Death Penalty Administration: A Response to Alexandra Klein's *Nondelegating Death*

ERIC BERGER*

I. INTRODUCTION

Professor Alexandra Klein's excellent new article, *Nondelegating Death*, makes an important and original contribution. State method-of-execution statutes, she points out, afford very broad discretion to administrative agencies to craft and implement execution protocols.[1] These statutes, she argues, raise questions under states' nondelegation and separation of powers doctrines. Whereas the U.S. Supreme Court has not vindicated a federal nondelegation doctrine challenge since the mid-1930s,[2] state courts apply the doctrine on a regular basis. Death row inmates, therefore, should consider the nondelegation doctrine when they challenge state execution protocols, and we all should keep the doctrine in mind when evaluating state execution practices.

Klein's article is insightful. State administration of the death penalty is often haphazard and appalling. The litany of errors is chilling. State departments of corrections (DOCs) employ unqualified executioners, use the wrong drug during executions, and select lethal injection protocols that greatly heighten the risk of excruciating pain. Unsurprisingly, states have visibly botched several executions in recent years. It is quite possible, perhaps even likely, that they have inflicted excruciating pain in many more executions; because many state protocols have included a paralytic, it is impossible to know how many inmates have died an excruciating death.

State agencies make these errors in part because state legislatures' broad delegations permit them to do so. Klein contends that to understand and reduce that risk, we must look to top-level legislative decisions that entrust so much authority to inexpert DOC officials. State legislators pass the buck to unqualified, inexpert state correctional officials. Judges confronted with these cases, Klein concludes, should "offer[] a stronger nondelegation analysis for method of execution statutes."

---

* Earl Dunlap Distinguished Professor of Law, University of Nebraska College of Law. I thank Alex Klein for very helpful comments and for the invitation to write this Response to her great Article. Thanks also to Meagan Diamond, Jared Connors, and the other editors of the Ohio State Law Journal for excellent editorial assistance.

1 *See* Alexandra L. Klein, *Nondelegating Death*, 81 OHIO ST. L.J. 923 (2020).

2 *See generally* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

Professor Klein builds her case very well, and she identifies many deep flaws underlying state methods of execution. However, whereas Professor Klein views the state administration of execution protocols primarily through the lens of the nondelegation doctrine, I tend to think that we should understand those same problems with reference to a wider range of administrative law doctrines and norms. While the nondelegation norms Klein explores are a factor, they are, by my lights, just one small piece of a bigger puzzle.

This Response to Professor Klein's generative article considers the various administrative law norms and doctrines implicated by the problems she cogently explores. My Response concurs with Klein that state DOCs' implementation of the death penalty is deeply problematic. It also agrees that state legislatures have often delegated a great deal of authority over execution protocols and that some states' nondelegation doctrines provide a plausible litigation hook for mounting challenges to those protocols. However, the nondelegation issue is just one of several administrative problems that often bedevil state lethal injection procedures. This Response focuses on the other administrative problems. To that end, my Response should be understood not as criticism but rather as a friendly amendment.

Indeed, Professor Klein and I agree on far more than we disagree. In my view, she focuses on the crucial issue: the (often neglected) administrative failings underlying state lethal injection procedures. I would contend, in fact, that one cannot understand lethal injection problems without an administrative law lens. Reasonable people can disagree about the moral propriety of capital punishment, but no one should be comfortable with inexpert, untrained personnel designing and implementing needlessly excruciating execution protocols which rely on dangerous drugs and quasi-medical techniques they do not understand. This insight is central to understanding lethal injection today, and a majority of Justices on the U.S. Supreme Court have failed to grapple with it.[3]

Part I of this Response agrees with Klein that many states' administration of the death penalty is problematic but raises some concerns about relying too heavily on the nondelegation doctrine. Part II contends that the problems with lethal injection implicate a wider range of administrative law concerns. Attention to these issues helps us better understand the deep systemic failures with state execution methods. The Response concludes by observing that administrative law issues shed light on not just problematic execution methods but on broader problems with our prison and criminal justice systems.

---

[3] *See generally* Bucklew v. Precythe, 139 S. Ct. 1112 (2019); Glossip v. Gross, 135 S. Ct. 2726 (2015); Baze v. Rees, 553 U.S. 35 (2008).

II. THE NONDELEGATION DOCTRINE AND EXECUTION METHODS

The federal nondelegation doctrine has been extremely deferential for almost a century. Under current doctrine, if Congress chooses to delegate its legislative authority to an administrative agency, it must provide that agency with an "intelligible principle" to guide its action. In practice, since the mid-1930s, the Supreme Court has upheld all delegations no matter how broad or vague the "intelligible principle." As Professor Chemerinsky explains, this deference "reflects a judicial judgment that broad delegations are necessary in the complex modern world and that the judiciary is ill-equipped to draw meaningful lines."[4]

Professor Klein demonstrates, however, that state nondelegation doctrines are different. Though conceptually similar, these state doctrines tend to be more robust. State constitutions, after all, differ from the federal one and from each other, and some states' separations-of-powers principles require that delegations to state agencies provide more detailed instructions than we often find at the federal level.

Of course, it is possible that federal nondelegation doctrine will become less deferential in the near future. In *Gundy v. United States*, the Court's participating conservative Justices all signaled a willingness to revisit the doctrine. Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas, wrote a dissent criticizing the "intelligible principles misadventure." Justice Alito concurred in the judgment but also signaled his interest in reevaluating the nondelegation doctrine. Justice Kavanaugh did not participate in *Gundy*, but he too has indicated that he would be open to reevaluating the nondelegation doctrine, especially in cases involving Congress's authority to delegate "major policy questions" to administrative agencies.

It is not hard to count to five and conclude that change could be on the way.[5] Congress's unfettered authority to delegate problems to administrative agencies may soon be a thing of the past. Depending on how the Court framed a future opinion, such a decision potentially could call into question the constitutionality of dozens of administrative agencies and thousands of agency actions. Of course, the Court instead could send a more modest shot across Congress's bow, signaling that Congress ought to delegate with moderately greater specificity while taking care to preserve existing statutory and regulatory law, as well as the structure of contemporary American government.

Chief Justice Roberts, in particular, often gravitates towards judicial minimalism and may be reluctant to join too disruptive an opinion. The Chief

---

4 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 354 (2019).

5 Justice Ginsburg died as this Response was going to press. Obviously, her replacement's views will also factor into this doctrine's future.

Justice, and possibly other conservatives, may be more inclined to issue a decision along the lines of something like *Lopez v. United States*. That decision was notable in that it marked the first time in nearly sixty years that the Supreme Court held that a federal statute had exceeded Congress's authority under the Commerce Clause. At the time, it seemed like a big deal. In retrospect, though, *Lopez* was a rather limited decision. Yes, it reined in Congress's authority a tad, but it seems to offer Congress drafting instructions more than a strict prohibition on the kinds of legislation it can pass.[6] To be sure, subsequent opinions chipped away a little more at Congress's Commerce Clause power,[7] but, all in all, the doctrinal revisions have been modest, not momentous—at least so far. A change to the federal nondelegation doctrine might operate similarly.

That said, it is certainly possible that today's conservative Court could change the nondelegation doctrine (and, for that matter, the Commerce Clause, too) more dramatically, either immediately or over time. If it did, such a move *could* call into question large sectors of the federal government and result in legal and structural chaos. After all, as one of the leading casebooks on administrative law puts it: "Modern government is administrative government. Much of modern life is a product, in large part, of the activities of government agencies."[8] Were the Court to hold or imply that some or many administrative agencies were unconstitutional because Congress had not delegated to them with sufficient specificity, huge swaths of American law might be challenged as null and void, resulting in widespread legal, political, and economic chaos. This extreme outcome might be unlikely, but it is not altogether implausible.

I do not favor these doctrinal changes, but that does not mean I believe that the administrative state is problem free. Rather, I suggest that the nondelegation doctrine, which could imply the illegitimacy of administrative action writ large, is the wrong mechanism to address agency abuses. For one, Congress needs to delegate and do so broadly because it has no other choice. It lacks the time, expertise, and resources to manage closely the thousands of problems and policy issues facing the nation.[9] The Court itself has explained that "Congress simply

---

6 *Lopez*, for instance, signaled that when Congress legislates pursuant to its commerce authority, it should include a jurisdictional element and Congressional findings demonstrating how the regulated conduct substantially affected interstate commerce.

7 *See, e.g.*, NFIB v. Sebelius, 567 U.S. 519, 547–61 (2012); United States v. Morrison, 529 U.S. 598, 607–19 (2000).

8 STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 1 (8th ed. 2017).

9 Of course, the legal arguments for and against a more robust nondelegation doctrine do not turn solely on the practicalities. For an excellent article contending that the original constitutional understanding permitted broad Congressional delegations, see generally Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. – (forthcoming 2021), https://dx.doi.org/10.2139/ssrn.3512154.

cannot do its job absent an ability to delegate power under broad general directives." To this Professor Strauss adds persuasively that "given the limitations of language, of human foresight, and of the time available for the task, no single institution could be expected to provide in detail for all the matters warranting 'legislative' attention in a complex society."[10] Quite simply, for the country to function, Congress needs to delegate and needs broad authority to do so.[11] The same is likely true at the state level, albeit probably to a somewhat lesser extent.

Revival of the nondelegation doctrine is problematic, then, because it could limit legislatures' authority to delegate complicated policy problems to administrative agencies. While the doctrine's proponents seem to think that a change along these lines might force Congress to do its job, it seems far more likely that the nation will handle many crucial problems even more inadequately than it already does. Governing such a large, complex society intelligently is already extremely difficult. Without energetic administrative agencies, it would likely be impossible.

To the extent some administrative action *is* incompetent, arbitrary, abusive, inefficient, or otherwise troublesome, other administrative norms and doctrines are a better way to address problems. Unlike the nondelegation doctrine, most other administrative law mechanisms do not call into question the very legitimacy of the administrative state. Rather, they focus instead on particular agency actions, requiring agencies to follow proper administrative norms and procedures. They are granular, not global.

Professor Klein is certainly correct that state nondelegation doctrines are distinct from the federal doctrine. The reliance on a state nondelegation doctrine to challenge state method of execution practices, then, would not necessarily portend a change to the federal doctrine. But though they are separate bodies of law, federal and state law can inform each other, and trends in one system can influence the other.[12] More importantly, while state legislatures' tasks are less

---

10 PETER L. STRAUSS, ADMINISTRATIVE JUSTICE IN THE UNITED STATES 30 (2d ed. 2002).

11 Probably needless to say, judges and commentators disagree vehemently on the wisdom and constitutionality of our administrative state. Gary Lawson's recent thought-provoking article in support of a reinvigorated nondelegation doctrine is one example of thoughtful scholarship on the other side of these debates.

12 To offer one example, when the U.S. Supreme Court recognized a federal constitutional right to same-sex marriage in *Obergefell v. Hodges*, it included an appendix listing state and federal judicial decisions addressing the issue under either federal or state constitutional law. The state court decisions construing state constitutional law were obviously not binding on the U.S. Supreme Court in its interpretation of the U.S. Constitution, but the Court nevertheless found them relevant as "reflect[ing] the more general, societal discussion of same-sex marriage and its meaning that has occurred over the past decades." While the nondelegation doctrine raises different kinds of concerns, the

overwhelming than Congress's, they too cannot handle everything on their plate without delegating some authority. Too robust a state nondelegation doctrine could unnecessarily hamper effective state governance. After all, "[m]odern government is administrative government."[13]

Relatedly, as Klein acknowledges herself, it may not be realistic to require much greater legislative specificity. The line between policymaking, which is a legislative function, and policy implementation, which is administrative, is, at best, blurry. Too robust a nondelegation doctrine would force courts to draw arbitrary lines between policymaking and policy implementation. Such a task would be nearly impossible for judges to handle well, and it would also yield significant uncertainty at the policy level.

At a more pragmatic level, death penalty states would undoubtedly complain, with some justification, that more specific method-of-execution legislation would deny them the flexibility they need to change protocols without new legislation. Over the past decade, drug shortage issues have forced some states to switch protocols. While death penalty opponents relish any obstacle that makes it harder for states to resume executions, courts might not want to forbid delegations that would make it hard for states to carry out death sentences without new legislation every time the existing protocol hit a snag. After all, if state legislatures have already approved capital punishment, it seems needlessly burdensome to require them also to approve method-of-execution revisions. Courts might not find these practicability concerns decisive, but I suspect many would find them persuasive.

There are also questions about the degree of specificity we want to require of legislatures, both in the method-of-execution context and more generally. We should certainly require state legislatures to select whether to have capital punishment. It is also fair to ask them to identify the general method (*e.g.*, lethal injection, firing squad, etc.). It is less clear that state legislatures possess the expertise, time, and resources to select protocol details intelligently. Do we really want state legislatures deciding the drug dosages, the layout of the execution chamber, or the contingency plans should problems arise? It is unlikely that state legislatures would deal with these problems any more competently than state correctional departments have. If anything, given their other commitments and political pressures, it seems quite possible legislatures would do an even worse job.

Professor Klein deserves great credit for her thorough and intelligent study casting light on delegation concerns. States often *do* delegate broad authority to agencies to carry out executions, and they offer those agencies minimal

---

Supreme Court could plausibly find relevant how state systems and the public more generally perceive the administrative state.

13 BREYER ET AL., *supra* note 8, at 1.

guidance. However, as I shall argue in the next section, state practices also implicate other administrative law issues. To that extent, I tend to view the broad delegation of authority as part of a wider array of administrative shortcomings.

III. ADMINISTRATIVE LAW PROBLEMS WITH STATE EXECUTION METHODS

Because Professor Klein provides a thorough examination of states' broad delegation of execution protocols, I will focus instead on other administrative problems that plague state execution procedures. Litigants might use these shortcomings to challenge state protocols on state administrative law grounds or to argue that states do not deserve deference in cases involving the Eighth Amendment or other constitutional challenges. Collectively, these factors make clear that states administer their execution protocols with an alarming lack of professionalism.

The factors fall into three general categories: political accountability, expertise, and procedural regularity. Political accountability factors speak to agencies' primary weakness, namely their lack of democratic legitimacy. While agencies' democratic legitimacy will generally compare unfavorably to elected legislatures, the degree of accountability they enjoy can vary depending on a variety of factors (including the terms of the statutory delegation). Expertise, by contrast, speaks to agencies' primary strength: their detailed understanding of specialized problems. Finally, procedural regularity can help ensure that agencies do not enjoy standardless discretion, unsettle reliance interests, and unduly tread on individual rights.

Admittedly, these factors are complicated. An important advantage of Professor Klein's approach, then, is that it will usually require fewer judicial resources, as courts under her approach would apply one administrative law doctrine rather than several. Nevertheless, the following discussion demonstrates why some of the administrative issues bedeviling state execution protocols are analytically distinct from each other and therefore difficult to address entirely under a single doctrinal rubric.

A. *Political Accountability*

We start with factors implicating political accountability. The nondelegation doctrine, of course, is one of these. One of that doctrine's core concerns is that legislatures will relinquish their constitutional authority to make the law. When legislatures abdicate this authority, it raises problems implicating both democracy and separation of powers. Excessive delegation raises democracy concerns, because administrative officials are usually unelected and therefore far less politically accountable than elected legislators. It raises separation-of-powers concerns to the extent that it sometimes asks executive

officials to assume the legislative task of creating the law, a task state constitutions usually entrust to legislatures alone.

As Klein explains, the degree of legislative specificity is an important factor in determining whether agency action is politically accountable. If the legislature does not give sufficient instructions to the implementing agency, then the connection between the agency and the electorate, tenuous to begin with, might be altogether lacking. An agency's political accountability, then, hinges in part on the details of the legislative instructions.

The nondelegation doctrine, however, is not the only relevant facet of an agency's political accountability. Oversight and transparency matter, too. Once a legislature delegates authority to an agency, it can maintain some degree of political accountability by proper oversight. Ideally, this oversight will involve both external review of the agency (so that the elected legislature and governor will keep tabs on how the agency does its job) *and* intra-agency review (so that the agency leaders, who are more directly accountable to elected officials, will monitor lower level employees to make sure they carry out policies carefully and correctly).

Agency transparency is also an important factor in determining agency accountability. If agencies operate in secret, the people and their elected representatives cannot know what government is doing. Inadequate transparency, thus, undermines political accountability.

In the lethal injection context, the various accountability factors each militate against deference to state correctional departments. As Klein demonstrates, state legislatures often delegate at very broad level of generality without any real detail to guide agencies. Nor do state governors or legislatures closely monitor how correctional departments design and carry out their execution protocols. To the contrary, most are happy to wash their hands of the unpleasant business. And many state legislatures compound these problems by passing broad secrecy statutes that insulate state execution protocols from any transparency that might shed light on state malfeasance or incompetence.[14]

To be sure, states are not identical, and some may rate higher than others in particular metrics. By and large, however, state execution practices are marked by a lack of political accountability. In other words, the usual concerns about the administrative state are, if anything, even stronger in this setting.

For my purposes here, it is important to point out that oversight and transparency are related to but analytically distinct from delegation. Agencies

---

[14] *See* DEATH PENALTY INFO. CTR., BEHIND THE CURTAIN: SECRECY AND THE DEATH PENALTY IN THE UNITED STATES 32–45 (2018), https://files.deathpenaltyinfo.org/documents/pdf/SecrecyReport-2.f1560295685.pdf; Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 B.C. L. REV. 1367, 1388–92 (2014).

might have concrete marching orders from legislatures but still act in secrecy and with minimal oversight. The other side of the coin can also be true: agencies might lack clear guidance from legislatures but still report their work transparently to elected officials, who in turn monitor agency actions regularly.

Of course, as Klein suggests, vague legislative instructions may often be interconnected with these other accountability shortcomings. A legislature that delegates open-ended authority may be more prone to neglect its oversight responsibilities. But this is not necessarily the case. To this extent, the nondelegation doctrine gets at one, but only one, important facet of an agency's political accountability.

B. *Expertise*

If agencies' lack of political accountability is one of their frequent shortcomings, their expertise should usually work in their favor.[15] After all, agencies usually enjoy a specialized epistemic authority over technical and complicated policy areas that the legislature lacks. That usual expertise, however, frequently has been absent in the lethal injection sphere.

State officials often lack a basic understanding of the execution protocols they design and implement. They sometimes do not understand the risks of the drugs they select. They also often delegate lethal injection protocols down the chain of command to other employees who lack the medical training to understand how to inject those drugs without causing excruciating pain. In at least one instance, state officials actually injected the wrong drug during an execution.

Professor Klein reminds us that courts in this area show "unwarranted reliance on agency expertise." I agree entirely. However, whereas Klein situates the discussion of expertise in the context of nondelegation doctrine analysis, I tend to think the lack of expertise is mostly independent of the nondelegation doctrine.[16] Even the clearest legislative instructions will do little to cure problems resulting from a lack of agency expertise. Indeed, such epistemic shortcomings might compromise agencies' abilities to comply with those very instructions.

Consequently, epistemic shortcomings should affect judicial analysis in many kinds of cases challenging state execution protocols, not just cases involving the nondelegaton doctrine. A court, for instance, should offer less deference to a state execution protocol facing an Eighth Amendment challenge if the record demonstrates that state doesn't know what it's doing. Similarly, even where the delegating statute contains clear instructions, a court should not

---

15 *See* JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 19 (1985).

16 In fairness, Professor Klein herself notes that "[a]gency competence is a distinct, but interrelated issue from nondelegation." Klein, *supra* note 1, at 969.

defer to an agency that fails to examine the relevant facts thoroughly.

Indeed, problems of epistemic authority and nondelegation fundamentally address different concerns. Inadequate delegation exacerbates an agency's primary weakness: its lack of political accountability. To the extent that legislatures have no choice but to leave details to agencies, administrative agencies necessarily will have some freedom to maneuver with minimal political accountability. The question raised by the nondelegation doctrine is, in essence, how little legislative input is too little.

By contrast, if an agency acts without expertise or thoroughness, it undercuts its primary strength. An agency operating without expertise or thorough consideration does not necessarily cut itself off from democratic actors, but it does undermine its own raison d'être. Why should we allow an agency to act unless it is doing something that the legislature could not do itself?

Epistemic shortcomings, then, are distinct from inadequate legislative delegations. A comprehensive statutory delegation may easily satisfy nondelegation doctrine concerns, but if the agency at issue lacks expertise and care, we can expect both legal and policy problems. While courts considering state execution practices should keep all these issues in mind, they should also remember that these matters are analytically and doctrinally distinct.

C. *Procedural Regularity*

Finally, courts considering these issues should also examine whether the agencies responsible for administering the death penalty are acting with procedural regularity. Procedural rules serve yet another function in administrative government. Relatively formalized procedures, like notice-and-comment rulemaking, helps check agencies' administrative discretion, thereby helping to protect private reliance interests and individual liberties. Agencies that follow regular procedures are less likely to engage in arbitrary abuses of power than those that abandon standard procedures and act on the fly without careful deliberation and reasoned explanation.

Once again, the nondelegation doctrine is related to but distinct from these issues. A state might delegate clear and precise instructions to an agency, satisfying nondelegation doctrine requirements under even the strictest versions of that doctrine. The agency, however, still owes careful, predictable procedures to the public and the individuals whose lives it affects. For example, when the legislature delegates rulemaking authority to an agency, even clear legislative instructions cannot absolve that agency from following the required processes for promulgating new rules. Indeed, these rulemaking requirements have real bite. Federal courts do not strike down broad delegations to agencies under current doctrine, but they *do* often find agency action lacking for failure to follow proper administrative procedures. These holdings constrain administrative discretion, but not through the nondelegation doctrine.

Admittedly, procedural rules operate differently in the death penalty context than in most administrative settings. Several states have exempted their method-of-execution protocols from ordinary administrative law and disclosure requirements. To that extent, many states have made it much harder to challenge state execution protocols on administrative law grounds, such as the failure to employ notice-and-comment rulemaking. However, in states without such provisions, some courts have struck down execution protocols precisely because the state failed to follow its own administrative procedures.[17]

Even where a state has exempted its protocol from ordinary administrative law, however, it is worth noting that these administrative law factors can still have traction in constitutional cases. Where states have failed to follow basic administrative law norms in designing execution protocols, courts hearing Eighth Amendment challenges ought not defer to the states.[18] After all, states themselves have demonstrated that they often lack the expertise to design and carry out executions safely. By skipping notice-and-comment rulemaking, states also deprive themselves the opportunity to receive input from outsiders with expertise. The result is likely a less professional, more dangerous execution protocol.

Of course, the factors here are connected in some ways to nondelegation concerns. For example, *Chenery* requires that administrative orders be upheld on the grounds upon which the agency relied in exercising its powers in the first place. As Kevin Stack has explained, this requirement forces agencies to justify their actions in terms of the initial statutory delegation, thereby reinforcing the agency's democratic legitimacy. To this extent, concerns about procedural regularity intersect with the nondelegation doctrine. Once again, though, they are separate doctrines, drawing on different precedents and serving distinct, albeit interrelated, purposes in our administrative law.

III. CONCLUSION: THE FAILURES OF THE PRISON SYSTEM

The problems considered briefly here help us understand the deep problems with lethal injection today. Part of the problem, as Klein argues, is that state legislatures have delegated vast and standardless discretion to state agencies. There are other problems, though. Once legislatures delegate these matters, they wash their hands of them, unwilling to oversee the problems for which they are

---

[17] *See* Morales v. Cal. Dep't of Corr. & Rehab., 85 Cal. Rptr. 3d 724, 732–33 (Cal. Ct. App. 2008); Evans v. Maryland, 914 A.2d 25, 80–81 (Md. 2006); Smith v. Montana, No. 2008-303, slip op. at 11 (Mont. 1st Jud. Dist. Ct. Oct. 6, 2015).

[18] In other words, courts should not offer states the benefit of the doubt in this context. Deference in these cases, then, should work as a gloss that affects, but does not pre-determine, the substantive constitutional inquiry. *See* Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2074-77 (2011).

responsible. The agencies, for their part, often lack the expertise and care to make sound decisions, and they fail to follow regularized procedures. In short, the breadth of the delegation is part of a larger array of administrative failings.

It is worth noting that many of these problems apply not only to method of executions but to prison issues more generally. State departments of corrections are probably especially inexpert when it comes to lethal injection. After all, lethal injection requires a medicalized expertise that correctional departments manifestly lack. These departments, though, ostensibly can claim some genuine expertise over prison security, so one might think that their administrative pedigree would be sounder outside the lethal injection sphere. Perhaps it is, but sometimes only marginally. Prison officials sometimes make decisions with no transparency and little rhyme or reason, and the litany of prison abuses is vast and appalling.[19]

Of course, some prisons are better than others, but there are plenty of horrific examples of serious human rights abuses by prisons and prison officials. These abuses, such as prolonged solitary confinement, often inflict grave physical and psychological harm while serving little or no penological value.

Current laws like the Prison Litigation Reform Act make it difficult for inmates to successfully challenge prison conditions, but courts should recognize that those challenges implicate the administrative factors identified here. When prison officials act without oversight, accountability, expertise, and procedural regularity, they can violate their own institution's rules and subject prisoners to needless suffering in ways that serve neither safety nor rehabilitative purposes. The problem is not usually that state legislatures have delegated authority over incarceration to prisons. State legislatures probably should provide clearer guidance to correctional departments and more statutory protections to inmates, but they necessarily will have to leave the business of prison administration to prison administrators. It is impossible to legislate instructions for every scenario. Rather, the problem is that many states delegated that authority for decades and then neglected the issues, unwilling to confront the fact that their prisons are needlessly dangerous and cruel places that often fail to protect their own inmates' wellbeing or prepare them for life after incarceration.[20]

Professor Klein's excellent study of state nondelegation doctrine and execution practices calls important attention to the dangers of excessive, standardless delegation. In conjunction with some other relevant administrative

---

[19] For especially disturbing accounts of prison arbitrariness and human rights abuses involving long-term solitary confinement, see generally KERAMET REITER, 23/7: PELICAN BAY PRISON AND THE RISE OF LONG-TERM SOLITARY CONFINEMENT (2016) and ALBERT WOODFOX, SOLITARY: MY STORY OF HOPE AND TRANSFORMATION (2019).

[20] Professor Barkow makes a related point about separation of powers in the criminal context more generally.

inquiries, greater attention to those concerns can help shed much needed light both on the dangers of state execution protocols and also other failings of prisons and the criminal justice system more generally. Administrative details, seemingly petty and insignificant, can in fact be the building blocks for a more competent, fair government and a more just world.