sending a stay-of-execution request to the criminal appeals court. The appeals court refused to grant it, stating that it had no pending litigation there: the challenge to the secrecy law was a civil action, and its jurisdiction was purely criminal. Lockett's attorneys then appealed to the state supreme court, which ordered its own stay of execution while the appeal of the ruling on the constitutionality of the state secrecy law was pending. Oklahoma's governor refused to honor the stay, saying that the state supreme court had no authority to issue it because the criminal appeals court had the final say on criminal issues (which it did, although the reason for the stay was civil, and thus properly before the state supreme court). A state legislator drafted a constitutional amendment to oust the stay, and Oklahoma then issued its own stay. The state supreme court issued its own stay, and the fracas said "constitutional crisis." Given the drama, by the time Lockett was executed, as planned, Oklahoma used midazolam as the sole drug. At execution, a man said Lockett was unconscious in the protocol. Lockett's body started to convulse, he clenched his jaw, and his head from side to side, "something's wrong," and "He began trying to talk. That's when officials issued the stay, and...
two more grueling ones. Two more were more grueling. The public became truly shocked when Lockett was convicted of kid­

napping, and then buried him and then buried him and then buried him high drama. Oklahoma was using a new three-drug protocol, with midazolam as the first, anesthetic element. Ten minutes into the execution, a member of the execution team announced that Lockett was unconscious, a signal to proceed with the remaining drugs in the protocol. That's when the execution went haywire. Lockett's body started writhing and twitching. His foot kicked, then he clenched his jaw as his body buckled. He started rolling his head from side to side, mumbling the words “I'm not,” “some­thing's wrong,” and “man...” At one point, he opened his eyes. He began trying to lift his body off the gurney, as if to sit up. That's when officials closed the blinds to the viewing room.

Given the drama beforehand, the press was primed and ready by the time Lockett's execution date rolled around. It did not go as planned. Oklahoma was using a new three-drug protocol, with midazolam as the first, anesthetic element. Ten minutes into the execution, a member of the execution team announced that Lockett was unconscious, a signal to proceed with the remaining drugs in the protocol. That's when the execution went haywire. Lockett's body started writhing and twitching. His foot kicked, then he clenched his jaw as his body buckled. He started rolling his head from side to side, mumbling the words “I'm not,” “something's wrong,” and “man...” At one point, he opened his eyes. He began trying to lift his body off the gurney, as if to sit up. That's when officials closed the blinds to the viewing room.


37. Eckholm, Execution Case Roils Oklahoma Courts, supra note 34; Sanburn, Oklahoma's 'Constitutional Crisis,' supra note 32.

38. Eckholm, Execution Case Roils Oklahoma Courts, supra note 34; Sanburn, Oklahoma's 'Constitutional Crisis,' supra note 32.


40. Levi et al., supra note 31. For the story of why states are using new, untested lethal injection protocols, see generally Gibson & Lain, supra note 13.


42. Sanburn, 25 Secret Minutes, supra note 41.

43. Berman, supra note 30.

44. Id.; Levi et al., supra note 31.

45. See Sanburn, 25 Secret Minutes, supra note 41.

46. See id.; Levi et al., supra note 31.

47. Berman, supra note 30; Sanburn, 25 Secret Minutes, supra note 41.
Behind the scenes, a member of the execution team checked Lockett’s IV and discovered that the line had blown. Lockett’s vein had collapsed, and according to Oklahoma’s Department of Corrections, “[T]he drugs had either absorbed into tissue, leaked out or both.” The team halted the execution process and asked witnesses to leave. Forty-three minutes after the execution had begun, Lockett was dead. Officials initially stated that he died of a heart attack, but an autopsy later stated that lethal injection was responsible for his death.

The press had a field day, often noting the earlier botched executions of McGuire and Wilson in its coverage. As the incident began to draw worldwide attention, the White House press secretary issued 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.”

Oklahoma’s governor held a press conference as well. She began with a lengthy recitation of Lockett’s crimes, followed by a statement of her support for the death penalty as an appropriate response. She then recognized the state’s need to be certain that its execution protocols worked, announcing that she had tapped her public safety commissioner to conduct an “independent review” of the incident and that she would stay further executions until the reviewer is a member of the execution team.

After Lockett’s execution went awry, the press took note of Oklahoma’s botched injection chamber that Oklahoma had used for Lockett’s execution.

Four minutes after the execution began, Wood’s lips moved, long breaths “sounding...
The execution team checked the IV, but it was blown. Lockett's IV had been incorrectly placed into tissue, leaked during the lethal injection process and asked that he die of a heart attack if the execution had not been completed that he died of a heart attack if the lethal injection had not been completed.

As the incident unfolded, the House press secretary said in her role as an appropriate but independent representative of the public, she would recognize the need for further executions.

Four minutes into the execution, a member of the execution team announced that Wood was sedated. Shortly thereafter, Wood's lips moved and he started gasping for air, taking deep, long breaths "like he was drowning." He gulped like a fish on
land,” one reporter stated, adding, “The movement was like a piston: The mouth opened, the chest rose, the stomach convulsed.”

An hour into the execution, Wood’s attorneys filed an emergency petition to stop it. A representative from the Arizona Attorney General’s office told the federal district court where it was filed that there was no point, as Wood had already been given a second dose of lethal injection drugs and was “effectively brain-dead.” Wood died before the court could issue a ruling, an hour and fifty-seven minutes after his execution began. Records revealed that the execution team had given Wood fifteen doses of lethal injection drugs.

The public outcry that followed was deafening. Even Arizona Senator John McCain described Wood’s execution as a “bollock- upped situation” that amounted to “torture,” although he later softened that description, saying, “Rather than say it’s torture, I say that it’s not humane.”

But Arizona Governor Janet Napolitano, who had initially taken the blame, denying that Wood “tortured” anyone and calling medical errors “inexplicable,” softened that description even further, saying, “I agree that it was not the type of execution that ought to have been conducted. We are looking into how it happened.”

The governor added that she expected the Arizona Department of Corrections to conduct a “thorough, independent, comprehensive review” of the execution.

And with that, the Arizona executions came to an end. The rest of the state’s execution list was never scheduled. The rest of the state’s execution list is now frozen.
sent was like a piston-nach convulsed.\textsuperscript{66}

filed an emergency
Arizona Attorney
where it was filed
been given a second
reliant brain-dead.\textsuperscript{69}

an hour and fifty-
revel revealed that
\textsuperscript{65}

But Arizona Department of Corrections
officials had a different
take, denying that Wood's execution was botched in the first place
and calling media reports to the contrary "premature and erroneous."\textsuperscript{75}
According to officials, the execution was not botched because Wood was "comatose and never in pain."\textsuperscript{76}
Arizona's governor agreed, telling the press, "One thing is certain, however, inmate Wood died in a lawful manner and by eyewitness and
medical accounts he did not suffer. This is in stark comparison to
the gruesome, vicious suffering that he inflicted on his two victims—and the lifetime of suffering he has caused their family."\textsuperscript{77}
The governor announced that she had nevertheless directed the
Department of Corrections to review its execution process, which
it did.\textsuperscript{78} The ensuing report concluded that Wood's execution was
conducted in accordance with proper procedures and that his
gasps were "normal bodily responses to dying."\textsuperscript{79} Nothing went
wrong, the report stated, but Arizona would likely alter its lethal
injection protocol in future executions.\textsuperscript{80}

And with that, 2014's spate of botched executions came to an
end. The rest of the year was relatively quiet, with just nine
executions in the last five months of 2014.\textsuperscript{81} That put 2014's year-end

\textsuperscript{67} See Kiefer, \textit{Report Describes Arizona Execution}, supra note 62.
director says Joseph Rudolph Wood's execution wasn't botched. But he's committed to 'comprehensive review'? Riiiiight.... Excuse us if we have no confidence it will be anything more than a whitewash.").
\textsuperscript{70} See id.
total number of executions at thirty-five, the lowest annual tally in twenty years.82

II. THREE OBSERVATIONS ABOUT THE POLITICS OF BOTCHED EXECUTIONS

The year 2014 is notable not only for its botched executions, but also for the politics that accompanied them. Going into 2014, the politics of botched executions were quiet, virtually nonexistent. Michael Lee Wilson's botched execution drew no public attention, and demanded no public relations response. That started to change with Dennis McGuire's execution a week later, and by Clayton Lockett's botched execution in April, the politics that permeate the death penalty more generally had found their way to botched executions too. Looking back at 2014, what might we say about the politics of botched executions, aside from the fact that they now exist?

At least three observations come to mind. The first is about states' fealty to the death penalty. What was striking about the state responses to 2014's botched executions was how strident officials were in denying there was a problem, how resolute they were in protecting the process from meaningful inquiry, how committed they were to defending the execution at all costs. Ohio stating it was confident that Dennis McGuire suffered no pain, Arizona claiming that its execution of Joseph Wood was not botched—as if just stating a proposition could make it so. Oklahoma literally closing the blinds so no one could see what was happening, then figuratively closing them with an “independent review” by a non-independent arm of the state.

The epitome of this phenomenon is the press conference where Arizona denied that Joseph Wood's execution had been botched. A Department of Corrections official gave a statement to the press, then refused to take questions and turned to walk away from the mic.83 But as he was leaving, a member of the press asked him, "How is a twc [sic] gered in the ai [sic] A similar statement to the execution and the execution or the announcement.85 She have independent in no compunction to answer?

This phenomenon that when someone is to take responsibility different from minu minimize, deny the the public related no connect?

The answer is that when someone claims "religion is the state, the death penalty is supporting that botched execution was not only because the answers are need, to believe in the death penalty as a necessary case no state responsi pistics of botched executions.

“How is a two-hour execution not botched?” The question lingered in the air, unanswered.

A similar scene played out when Oklahoma’s governor read her statement to the press in the wake of Clayton Lockett’s botched execution and then refused to take questions, either about the execution or the so-called “independent” review she had just announced. She came under heavy fire for that non-independent investigation, but resolutely pushed forward, feeling no compunction to answer critics’ claims. Did she even have an answer?

This phenomenon is perplexing. Public Relations 101 teaches that when something goes wrong, the politically correct response is to take responsibility, and take action to fix it. That feels very different from what we are seeing here—state responses that minimize, deny, and paper over the problem, with little regard for the public relations implications along the way. Why the disconnect?

The answer may be what my colleague Jim Gibson calls the “religion of the death penalty”—a blind faith in the sanctity of the death penalty and its processes despite the absence of facts supporting that belief on the ground. The accused didn’t suffer, the execution wasn’t botched. State officials won’t take questions not only because they don’t have answers, but also because no answers are needed on matters of unquestioned faith. Either you believe in the death penalty, in which case you see botched executions as a necessary cost of doing business—or you don’t, in which case no state response short of abolition will soothe you. The politics of botched executions are not about public relations; they are

84. Id.
about states' commitment to the death penalty. In the face of weakness, they show strength.

A second observation is that 2014's high-profile botched executions and the political responses accompanying them have, in turn, given rise to backlash politics of their own. States' responses to botched executions have given critics even more to criticize, and a new narrative to sell—one that turns from the wrongs of the offender to the wrongs of the state, from the need for retribution to the need for procedural protections. States shield their protocols from meaningful scrutiny,\(^87\) use untested drugs from undisclosed providers,\(^88\) rush to execute while litigation is still underway,\(^89\)—even threaten to impeach judges who step into the fray.\(^90\) Against the backdrop of botched executions, states' fealty to the death penalty and its processes makes a compelling case for the need for restraint.

Indeed, the backlash politics of botched executions have moved beyond botched executions, drawing renewed attention to the death penalty's other perceived failings. President Barack Obama's announcement that the Justice Department would be conducting a full-scale review of the death penalty in the wake of Clayton Lockett's botched execution is a prime example.\(^91\)

87. Andrew Cohen, Oklahoma's Courts Are at War Over Lethal-Injection Secrecy, ATLANTIC (Apr. 21, 2014, 1:55 PM), http://www.theatlantic.com/national/archive/2014/04/Oklahoma/360940/ ("You cannot sustain an Eighth Amendment claim here unless you can establish that the drugs to be used will cause pain to the condemned ... and you cannot prove that they'll cause pain because you have no right to demand that state officials share information about the drugs with you.... The conflict today is about secrecy and transparency—not guilt or innocence or crime or punishment.").


90. Cohen, Oklahoma Just Neutered Its State Supreme Court, supra note 39 (discussing constitutional showdown that preceded botched Clayton Lockett execution and impeachment proceedings instituted against the five Oklahoma Supreme Court Justices who granted a stay in the case, and who, two days after, lifted it).


Those questions are becoming harder to ignore, and the backlash politics of botched executions are moving beyond botched executions, drawing renewed attention to the death penalty's other perceived failings. President Barack Obama's announcement that the Justice Department would be conducting a full-scale review of the death penalty in the wake of Clayton Lockett's botched execution is a prime example.\(^91\)

2015] TH

I've said in the past that the crime is so terrible that it's appropriate—retribution appropriate—that in this case, we have seen significant flaws in the death penalty. But I have always come to the conclusion that the death row who are on death row who have all these I think it's in the ultimate penalty is being—what it highlights something that you have to, as a society, think about... .

Using drugs not currently sanctioned by the state to execute is a matter of public interest. By making the public aware of things that we might expect and, in fact, nothing like what we are used to seeing from the realities of today.

In the wake of 2014's botched executions, critics have highlighted the need for restraint, and state officials have responded with new narratives that emphasize the need for procedural protections. President Barack Obama's announcement of a full-scale review of the death penalty is a prime example of how the backlash politics of botched executions are moving beyond botched executions, drawing renewed attention to the death penalty's other perceived failings.
In the face of the botched executions they have, in the States’ responses more to criticize, from the wrongs of the need for retribution states shield their sedated drugs from litigation is still who step into the positions, states’ fealty: a compelling case

Those questions were not new. What was new was the President asking them.

A third and final observation about the politics of botched executions regards the changing cultural construct of lethal injection in the United States. Before 2014’s spate of botched executions, lethal injection was widely viewed as painless, peaceful—like putting down a beloved pet. Not so today. 2014’s botched executions exposed the violence inherent in taking human life, and the façade of lethal injection in masking it. As Chief Judge Alex Kozinski of the Ninth Circuit Court of Appeals put the point:

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, savage events, and nothing the state tries to do can mask that reality. Nor should it. If we are willing to carry out executions, we should not shield ourselves from the reality that we are shedding human blood.

In the wake of 2014’s botched executions, numerous op-eds, commentaries, and news articles agreed. Botched executions were a
vivid reminder of the brutality of the death penalty, but the brutality of state-imposed death had always been there—botched execution or not.96

As Austin Sarat writes in Gruesome Spectacles, it is not the fact of botched executions but rather their “cultural reception” that defines the impact they have in the larger sociopolitical discourse.97 Are botched executions merely misfortunes? Or do they challenge the legitimacy of the executing state?98 Interestingly, Sarat concludes that botched executions have not moved public sentiment, or even played a role in abolitionist politics99—and he was undoubtedly right when he was writing his book. Ironically, the year it was published, 2014, is the year that characterization became no longer true.

III. STATE RESPONSES TO BOTCHED EXECUTIONS AND THE CONSTITUTIONALITY OF LETHAL INJECTION

In the final part of this essay, I ask how state responses to botched executions (or the lack thereof) might impact the constitutionality of lethal injection itself. At the time of this writing,
the Supreme Court’s only pronouncement on the constitutionality of lethal injection is its 2008 decision in Baze v. Rees, which upheld Kentucky’s three-drug protocol.\textsuperscript{100} Although Baze was a deeply splintered decision,\textsuperscript{101} its takeaway was relatively clear: execution by lethal injection violates the Eighth Amendment’s Cruel and Unusual Punishments Clause only when the protocol used poses “substantial risk of serious harm” in light of alternatives that are “feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain.”\textsuperscript{102} How might state responses to botched executions play into this analysis?

Perhaps they don’t. One might plausibly conclude that how a state handles the backside of a botched execution is its own business, just like any other public relations mess.

But one might also plausibly conclude that what a state does (or does not do) in response to a botched execution is constitutionally significant under Baze. Botched executions put the state on notice that there was a problem—perhaps with the drug protocol, or the dosage administered, or the manufacturer of the drugs, or the training of the execution team, or whatever else might have gone wrong. The question, then, is this: Do states have a responsibility under Baze to figure out what the problem is and fix it before conducting further executions?

Oklahoma’s continued use of midazolam in its lethal injection protocol—and the Supreme Court’s recent grant of certiorari in Glossip v. Gross\textsuperscript{103}—takes the question out of the realm of the purely hypothetical. After Clayton Lockett’s botched execution, Oklahoma spent over $100,000 to renovate its execution chamber.\textsuperscript{104} New and improved equipment, more room in the execution chamber, less space for media witnesses.\textsuperscript{105} Oklahoma also altered its lethal injection protocol, but not to replace midazolam, the
drug used in three of 2014’s four botched lethal injections— that of Lockett, McGuire, and Wood. Instead, Oklahoma upped the amount of midazolam injected from one hundred milligrams to five hundred. Oklahoma claims that Lockett’s botched execution was caused by the failure of his IV line, so concerns about the drug are inapposite.

But the use of midazolam in executions is extremely controversial because it is a sedative, not an anesthetic. It is also subject to a so-called “ceiling effect” upon saturation in the body. As one anesthesiologist explained, “[I]t doesn’t matter if you give the person 500 additional doses or five million doses. It won’t have any more effect.” The problem is the drug, not the dosage. And that’s especially problematic for Oklahoma executions because the state’s three-drug protocol follows midazolam with a paralytic, so unless the injection of the paralytic goes awry (as it did in Lockett’s case), the condemned will be paralyzed and unable to express pain. Indeed, that may be the very point.

In January 2015, four Oklahoma death row inmates appealed to the U.S. Supreme Court for a stay of execution while they liti­gated Oklahoma’s protocol. The Supreme Court voted five-four to deny the stays, with Justice Sotomayor writing for the four Justices in dissent that she was “deeply troubled by this evidence suggesting that midazolam cannot be constitutionally used as the first drug in a three-drug protocol.”


Of course, however, the politics of botched executions remain one’s guess. But botched executions are precisely the reason that death penalty states have a moratorium on the drug because it’s not just the inmate’s responses as well...
first drug in a three-drug lethal injection protocol." The dissenting opinion discussed all three of 2014’s botched executions using midazolam. For at least four members of the Court, it would appear that a state’s response to botched executions is highly relevant under Baze.

A week later the Supreme Court granted certiorari to consider Oklahoma’s use of midazolam in its lethal injection protocol, but by then the case had three death row inmates rather than four. The litigation that began as Warner became Glossip v. Gross. Now the country watches, and waits. Until the Court decides Glossip, the Attorney General of the United States has called for a moratorium on executions, and at least one death dealing state, Florida, has heeded that call based on “a reasonable and realistic chance of [its lethal injection protocol] being declared to be cruel and unusual punishment by the United States Supreme Court.”

Of course, how the intersection of constitutional doctrine and the politics of botched executions will play out in Glossip is anyone’s guess. But this much is clear: The state responses to botched executions in 2014 will almost certainly mean more botched executions in the future. And that could be a problem for death penalty states when the Supreme Court decides Glossip—because it’s not just executions that states have botched, but their responses as well.