

What You Don't Know Will Kill You: A First Amendment Challenge to Lethal Injection Secrecy

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The conventional cocktail of drugs used in lethal injection executions has been sodium thiopental, pancuronium bromide, and potassium chloride. However, in 2011, the sole manufacturer of sodium thiopental in the United States, Hospira, Inc., restricted the distribution of the drug to prevent it from being used in executions.¹ In response, states are now experimenting with drugs like pentobarbital, midazolam and hydromorphone in executions.² Furthermore, several states have obtained, or intend to obtain, death penalty drugs from compounding pharmacies, entities which have recently come under intense scrutiny for their lack of regulatory oversight and production of sub-standard drugs.³ The most alarming development, however, is the secrecy that has accompanied lethal injection executions in recent years.⁴ For example, some states, like Georgia, have passed statutes that make information about the source of the drugs and the professional qualifications of the lethal injection participants a confidential state secret.⁵ Understandably, much discussion about lethal injection drugs and the states' lethal injection protocols is focused on the Eighth Amendment

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1. Nathan Koppel, *Drug Halt Hinders Executions in U.S.*, WALL S. J. (Jan. 22, 2011), <http://online.wsj.com/articles/SB10001424052748704754304576095980790129692>.

2. See Deborah Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L.J. 1332, 1358–59, charts 3 & 4 (2014) [hereinafter Denno, *Lethal Injection Chaos*].

3. See *infra* note 14.

4. See *infra* notes 16–17.

5. See GA. CODE ANN. § 42-5-36(d) (2013); see also *infra* Part III.C.

and Due Process consequences for the condemned.⁶ This Note, however, analyzes a particular lethal injection secrecy statute under the First Amendment, and concludes that the public has a qualified right of access to information about lethal injection drugs under the First Amendment.⁷

I. INTRODUCTION

In the United States, execution methods have changed as the morals and conventions of society progress and mature.⁸ But until a 2008 Supreme Court decision upholding Kentucky's three-

6. See, e.g., Denno, *Lethal Injection Chaos*, *supra* note 2; Deborah Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49 (2007) [hereinafter Denno, *Lethal Injection Quandary*]. See also Deborah Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What it Says About Us*, 63 OHIO ST. L. J. 63 (2002); Deborah Denno, *Getting to Death: Are Executions Constitutional*, 82 IOWA L. REV. 319 (1997). However, this Note does not write on a completely blank slate. See Ellyde Roko, *Executioner Identities: Toward Recognizing a Right to Know Who Is Beneath the Hood*, 75 FORDHAM L. REV. 2791 (2007) [hereinafter Roko, *Executioner Identities*] (arguing that the First Amendment provides a right of access to information concerning execution identities).

7. At the time of publication, two press organizations have filed lawsuits against the state of Missouri challenging lethal injection secrecy in that state. See Ed Pilkington & Jon Swaine, *Guardian Challenges Lethal Injection Secrecy in Landmark Missouri Lawsuit*, THE GUARDIAN (May 15, 2014), <http://www.theguardian.com/law/2014/may/15/guardian-challenges-lethal-injection-secrecy-death-penalty-drugs>. See also Rachel Lippman, *Suits Challenge Missouri Over Secrecy About Execution Procedures*, ST. LOUIS PUB. RADIO (May 15, 2014), <http://news.stlpublicradio.org/post/suits-challenge-missouri-over-secrecy-about-execution-procedures>. Similarly, the American Civil Liberties Union (ACLU) has filed suit against the state of Pennsylvania on behalf of three press organizations, challenging the state's refusal to disclose the source of its compounded drugs. See *Pennsylvania Challenged Over Execution Drugs Secrecy in Federal Court*, THE GUARDIAN (Sept. 17, 2014), <http://www.theguardian.com/world/2014/sep/11/aclu-challenges-pennsylvania-lethal-injection-secrecy>. Additionally, the ACLU and two newspaper organizations have filed suit against Oklahoma for closing the blinds of the execution chamber during the botched execution of Clayton Lockett. See Press Release, American Civil Liberties Union, ACLU and News Organizations Sue Over Closed Blinds During Botched Lockett Execution (Aug. 25, 2014), available at <https://www.aclu.org/free-speech/aclu-and-news-organizations-sue-over-closed-blinds-during-botched-lockett-execution>. The Oklahoma Department of Corrections has moved to dismiss the complaint, arguing (1) the plaintiffs lack standing, (2) the state has Eleventh Amendment Immunity, and (3) the First Amendment does not grant a right of access to public executions. See Def.'s Mot. To Dismiss, *The Observer, et al. v. Patton, et al.*, CIV-14-905-HE (Oct. 21, 2014), available at <http://bloximages.newyork1.vip.townnews.com/tulsaworld.com/content/tncms/assets/v3/editorial/f/dd/fddb0ea-8b1c-575e-af4e-69edf61639d9/544843d464acc2.pdf>. Executions are currently on hold as the state searches for new death penalty drugs. See Ed Pilkington, *Oklahoma Delays Executions Again Despite Unveiling New Death Chamber*, THE GUARDIAN (Oct. 13, 2014), <http://www.theguardian.com/us-news/2014/oct/13/oklahoma-delays-executions-again-days-after-unveiling-new-death-chamber>.

8. See generally Richard Dieter, *Methods of Execution and Their Effect on the Use of the Death Penalty in the United States*, 35 FORDHAM URB. L.J. 789 (2008) [hereinafter Dieter, *Methods of Execution*].

drug lethal injection protocol, *Baze v. Rees*, the Supreme Court had little to say about which execution methods are constitutional.⁹ Since *Baze*, however, the lethal injection landscape has drastically changed.¹⁰ Specifically, shortages of death penalty drugs are forcing states to use new drugs from unconventional sources.¹¹ Compounding pharmacies are an increasingly popular source for drugs. Indeed, at least five states have executed prisoners with compounded drugs,¹² and four others have publicly

9. See *Baze v. Rees*, 553 U.S. 35 (2008). In 1878, however, the Court allowed the execution by firing squad of Wallace Wilkerson. See *Wilkerson v. State of Utah*, 99 U.S. 130 (1878). Additionally, two botched Florida electric chair executions in the late-1990's almost resulted in Supreme Court review of that method. During Florida's execution of Pedro Medina a "crown of foot high-flames" shot up from his head, "filling the execution chamber up with a stench of thick smoke gagging the two dozen official witnesses." Michael Radelet, *Examples of Post-Furman Botched Executions*, DEATH PENALTY INFO. CTR. (July 24, 2010) [hereinafter Radelet, *Botched Executions*], <http://www.deathpenaltyinfo.org/some-examples-post-furman-botched-executions>. Florida used a new electric chair two years later for the execution of Allen Lee Davis, but the execution was similarly grisly: before he was pronounced dead ". . . the blood from his mouth had poured onto the collar of his white shirt, and the blood on his chest had spread to the size of a dinner plate, even oozing through the buckle holes on the leather strap holding him to the chair." *Id.* (quoting *Davis Execution Gruesome*, GAINESVILLE SUN, July 8, 1999, at A1). After another inmate challenged the constitutionality of Florida's use of the electric chair, the Supreme Court granted certiorari. See *Bryan v. Moore*, 528 U.S. 960 (1999) (granting certiorari). However, the Court later dismissed the case after the Florida legislature convened a special session and changed its method to lethal injection. See *Bryan v. Moore*, 528 U.S. 1133 (2000) (dismissing writ of certiorari as improvidently granted).

10. See Denno, *Lethal Injection Chaos*, *supra* note 2, at 1358–59, charts 3 & 4 (detailing changes in lethal injection protocols post-*Baze*).

11. See, e.g., Gregg Zoroya, *Death Penalty Spurs Wild West Scramble for Drugs*, USA TODAY (Mar. 17, 2014), <http://www.usatoday.com/story/news/nation/2014/03/09/executions-lethal-injection-drugs-prisons-death-penalty/5866947/> ("Prison guards meet in the desert to hand off chemicals for executions. A corrections boss loaded with cash travels to a pharmacy in another state to buy lethal sedatives. States across the country refuse to identify the drugs they use to put the condemned to death . . . Manufacturers are cutting off supplies of lethal injection drugs because of opposition to the death penalty, and prison officials are improvising to make up the deficit — sharing drugs, buying them from under-regulated pharmacies or using drug combinations never employed before in putting someone to death.").

12. Georgia used compounded pentobarbital from an unknown source for the execution of Marcus Wellons. See Rhonda Cook, *Marcus Wellons Executed*, AJC.COM (June 18, 2014), <http://www.usatoday.com/story/news/nation/2014/06/16/marcus-wellons-execution/10629335/> [hereinafter Cook, *Wellons Executed*]. Missouri has used compounded pentobarbital since November 2013 in ten executions. See *State by State Lethal Injection*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/state-lethal-injection> (last visited Sept. 12, 2014, 1:41 pm) [hereinafter *State by State Lethal Injection*]; see also *Execution List 2013*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/execution-list-2013> (last visited Sept. 12, 2014, 1:43pm) [hereinafter *Execution List 2013*], and *Execution List 2014*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/execution-list-2014> (last visited Sept. 12, 2014 1:45pm) [hereinafter *Execution List 2014*]. Oklahoma used compounded pentobarbital in the execution of Michael Lee Wilson. See Graham Lee

expressed interest in using compounded drugs.¹³ Yet there is reason to believe that the quality and potency of these drugs — which are not approved by the Federal Food and Drug Administration (FDA) — is deficient.¹⁴ Consequently, there is reason to

Brewer, *Condemned Man's Last Words Lead to Questions About Lethal Injection 'Cocktail' Oklahoma, U.S.*, NEWSOK (Feb. 9, 2014), <http://newsok.com/condemned-mans-last-words-lead-to-questions-about-lethal-injection-cocktail-in-oklahoma-u.s./article/3932043> [hereinafter Brewer, *Condemned Man's Last Words*]. South Dakota used compounded pentobarbital for the executions of Eric Robert and Donald Moeller. See Press Release, Reprive, South Dakota Carries Out Execution Using Contaminated Compounded Drug (Oct. 17, 2012), available at http://www.reprive.org.uk/press/2012_10_17_compound_pharmacy_death_penalty/ [hereinafter *South Dakota Carries Out Execution*]; see also *South Dakota Covers Up Source of 'DIY' Death Penalty Drugs Ahead of Execution*, Reprive (Oct. 30, 2012), http://www.reprive.org.uk/press/2012_10_30_South_Dakota_execution_drugs/ [hereinafter *South Dakota Covers Up Source of Drug*]. Texas has used compounded pentobarbital in eleven executions since October 2013. See *State by State Lethal Injection*; see also *Execution List 2013*, and *Execution List 2014*.

13. Louisiana intended to purchase lethal injection drugs from an Oklahoma-based compounding pharmacy, potentially in violation of Louisiana state law. See Della Hasselle, *State has Explored Illegally Obtaining Drug for Upcoming Execution*, THE LENS (Jan. 25, 2014), <http://thelensnola.org/2014/01/25/state-has-explored-illegally-obtaining-drug-for-execution/> [hereinafter Hasselle, *State Explored Illegally Obtaining Drug*]. In May 2014, however, Louisiana announced a six-month stay of executions, pending a review of its lethal injection protocol and alternative methods of execution. Della Hasselle, *Execution of Child-Killer Delayed Six Months After Botched Lethal Injections Elsewhere*, THE LENS (May 9, 2014), <http://thelensnola.org/2014/05/09/execution-of-child-killer-delayed-at-least-six-months-after-botched-lethal-injections-elsewhere/>. Mississippi intends to use compounded pentobarbital, vecuronium bromide and potassium chloride. See *Mississippi Death Row Inmate Drops Lawsuit after Info Provided on Execution Drug*, AP (Mar. 20, 2014), http://blog.gulfive.com/mississippi-press-news/2014/03/mississippi_death_row_inmate_d.html [hereinafter *Mississippi Inmate Drops Lawsuit*].

Ohio announced its intention to use compounded pentobarbital in October 2013. See *State by State Lethal Injection*, *supra* note 12. However, the state used midazolam and hydromorphone manufactured by Hospira, Inc., for the botched execution of Dennis McGuire on January 16, 2014. Andrew Welsh-Huggins, *APNewsbreak: Where Ohio Got its Execution Drugs*, AP (Feb. 20, 2014), <http://bigstory.ap.org/article/apnewsbreak-where-ohio-got-its-execution-drugs>. Currently, all executions in Ohio are postponed in until January 15, 2015. Alan Johnson, *Moratorium on Ohio's Executions Extended until January*, COLUMBUS DISPATCH (SEPT. 12, 2014), <http://www.dispatch.com/content/stories/local/2014/08/11/Moratorium-on-lethal-injections-in-Ohio-extended.html> Pennsylvania's last execution was in 1999. See, e.g., *Death Penalty in Flux*, DEATH PENALTY INFO. CNTR., <http://www.deathpenaltyinfo.org/death-penalty-flux> (last visited Sept. 14, 2014, 2:10 pm). Nevertheless, Pennsylvania intends to obtain compounded drugs in preparation for upcoming executions. See Laurie Mason Schroder, *Could Pennsylvania Botch an Execution?*, MCALL.COM (Sept. 1, 2014), <http://www.mcall.com/news/local/mc-lehigh-lethal-injection-drugs-20140901-story.html#page=2> [hereinafter Schroder, *Could Pennsylvania Botch an Execution?*].

14. See, e.g., *FDA Alerts Health Care Professionals of Infection Repackaged Avastin Intravital Injections*, FDA.GOV (Aug. 30, 2011), <http://www.fda.gov/drugs/drugsafety/ucm270296.htm> (reporting that tainted injections of Avastin manufactured by a single compounding pharmacy caused serious eye infections for at least twelve patients, some of whom suffered from a complete loss in vision); *Notes From the Field: Multistate Outbreak*

believe using compounded drugs in lethal injections might increase the likelihood of an unconstitutional execution.¹⁵

The most alarming development, however, is the growing number of states that are becoming less transparent about the administration of lethal injection executions, even as they experiment with new combinations of drugs with little or no knowledge about their efficacy in executions. For example, five states have passed sweeping lethal injection secrecy statutes that prevent the prisoner and the public from learning critical information about the drugs, including their source and the identities and professional qualifications of lethal injection participants.¹⁶ Two states have achieved similar ends by amending or reinterpreting existing executioner-participant secrecy statutes to include persons or entities involved in the manufacturing of lethal injection drugs as “members” of the lethal injection team.¹⁷ Still others simply refuse to disclose information about the source of their death penal-

of Postprocedural Fungal Endophthalmitis Associated with a Single Compounding Pharmacy, CDC.GOV (May 4, 2012), <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6117a5.htm> (reporting that 33 patients in seven states suffered partial to severe vision loss after contracting a rare fungal eye infection from drugs manufactured from a compounding pharmacy); *CDC Update on the Multistate Outbreak of Fungal Meningitis and Other Infections: One Year Later*, CDC.GOV (Oct. 23, 2013), <http://www.cdc.gov/media/releases/2013/s1023-multistate-outbreak.html> [hereinafter *Multistate Outbreak of Meningitis*] (reporting that 751 patients contracted fungal meningitis from steroids manufactured by a compounding pharmacy, 64 of whom died).

15. See, e.g., *South Dakota Carries Out Execution Using Contaminated Compounded Drugs*, REPRIEVE (Oct. 17, 2012), http://www.reprive.org.uk/press/2012_10_17_compound_pharmacy_death_penalty/ (reporting that the lethal dose of compounded pentobarbital used in Eric Robert's execution was contaminated with fungus); see also Brewer, *Condemned Man's Last Words*, *supra* note 12, (reporting that Michael Lee Wilson's final words were “I feel my whole body burning.”); and accompanying text.

16. See, e.g., ARK. CODE ANN. § 5-4-617 (West 2013); GA. CODE ANN. § 42-5-36(d)(1)-(2)(West 2013); 22 OKLA. ST. ANN. § 1015 (West 2014); S.D. CODIFIED LAWS § 23A-27A-31.2 (2013); TENN. CODE ANN. § 10-7-504 (h)(1) (West 2014). Additionally, Florida added an exemption to its public records inspection statute in 2000 that allows the state to withhold information about persons who compound drugs. See FLA. STAT. ANN. 945.10(1)(g)(West 2014); 2000 Fla. Sess. Law. Serv. Ch. 2000-1 (S.B. 4A) (West). Because the amendment pre-dates the current controversy, however, it is not included in the above count. Nevertheless, concerns regarding rapidly changing, experimental lethal injection protocols, the use of sub-potent or sub-standard compounded drugs and lethal injection secrecy apply as forcefully to Florida as any other state. See *infra* Part III, V & accompanying text.

17. See ARIZ. REV. STAT. ANN. § 13-757 (C)(West 2009), and ARIZ. DEP'T OF CORR. EXECUTION PROCEDURES MANUAL 2, available at <https://corrections.az.gov/sites/default/files/0710.pdf>; see also MO. REV. STAT. 546.720 (2) (West 2007), and Press Release, State of Missouri Department of Corrections, Missouri Department of Corrections Adopts New One-Drug Execution Protocol (Oct. 22, 2013), available at <http://doc.mo.gov/PressReleases/2013/20131022.pdf>.

ty drugs.¹⁸ This Note argues, however, that the public has a right of access to the information concealed by lethal injection secrecy statutes and practices under the First Amendment, and, accordingly, that lethal injection secrecy is unconstitutional.

This Note proceeds in four substantive sections. The first half begins by providing a general context for the current controversy over lethal injection secrecy. Part II supplies a brief history of capital punishment in the United States and details the impact of death penalty drug shortages on the administration of lethal injection executions. Part III provides a brief overview of compounding pharmacies, explains their role in lethal injection protocols and explains the relationship between compounding pharmacies and lethal injection secrecy. The second half of the Note narrows its focus to outlining a First Amendment challenge to Georgia's lethal injection secrecy statute. Part IV details the background of the statute, provides an overview of its language and examines a recent decision by the Georgia Supreme Court upholding its constitutionality. Part V challenges that decision and argues that there *is* a constitutional right of access to identifying information about the source of the drugs, the safety record and manufacturing processes of the compounding pharmacy, the results of purity and sterility tests performed on those drugs, and the professional qualifications of pharmacists and doctors involved in the process of compounding the drugs.

18. Texas and Idaho do not have secrecy laws, but do not disclose information regarding the identities and sources of lethal injection drugs. See, e.g., Terri Langford, *AG: Prisons Can Keep Info About Execution Drugs Secret*, TEXAS TRIBUNE (May 29, 2014), <https://www.texastribune.org/2014/05/29/ag-says-prisons-can-keep-execution-drugs-secret/> (reporting that Texas does not disclose the source of lethal injection drugs because of the possibility of "real harm" to execution participants); *Idaho Refuses to Disclose Lethal Injection Drug Source*, KTVB.COM (May, 1 2014), <http://www.ktvb.com/story/news/local/2014/07/03/12163337/> (reporting that the Idaho Department of Corrections defends nondisclosure by citing to three disparate state laws). Additionally, Pennsylvania recently delayed the execution of Hubert Michael Jr. because it could not find drugs, but refused to disclose any details regarding how drugs are obtained. See Mark Berman, *Pennsylvania Execution Delayed Because the State Doesn't Have Lethal Injection Drugs*, WALL S. J. (Sept. 12, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/09/12/pennsylvania-execution-delayed-because-the-state-doesnt-have-lethal-injection-drugs/>.

II. A BRIEF HISTORY OF THE DEATH PENALTY AND LETHAL INJECTION EXECUTIONS

Part II provides a summary of the various methods of execution, past and present. Section A is a brief overview of the death penalty's history, culminating in the Supreme Court's 2008 decision upholding lethal injection in *Baze v. Rees*.¹⁹ Section B details how drug shortages are radically changing states' lethal injection protocols.

A. HISTORY OF THE DEATH PENALTY

For much of American history, executions were public.²⁰ Public hangings were long the preferred method because of their minimal cost and clear communitarian message, but were eventually abandoned after a series of riotous executions.²¹ Seeking a controlled and private alternative, New York performed the first execution by electrocution in 1890.²² The electric chair had the benefit of withholding the execution from the eyes of the public at large,²³ but botched executions were fairly common.²⁴ Similarly, the next innovation, execution by gas chamber, shielded the execution from the general public, but the prisoner's suffocation by cyanide gas was clearly inhumane.²⁵ Thus, after a nearly nine-

19. 553 U.S. 35 (2008).

20. See Dieter, *Methods of Execution*, *supra* note 8, at 790–91.

21. *Id.* at 90.

22. *Id.* at 90–91.

23. *Id.* at 91.

24. See Radelet, *Botched Executions*, *supra* note 9. Additionally, any discussion of botched electric chair executions must also include the execution of Willie Francis, who survived Louisiana's first attempt to execute him — only to be subject to the chair again after the Supreme Court declined to hold multiple executions unconstitutional. Louisiana *ex rel.* Francis *Resweber*, 329 U.S. 459 (1947). For a fascinating portrait of Willie Francis and the world he lived and died in, see Deborah Denno, *When Willie Francis Died: The "Disturbing" Story Behind One of the Eighth Amendment's Most Enduring Standards of Risk*, in DEATH PENALTY STORIES 17–94 (John H. Blume & Jordan M. Steiker, eds. 2009).

25. Prison officials cleared the viewing room when Jimmy Lee Gray's gasps and moans for air repulsed witness during his September 3, 1983 execution. Radelet, *Botched Executions*, *supra* note 9. At one point, Gray's head struck a metal pole behind the chair so violently that it shook the walls of the execution chamber. *Sex Murderer Dies in Gas Chamber*, THE TELEGRAPH, Sept. 2, 1983, at 17. Similarly, one reporter present at Arizona's April 6, 1992 execution of Donald Eugene Harding remarked, "Harding's death was extremely violent. He was in great pain. I heard him gasp and moan. I saw his body turn from red to purple." *Id.* (quoting Charles Howe, *Arizona Killer Dies in Gas Chamber*, S.F. CHRON. Apr. 7, 1992, at A2). Harding was not pronounced dead until ten and a half

year pause on executions caused by *Furman v. Georgia*,²⁶ states searched yet again for alternative execution methods.²⁷ Lethal injection became a prime candidate.²⁸

In 1977, Oklahoma became the first state to adopt lethal injection.²⁹ At the request of two Oklahoma legislators, Dr. A. Jay Chapman, Oklahoma's Chief Medical Examiner and a self-professed "expert in dead bodies but not in getting them that way,"³⁰ recommended a two-part injection in which the prisoner would have an "ultra-short acting barbiturate" and "chemical paralytic" introduced to his body via intravenous drip.³¹ A third drug was added in 1981.³² Thus, despite no medical or scientific justification,³³ the three-drug lethal injection cocktail was born: sodium thiopental, pancuronium bromide, and potassium chloride.³⁴

On the surface, lethal injection executions appear more humane than the relevant alternatives. Yet the method is not as simple as the prisoner peacefully drifting off to sleep.³⁵ In theory, sodium thiopental renders the prisoner unconsciousness, while pancuronium bromide causes suffocation by paralyzing the lungs and diaphragm and potassium chloride causes cardiac arrest.³⁶

minutes after the cyanide tablets were dropped, all the while struggling against the leather restraining straps. *Id.*

26. 408 U.S. 238 (1972) (holding the death penalty unconstitutional). The death penalty was reinstated four years later. See *Gregg v. Georgia*, 428 U.S. 153 (1976).

27. See Dieter, *supra* note 8, at 92.

28. See Denno, *Lethal Injection Quandary*, *supra* note 6, at 65 (finding that early proponents of lethal injection stressed that the method appeared more humane and visually palatable than other execution alternatives).

29. *Id.* However, New York first considered lethal injection as a method of execution in 1888, though the state commission considering the proposal ultimately rejected the idea, fearing that the public would begin to associate the death penalty with the profession of medicine. *Id.* at 64. Similarly, a 1953 commission in Great Britain dismissed lethal injection as no better than hanging. *Id.* at 64–65.

30. *Id.* at 66. Nevertheless, Chapman was unconcerned about any repercussions his involvement in devising Oklahoma's lethal injection protocols would have on his professional reputation; when warned about the Oklahoma Medical Association's position that doctors should have no business participating in lethal injections, he remarked: "To hell with them: let's do this." *Id.*

31. *Id.* at 66–67.

32. *Id.* at 74.

33. *Id.* at 118.

34. See *generally id.* at 70–75.

35. See *id.* at 67 (reporting that Oklahoma State Senator Bill Wiseman believed lethal injection had the following benefits: "No pain, no spasms, no smells or sounds — just sleep, then death.").

36. In the words of Chapman:

However, if the sodium thiopental fails or is administered improperly, pancuronium bromide can mask responses from the prisoner, raising the possibility that the prisoner, paralyzed and unable to call out, is painfully suffocating.³⁷ Likewise, without proper anesthetic, potassium chloride can cause an intense burning throughout the body before causing cardiac arrest.³⁸

Nevertheless, the first execution by lethal injection in the United States was carried out in Texas in 1982.³⁹ And despite protests from the medical community and no scientific testing, thirty-seven other states adopted lethal injection from 1977 to 2002, most of which copied Oklahoma's three-drug cocktail blueprint.⁴⁰ Finally, in 2008, the Supreme Court declined to hold the three-drug cocktail unconstitutional under the Eighth Amendment in *Baze v. Rees*, ruling that the petitioner had failed to show that the three-drug combination posed a substantial or objectively intolerable risk of serious harm compared to known and available alternatives.⁴¹

B. POST-BAZE DRUG SHORTAGES AND RISK

Although the petitioner in *Baze* did not succeed on his Eighth Amendment claim, the Court's opinion provided a framework for future challenges to lethal injection.⁴² Indeed, there were more

Obviously, it would not be necessary to use all three of the drugs. Any one of them would do the trick — even a massive overdose of the ultrashort barbiturate—as it is done with the euthanasia of animals. The pancuronium would also do it, but the effect would be delayed for the asphyxia to develop from the inability of the person to carry on respiration. Potassium chloride could be given alone as well, although it does cause pain as it travels through the vein in high concentration — which might [be] a problem for some folks, but that would not be a problem, so far as I am concerned . . . Perhaps hemlock is the answer for all the bleeding hearts who completely forget about the victims — and their suffering — Socrates style. The things that I have seen that have been done to victims is [sic] beyond belief. And we should worry that these horses' patoots should have a bit of pain, awareness of anything — give me a break.

See id. at 74, n.151 (quoting emails from A. Jay Chapman).

37. *See id.* at 55–56; Denno, *Lethal Injection Chaos*, *supra* note 2, at 1334.

38. *See* Denno, *Lethal Injection Quandary*, *supra* note 6, at 55–56; Denno, *Lethal Injection Chaos*, *supra* note 2, at 1334.

39. *State by State Lethal Injection*, *supra* note 12.

40. *See* Denno, *Lethal Injection Quandary*, *supra* note 6, at 78.

41. 553 U.S. 36, 53–64 (2008).

42. Yet the *Baze* court did not speak in one voice; one commentator has described the plurality's fractured Eighth Amendment analysis as “vague and diffuse.” Denno, *Lethal Injection Chaos*, *supra* note 2, at 1335. Chief Justice Roberts announced the judgment of

challenges to lethal injection in the five years after *Baze* than in the previous thirty.⁴³ A central reason for the explosion of challenges is the scarcity of lethal injection drugs.

The first domino fell when Hospira, Inc., the sole manufacturer of sodium thiopental in the United States, ended domestic production of the drug in 2009.⁴⁴ States subsequently scrambled to obtain sodium thiopental from international sources. For instance, in 2011, Georgia's Department of Corrections attempted to import the drug — potentially in violation of federal law — from an unlicensed drug distributor operating out of the back of a driving school in London.⁴⁵ However, the states' ability to obtain foreign sodium thiopental was limited by a lawsuit brought against the Food and Drug Administration (FDA) by death row inmates. In *Beatty v. FDA*, the court found that foreign sodium thiopental exposed prisoners to “the risk that the drug will not function as intended.”⁴⁶ Moreover, the court ruled that the FDA had departed from “a longstanding policy of not allowing unapproved prescription drugs,” and exhibited a “seemingly callous indifference to the health consequences of those imminently facing the executioner's needle.”⁴⁷ The D.C. Court of Appeals upheld the district court's decision in *Cook v. FDA*.⁴⁸ Faced with a rapidly expiring supply of thiopental and no clear path to procure more, many states changed their lethal injection protocols to allow for the use of pentobarbital,⁴⁹ a sedative often used to control convulsions and euthanize animals.⁵⁰

Yet pentobarbital presents many of the same problems as thiopental. First, little data exists about its reliability or efficacy in

the Court and delivered an opinion in which Justices Kennedy and Alito joined. *Baze*, 553 U.S. at 40–63. Justice Alito, however, filed a concurring opinion. *Id.* at 63–71. Furthermore, Justice Stevens, Scalia, Thomas, and Breyer filed opinions concurring in the judgment. *Id.* at 71–113. Finally, Justice Thomas and Scalia joined each other's opinions. *Id.* at 87–107.

43. Denno, *Lethal Injection Secrecy*, *supra* note 2, at 1335 (collecting and analyzing 300 cases challenging lethal injection protocols in the five years since *Baze*).

44. See Koppel, *Drug Halt Hinders Executions*, *supra* note 1.

45. Kathy Lohr, *Georgia May Have Broken Law by Importing Drug*, NPR (Mar. 17, 2011), <http://www.npr.org/2011/03/17/134604308/dea-georgia-may-have-broken-law-by-importing-lethal-injection-drug>.

46. 853 F. Supp. 2d 30, 37 (D.D.C. 2012).

47. *Id.* at 43.

48. 733 F. 3d 1, 11 (D.C. Cir. 2013).

49. Denno, *Lethal Injection Chaos*, *supra* note 2, at 1358–59, chart 3 & 4.

50. Denno, *Lethal Injection Quandary*, *supra* note 6, at 75–76 (finding that several states' lethal injection protocols are below the standard used by veterinarians to euthanize animals).

inducing anesthesia.⁵¹ Second, there is evidence to suggest that pentobarbital takes longer than sodium thiopental to anesthetize. For example, in the first three-drug lethal injection using pentobarbital in Georgia, observers of Roy Willard Blankenship's execution reported that his "eyes were open throughout" and that he jerked his head in an expression of pain and discomfort.⁵² So disturbing was Blankenship's execution that the next prisoner to be executed in Georgia with pentobarbital was videotaped — only the second instance of a videotaped execution in this country.⁵³ Lastly, the manufacturer of pentobarbital, Lundbeck, Inc., a Dutch Company, opposes the use of the drug in lethal injections and has taken affirmative steps to prevent it from being used in executions.⁵⁴ Accordingly, states' supplies of pentobarbital will eventually expire, forcing Departments of Corrections across the country to seek out other substitutes.⁵⁵

But any substitute for sodium thiopental or pentobarbital is likely to experience similar problems. For example, in 2012, Missouri changed its lethal injection protocol to allow the use of a massive dose of propofol in a single-drug lethal injection.⁵⁶ However, Missouri changed its protocol again after the European Union threatened to limit exports of the drug, which is used frequently as an anesthetic in American hospitals.⁵⁷ Likewise, after Arkansas purchased phenobarbital, a medication used to treat seizures, the drug's manufacturer pledged to prevent the drug

51. See Denno, *Lethal Injection Chaos*, *supra* note 2, at 1363. Additionally, the drug's manufacturers caution against using the drug in a lethal injection. *Id.*

52. Rachel Quigley, *'He Suffered Greatly': Medical Expert Describes How Prisoner Thrashed Desperately During 'Botched' Execution with New Drug*, THE DAILY MAIL (June 30, 2011), <http://www.dailymail.co.uk/news/article-2009873/He-suffered-greatly-Medical-expert-describes-prisoner-thrashed-desperately-botched-execution-new-drug.html>.

53. Rhonda Cook, *DeYoung Executed with Videographer Documenting His Death*, ATLANTA JOURNAL-CONSTITUTION (July 22, 2011), <http://www.ajc.com/news/news/local/deyoung-executed-with-videographer-documenting-his/nQJq5>. A prisoner might request a videotaped execution to preserve the evidentiary record if there is reason to suspect that a botched execution is likely. Steven Hsieh, *Why This Missouri Death Row Inmate Wants His Execution Videotaped*, THE NATION (May 16, 2014), <http://www.thenation.com/blog/179903/why-missouri-death-row-inmate-wants-his-execution-videotaped>.

54. David Jolly, *Danish Company Blocks Sale of Drug for U.S. Executions*, N.Y. TIMES, (July 1, 2011), <http://www.nytimes.com/2011/07/02/world/europe/02execute.html>.

55. See Denno, *Lethal Injection Chaos*, *supra* note 2, at 1364.

56. *State by State Lethal Injection*, *supra* note 12.

57. See *Missouri: Propofol Use in Execution Is Rejected*, N.Y. TIMES (Oct. 11 2013), <http://www.nytimes.com/2013/10/12/us/missouri-propofol-use-in-execution-is-rejected.html>.

from being sold for additional executions.⁵⁸ Additionally, Hospira, Inc., has “ceased the direct sale” of pancuronium bromide, rocuronium bromide, vecuronium bromide, potassium chloride, midazolam and hydromorphone to U.S. prisons.⁵⁹ In this respect, the difficulty in obtaining death penalty drugs is not merely because of “drug shortages”, but rather the result of a calculated drug embargo instituted by the European Union against the United States for human rights abuses.⁶⁰

Although the strategy has succeeded in making it difficult for some states to adhere to their execution schedules, others proceed undeterred. But the unavailability of death penalty drugs forces states to constantly revise their lethal injection protocols to allow the use of new, untested drugs in executions, often with little or no knowledge about the efficacy of those drugs for use in executions.⁶¹ The resulting randomness and unreliability of these lethal injection protocols, coupled with the well-documented occurrence of executioner incompetence,⁶² makes unconstitutional executions more likely. This is not merely speculative. Recent executions demonstrate the consequence of compounding these risks.

For example, during Ohio’s January 16, 2014 execution of Dennis McGuire, McGuire reportedly made loud, snorting noises and breathed irregularly for nearly ten minutes before finally passing away — twenty-five minutes after a never-before-tested combination of midazolam and hydromorphone was administered

58. See Ed Pilkington, *British Drug Company Acts to Stop its Products Being Used in U.S. Executions*, THE GUARDIAN (May 15, 2013), <http://www.theguardian.com/world/2013/may/15/death-penalty-drugs-us-uk>.

59. *Hospira Position on Use of Our Products in Lethal Injections*, HOSPIRA, http://www.hospira.com/about_hospira/government_affairs/hospira_position_on_use_of_our_products/index (last visited Sept. 14, 2014).

60. See, e.g., Ed Pilkington, *Europe Moves to Block Trade in Medical Drugs used in U.S. Executions*, THE GUARDIAN (Dec. 20, 2011), <http://www.theguardian.com/world/2011/dec/20/death-penalty-drugs-european-commission>.

61. Today, the majority of states use either a one-drug protocol or a three-drug protocol. See *State by State Lethal Injection*, *supra* note 12. States that use a one-drug protocol (Arkansas, California, Georgia, Idaho, Indiana, Missouri, North Carolina, Tennessee and Texas) uniformly inject a single dose of pentobarbital. *Id.* By contrast, states that use a three-drug protocol (Alabama, Delaware, Florida, Mississippi, Nebraska, Pennsylvania, South Carolina, Utah, Virginia and Wyoming) use a variety of drugs, including some mix of pentobarbital, midazolam, brexital, vecuronium bromide and potassium chloride. *Id.* The remaining states use either two-drug or variable protocols. *Id.* Most states that have a two-drug protocol (Arizona, Louisiana and Ohio) use midazolam and hydromorphone, but one (Montana) does not specifically identify the two drugs. *Id.* The last two states (Kentucky and Oklahoma) have variable protocols that specify which drugs are to be used based on availability. *Id.*

62. See Roko, *Executioner Identities*, *supra* note 6, at 2792–95, 2818–20.

into his body.⁶³ Strikingly, Oklahoma's April 29, 2014 execution of Clayton Lockett was so botched it was called off by a prison official.⁶⁴ According to witnesses, he attempted to rise up from the table and gasped "man" *after* the pain-killing sedative, midazolam, was administered.⁶⁵ Nevertheless, Mr. Lockett died forty-three minutes after being injected with cocktail of midazolam, pancuronium bromide and potassium chloride.⁶⁶ And Arizona's July 23, 2014 execution of Joseph Wood is only the latest instance of a pattern likely to continue without more oversight and accountability in the administration of lethal injections. After being injected with a midazolam and hydromorphone, Mr. Wood struggled "like a fish on shore gulping for air" for nearly an hour

63. Max Ehrenfreund, *Dennis McGuire Executed in Ohio with New Combination of Lethal Injection Drug*, WASH. POST (Jan. 16, 2014), http://www.washingtonpost.com/national/dennis-mcguire-executed-in-ohio-with-new-combination-of-lethal-drugs/2014/01/16/612e22a2-7ede-11e3-93c1-0e888170b723_story.html.

64. Erik Eckholm & John Schwartz, *Timeline Describes Frantic Scene at Oklahoma Execution*, N.Y. TIMES (May 1, 2014), <http://www.nytimes.com/2014/05/02/us/oklahoma-official-calls-for-outside-review-of-botched-execution.html>

65. Erik Eckholm, *One Execution Botched, Oklahoma Delays the Next*, N.Y. TIMES (Apr. 29, 2014), <http://www.nytimes.com/2014/04/30/us/oklahoma-executions.html>.

66. Erik Eckholm & John Schwartz, *Oklahoma Vows Review of Botched Execution*, N.Y. TIMES (Apr. 30, 2014), <http://www.nytimes.com/2014/05/01/us/oklahoma-faces-sharp-scrutiny-over-botched-execution.html>. Lockett was first reported to have died of a heart attack, but a subsequent autopsy concludes that the cause of death was the lethal injection. See Autopsy Report, SW. INST. OF FORENSIC SCIS. AT DALLAS, Aug. 28, 2014, *available at* <http://www.dps.state.ok.us/Investigation/Autopsy%20Report.PDF> ("It is our opinion that Clayton Derrell Lockett, a 38-year-old black male, died as the result of judicial execution by lethal injection."). The report does not explain, however, why the execution took 43 minutes, or why witnesses reported that he appeared to be in pain.

The Lockett execution also demonstrates the turbulent politics of capital punishment. After the Oklahoma Supreme Court stayed the executions of Clayton Lockett and Charles Warner on April 21, 2014 to evaluate the constitutionality of the state's lethal injection secrecy law, the governor of the state, Mary Fallin, announced that she would not honor the stays of execution. The following day, state representative Mike Christian initiated impeachment proceedings against the five judges who expressed doubt about the lethal injection secrecy law. On April 23, the Supreme Court reversed its decision. See generally, Andrew Cohen, *Oklahoma Courts at War over Lethal Injection Secrecy*, THE ATLANTIC (Apr. 21, 2014), <http://www.theatlantic.com/national/archive/2014/04/Oklahoma/360940/>.

and a forty minutes before dying.⁶⁷ Senator John McCain later remarked that he believed the execution amounted to “torture.”⁶⁸

III. COMPOUNDING PHARMACIES AND LETHAL INJECTION SECRECY

Faced with dwindling supplies of lethal injection drugs, states are now obtaining lethal injection drugs from compounding pharmacies. Part III explains why states are using compounding pharmacies. First, Section A summarizes the risks compounding pharmacies pose to public health and the various efforts to provide additional oversight of the compounding industry. Second, Section B explains why states are turning to compounding pharmacies to manufacture their lethal injection drugs. Lastly, Section C provides a general overview of lethal injection secrecy, including the justifications and criticisms of the practice and details about the relationship between secrecy and compounding pharmacies.

A. AN OVERVIEW OF COMPOUNDING PHARMACIES AND REGULATORY OVERSIGHT

Occasionally, the health needs of a patient cannot be met by a drug approved by the Food and Drug Administration (FDA).⁶⁹ For instance, a patient may be allergic to certain ingredients in a drug or may need it in liquid form.⁷⁰ In these circumstances, a patient might obtain a “compounded” drug from a local, licensed pharmacist who combines, mixes, or alters the drug to the needs of that specific patient pursuant to a physician’s prescription.⁷¹

67. Bob Ortega, Michael Kiefer & Mariana Dale, *Execution of Arizona Murderer takes Nearly Two Hours*, AZ CENTRAL (July 24, 2014), <http://www.azcentral.com/story/news/local/arizona/2014/07/23/arizona-execution-botched/13070677/>. Mr. Wood’s execution took so long that his attorneys had time to file an unsuccessful emergency appeal to the Supreme Court. See Mark Berman, *Arizona Execution Lasts Nearly Two Hours, Lawyer says Joseph Wood was ‘Gasping and Struggling to Breathe’*, WASH. POST (July 23, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/07/23/arizona-supreme-court-stays-planned-execution/>.

68. Burgess Everett, *John McCain: Arizona Execution ‘Torture’*, POLITICO (July 24, 2014), <http://www.politico.com/story/2014/07/john-mccain-arizona-execution-109350.html>.

69. COMPOUNDING AND THE FDA: QUESTIONS AND ANSWERS, FDA, <http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/PharmacyCompounding/ucm339764.htm> (last visited Sept. 14, 2014, 9:56 am).

70. *Id.*

71. *Id.*

Compounded drugs are not FDA-approved and are regulated permissively by the federal government.⁷² State pharmacy boards have the primary responsibility for the oversight of compounding pharmacies.⁷³ Although regulations vary from state to state, all pharmacists are required to pass a standardized, nationally-administered exam to obtain a license to compound drugs.⁷⁴

The FDA, however, has frequently expressed concern that compounding pharmacies exploit their lack of federal regulation. For example, in response to the discovery that some compounding pharmacies were in fact engaged in large-scale drug manufacturing,⁷⁵ Congress passed the Federal Food and Drug Administration Modernization Act (FDAMA)⁷⁶ in 1997, which exempted compounding pharmacies from certain FDA regulations if the pharmacies made non-commercially available drugs from approved ingredients pursuant to standard manufacturing processes for individuals with valid prescriptions.⁷⁷

Still, it became increasingly clear during the 2000s that the FDMA was not a panacea to the serious public health risks of some compounding pharmacies. In addition to sending out a host

72. See *Id.* See also Denno, *Lethal Injection Chaos*, *supra* note 2, at 1336.

73. See QUESTIONS AND ANSWERS, *supra* note 69; *Lethal Injection Chaos*, at 1367–68. However, large compounding pharmacies registered as “outsourcing facilities” under section 21 U.S.C. 503(b) of the Federal Food, Drug and Cosmetic Act are regulated by the FDA. *Id.* See *infra* p. 15–16, notes 91–98 and accompanying text.

74. See Denno, *Lethal Injection Secrecy*, at 1368.

75. See OFFICE OF CONGRESSMAN EDWARD J. MARKEY, COMPOUNDING PHARMACIES, COMPOUNDING RISK 5 (Oct. 29, 2012), available at http://interactive.snm.org/docs/Compounding%20Pharmacies%20-%20Compounding%20Risk%20FINAL_0.pdf (noting that prior to legislative action, the FDA issued a Compliance Policy Guide for compounding pharmacies in 1992, warning that it would exercise its authority over compounding pharmacies “when the scope and nature of a pharmacy’s activity raises the kind of concerns normally associated with a manufacturer”)

76. Food and Drug Administration Modernization Act of 1997, Pub. L. No. 105-115, § 127, 111 Stat. 2296, 2328 (1997).

77. COMPOUNDING PHARMACIES, *supra* note 75, at 5. FDAMA also prohibited pharmacies from advertising and promoting their compounded products. *Id.* at 6. The Supreme Court, however, ruled in 2002 that this provision violated the compounding pharmacies’ First Amendment rights, but did not rule whether the provision was severable from the rest of the FDAMA. See *Thompson v. Western Medical*, 535 U.S. 357, 366–77 (2002). In response to *Thompson*, the FDA published another compliance guide warning compounding pharmacies that if they engaged in one or more of nine specific activities, the FDA would exercise its enforcement discretion. COMPOUNDING PHARMACIES, at 6. For other violations, the FDA would leave regulatory enforcement to the states. *Id.* The unresolved question of severability, however, contributed to the ambiguity of the FDA’s authority to regulate compounding pharmacies for the next decade. See *generally infra* note 90 and accompanying text.

of warning letters to at-risk compounding pharmacies,⁷⁸ the FDA issued two reports detailing the defects of compounded drugs. The first report, published in 2003, revealed that of 29 samples of products collected from 12 different compounding pharmacies which allowed customers to order drugs online, 10 failed one or more of the standard quality tests performed.⁷⁹ The second report, published in 2006, sampled 198 products from compounding pharmacies throughout the country.⁸⁰ One hundred and twenty-five were active pharmaceutical ingredients (APIs) and 73 were finished compounded drug products.⁸¹ All 198 drugs were analyzed for identification of active ingredient, potency (also known as assay), and for drugs in capsule form, content uniformity.⁸² Although all APIs passed analysis, one-third of the testable compounded drugs failed.⁸³ Moreover, the report revealed that be-

78. See *Inspections, Compliance, Enforcement and Criminal Investigations*, FDA, <http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/default.htm> (last visited Sept. 15, 2014, 12:40pm) (indicating that 94 warning letters went sent to compounding pharmacies from 1999–2014). These letters demonstrate that compounding pharmacies engage in a variety of risky activities including, but not limited to, the following: advertising compounded drugs with claims of unsubstantiated efficacy and superiority; deviating from standard quality control and manufacturing processes; compounding drugs that are not active ingredients in any FDA-approved drug; compounding drugs previously removed from the market because of safety and efficacy concerns; and compounding drugs in unsanitary conditions. See, e.g., Warning Letter from Alonza E. Cruze, Dir. L.A. Dist., FDA, to Thomas Reed & Dana Reed-Kane, Owners, Reed's Compounding Pharm. (Jan. 7, 2008), available at <http://www.fda.gov/iceci/enforcementactions/warningletters/2008/ucm1048446.htm>; Warning Letter from Kirk Sooter, Acting Balt. Dist. Dir., FDA, to Oliver LeGrain, President, IBA Molecular, Inc. (October 24, 2008) available at <http://www.fda.gov/iceci/enforcementactions/warningletters/2008/ucm1048084.htm>; Warning Letter, Douglas I. Ellsworth, N.J. Dist. Dir., FDA, to Gene Ragazzo & James Palmieri, Co-owners, Drugs Are Us, Inc. (June 7, 2009), available at <http://www.fda.gov/iceci/enforcementactions/warningletters/2004/ucm146432.htm>; Warning Letter, Carol Heppe, Cincinnati Dist. Dir., FDA, to George Fiderio, President, Gentere, Inc. (July 13, 2004), available at <http://www.fda.gov/iceci/enforcementactions/warningletters/2004/ucm146503.htm>.

79. See *Report: Limited FDA Survey of Compounded Drug Products*, FDA, <http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/PharmacyCompounding/ucm155725.htm> (last visited September 15, 2014) (noting that the failure rate for commercially produced samples is 2%).

80. See *2006 Limited FDA Survey of Compounded Drug Products*, FDA, <http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/PharmacyCompounding/ucm155725.htm> (last visited September 15, 2014) (noting that the failure rate for commercially produced samples is 2%).

81. *Id.*

82. *Id.*

83. *Id.* (noting that of the 73 original samples, sixteen were not analyzed because the expiration date elapsed before testing, and the results of 21 of the remaining 57 samples were unusable “for various reasons”).

tween 1990 and 2005, the FDA knew of at least 240 instances of serious illness or death associated with compounded drugs.⁸⁴ Despite these troubling findings, the momentum for new legislation expanding federal regulation of compounding pharmacies stalled in 2007.⁸⁵

But the debate resurfaced in October 2012 when the New England Compounding Center (NECC), a paradigmatic example of a large drug manufacturer masquerading as a small compounding pharmacy, was thrust into the public spotlight after it was discovered that its compounded steroids were contaminated with fungal meningitis.⁸⁶ To date, 751 instances of fungal meningitis and 64 deaths have resulted from the contamination.⁸⁷ The outbreak catalyzed intense FDA and Congressional scrutiny of compounding pharmacies. Between February and April 2013, the FDA investigated 31 compounding pharmacies and observed a variety of irregularities, including: “unidentified black particles floating in vials of supposedly sterile medicine; rust and mold in ‘clean rooms’ where sterile injectable medications were produced; technicians handling supposedly sterile products with bare hands; and employees wearing non-sterile lab coats.”⁸⁸ The FDA’s assessment was corroborated by a report released by Congress in April 2013, which concluded that the NECC fungal meningitis outbreak “would not have occurred if not for a company whose management was willing to consistently cut corners and prioritize the expansion of their business over the safety of their

84. *Id.* See also COMPOUNDING PHARMACIES, *supra* note 75, at 8–9 (reporting that adverse medical incidents related to compounding pharmacy practices occurred in at least 34 states).

85. See COMPOUNDING PHARMACIES, *supra* note 75 at 8 (reporting that legislation proposed in 2007 which would clarify FDA authority over compounding pharmacies was vigorously opposed by pharmaceutical trade organizations).

86. See, e.g., Denise Lavoie, *Victims in Meningitis Outbreak Hope for Criminal Charges Against Compounding Pharmacy*, NBC NEWS (Nov. 25, 2013), <http://www.nbcnews.com/health/health-news/victims-meningitis-outbreak-hope-criminal-charges-against-compounding-pharmacy-f2D11653410>. In December 2013, New England Compounding Center entered into a \$100 million dollar settlement with the victims. Holly Yan, *Pharmacy Owners Agree to \$100 Million Settlement After Meningitis Outbreak*, CNN HEALTH (Dec. 24, 2013), <http://www.cnn.com/2013/12/24/health/meningitis-pharmacy-settlement/>.

87. See *Multistate Outbreak of Meningitis*, *supra* note 14.

88. Margaret A. Hamburg, *Proactive Inspections Further Highlight Need for New Authorities for Pharmacy Compounding*, FDA VOICE (Apr. 11, 2013), <http://blogs.fda.gov/fdavoices/index.php/2013/04/proactive-inspections-further-highlight-need-for-new-authorities-for-pharmacy-compounding/>.

products.”⁸⁹ The report also suggested that new legislation or clarification in the statutory authority of the FDA to exercise its authority over compounding pharmacies was needed.⁹⁰

Indeed, in response to the urgent public health problems posed by compounding pharmacies, Congress passed the Drug Quality and Security Act (DQSA)⁹¹ a little over one year after the meningitis outbreak.⁹² Yet it is uncertain what effect the DQSA will have on improving the safety of compounded drugs, much less its implications for the current controversy over compounded lethal injection drugs. Still, the law bridges a gap in the FDA’s authority to regulate large-scale compounders. Though state regulatory boards will continue to oversee traditional compounding pharmacies,⁹³ larger compounders may elect to register as “outsourcing facilities.”⁹⁴ Outsourcing facilities must report specific information about the drugs it produces, including the source of the ingredients its uses to compound.⁹⁵ Additionally, the FDA now has some control over the drugs that outsourcing facilities pro-

89. COMM. ON ENERGY AND COMMERCE, FDA’S OVERSIGHT OF NECC AND AMERIDOSE: A HISTORY OF MISSED OPPORTUNITIES? 39 (Apr. 16, 2013), *available at* <http://docs.house.gov/meetings/IF/IF02/20130416/100668/HHRG-113-IF02-20130416-SD101.pdf>.

90. *See id.* at 3 (concluding though “internal FDA documents do show that the agency has been grappling with its authority over compounding for decades”, “[it is] troubling . . . that the FDA allowed this uncertainty to essentially paralyze the agency’s oversight efforts from 2009 through 2012, even with respect to companies operating well outside the bounds of traditional pharmacy compounding . . .”). *See also id.* at 40 (“The Committee is committed to ensuring that something like this never happens again. If additional legislation is needed so the FDA can adequately enforce the pertinent provisions of the FDCA with respect to companies that label themselves compounding pharmacies, yet are engaged in large-scale manufacturing and distribution activities, the Committee will work on such legislation.”).

91. Pub. L. No. 113-54, 127 Stat. 587 (2013).

92. Sabrina Tavernise, *Bill on Drug Compounding Clears Congress a Year after a Meningitis Outbreak*, N.Y. TIMES (Nov. 18, 2013), <http://www.nytimes.com/2013/11/19/us/bill-on-regulating-drug-compounding-clears-senate.html>.

93. *See* 21 U.S.C. § 353(a) (2013). In July 2014, the FDA published guidance on enforcement. *See generally* U.S. DEPT OF HUMAN HEALTH SERVS., FDA, CNTR. FOR DRUG EVALUATION AND RESEARCH, GUIDANCE, PHARM. COMPOUNDING OF HUMAN DRUG PRODUCTS UNDER SECTION 503A OF THE FED. FOOD, DRUG AND COSMETIC ACT (2014), *available at* <http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/UCM377052.pdf>.

94. *See* 21 U.S.C. § 353b (2013). Electing to register as an outsourcing facility exempts compounders from certain FDA approval and labeling requirements. *Id.* § 353b(a) (exempting outsourcing facilities from § 352(f)(1) and § 355). An outsourcing facility is a facility engaged in the compounding of sterile drugs; it need not be a licensed pharmacy or obtain prescriptions for individual patients. *Id.* § 353b(d)(4)(B)–(C).

95. *Id.* § 353b(b)(2). These reports are confidential, unless the Secretary finds that nondisclosure is inconsistent with public health. *See id.* § 353b(b)(2)(C).

duce,⁹⁶ as well as how compounded drugs are labeled.⁹⁷ Finally, outsourcing facilities are subject to risk-based inspections and adverse-event reporting.⁹⁸

B. DEATH PENALTY DRUGS AND COMPOUNDING PHARMACIES

In spite of the well-documented risks presented by compounded drugs, Georgia, Missouri, Oklahoma, Texas, and South Dakota have used compounded drugs in lethal injections.⁹⁹ In particular, Missouri and Texas, who have been candid about using compounded drugs, have executed at least 21 prisoners with compounded pentobarbital since the autumn of 2013.¹⁰⁰ But the use of compounded drugs is not without risk. For example, the compounded pentobarbital South Dakota used for the October 15,

96. See *id.* § 353b(a)(2) (prohibiting outsourcing facilities from compounding drugs from bulk drug substances unless there is a clinical need or drug shortage); *id.* § 353b(a)(3) (requiring ingredients to comply with standards approved by the Secretary); *id.* § 353b(a)(4) (prohibiting outsourcing facilities from producing markets withdrawn from the market because of safety or efficacy concerns); *id.* § 353b(a)(5) (prohibiting outsourcing facilities from compounding copies of approved drugs); *id.* § 353b(a)(6)–(7) (mandating requirements for drugs which are difficult to compound, or are subject to a risk evaluation and mitigation strategy); *id.* § 353b(a)(8) (prohibiting outsourcing facilities from selling drugs to wholesalers).

97. See *id.* § 353b(a)(10)(A)–(C) (mandating certain labeling and container requirements).

98. See *id.* § 353b(b)(4)–(5).

99. See *supra* note 12. It is possible that other states, like Florida and Arizona, have used or plan to use compounded drugs. However, these states do not disclose the source of their lethal injection drugs. See *supra* note 17 and accompanying text.

100. See *supra* note 12. True, many of these executions have occurred without reported incident. But the definition of a botched execution should not be limited to the obvious catastrophes, such as the executions of Clayton Lockett and Joseph Wood. See *supra* Part II.B. One of the primary concerns of execution by lethal injection is that one drug might inflict an unconstitutional amount of pain upon the prisoner, but his or her pain response is masked by another drug. See *supra* Part II.A. Although some states, like Missouri and Texas, use a single drug protocol, others do not. See *supra* note 61. Furthermore, lethal injection secrecy allows states to avoid being held accountable to their stated protocols. See, e.g., Chris McDaniel, *Missouri Swore It Wouldn't Use a Controversial Execution Drug. It Did.*, ST. LOUIS PUB. RADIO (Sept. 2, 2014), <http://news.stlpublicradio.org/post/missouri-swore-it-wouldn-t-use-controversial-execution-drug-it-did> (reporting that Missouri officials used midazolam in every execution since November of 2013, despite Missouri's Director of Department of Corrections, Georgie Lombardi, testifying under oath that midazolam would never be used in an execution); see also Chris McDaniel, *State Reveals More Details of Midazolam Use When Inmates are Executed*, ST. LOUIS PUB. RADIO (Sept. 6, 2014) <http://news.stlpublicradio.org/post/state-reveals-more-details-midazolam-use-when-inmates-are-executed> (reporting that though Missouri officials defended their actions by explaining that midazolam is used as a pre-execution sedative, the prisoner is not given a choice whether to accept the drug and it is injected into the prisoner through an IV at dose far greater than that recommended by anesthesiologists to achieve the stated purpose); see also *infra* p. 20-23 and accompanying text.

2012 execution of Eric Robert was contaminated with fungus, a fact revealed only after the press inquired about the drugs following his unusually long execution.¹⁰¹ Similarly, Michael Lee Wilson reportedly said that he could feel his body burning after being injected with compounded pentobarbital.¹⁰² Considering the risk — and publicity — that accompanies lethal injections of compounded drugs, that several states¹⁰³ are eager to obtain drugs from compounding pharmacies further evidences the desperation caused by drug shortages. For example, before Colorado Governor John Hickenlooper issued a moratorium on the death penalty,¹⁰⁴ the Department of Corrections sent out a letter to 97 different compounding pharmacies asking for “sodium thiopental or [an] equally more effective substance to cause death.”¹⁰⁵ Still other states, like Louisiana and Missouri, have considered potentially violating state and federal law by purchasing compounded drugs from compounding pharmacies located outside state lines.¹⁰⁶

C. LETHAL INJECTION SECRECY

This section provides an overview to lethal injection statutes and practices by first outlining the secrecy statutes and practices of several states and then offering general justifications and criticism of lethal injection secrecy.

1. *Overview of State Secrecy Statutes and Practices*

In addition to incorporating compounded drugs into increasingly experimental lethal injection protocols, ten states are

101. See *South Dakota Carries Out Execution*, *supra* note 12. The same supply was likely used for the October 30, 2012 execution of another inmate in South Dakota, Donald Moeller. See *South Dakota Covers Up Source of Drug*, *supra* note 12.

102. Brewer, *Condemned Man’s Last Words*, *supra* note 12.

103. See *generally supra* note 13.

104. See Office of the Governor, Exec. Order No. D 2013-006, Death Sentence Reprieve (May 22, 2013).

105. Tim Hoover, *Colorado Asks Pharmacists for Help in Securing Lethal Injection Drugs*, THE DENVER POST, March 12, 2013, http://www.denverpost.com/ci_22775748/colorado-asks-pharmacists-help-securing-lethal-injection-drug.

106. See, e.g., Hasselle, *State Explored Illegally Obtaining Drug*, *supra* note 13; Laura Sullivan, *Missouri Execution Stalled Over Lethal Injection Drugs in Short Supply*, NPR (Feb. 18, 2014), <http://www.npr.org/2014/02/18/279216377/missouri-execution-stalled-over-lethal-drugs-in-short-supply> (reporting Missouri purchased lethal injection drugs from an unregistered compounder located in Oklahoma).

shrouding their executions in secrecy.¹⁰⁷ Five states, for example, have passed statutes exempting information about lethal injection protocols from Freedom of Information Requests or classifying such information a confidential state secret.¹⁰⁸ For example, Georgia's statute makes information about the source of lethal injection drugs, the identity of the compounder, and the qualifications of the pharmacist and doctor who prescribe and compound the drug a confidential state secret.¹⁰⁹ Furthermore, the law can be interpreted as prohibiting judicial review of this information.¹¹⁰ Additionally, Arkansas amended its execution protocols in 2013¹¹¹ to exempt information about its execution procedures from the state's Freedom of Information Act.¹¹² Similarly,

107. Arkansas, Arizona, Georgia, Idaho, Missouri, Oklahoma, Pennsylvania, Tennessee, Texas and South Dakota. *See supra* notes 16–18 and accompanying text.

108. *See supra* note 16.

109. *See* GA. CODE ANN. § 42-5-36(d)(1)(2) (West 2013).

110. *Id.* (“[T]he identifying information of any person or entity that manufactures, supplies, compounds, or prescribes the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence shall be confidential and shall not be subject to disclosure . . . *under judicial process*. Such information shall be classified as a confidential state secret.”) (emphasis added). *See also infra* Part IV.

111. 2013 Ark. Act 139.

112. Arkansas's statute reads in pertinent part:

- (a) The Department of Correction shall carry out the sentence of death by intravenous lethal injection of a barbiturate in an amount sufficient to cause death.
- (b) Before the intravenous lethal injection is administered, the condemned prisoner shall be intravenously administered a benzodiazepine.
- (c) The drugs set forth in subsections (a) and (b) of this section shall be administered along with any substances that the manufacturer has mixed with the drugs and any additional substances, such as saline solution, called for in the manufacturer's instructions.
- (d) Catheters, sterile intravenous solution, and other equipment used for the intravenous injection of the drugs set forth in subsections (a) and (b) of this section shall be sterilized and prepared in a manner that is safe and commonly performed in connection with the intravenous administration of drugs of that type.
- (e) The Director of the Department of Correction shall develop logistical procedures necessary to carry out the sentence of death, including:
 - (1) The following matters:
 - (A) *Ensuring that the drugs and substances set forth in subsections (a)–(d) of this section and other necessary supplies for the lethal injection are available for use on the scheduled date of the execution; . . .*
 - (G) *The identity, arrival, and departure of the persons involved with carrying out the sentence of death at the facility where the sentence of death will be carried out; . . .*
 - (g) *The procedures under subdivision (e)(1) of this section and the implementation of the procedures under subdivision (e)(1) of this section are not subject to disclosure under the Freedom of Information Act of 1967 . . .*

ARK. CODE ANN. §§ 5-4-617(a)–(d); (e)(1)(A), (G); (g) (West 2013) (emphasis added).

Oklahoma and Tennessee passed statutes in 2011 and 2013, respectively,¹¹³ requiring the identities of the persons and entities supplying lethal injection drugs be kept confidential, as well as records related to the purchase of such drugs.¹¹⁴ And South Dakota's 2013 secrecy law makes disclosure of information that identifies a supplier of lethal injection drugs a misdemeanor punishable by one-year imprisonment, a two-thousand dollar fine, or both.¹¹⁵

Five other states have adopted lethal injection secrecy practices without a legislative mandate. For instance, Arizona and Missouri's Department of Corrections have interpreted existing exe-

113. See 2011 Okla. Sess. Law Serv. Ch. 70 (West); 2013 Tenn. Pub. Law. Ch. 314.

114. Oklahoma's statute provides:

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. The purchase of drugs, medical supplies or medical equipment necessary to carry out the execution shall not be subject to the provisions of the Oklahoma Purchasing Act.

OKLA. STAT. ANN. tit. 22, § 1015B. Similarly, Tennessee's statute provides:

[T]hose parts of the record identifying an individual or entity as a person or entity who or that has been or may in the future be directly involved in the process of executing a sentence of death shall be treated as confidential and shall not be open to public inspection "[P]erson or entity" includes, but is not limited to . . . a contractor or employee of a contractor, a volunteer who has direct involvement in the process of executing a sentence of death, or a person or entity involved in the procurement or provision of chemicals, equipment, supplies and other items for use in carrying out a sentence of death. Records made confidential . . . include . . . records related to remuneration to a person or entity in connection with such person's or entity's participation in or preparation for the execution of a sentence of death

TENN. CODE ANN. § 10-7-504(h)(1) (West 2014).

115. South Dakota's statute provides:

The name, address, qualifications, and other identifying information relating to the identity of any person or entity supplying or administering the intravenous injection substance or substances under chapter 23A-27A are confidential. Disclosure of the foregoing information may not be authorized or ordered. Disclosure of confidential information pursuant to this section concerning the execution of an inmate under chapter 23A-27A is a Class 1 misdemeanor.

S.D. CODIFIED LAWS § 23A-27A-31.2 (2013); S.D. CODIFIED LAWS § 22-6-2(1)(2005) (defining the penalties for class 1 misdemeanors).

tioner confidentiality statutes¹¹⁶ to include information about the suppliers of lethal injection drugs.¹¹⁷ Lastly, Pennsylvania, Texas and Idaho simply refuse to disclose certain information about the source of their lethal injection drugs.¹¹⁸

2. *Justifications and Criticisms of Lethal Injection Secrecy*

There are four plausible justifications for lethal injection secrecy: (1) protecting participants from professional censure; (2) protecting participants from harassment and threats from death penalty abolitionists; (3) shielding doctors, pharmacists, and compounding pharmacies from liability; and (4) preventing dilatory lawsuits from delaying executions. In enacting lethal injection secrecy statutes, lawmakers have explicitly advanced the first two justifications. Namely, that lethal injection secrecy protects the medical and pharmaceutical participants of the lethal

116. See Roko, *Executioner Identities*, *supra* note 6, at n.39 (indicating that at one point Florida, Illinois, Montana and New York all had statutes intended to protect the identity of the executioner).

117. Compare ARIZ. REV. STAT. ANN. § 13-757(C) (West 2009) (“The identity of executioners and other persons who *participate or perform ancillary functions in an execution* and any information contained in records that would identify those persons is confidential and is not subject to disclosure”) (emphasis added), and ARIZ. DEPT OF CORR. EXECUTION PROCEDURES MANUAL 2, available at <https://corrections.az.gov/sites/default/files/0710.pdf> (“The anonymity of any person . . . who participates in or performs any ancillary function(s) in the execution, *including the source of the execution chemicals*, and any information contained in records that would identify those persons are, as required by statute, to remain confidential and are not subject to disclosure.”) (emphasis added). Compare

The director of the department of corrections shall select an execution team which shall consist of those persons who administer lethal gas or lethal chemicals and those persons, such as medical personnel, who provide direct support for the administration of lethal gas or lethal chemicals. The identities of members of the execution team, as defined in the execution protocol of the department of corrections, shall be kept confidential . . . [A]ny portion of a record that could identify a person as being a current or former member of an execution team shall be privileged and shall not be subject to discovery, subpoena, or other means of legal compulsion for disclosure to any person or entity, the remainder of such record shall not be privileged or closed unless protected from disclosure by law.

MO. REV. STAT. 546.720 (2) (West 2007) (emphasis added), and Press Release, State of Missouri Department of Corrections, Missouri Department of Corrections Adopts New One-Drug Execution Protocol (Oct. 22, 2013), available at <http://doc.mo.gov/PressReleases/2013/20131022.pdf> (“The department also announced that it has added a compounding pharmacy to its execution team. The compounding pharmacy will be responsible for providing pentobarbital for executions carried out under the new protocol.”).

118. See *supra* note 18.

injection process from professional censure, as well as harassment from death penalty abolitionists. For example, the American Medical Association, the American Nurses' Association, the American Society of Anesthesiologists, and the National Commission on Correction Health Care have ethical guidelines opposing members' participation in lethal injections.¹¹⁹ However, some states either require that a medical professional participate in lethal injection proceedings or at least contemplate one's presence.¹²⁰ Hence, states argue that the ability to withhold the identities of medical professionals who choose to assist with executions is essential to protecting those individuals from professional censure and harm to their personal reputations.¹²¹ Relatedly, lethal injection secrecy proponents also argue that participants would be unwilling to participate without secrecy because of threats of reprisal and harassment from death penalty abolitionists.¹²²

A third justification, not often explicitly advanced by state legislators, is that lethal injection secrecy allows doctors, pharmacists, and manufacturers of drugs to avoid liability for participation in executions. Patients have successfully sued their doctors for negligence and failure to warn them about the risks of defective or dangerous compounded drugs.¹²³ To that end, the estate of

119. Denno, *Lethal Injection Quandary*, *supra* note 6, at 53–59, 77–91. Whether the ethical guidelines of state medical boards and professional organizations actually prevent doctors and pharmacists from participating in lethal injection executions is doubtful. See *infra* Part V.D.2.

120. Denno, *Lethal Injection Quandary*, *supra* note 6, at 77–90.

121. Rhonda Cook & Bill Rankin, *Lethal Injection Secrecy Bill Wins Approval*, ATLANTA JOURNAL-CONSTITUTION (Mar. 26, 2013), <http://www.ajc.com/news/news/state-regional-govt-politics/lethal-injection-secrecy-bill-wins-approval/nW4tK/>.

122. Noomaan Merchant and Michael Gracyk, *Official: Texas Can Keep Lethal Drug Source Secret*, ASSOCIATED PRESS (May 29, 2014), <http://bigstory.ap.org/article/missouri-attorney-general-wants-execution-changes> (reporting that a Houston-area compounding pharmacy received constant inquiries from the press, hate mail and messages, but Texas law enforcement was not investigating any of the complained of activity). Additionally, Woodlands Compounding Pharmacy of Texas asked the Texas Department of Corrections for the prompt return of the compounded phenobarbital the state had purchased from the company after its identity was disclosed in a federal lawsuit brought by Texas death row inmates. See Carey Gilliam, *Texas Says Won't Return Execution Drugs to Pharmacy Facing Scrutiny*, REUTERS (Oct. 7, 2013), <http://www.reuters.com/article/2013/10/07/us-usa-execution-drug-idUSBRE9960W320131007>.

123. See Alicia Gallegos, *Physicians Entangled In Tainted Drugs Lawsuits*, AM. MED. NEWS (Feb 11, 2013), www.amednews.com/article/20130211/profession/130219977/2. Moreover, medical malpractice insurance may not cover non-FDA approved drugs. See Jennifer Grudeman, et. al, *Potential Risks of Pharmacy Compounding*, DRUGS R D (Mar. 23, 2013), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3627035/>.

Clayton Lockett has filed a lawsuit against Oklahoma and the lethal injection participants seeking injunctive relief and damages for his botched execution.¹²⁴ Thus, it is not inconceivable that lethal injection secrecy is an attempt to encourage physician and pharmaceutical participation by making it difficult for potential plaintiffs to identify tortfeasors.¹²⁵

A final justification, also not often explicitly advanced, is that legal challenges to lethal injection secrecy are merely dilatory tactics used to delay executions.¹²⁶ That is, information about lethal injection drugs, including their source, potency and the qualifications of their compounder, is irrelevant where the ultimate purpose of the drugs to end a prisoner's life. Here, the assumption is that a prisoner has no constitutional right to a painless execution.¹²⁷ Another line of argument suggests that even if the potential complications caused by substandard lethal injection drugs were relevant to the facing execution, it is impossible to know whether a prisoner actually experiences pain during an execution.¹²⁸

124. See Ed Pilkington, *Oklahoma Delays Executions Again Despite Unveiling New Death Chamber*, THE GUARDIAN (Oct. 13, 2014), <http://www.theguardian.com/us-news/2014/oct/13/oklahoma-delays-executions-again-days-after-unveiling-new-death-chamber>. In addition, the family of Dennis McGuire publicly contemplated suing South Dakota and the lethal injection participants after Ohio botched his execution. *Family Sues in Protracted Ohio Execution*, N. Y. TIMES (Jan. 25, 2014), <http://www.nytimes.com/2014/01/26/us/family-sues-in-protracted-ohio-execution.html>.

125. See also *infra* Part V.D.2.

126. See Kevin O'Hanlon, *Death Penalty Expert: Nebraska Must Change Lethal Injection Drug*, LINCOLN JOURNAL STAR, July 24, 2013, http://journalstar.com/news/state-and-regional/nebraska/death-penalty-expert-nebraska-must-change-lethal-injection-drug/article_b34fdfec-c56c-5cd5-87c1-6b15a618789b.html (quoting the Nebraska Attorney General as stating the challenge to Nebraska's foreign-made sodium thiopental was "frivolous, dilatory, and irrelevant").

127. Chief Justice Roberts has framed the issue thusly:

The Eighth Amendment to the Constitution, applicable to the States through the Due Process Clause of the Fourteenth Amendment, provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." We begin with the principle...that capital punishment is constitutional. It necessarily follows that there must be a means of carrying it out. Some risk of pain is inherent in any method of execution — no matter how humane — if only from the prospect of error in following the required procedure. It is clear, then, that the Constitution does not demand the avoidance of all risk of pain in carrying out executions.

Baze, 553 U.S. at 47 (internal citations omitted).

128. Some have suggested defense attorneys tell their clients to "put on a show" during executions. See Pete Williams & Tracy Connor, *Missouri Killer Executed After Supreme Court Clears the Way*, NBC NEWS (Jan. 29, 2014), http://usnews.nbcnews.com/_news/2014/

On the other hand, critics argue that lethal injection secrecy pose grave constitutional concerns regarding the administration of the death penalty. First, secrecy makes it practically difficult for a prisoner to obtain the facts necessary to raise an Eighth Amendment claim under *Baze*.¹²⁹ Second, in addition to violating

01/29/22495815-missouri-killer-executed-after-supreme-court-clears-the-way?lite. A subsequent investigation by the Ohio Public Defender did not find any evidence supporting the accusation. See Tracy O'Connor, *Ohio Lawyers Deny Coaching Executed Man to Put on a "Big Show"*, NBC NEWS (Jan. 28, 2012), http://usnews.nbcnews.com/_news/2014/01/28/22482116-ohio-lawyers-deny-coaching-executed-man-to-put-on-a-big-show?lite. Furthermore, assuming that McGuire was conscious enough to feign pain, the fact he did so for the twenty minutes it took for him to die tends to support the proposition that the lethal injection was not administered properly.

129. The problems created by lethal injection secrecy in light of post-*Baze* Eighth Amendment precedent has been noted by several judges. For example, though ultimately finding that Marcus Wellons had not established a substantial likelihood of success on the merits of his 42 U.S.C. § 1983 Eighth and First Amendment claims, one judge explained the predicament lethal injection secrecy creates for prisoners seeking to vindicate their Eighth Amendment and due process rights as a “disturbing circularity problem”:

I write separately to highlight the disturbing circularity problem created by Georgia’s secrecy law regarding methods of execution in light of our circuit precedent. We explained in *Mann v. Palmer* that “[a]fter *Baze*, an inmate who seeks a stay of execution must establish that the lethal injection protocol of his state creates a *demonstrated* risk of severe pain that is substantial when compared to the *known alternatives*.” . . . [I]n order to succeed under the Eighth Amendment, he must show that the manner in which Georgia intends to execute him generates “a substantial risk of serious harm or an objectively intolerable risk of harm.” Possibly due to his lack of information about the compound pentobarbital that will be used and the expertise of the people who will administer his execution, Wellons has not shown such a risk. Indeed, how could he when the state has passed a law prohibiting him from learning about the compound it plans to use to execute him? . . . Without additional information about the method of his execution, it seems nearly impossible for Wellons to make the argument that Defendants’ planned execution creates an “objectively intolerable risk of harm.” . . . Unless judges have information about the specific nature of a method of execution, we cannot fulfill our constitutional role of determining whether a state’s method of execution violates the Eighth Amendment’s prohibition against cruel and unusual punishment before it becomes too late.

Wellons v. Comm’r, Ga. Dept. of Corr., 754 F.3d 1260, 1267–68 (11th Cir. 2014) (Wilson, J., concurring) (internal citations omitted). See also *In re Lombardi*, 741 F.3d 888, 898–902 (8th Cir. 2014) (Bye, J., dissenting) (“[T]he prisoners have a significant interest in obtaining the identities of these parties to assert their constitutional right against being subjected to ‘serious illness and needless suffering’ during execution Aside from disclosure, the Director has not shown how the prisoners can obtain critical information about the chemical composition, purity, potency, and safety of the compounded pentobarbital which Missouri uses in its executions.”) (internal citations omitted); *Owens v. Hill*, 758 S.E.2d 794, 806–08 (Ga. 2014) (Benham, J., dissenting) (noting that the speculation “permeating Hill’s [Eighth Amendment] claims arises solely from the states’ unwillingness, in light of the secrecy statute, to disclose information that would allow him to make more specific claims”).

some states' Freedom of Information Laws,¹³⁰ many argue that lethal injection secrecy violates the prisoner and public's First Amendment right of access to information concerning the administration of the death penalty.¹³¹

Second, critics argue that lethal injection secrecy reduces predictability and accountability in lethal injection executions. For example, despite several officials testifying under oath that Missouri would not use midazolam in an execution, reports indicate that Missouri Department of Corrections officials have used midazolam in every execution since November 2013 — without the knowledge of prisoners, defense attorneys or judges.¹³² Likewise, during Arizona's two-hour-long execution of Joseph Wood, he was injected 15 times with midazolam and hydromorphone, far exceeding the amount mandated by state's lethal injection protocol.¹³³

Finally, lethal injection facilitates an underground economy of death penalty drugs. In February of 2013, for instance, Missouri's Department of Corrections gave one of its officers \$11,000 dollars in cash and sent him into Oklahoma to purchase lethal injection drugs from a compounding pharmacy not licensed to sell drugs in Missouri.¹³⁴ Selling a drug without a license, however, is a felony under Missouri law.¹³⁵ And Louisiana DOC officials tricked a hospital into selling it hydromorphone, which the hospital would not have done had it known that the state intended to use the drug in an execution.¹³⁶

130. See *supra* note 7 and accompanying text.

131. See *infra* Part V.

132. Chris McDaniel, *Missouri Swore It Wouldn't Use a Controversial Execution Drug, It Did.*, ST. LOUIS PUB. RADIO (Sept. 2, 2014), <http://news.stlpublicradio.org/post/missouri-swore-it-wouldn-t-use-controversial-execution-drug-it-did>.

133. See Tom Dart, *Arizona Inmate Joseph Wood was Injected 15 Times with Execution Drugs*, THE GUARDIAN (Aug. 2, 2014), <http://www.theguardian.com/world/2014/aug/02/arizona-inmate-injected-15-times-execution-drugs-joseph-wood>.

134. See *Secrecy Behind Missouri's Execution Drugs*, REVEAL, <http://revealradio.org/execution-drugs/>.

135. Chris McDaniel & Veronique Lacapra, *Investigation: Missouri's Execution Drug Source Raises Legal, Ethical Questions*, ST. LOUIS PUB. RADIO (Dec. 31, 2013), <http://news.stlpublicradio.org/post/investigation-missouris-execution-drug-source-raises-legal-ethical-questions#three> (last visited Sept. 28, 2014).

136. See Della Hasselle, *In a Rush to Find Lethal Injection Drug, Prison Officials Turned to a Hospital*, THE LENS (August 6, 2014), <http://thelensnola.org/2014/08/06/lake-charles-memorial-hospital-sold-execution-drug-to-state/>.

IV. GEORGIA'S LETHAL INJECTION SECRECY STATUTE

As noted in Part III.C, Georgia responded to lethal injection drug shortages by enacting a particularly restrictive lethal injection secrecy act. Section A of this Part summarizes the key provisions of the law and the events leading up to its passage. Section B discusses the first challenge to the law by Warren Lee Hill. It provides a summary of the procedural posture of the case, the Fulton County Superior Court's emergency grant of injunctive relief and the Georgia Supreme Court's decision to reverse and vacate the Superior Court's injunction.

A. BACKGROUND AND OVERVIEW OF GEORGIA'S SECRECY STATUTE

As discussed earlier, death penalty drug shortages present difficult decisions for death penalty states post-*Baze*.¹³⁷ Georgia is no exception. After Hospira's exit from the sodium thiopental market, observers in two different Georgia executions reported that the prisoners appeared to suffer during their executions.¹³⁸ The sodium thiopental used in each execution was purchased from DreamPharma, a London drug distributor operating out of the back of a driving school.¹³⁹ The Drug Enforcement Agency's subsequent confiscation of the state's supply of sodium thiopental forced Georgia to substitute pentobarbital for sodium thiopental.¹⁴⁰ Later that year, after the apparently botched execution of Roy Blankenship, the protocol was changed again.¹⁴¹ Georgia's current lethal injection protocol requires a single, lethal dose of pentobarbital.¹⁴²

Following the DreamPharma debacle, the Georgia Department of Corrections (DOC) lobbied the Georgia legislature for a

137. See *supra* Part II–III.

138. That of Emmanuel Hammond and Brandon Rhodes. See Liliana Segura, *The Executioner's Dilemma*, THE NATION (May 11, 2011), <http://www.thenation.com/article/160648/executioners-dilemma#>.

139. *Id.*

140. See Lohr, *Georgia May Have Broken Law by Importing Drug*, *supra* note 45.

141. *Georgia Inmates' Thrashing During Execution Raises New Questions About Death Row Drug*, AL.COM (June 28, 2011), http://blog.al.com/wire/2011/06/georgia_inmates_thrashing_duri.html; see *State by State Lethal Injection*, *supra* note 12.

142. See *State by State Lethal Injection*, *supra* note 12.

secrecy law.¹⁴³ House Bill 122 was introduced on January 28, 2013.¹⁴⁴ One of the bill's sponsors, Representative Kevin Tanner, stated that the purpose of the bill was to shield those participating in executions from intimidation and being ostracized in the community, observing that the companies supplying the drugs "are very reluctant to participate in [the] process because of harassment and threats."¹⁴⁵ In March 2013, the Georgia legislature approved H.B. 122,¹⁴⁶ and on May 7, 2013, Governor Nathan Deal signed it into law.¹⁴⁷ The statute, in pertinent part, provides:

The identifying information of any person or entity who participates in or administers the execution of a death sentence and the identifying information of any person or entity that manufactures, supplies, compounds, or prescribes the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence shall be confidential and shall not be subject to disclosure Article 4 of Chapter 18 of Title 50 or under judicial process. Such information shall be classified as a confidential state secret.¹⁴⁸

The statute defines "identifying information" as "any records or information that reveals a name, residential or business address, residential or business telephone number, day or month of birth, social security number, or professional qualifications."¹⁴⁹ Compared to similar legislation enacted in other states, Georgia's statute is particularly troubling.¹⁵⁰ Indeed, by broadly defining "identifying information" and preventing its discovery by "judicial process," the statute conceals nearly all information about lethal injection drugs from the prisoner, public and even judiciary.

143. Andrew Cohen, *New 'Injection Secrecy' Law Threatens First Amendment Rights in Georgia*, COLUMBIA JOURNALISM REVIEW (July 17, 2013), http://www.cjr.org/behind_the_news/georgia_lethal_injections_shie.php.

144. H.B. 122, 2013–2014 Reg. Sess. (Ga. 2013), available at <http://www.legis.ga.gov/legislation/en-US/display/20132014/HB/122>.

145. Rhonda Cook & Bill Rankin, *Lethal Injection Secrecy Bill Wins Approval*, AJC.COM (Mar. 26, 2013), <http://www.ajc.com/news/news/state-regional-govt-politics/lethal-injection-secrecy-bill-wins-approval/nW4tK/>.

146. H.B. 122, *supra* note 144.

147. OFFICE OF THE GOVERNOR, 2013 BILLS SIGNED, GEORGIA.GOV, <http://gov.georgia.gov/bills-signed/2013> (last visited Aug. 26, 2014).

148. GA. CODE ANN. § 42-5-36(d)(2) (West 2013).

149. *Id.* § 42-5-36(d)(1).

150. *See supra* Part III.C.

B. WARREN LEE HILL CHALLENGES GEORGIA'S SECRECY STATUTE

Georgia's lethal injection secrecy statute confronted its first challenge on July 12, 2013, when Warren Lee Hill filed an emergency motion for preliminary injunction and action for declaratory judgment in the Superior Court of Fulton County.¹⁵¹ The trial court granted injunctive relief and a stay of execution, but the Georgia Supreme Court reversed and vacated the stay following the appeal. This Section places the lethal injection secrecy controversy within the broader context of Georgia's administration of the death penalty by providing brief summary of the procedural history and background of Mr. Hill's case. This section also provides an overview of the trial court order and the Georgia Supreme Court decision reversing Mr. Hill's stay of execution and upholding Georgia's lethal injection secrecy statute.

1. *Procedural History*

Mr. Hill was already serving a life sentence for the murder of his girlfriend when he brutally murdered a fellow inmate with a nail-studded board in 1991.¹⁵² He was sentenced to death for this crime.¹⁵³ In a 1996 collateral attack proceeding in Georgia state court, Mr. Hill first raised intellectual disability as a contested issue.¹⁵⁴ Three experts testified they believed that Mr. Hill was a malingerer,¹⁵⁵ and the state habeas court upheld Mr. Hill's death sentence, finding that Mr. Hill failed to prove that he was intellectually disabled.¹⁵⁶ The Georgia Supreme Court affirmed.¹⁵⁷

151. Hill v. Owens, Order, 2013-CV233771 (Ga. Sup. Ct., July 18, 2013), available at <http://www.deathpenaltyinfo.org/documents/HillStayOrder.pdf>.

152. *In re Warren Lee Hill*, 715 F.3d 284, 285 (11. Cir. 2013)

153. Hill v. State, 263 Ga. 37 (1993).

154. *In re Hill*, 715 F.3d at 285–86.

155. *Id.* at 287. Meaningful to the state court was the fact that Mr. Hill had a fairly decorated military record and would have achieved a rank of E-6 had he not murdered his girlfriend. *Id.* at n.4.

156. *Id.* at 286. Although the Supreme Court has ruled that the intellectually disabled are categorically exempt from the death penalty, see *Atkins v. Virginia*, 536 U.S. 304 (2002), it left to the states to decide who qualifies as intellectually disabled. But of all death penalty states, Georgia has the most stringent standard. See GA. CODE ANN. § 17–7–131(a)(3) (providing that “mentally retarded” means (1) having “significantly subaverage general intellectual functioning,” (2) “resulting in or associated with impairments in adaptive behavior,” (3) “which manifested during the developmental period”). The proponent must prove his intellectual disability beyond a reasonable doubt. Mr. Hill challenged Georgia's intellectual disability standard in 2011, and lost. See generally Hill v. Humph-

Based on these facts, a federal district court denied relief to Mr. Hill's first federal habeas corpus petition in 2004.¹⁵⁸ A second state habeas asserting the same intellectual disability claim was denied in 2012.¹⁵⁹ Mr. Hill then filed a third state habeas petition in February of 2013, revealing that the experts who concluded Mr. Hill was a malingerer in the 1996 state habeas proceeding had recanted their testimony.¹⁶⁰ Thus, all seven experts who examined Mr. Hill in 1997 unanimously agreed he was, in fact, intellectually disabled.¹⁶¹

His petition, however, was denied.¹⁶² The state habeas court held that Mr. Hill's third state habeas petition raised claims that were already adjudicated on the merits, and were therefore procedurally barred under state law.¹⁶³ The Georgia Supreme Court denied his application for probable cause and stay of execution, but on February 19, three hours before his scheduled execution, the Eleventh Circuit granted Mr. Hill leave to file a successive petition of habeas corpus and issued a conditional stay of execution.¹⁶⁴ However, finding that Mr. Hill had procedurally defaulted on his claims of intellectual disability, the Eleventh Circuit eventually denied his habeas corpus petition.¹⁶⁵ Mr. Hill's execution date was set for July 15, 2013.¹⁶⁶

rey, 662 F.3d 1335 (11th Cir. 2011) (holding that Georgia's allocation of the burden of proof is not contrary to clearly established federal law) *cert. denied*, Hill v. Humphrey, 132 S. Ct. 2727 (2012). This Note intends the term "intellectual disability" to hold the same legal meaning as "mentally retarded."

157. Head v. Hill, 277 Ga. 255 (2003).

158. In re Hill, at 287.

159. *Id.* The Supreme Court denied certiorari. See Hill v. Humphrey, 133 S. Ct. 1324 (2013).

160. In re Hill, at 288.

161. See Jesse Wegman, *A Rare Plea to the Court*, N.Y. TIMES (Sept. 21, 2013), http://www.nytimes.com/2013/09/22/opinion/sunday/a-rare-plea-to-the-court.html?_r=0.

162. In re Hill, at 288–89.

163. *Id.*

164. *Id.* at 289–90.

165. *Id.* at 300. The lone dissenter, Judge Rosemary Barkett, soberly observed: "[t]he idea that courts are not permitted to acknowledge that a mistake has been made which would bar an execution is quite incredible for a country that not only prides itself on having the quintessential system of justice but attempts to export it to the world as a model of fairness." *Id.* at 302 (Barkett, J., dissenting).

166. Hill v. Owens, Order, 2013-CV233771 at 2 (Ga. Sup. Ct., July 18, 2013), available at <http://www.deathpenaltyinfo.org/documents/HillStayOrder.pdf>.

2. Trial Court Grants Emergency Injunctive Relief

After the Supreme Court declined to hear Mr. Hill's case on direct appeal in October of 2013,¹⁶⁷ he challenged the constitutionality of Georgia's secrecy law. On the day the death warrant was issued, Mr. Hill's counsel submitted an Open Records Request to obtain information about the drugs the state intended to use for his execution.¹⁶⁸ The state responded five days before his scheduled execution with a redacted report providing no information about the identity of the manufacturer or supplier of the drug to be used for Mr. Hill's execution.¹⁶⁹

On July 12, 2013, Mr. Hill filed an action for declaratory judgment in Fulton Superior Court challenging the constitutionality of Section 42-5-36(d).¹⁷⁰ On July 18, the trial court granted a preliminary injunction staying Mr. Hill's execution, finding that Mr. Hill was likely to succeed on the merits, and that without injunctive relief, Mr. Hill would suffer the irreparable harm of an unconstitutional execution.¹⁷¹

In the order, the court expressed grave concerns about the constitutionality Section 42-5-36(d). First, the court found that the heavily redacted report provided to Mr. Hill was insufficient to assuage legitimate concerns about its purity and compounding.¹⁷² Indeed, the court remarked that withholding information about the source of the pentobarbital and the professional qualifications of those involved in the compounding process made it "impossible for the Plaintiff to craft a meaningful Eighth Amendment claim."¹⁷³ Second, the court found that Section 42-5-36(d) presented serious separation of powers concerns under the Georgia Constitution by prohibiting judicial review.¹⁷⁴ Finally, the court also ruled that Section 42-5-56(d) was an impermissible content-based discrimination and therefore violated the First Amendment of the United States Constitution, as well as the Georgia Constitution.¹⁷⁵

167. Hill v. Humphrey, 134 S.C.t 115 (2013) (cert. denied).

168. Brief of Appellee, at 11, Owens v. Hill, 758 S.E. 2d 794 (Ga. 2014) (No. S12A1819).

169. *Id.*

170. Hill v. Owens, Order, 2013-CV233771, at 1.

171. *Id.* at 3.

172. *Id.* at 5.

173. *Id.* at 5.

174. *Id.* at 6.

175. *Id.* at 7.

3. *Georgia Supreme Court Reverses the Trial Court Order*

The state subsequently filed, and was granted, an application for discretionary appeal to the Georgia Supreme Court. The Georgia Supreme Court then ruled the superior court's grant of injunctive relief was an abuse of discretion.¹⁷⁶ The court held, over dissent, that Mr. Hill failed to show that Section 42-5-56(d) (1) violated the Eighth Amendment; (2) violated due process; (3) constituted a violation of separation of powers under the Georgia Constitution or the Supremacy Clause of the United States Constitution; and (4) violated Mr. Hill's First Amendment rights.

Principally, the *Hill* court held that Mr. Hill failed to demonstrate that the compounded drugs to be used in his execution posed a substantial or intolerable risk of serious harm.¹⁷⁷ The court reasoned that though there is a risk that compounded drugs could be substandard or contaminated, sterility is "simply a meaningless issue" where the ultimate purpose of the drug is to end a prisoner's life.¹⁷⁸ Furthermore, the court argued that the risk of producing substandard drugs is mitigated when a compounding pharmacy creates a common drug, like pentobarbital, pursuant to a valid prescription.¹⁷⁹ In short, the court did not believe that Mr. Hill had demonstrated how basic information about the specific compounding pharmacy involved in the creation of the drugs could provide a factual basis for an underlying Eighth Amendment claim, even assuming that the compounding pharmacy experienced difficulties producing safe drugs in the past.¹⁸⁰

The court also held that Section 42-5-36(d) did not violate Mr. Hill's due process rights and access to the courts. Again, the court reasoned that because Mr. Hill's underlying Eighth Amendment claim was "speculative" and "unfounded," the failure of his claims was not due to any state or federal due process violation.¹⁸¹ Similarly, the court did not believe, in this instance, that Section 42-5-36(d) violated the doctrine of separation of powers or the Supremacy Clause. Although the court acknowledged that the statute could pose serious problems under both the Unit-

176. *Owens v. Hill*, 758 S.E.2d 794 (Ga. 2014).

177. *Id.* at 801-03.

178. *Id.* at 802-03.

179. *Id.* at 802.

180. *Id.* at 802-803.

181. *Id.* at 804 n.10.

ed States and Georgia constitutions,¹⁸² the court held that the failure of Hill's claims stemmed from the fact that his claims were meritless.¹⁸³

Lastly, the court ruled that Section 42-5-36(d) did not violate the First Amendment guarantee of free speech. After noting that the public has a right of access to some government proceedings and processes if public access has been granted historically and such access plays a positive role in the functioning of the process, the court held that the historical tradition of concealing the identities of executioners and the risk that individuals and entities might become unwilling to participate in executions favored upholding the secrecy law.¹⁸⁴

V. GEORGIA'S SECRECY LAW VIOLATES THE FIRST AMENDMENT

As James Madison observed, “[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which

182. *Id.* at 804 (“There is no doubt that a statute enacted by the General Assembly that denied Hill his constitutional right to be free from cruel and unusual punishment and improperly interfered with the power of the judiciary to enforce that right would present serious questions regarding the unquestionable rule that constitutional provisions take supremacy over legislative enactments when the two are in irreconcilable conflict and that the judiciary has an independent, constitutionally-mandated role to ensure the Constitution is enforced when it is in conflict with a legislative enactment.”).

183. *Id.*

184. *Id.* at 805–06. Accordingly, the *Hill* court did not address the level of scrutiny that would attach to the qualified right. *See infra* Part V. In a dissent for two judges, Judge Benham argued that the statute violated Mr. Hill's due process rights. Writing in light of the “macabre” results of Oklahoma's execution of Clayton Lockett, the dissent observed that the proper administration of the death penalty requires “a high level of certainty,” a requirement that “Georgia's confidential inmate state secret statute does nothing to achieve.” *Id.* at 807 (Benham, J., dissenting). Instead, in the dissent's view, the statute has “the effect of creating the very secret star chamber-like proceedings in which the State has promised its citizens [it] would not engage.” *Id.* Moreover, the speculative nature of Mr. Hill's claims was the inevitable result of the state's unwillingness to disclose information that would allow him to make specific claims. *Id.* Finally, the dissent noted that Mr. Hill could be allowed access to information identifying the compounding pharmacy that produced the drug and the source of the bulk materials used by the pharmacy to manufacture the drug if information was released in a way that minimized harm to execution participants. *Id.* at 808.

knowledge gives.”¹⁸⁵ A state’s power over an individual is never higher than when it ends the life of a citizen, and the potential for “tragedy” or “farce” is magnified without an adequately informed public serving as a check against the exercise of that power.

To be sure, the First Amendment does not provide a general right to information possessed by the Government.¹⁸⁶ Furthermore, the press has no special right of access to information unavailable to the public.¹⁸⁷ But the Supreme Court has long declined to interpret the First Amendment in a narrow, literal fashion.¹⁸⁸ And Court has recognized that a newsgathering right is not without constitutional protections.¹⁸⁹ Additionally, in the

185. Letter from James Madison to W.T. Barry (August 4, 1822), 9 THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt, ed., 1900), available at <http://oll.libertyfund.org/titles/madison-the-writings-vol-9-1819-1836>.

186. See *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (Stewart, J., concurring) (“The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally. The Constitution does no more than assure the public and the press equal access once government has opened its doors.”).

187. See *Pell v. Procunier*, 417 U.S. 817, 834 (1974).

188. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). Writing for the Court, Justice Brennan explained:

But we have long eschewed any “narrow, literal conception” of the Amendment’s terms, for the Framers were concerned with broad principles, and wrote against a background of shared values and practices. The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights. Underlying the First Amendment right of access to criminal trials is the common understanding that “a major purpose of that Amendment was to protect the free discussion of governmental affairs[.]” By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self government. Thus to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected “discussion of governmental affairs” is an informed one.

Globe Newspapers, at 604–05 (internal citations omitted).

189. *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972) (although declining to create a privilege for journalists protecting them from having to divulge their sources, the Court remarked that “news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment”). Justice Stewart argued that the right to gather news is a necessary corollary to the right to publish the news:

A corollary of the right to publish must be the right to gather news. The full flow of information to the public protected by the free-press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated. News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to pub-

context of criminal proceedings, the Court has recognized the First Amendment provides protection against government overreach.¹⁹⁰ Lastly, the Court has long understood that the irrevocable finality of the death penalty necessitates special limitations on the administration of capital punishment.¹⁹¹

Simply put, death is different. The death penalty sits at the outer bounds of justifiable state action — a fact recognized by much of the world.¹⁹² Accordingly, if there is any state action where transparency assumes a special importance, it is the administration of the capital punishment. And if there is any state that has demonstrated that its lethal injection procedures beg for the disinfecting light of the sun,¹⁹³ it is Georgia.

Hence, Part V argues that the Georgia Supreme Court erred in its decision: the First Amendment *does* provide a right of ac-

lish would be impermissibly compromised. Accordingly, a right to gather news, of some dimensions, must exist.

Id. at 727–28 (Stewart, J., dissenting) (internal citations omitted).

190. See *infra* Part V.A.

191. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 286-89 (1972) (Brennan, J., concurring) (“[d]eath is a unique punishment”; “[d]eath . . . is in a class by itself”); *id.* at 306 (Stewart, J., concurring) (“penalty of death differs from all other forms of criminal punishment, not in degree but in kind”); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (joint opinion of Stewart, J., Powell, J., and Stevens, J.) (“penalty of death is different in kind from any other punishment” and emphasizing its “uniqueness”); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (joint opinion of Stewart, J., Powell, J., and Stevens, J.) (“penalty of death is qualitatively different from a sentence of imprisonment, however long”); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (“qualitatively different”); *Wainwright v. Witt*, 469 U.S. 412, 463 (1985) (Brennan, J., dissenting) (citing the “previously unquestioned principle” that the death penalty needs special safeguards because it is “qualitatively different”); *McCleskey v. Kemp*, 481 U.S. 279, 340 (1987) (Brennan, J., dissenting) (“hardly needs reiteration that this Court has consistently acknowledged the uniqueness of the punishment of death”); *Atkins v. Virginia*, 536 U.S. 304, 337 (2002) (Scalia, J., dissenting) (remarking that holding it unconstitutional to sentence individuals with intellectual disability to death is the “pinnacle of . . . death-is-different jurisprudence”); *Ring v. Arizona*, 536 U.S. 584, 605-06 (2002) (“no doubt that [d]eath is different”) (citation omitted); *id.* at 614 (Breyer, J., concurring) (“[The] Eighth Amendment requires States to apply special procedural safeguards when they seek the death penalty.”); *Baze v. Rees*, 553 U.S. 35, 84 (2008) (“[O]ur decisions rel[y] on the premise that “death is different” from every other form of punishment to justify rules minimizing the risk of error in capitals cases.”) (Stevens, J., concurring).

192. *Abolitionist and Retentionist Countries*, DEATH PENALTY INFO. CNTR., <http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries?scid=30&did=140> (last visited Sept. 17, 2014) (reporting that 140 countries are abolitionist countries in law or practice and 58 are retentionist countries).

193. Louis D. Brandeis, *What Publicity Can Do*, HARPER’S WEEKLY, December 20, 1913, available at <http://www.law.louisville.edu/library/collections/brandeis/node/196> (“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman”).

cess to the information concealed by Georgia's lethal injection secrecy statute. Sections A and B provide the contours of the right of access to information related to criminal proceedings and penal institutions. Section C argues that a right of access to information about lethal injection protocols is supported by the Supreme Court's Eighth Amendment jurisprudence. Lastly, Section D analyzes Georgia's secrecy statute under the Supreme Court's right of access jurisprudence and concludes that the public has a right of access to the information the statute conceals.

A. THE FIRST AMENDMENT RIGHT OF ACCESS TO CRIMINAL PROCEEDINGS

Aware of the great power the state wields when it deprives a citizen of life or liberty, the Supreme Court has recognized in several cases that the press has presumptive access to judicial proceedings absent some compelling, narrowly-tailored state interest. For instance, in *Richmond Newspapers Inc. v. Virginia*, the defendant, on trial a fourth time for the murder of a hotel manager in a small community, moved for private trial proceedings closed to members of the press.¹⁹⁴ Although the state trial court and appellate court agreed with the defendant, the Supreme Court reversed, holding that the court order violated the public's First Amendment right to attend the trial.¹⁹⁵ For the plurality, Chief Justice Burger argued that extensive historical evidence that criminal trials in this country and in England were presumptively open to the public favored a right of access.¹⁹⁶ Moreover, the state court did not articulate any reason for the closure or consider whether less restrictive alternatives might assuage the defendant's concerns about a public trial.¹⁹⁷

Two years later, in *Globe Newspaper Co. v. Superior Court*, the Supreme Court affirmed the holding of *Richmond Newspapers*.¹⁹⁸ Relying on a Massachusetts statute that required closure of the courtroom while rape victims under the age of 18 testified, the trial court barred members of the press from attending a rape

194. 448 U.S. 555 (1980).

195. *Id.* at 581.

196. *Id.* at 564–575.

197. *Id.* 580–81.

198. 457 U.S. 596 (1982).

trial.¹⁹⁹ Although the Supreme Court noted that the public's right to attend criminal proceedings is not absolute, the Court held that the state's interests in protecting minor rape victims from psychological and physical harm and encouraging minors to testify against the accused was not sufficient to justify a broad mandatory closure rule.²⁰⁰ After observing that the First Amendment "serves to ensure that the individual citizen can effectively participate in and contribute to our Republican system of self-government,"²⁰¹ the Court went on to note:

. . . [T]he right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process — an essential component in our structure of self-government. In sum, the institutional value of the open criminal trial is recognized in both logic and experience.²⁰²

Thus, the Court established that a state seeking to enforce a statute that closes the courtroom to the public must show a compelling interest and that the state's restriction of access is narrowly tailored to serve that interest.²⁰³

The Supreme Court extended the public and press' right of access to voir dire hearings in *Free Enterprise Co. v. Superior Court of California (Free Enterprise I)*.²⁰⁴ Free Enterprise petitioned to be present during the voir dire of a death penalty trial, but the trial court denied its request and only allowed the newspaper and public to attend the general voir dire just three days of the nearly

199. *Id.* at 599.

200. *Id.* at 607.

201. *Id.* at 604.

202. *Id.* at 606.

203. *Id.* at 607.

204. 464 U.S. 501 (1984).

six-week voir dire.²⁰⁵ The court also denied Free Enterprise's request that it be provided with a transcript of the portion of voir dire it was not permitted to attend.²⁰⁶ The Supreme Court reversed, holding that the trial judge failed to make appropriately specific findings to necessitate closure of the courtroom and the complete nondisclosure of the transcript.²⁰⁷ The Court reasoned that although protecting the identity of jurors who disclose sensitive or private issues during voir dire may be a compelling state interest, the broad order was not narrowly-tailored to serve those interests.²⁰⁸

Two years after *Free Enterprise I*, the Court once more extended the right of access in criminal proceedings to include attendance at preliminary hearings in *Press-Enterprise Co. v. Superior Court (Free Enterprise II)*.²⁰⁹ Here, the Court explained that a right of access claim must satisfy the "logic and experience test": the proponent must demonstrate the "place and process have historically been open to the press and general public" and that public access would play a "significant positive role in the functioning of the particular process in question."²¹⁰ Once a right of access attaches, proceedings cannot be closed unless "closure is essential to preserve higher values" and the restriction is narrowly-tailored to serve that interest.²¹¹

B. THE FIRST AMENDMENT RIGHT OF ACCESS TO PENAL INSTITUTIONS

Although the First Amendment of the right to access criminal proceedings is well established, lethal injections are administered under the supervision of state correctional facilities. Unlike judicial proceedings, penal institutions, by definition, are not public places and do not have a tradition of openness. Accordingly, the public's right to access to the processes of penal institutions is not as robust.

205. *Id.* at 503.

206. *Id.*

207. *Id.* at 513.

208. *Id.* at 510–12.

209. 478 U.S. 1 (1986).

210. *Id.* at 8.

211. *Id.* at 13.

For example, the leading decision, *Pell v. Procunier*,²¹² upheld a prison regulation prohibiting face-to-face interviews with specific prisoners by members of the press. After first noting that the regulation was not an attempt to conceal the conditions of its prisons or frustrate the press' investigation or reporting on that information, the Court declined to rule that the statute violated the prisoner's First Amendment free speech rights.²¹³ Indeed, the Court reasoned that the regulation was reasonable given the state's compelling interest in a secure prison, and that members of the press and prisoners could still communicate by letter.²¹⁴ Furthermore, because journalists have no constitutional right of access to prisons or their inmates beyond that afforded the general public, the Court declined to hold that the statute unconstitutionally interfered with the First Amendment right of freedom of the press.²¹⁵

In 1986, the Supreme Court heard another First Amendment challenge to a prison restriction in *Turner v. Safely*.²¹⁶ In this case, a Missouri Department of Corrections regulation prohibited inmates from marrying and certain forms of inmate-to-inmate correspondence.²¹⁷ In analyzing the prisoner's First Amendment rights, the Court looked to four factors: (1) whether a "valid, rational connection" existed between the prison regulation and the legitimate governmental interest offered to justify it;²¹⁸ (2), whether other means of exercising the right existed;²¹⁹ (3) what effect, if any, accommodation of the right might have on the prison population and staff;²²⁰ and (4) whether ready alternatives to the prison regulation exist.²²¹ Applying these factors to the regulations, the court affirmed the limitation on inmate-to-inmate correspondences, but struck down the limitation on inmate marriages.²²²

212. 417 U.S. 817, 829 (1974).

213. *Id.*

214. *Id.* at 823-28

215. *Id.* at 834.

216. 482 U.S. 78 (1987).

217. *Id.* at 81.

218. *Id.* at 89-91

219. *Id.*

220. *Id.*

221. *Id.* ("[T]he existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns.")

222. *Id.* at 91-98.

C. THE FIRST AMENDMENT AND THE PROHIBITION ON CRUEL AND UNUSUAL PUNISHMENT

The public's right to access information concealed by Georgia's lethal injection statute assumes a special importance because of the relationship between the First and Eighth Amendments: the First Amendment is essential to realizing the safeguard provided by the Eighth Amendment's prohibition of cruel and unusual punishment. First, a method of execution that presents a "substantial risk of serious harm" to prisoner violates the Eighth Amendment's Cruel and Unusual Punishment Clause.²²³ Second, the Court has assessed the constitutionality of particular methods of execution by looking to the "evolving standards of decency that mark the progress of a maturing society."²²⁴ As Justice Marshall correctly observed, this inquiry is not "whether a substantial proportion of American citizens, if polled, opined that capital punishment is barbarously cruel, but whether they would find it to be so in light of all information presently available."²²⁵ Accordingly, in order to adequately assess society's views on the death penalty, citizens must have access to reliable information about lethal injection procedures. However, the information that the citizens of Georgia need to assess their state's lethal injection protocols—source of the drugs, the safety record and manufacturing processes of the compounding pharmacy, the results of purity and sterility tests performed on those drugs, and the professional qualifications of pharmacists and doctors involved in the process of compounding the drugs—is the very information that Georgia makes unavailable. Thus, a First Amendment right of access to information about Georgia's lethal injection protocols is an im-

223. See *Baze v. Rees*, 553 U.S. 35 (2008).

224. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

225. *Furman v. Georgia*, 408 U.S. 238, 362 (1972) (Marshall, J., concurring); *Gregg v. Georgia*, 428 U.S. 227, 232 (1976) (Marshall, J., dissenting) ("[A] recent study, conducted after the enactment of the post-*Furman* statutes, has confirmed that the American people know little about the death penalty, and that the opinions of an informed public would differ significantly from those of a public unaware of the consequences and effects of the death penalty.") (citing Sarat & Vidmar, *Public Opinion, The Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171). Cf. *Globe Newspaper*, 457 U.S. at 606 ("Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the fact finding process, with benefits to both the defendant and to society as a whole."). See also generally Carol Steiker, *The Marshall Hypothesis Revisited*, 52 HOW. L.J. 525 (2009) (conceding her "longstanding discomfort" with the "Marshall hypothesis", but concluding "there is simply less to laugh at and more to respect in the Marshall hypothesis than first met my (and maybe your, the reader's) eye.").

portant component of the Eighth Amendment's prohibition of cruel and unusual punishment.

D. ANALYSIS

This section argues that there is a qualified right of access to certain information concealed by Georgia's lethal injection statute. First, Section D.1 argues that logic and experience dictate that a qualified right of access to information about lethal injection drugs exists. Second, Section D.2 demonstrates that the statute is not reasonably related to any penological interest. Third, Section D.3 shows that the statute provides no alternative means of exercising the right. Finally, Section D.4 argues that the presence of ready alternatives further evidences the unreasonableness of the statute.

1. *There is a Qualified Right of Access to Information about Lethal Injection Drugs*

The First Amendment provides a right of access to the information concealed by Georgia's lethal injection secrecy statute. "Experience" shows that executions have been historically open to the press and public and "logic" demonstrates that the access plays a significant positive role in the functioning of lethal injection executions.²²⁶

Turning to the first element, experience, executions in general have been historically open to the public.²²⁷ By contrast, Georgia only recently concealed information about its death penalty drugs after its supply of foreign sodium thiopental was seized by the DEA.²²⁸ To be sure, information concerning the source of lethal injection drugs and the qualifications of the participants might not have a similar tradition of openness as executions,²²⁹ but

226. *Free Enterprise II*, 478 U.S. 1, 11-12 (1986).

227. *See, e.g.*, Part II.A. *See also* *Ca. First Amendment Coal. v. Woodford*, 299 F.3d 868, 875-76 (9th Cir. 2002) (after noting the extensive historical evidence of public executions, holding that the First Amendment provides a right of access for members of the press to see the prisoner as the guards bring him into the chamber, tie him down to the gurney, and insert the intravenous lines).

228. *See supra* Part IV.A.

229. *Compare* *Wood v. Ryan*, 759 F.3d 1076, 1083-84 (9th Cir. 2014) (ruling that public details about executions, such as the types of ropes used for hangings and manufacturing cyanide used for gas chambers, raised "serious questions" about the historical tradition of public access to the sources of lethal injection drugs and the qualifications of execu-

many courts have recognized a right of access to documents that are related to, or generated in the course of, historically open proceedings.²³⁰ The wide agreement among the federal courts that a right of access extends to documents associated with public proceedings demonstrates that a proceeding is only nominally public if citizens are permitted to attend but prohibited from accessing the information necessary to formulate an informed discussion of governmental affairs.²³¹ Furthermore, execution proceedings are unlike typical public proceedings because they do not have dockets, motions, reports or pre-execution and post-execution filings. But like the right of access to transcripts, motions, memoranda and reports recognized in other cases,²³² a right of access to reliable information regarding the drugs that will be used in lethal injections and the qualifications of the participants is essential for an informed discussion of the administration of the death penalty.²³³

tioners), *vacated* 2014 WL 3600362 (S. Ct. July 22, 2014), *with Wood*, 759 F.3d at 1094–95 (Bybee, J., dissenting) (categorizing the historical evidence as “sporadic and anecdotal”). *See also* Owens v. Hill, 758 S.E.2d 794, 805 (Ga. 2014) (concluding that “[e]ven adopting the extravagant view that the acquisition of executions drugs is a government process subject to this test”, Hill’s First Amendment claim still fails).

230. *See, e.g.*, Nixon v. Warner Commc’ns, Inc., 435 U.S. 589, 597 n.7–8 (1978) (observing “that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.”); U.S. Index Newspapers LLC, No. 13-35243 2014 WL 4376296, at *10–18 (9th Cir. September 5, 2014) (holding that the First Amendment provides a right of access to certain documents related to contempt proceedings held ancillary to a grand jury investigation); U.S. v. Erie County, N.Y., No. 13-3653-cv 2014 WL 4056326, at *4–8 (2d Cir. August 18, 2014) (holding that the First Amendment provides a right of access to compliance reports filed by a prison as part of a civil rights settlement agreement); U.S. v. Ochoa-Vasquez, 428 F.3d 1015, 1030 (11th Cir. 2005) (holding that the First Amendment provides a right of access to sentencing memoranda, downward-departure motions and transcripts of sentencing hearings); *In re Time, Inc.*, 182 F.3d 270, 271 (4th Cir. 1999) (holding that the First Amendment provides a right of access to documents submitted in the course of trial); *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 572–75 (8th Cir. 1988) (holding that the First Amendment provides a right of access to documents filed in support of a search warrant application); U.S. v. Edwards 823 F.2d 111, 118 (5th Cir. 1987) (holding that the First Amendment provides a right of access to the record of a closed proceeding concerning jury misconduct); *In re Cont’l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984) (holding that the First Amendment provides a right of access to litigation committee reports in shareholder derivative suits).

231. *See* Globe Newspapers v. Superior Court, 457 U.S. 596, 604-695 (1982) (“Thus to the extent that the First Amendment embraces a right of access . . . it is to ensure that this constitutionally protected ‘discussion of governmental affairs’ is an informed one.”) (internal citations omitted).

232. *See* sources cited *supra* note 230.

233. *See Woodford*, 299 F.3d at 877 (ruling that the First Amendment provides a right of access to view executions, including the “initial procedures” that are “inextricably intertwined” with the process of putting the prisoner to death).

By contrast, the majority in *Hill* reasoned that the operative historical tradition is the practice of concealing the executioner's identity.²³⁴ However, the reasons motivating the historical tradition of concealing the executioner's identity apply to the participant who *actually* inflicts death on the prisoner.²³⁵ By design, a lethal injection execution requires the cooperation and coordination of a diffuse number of persons, entities and institutions, none of which is completely responsible for ending the prisoner's life.²³⁶ But more importantly, the identities of the participants are only one category of information concealed by Georgia's secrecy statute. There are several other categories, such as the expertise of the compounding pharmacist in question and the sterility and potency of the compounding drugs, which are more important than the identity of the participants. Moreover, the historical justifications for concealing the executioner's identity — diffusion of responsibility, comfort in anonymity, and mitigation of the shame of taking a human life — do not weigh heavily against accessing this information. Thus, on balance, the history of capital punishment in the United States demonstrates that the place and processes of execution have historically been open to the press and public.

In regards to the second element of the *Free Enterprise II* test, access to information concealed by Georgia's lethal injection secrecy statute would play a significant positive role in the functioning of capital punishment. Indeed, it is the central argument of this Note that public access would profoundly improve the functioning of lethal injections, given (1) the important role an informed citizenry plays generally in democracy and specifically in capital punishment;²³⁷ (2) the seizure of Georgia's supply of foreign, non-FDA approved lethal injection drugs by the DEA;²³⁸ (3) the report of several botched executions using a variety of drugs from undisclosed sources throughout the country, including Georgia;²³⁹ (4) the well-documented problems inherent in com-

234. *Hill*, 758 S.E.2d at 805–06.

235. See Roko, *Executioner Identities*, *supra* note 6, at 2796–2801 (noting that stigma and responsibility primarily motivate concealing executioners' identities).

236. *Id.* at 2801, n.78 (reporting that states created elaborate protocols for lethal injection so “[e]ach prison employee could think of himself as a mere link in a long chain that led to the condemned person's death”) (quoting STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 39 (2002)).

237. See *supra* Part V.C.

238. See *supra* Part IV.A

239. See *supra* Part II.B; IV.A

pounding pharmacies²⁴⁰; (5) that in addition to having no oversight by defense attorneys in our otherwise adversarial system, not even the judiciary may review information within the scope of the statute;²⁴¹ and (6) lethal injection secrecy removes accountability and predictability in the administration of executions.²⁴²

The court in *Hill*, however, argued that disclosure of confidential information would totally frustrate the administration of lethal injection executions by making it less likely that individuals necessary to the process would be willing to participate.²⁴³ In short, the court reasoned that “Georgia’s execution process is likely made more timely and orderly” by the lethal injection secrecy statute and therefore it plays a positive role in the functioning of capital punishment.²⁴⁴ But there is evidence that lethal injection secrecy measures are adopted by states to obscure the risks associated with compounding pharmacies, mask inconsistencies within their lethal injection protocols and conceal executioner incompetence.²⁴⁵ Indeed, history suggests that legal challenges to lethal injection protocols have caused states to make their protocols vague and to withhold information about executions from the prisoner and public.

For example, in 2001, Professor Denno’s comprehensive study of the lethal injection protocols of all 36 death penalty states revealed that most states’ protocols were too vague to assess or filled with errors.²⁴⁶ In 2005, as lawsuits challenging these defects began to gain traction in federal courts,²⁴⁷ Professor Denno conducted a second survey of the states’ protocols. In this study, she discovered that the number of states that had complete protocols detailing the drug and the amount to be used in the execution fell to less than one-third of the first study’s numbers.²⁴⁸ Additionally, half of all states in the survey did not allow any evalu-

240. See *supra* Part III.A, B.

241. See *supra* Part IV.A.

242. See *supra* Part III.C.2.

243. There are good reasons, however, to doubt that this is true. See *infra* Part V.D.2 at accompanying text.

244. *Owens v. Hill*, 758 S.E.2d 794, 806 (Ga. 2014).

245. See Denno, *Lethal Injection Chaos*, *supra* note 6, at 1379.

246. *Id.*

247. See Dieter, *Methods of Execution*, *supra* note 8, at 800–04 (detailing several 42 U.S.C. § 1983 lawsuits brought by death row prisoners seeking to enforce their Eighth Amendment rights from 2006–2007, which led to the Court to grant certiorari in *Baze v. Rees*, 553 U.S. 35 (2008)).

248. Denno, *Lethal Injection Chaos*, *supra* note 6, at 1379.

ation of their protocols, either because they asserted confidentiality or because the information did not exist.²⁴⁹ Furthermore, the number of states asserting confidentiality about their protocols increased fourfold.²⁵⁰

In the years since Professor Denno's studies, the incentives for states to withhold information about their lethal injection protocols have only increased.²⁵¹ Considering the difficulties states are experiencing in obtaining lethal injection drugs, it is unsurprising that some states are contemplating abandoning lethal injection altogether and returning to executions by gas chamber, electric chair or firing squad.²⁵² Within this historical context, Georgia's

249. *Id.* at 1380.

250. *Id.* at 1370.

251. The relationship between legal challenges and lethal injection secrecy is no better illustrated than Oklahoma's recent decision to (1) cut media witness from 12 to five, (2) prohibit cellphones in the execution chamber, (3) prohibit media members from wearing wristwatches, (4) placing an "official clock" in the execution chamber out of sight from media witnesses, and (5) cut off the condemned inmate's microphone as soon as his final statement is complete. See Graham Lee Brewer, *Oklahoma Department of Corrections Releases New Execution Protocol*, THE OKLAHOMAN (Oct. 1, 2014), <http://newsok.com/oklahoma-department-of-corrections-releases-new-execution-protocol/article/5347200>; Cary Spinwall, *DOC Files Another Motion to Dismiss First Amendment Suit Challenging Execution Access*, TULSAWORLD (Oct. 23, 2014), http://www.tulsaworld.com/news/courts/doc-files-another-motion-to-dismiss-first-amendment-suit-challenging/article_0e746ec0-f9c9-5d8c-9226-f2d15805fbf4.html. These changes follow Clayton Lockett's botched execution and subsequent challenges to the state's lethal injection protocols and lethal injection secrecy practices. See sources cited *supra* note 7 and accompanying text.

252. See e.g., Jim Slater, *State Consider Reviving Old-Fashioned Executions*, ASSOCIATED PRESS (Jan. 28, 2014), <http://bigstory.ap.org/article/states-consider-reviving-old-fashioned-executions>. In a dissent from a denial of rehearing *en banc* before Arizona's botched execution of Joseph Wood, Judge Kozinski framed the issue thusly:

Whatever happens to Wood, the attacks will not stop and for a simple reason: The enterprise is flawed. 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 some states and the federal government wish to continue carrying out the death penalty, they must turn away from this misguided path and return to more primitive — and foolproof — methods of execution. The guillotine is probably best but seems inconsistent with our national ethos. And the electric chair, hanging and the gas chamber are each subject to occasional mishaps. The firing squad strikes me as the most promising. Eight or ten large-caliber rifle bullets fired at close range can inflict massive damage, causing instant death every time. There are plenty of people employed by the state who can pull the trigger and have the training to aim true. . . . Sure, firing squads can be messy, but if we are willing to carry out executions, we should not shield ourselves from the reality that we are shedding human blood.

secrecy statute does not play a positive role in the administration of lethal injection executions. Rather, concealing information critical to the understanding and knowledge of the lethal injection process increases the risk of an unconstitutional execution by removing the process from the oversight of defense attorneys, judges, and most importantly, the people, in whose name the execution takes place.²⁵³

2. *Georgia's Secrecy Statute is Not Reasonably Related to Legitimate Penological Interest*

Although a constitutional right of access exists, it is only a qualified one. In typical public proceedings, like criminal proceedings, the right may be trumped by a compelling interest narrowly tailored to serve those interests.²⁵⁴ In the context of prison regulations, however, the right may be trumped by a restriction reasonably related to a legitimate penological interest.²⁵⁵ Although executions could plausibly be considered the final step in a criminal proceeding and therefore eligible for a more exacting standard of scrutiny, Georgia's lethal injection secrecy statute cannot survive the more deferential standard given to prison regulations. Indeed, concealing the source of lethal injection drugs, the safety record and manufacturing processes of the compounding pharmacy, the results of purity and sterility tests performed on those drugs, and the professional qualifications of pharmacists

Wood, 759 F.3d at 1102–03 (Kozinski, J., dissenting from denial of rehearing *en banc*).

253. Furthermore, it is not the case that physicians, pharmacists and drug manufacturers would not participate in lethal injection execution unless the state adopts lethal injection secrecy practices. Physicians, at least, have been participating in lethal injection executions in some form since the advent of the method. See *supra* Part II.A & V.D.2 and accompanying text.

254. See *Globe Newspapers v. Superior Court*, 457 U.S. 596, 606 (1982). See *Free Enterprise II*, 478 U.S. 1, 13–14 (1986) (“[s]ince a qualified right of access attaches . . . the proceedings cannot be closed unless specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest.”) (internal citations omitted).

255. See *Pell v. Procunier*, 417 U.S. 817, 822 (1974) (“[C]hallenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law.”); *Turner v. Safely*, 482 U.S. 78, 88 (1984) (“[W]hen a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”). See also *Ca. First Amendment Coal. v. Woodford*, 299 F.3d 868, 878–79 (9th Cir. 2002) (applying *Turner* to a prison regulation that limited non-prisoners’ First Amendment right of access to view an execution).

and doctors involved in the process of compounding the drugs is not reasonably related to any legitimate penological interest.

First, it is clear from the legislative history of Georgia's secrecy statute that its primary interest is protecting the identities of participants of lethal injections from harassment and threats from abolitionists.²⁵⁶ It is also clear that the state was not exclusively interested in the prevention of psychological harm to lethal injection participants—it also intended to incentivize local doctors, pharmacists, and compounding pharmacies to participate in the procedure by promising not to disclose their identities.²⁵⁷ To be sure, there is some basis for these concerns. For instance, scrutiny and publicity of compounding pharmacies has increased in recent years, perhaps making it less likely that a particular compounding pharmacy would wade into the lethal injection controversy.²⁵⁸ And doctors and compounders might be more hesitant to participate in lethal injection publicly because some pharmaceutical and medical professional organizations are opposed to members' involvement in lethal injection proceedings.²⁵⁹

These fears, however, are exaggerated or simply unsubstantiated. First, the author of this Note was unable to find any specific incident of harassment directed towards the physicians or pharmacists that participate in lethal injections in the media or in the legislative debates prior to the passage of Georgia's lethal injection secrecy bill, much less specific threats of physical harm.²⁶⁰ Neither could one of the sponsors of the bill.²⁶¹ Second,

256. See *supra* Part IV.A.

257. *Id.*

258. See *supra* Part III.C.2. Additionally, support for the death penalty is the lowest in more than 40 years. Jeffery Jones, *U.S. Support Lowest in More Than 40 Years*, GALLUP POLITICS (Oct. 29, 2013), <http://www.gallup.com/poll/165626/death-penalty-support-lowest-years.aspx> (reporting that 60% of Americans are in favor of the death penalty, the lowest since *Furman*).

259. See *supra* Part III.C.2.

260. In *Woodford*, the Ninth Circuit entertained, and ultimately dismissed, virtually the same argument made by the California Department Corrections in support of their restrictions on viewing executions. See *Woodford*, 299 F.3d at 881–83 (specifically finding the fear of reprisals against execution team members “speculative and contradict[ing] history”).

261. In an interview with Denis O'Hayer, State Senator Jesse Stone, a sponsor of the lethal injection secrecy bill admitted that he was unaware of any actual threats directed towards compounding pharmacies prior to the passage of the bill:

O'HAYER: Have there been threats of harassment against a compounding pharmacy because there aren't that many of them in the state, and have any of them complained to you or to anyone else in the legis-

doctors and pharmacists are not prohibited, legally or practically, from participating in executions by state medical board or professional organization ethical guidelines.²⁶² Indeed, no doctor in the United States has ever been disciplined by a medical board for participation in a lethal injection.²⁶³ In fact, Georgia prohibits its state medical board from sanctioning medical professionals who participate in lethal injections.²⁶⁴ Similarly, the ethical guidelines of the American Pharmacists Association, the International Compounding Pharmacy Association and the American Society of Health-Systems Pharmacists leave participation in a lethal injection as a matter of individual conscience.²⁶⁵ In short, the argument that lethal injection secrecy is necessary to ensure the participation of doctors and pharmacists belies the fact that doctors *are* participating and *have been* since the very beginning of lethal

lature that people opposed to the death penalty were threatening them in any way?

STONE: We did not have testimony concerning actual threats or harassment. It was the potential for that that led to the administration and or the agency involved requesting the legislation.

Denis O'Hayer, *Georgia's Execution Drug Secrecy Law: A Talk with One of Its Sponsors*, WABE.ORG (July 18, 2013), <http://wabe.org/post/georgias-execution-drug-secrecy-law-talk-one-its-sponsors> (at 3:59 of the broadcast version). Indeed, House Bill 122 started in the House as a proposal regarding the confidential records of sex offenders. Once the bill reached the Senate Judiciary Committee, however, the secrecy provisions were added as a rider. *Id.*

262. Ty Alper, *The Truth About Physician Participation in Lethal Injection Executions*, 88 N.C. L. Rev. 11, 26 (2009).

263. *Id.*

264. GA. CODE ANN. § 17-10-42.1 (West 2006) ("Participation in any execution of any convicted person carried out under this article shall not be subject of any licensure challenge, suspension, or revocation for any physician or medical professional licensed in the State of Georgia.").

265. See AMERICAN PHARMACISTS ASS'N, APHA POLICY MANUAL, PHARMACIST INVOLVEMENT IN EXECUTION BY LETHAL INJECTION, <http://www.pharmacist.com/policy-manual?ids=p-746355&tids=t-746353> (last visited Sept. 26, 2014, 1:56pm) ("APhA opposes laws and regulations which mandate or prohibit the participation of pharmacists in the process of execution by lethal injection."); David Kroll, *Why Don't Pharmacy Groups Condemn Lethal Injection Role?*, FORBES (May 14, 2014), <http://www.forbes.com/sites/davidkroll/2014/05/14/why-dont-pharmacy-groups-condemn-practitioner-role-in-lethal-injection/> (publishing an email from an International Compounding Pharmacy Association representative which reads, "IACP has taken no formal position on compounding pharmacies preparation of drugs used in executions. The pharmacy profession recognizes an individual practitioner's right to dispense a medication based upon his or her personal, ethical and religious beliefs."); AMERICAN SOC'Y OF HEALTH-SYSS. PHARMACISTS, USE OF DRUGS IN CAPITAL PUNISHMENT, available at http://www.ashp.org/s_ashp/docs/files/BP07/Ethics_Positions.pdf ("[t]he decision by a pharmacist to participate in the use of drugs in capital punishment is one of individual conscience. Pharmacists, regardless of who employs them, should not be at risk of any disciplinary action, including loss of their jobs, because refusal to participate in capital punishment.").

injection executions,²⁶⁶ and pharmacists are free to participate without professional consequence. Lastly, even if concealing information about the identities of doctor and pharmacist participants is necessary because of actual threats of reprisals or professional censure, the statute's language plainly encompasses more than just the personal identities of participants.²⁶⁷ Hence, the statute is not reasonably related to the legitimate penological interest of protecting the privacy of professionals that choose to participate in lethal injections.²⁶⁸

A second possible penological interest is facilitating the timely enforcement of executions and avoiding unnecessary delays in a process already stymied by procedural protections and safeguards. For instance, Warren Lee Hill is still on death row despite receiving a death sentence in 1991.²⁶⁹ Given the difficulty of

266. See *supra* Part II.A; Denno, *Lethal Injection Quandary*, *supra* note 6, at 88–89 (reporting that most death penalty statutes allow physician participation and approximately half require it). Furthermore, recognizing the risk of permitting laypeople to administer an essentially medical procedure, some doctors have argued that organized medicine has an obligation to permit physician participation in executions. See, e.g., David Waisel, *Physician Participation in Capital Punishment*, 82 MAYO CLINIC PROC. 1073 (2007), available at [http://www.mayoclinicproceedings.org/article/S0025-6196\(11\)61369-4/pdf](http://www.mayoclinicproceedings.org/article/S0025-6196(11)61369-4/pdf).

267. See GA. CODE ANN. § 42-5-36(d) (2010) (defining “identifying information” as “any records or information that reveals a name, residential or business address, residential or business address, residential or business telephone number, day or month of birth, social security number, or professional qualifications”) (emphasis added).

268. A related line of argument suggests lethal injection secrecy statutes are necessary not merely to protect the privacy of individuals and entities that provide lethal injection drugs, but to combat the abolitionists' strategy of imposing a death penalty drug embargo through targeting drug suppliers with political protest and boycotts. See *supra* Part II.B. But this argument vividly illustrates the distinctly content-based restriction flavor of private execution laws. See generally Nicholas Levi, *Veil of Secrecy: Public Executions, Limitations on Reporting Capital Punishment, and the Content-Based Nature of Private Execution Laws*, 55 FED. COMM. L.J. 131 (2002) (arguing that historical record demonstrates that private executions laws enacted in the nineteenth century were motivated by the state's pro-capital punishment political viewpoint).

269. See *supra* Part III.C. Justice Scalia recently expressed his criticism of Supreme Court's tendency to respond to perceived defects in the administration of capital punishment with additional layers of procedural protection during the oral argument of *Hall v. Florida*, 134 S. Ct. 1986 (2014), a case about a Florida law that required a death eligible defendant to offer an IQ test of 70 or below before being permitted to provide additional evidence of intellectual disability:

JUSTICE SCALIA:	How has it gone on this long? 1978 is when he killed this woman.
MR. WINSOR:	There have been a number of appeals in this case. There have been a number of issues raised, and there was a — but yes, there is —
JUSTICE KENNEDY:	But — but, General —
MR. WINSOR:	Yes, sir.

procuring lethal injection drugs, the grant of a dilatory, meritless action requiring a stay of execution might move an execution outside of the “death window”, constituting a waste of public resources.²⁷⁰ Additionally, some argue that information about lethal injection drugs, including their source, potency and the qualifications of their compounder, is irrelevant where the ultimate purpose of the drugs to end a prisoner’s life.²⁷¹

These arguments, however, cannot establish that Georgia’s lethal injection secrecy statute is reasonably related to Georgia’s interest in effectuating timely executions. First, the public’s ability to access information essential to safeguard the proper administration of executions should not be determined by the possibility of a meritless lawsuit that might erroneously result in a stay of execution. Meritless lawsuits can and should be disposed of on the pleadings like any other frivolous action.²⁷² Circumventing routine legal procedure because of the speculative possibility of a meritless lawsuit — and in the process preventing the prisoner

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- JUSTICE KENNEDY: The — the last ten people Florida has executed have spent an average of 24.9 years on death row. Do you think that that is consistent with the purposes of the death penalty, and is — is it consistent with sound administration of the justice system?
- MR. WINSOR: Well, I certainly think it’s consistent with the Constitution, and I think that there are obvious —
- JUSTICE KENNEDY: That wasn’t my question.
- MR. WINSOR: Oh, I’m sorry, I apologize.
- JUSTICE KENNEDY: Is it consistent with the — with the purposes that the death penalty is designed to serve, and is it consistent with an orderly administration of justice?
- MR. WINSOR: It’s consistent with the — with the —
- JUSTICE KENNEDY: Go ahead.
- MR. WINSOR: It is consistent with the purposes of the death penalty certainly.
- JUSTICE SCALIA: General Winsor, maybe you should ask us —
- JUSTICE KENNEDY: Well —
- JUSTICE SCALIA: — that question, inasmuch —
- JUSTICE KENNEDY: Well —
- JUSTICE SCALIA: — as most of the delay has been because of rules that we have imposed.

Hall v. Florida Transcript, 45:22–47:7, available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-10882_7758.pdf.

270. The window of time the State has before the death warrant expires or the expiration of lethal injection drugs.

271. See *supra* Part III.C.2.

272. Furthermore, rules of civil procedure and professional responsibility prohibit lawyers from filing frivolous, dilatory lawsuits. See, e.g., FED. R. CIV. PRO. 11(b); N.Y. R. PROF’L CONDUCT 3.1.

from accessing the very information necessary to reach the courthouse steps — is not a legitimate interest. Second, that the state intends to use a sufficiently large dose of undisclosed drugs to execute a prisoner does not obviate the underlying Eighth Amendment and First Amendment concerns. Although it may be that the Constitution does not contemplate painless executions, there is a level of pain which is “cruel” and “unusual” and therefore violates the Eighth Amendment. One way to assess whether a method of execution violates the Eighth Amendment is to draw from the “evolving standards of decency that mark the progress of a maturing society,”²⁷³ which can only be accurately assessed if the public is apprised of details concealed by Georgia’s lethal injection secrecy statute.²⁷⁴

A third penological interest is shielding doctors and pharmacists involved in the prescription or compounding of death penalty drugs from the liability of botched executions. There is some reason to think that such a claim is possible.²⁷⁵ It is not clear, however, that doctors or pharmacists owe a duty of care to condemned prisoners²⁷⁶ or even if participation in lethal injections constitutes the practice of medicine.²⁷⁷ In any event, teasing apart the nuances of medical ethics and establishing a *prima facie* negligence or malpractice claim in the context of a botched execution is outside the scope of this Note. It should suffice to observe, however, that even assuming that shielding participants from liability is a legitimate penological interest, that interest is not supported by the plain language of the statute.²⁷⁸

273. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

274. *See supra* Part V.C.

275. *See supra* p. 21, notes 123–25.

276. Compare Kenneth Baum, “*To Comfort Always*”: *Physician Participation in Executions*, 5 N.Y.U. J. Legis. & Pub. Pol’y, 47, 61 (2001) (“Condemned death row inmates are, for all practical purposes, terminally ill patients, albeit under a nontraditional definition of the term, and deserve to be treated as such.”), with Robert D. Truog, *Physicians, Medical Ethics, and Execution by Lethal Injection*, 331 J. OF AM. MED. ASS’N 2375 (2014) (“Execution is, intrinsically, the involuntary taking of the life of another human being, an act that can never be aligned with the goals of medicine. Regardless of whether execution is justified...it must never be perceived as a medical procedure.”)

277. *See Denno, Lethal Injection Quandary*, *supra* note 6, at 88–89 (reporting that several states specifically provide that lethal injections do not constitute the practice of medicine).

278. If the legislatures wanted to shield lethal injection participants from potential liability, then one would not expect to find such an exculpation provision embedded cryptically in statute classifying certain information a confidential state secret. *See Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 468 (2001) (noting that legislatures do not alter

Thus, Section 42-5-36(d) is not reasonably related to any legitimate penological interest. Although protecting the safety and privacy of those persons and entities supplying lethal injection drugs is a legitimate penological interest, concerns about threats, harassment and ethical guidelines is either exaggerated or unfounded. Similarly, though the efficient administration of capital punishment is a legitimate penological interest, broadly concealing all identifying information from public access in order to prevent the mere possibility of a meritless lawsuit is not reasonably related to this purpose. And even if the drafters of the bill intended to offer participants some protection from future liability resulting from their participation, the statutory language does not support such a reading. Finally, an additional weight on the side of disclosure, entirely absent from the court's analysis in *Hill*, is the potential for unconstitutional suffering caused by inadequate, vague lethal injection protocols.

3. *Alternative Means of Exercising the Right*

Georgia's lethal injection statute provides no alternative means of exercising any qualified access right to information about Georgia's lethal injection protocols. One could argue that certain information, such as laboratory purity tests of the lethal injection drugs, does not fall within the scope of Section 42-5-36(d). However, this is a fraction of the information the public needs in order to make informed decisions about their state's lethal injection protocol. Moreover, the identifying information of the laboratory testers, as "participants" in the administration of an execution, would presumably fall within the scope of Section 42-5-36(d). Accordingly, it is not difficult to imagine that the information Georgia chooses to disclose about the drugs it intends to use in an execution would be contained in a useless, unverifiable report replete with redactions.²⁷⁹

By way of contrast, in *Pell*, the Court stressed that members of the press who wanted to communicate to prisoners were not prohibited from writing letters to the inmates or communicating to

fundamental details of regulatory scheme in vague terms or ancillary provisions — that is, "hide elephants in mouseholes.")

279. Indeed, Hill's attorney's argued that such was the case in his brief to the Georgia Supreme Court. See Brief of Appellee-Plaintiff Warren Lee Hill, at 21, *Owens v. Hill*, 758 S.E.2d 794 (Ga. 2014) (No.S14A0082).

their permitted visitors.²⁸⁰ Furthermore, the Court also noted that the prison regulation at issue was not directed at concealing prison conditions or inhibiting the press' ability to report on that information.²⁸¹ Here, the function of Georgia's secrecy law comes at the direct expense of the public's ability to report on information it conceals. Hence, there are not alternative means for the public to exercise the right of access to information about Georgia's lethal injection drugs.

4. *The Presence of Ready Alternatives Further Evidences the Statute's Unreasonableness*

There are viable alternatives to broad nondisclosure required by Georgia's lethal injection secrecy statute. Indeed, as the dissenters in *Hill* recognized, the state's interests need not come at the expense of the prisoner and public's right to know critical details about the lethal injection process. That such information could be released in such a way that minimizes the harm to participants further evidences the unreasonableness of the restriction.

First, in situations where the state asserts that the identifying information is truly sensitive, an *in camera* inspection of the privileged information and, if necessary, a subsequent redaction of specific information, would be a far more reasonable means of serving the state's legitimate interest in protecting the privacy of execution participants than a blanket assertion of the state secrets privilege. Undoubtedly this would be valuable to the prisoner, but the public would not be able access the information.²⁸² And as argued earlier in this Note, the intersection of the First and Eighth Amendments, the awesome finality of the death penalty, and the structural importance of the First Amendment as a check on government overreach are powerful reasons to disclose information about lethal injection drugs.²⁸³ Hence, the best solu-

280. *Pell v. Procunier*, 417 U.S. 817, 829 (1974).

281. *Id.* at 833.

282. An interesting middle-ground solution would be to allow disclosure to interested parties prior to the execution and then make information about the source of the drugs publicly available after the execution. *See U.S. v. Edwards*, 823 F.2d 111, 118–19 (5th Cir. 1987) (ruling the First Amendment provides a right of access to the record of a closed proceeding concerning jury misconduct, but the trial court did not err in declining to make the transcripts publicly available before the jury reached its verdict).

283. *See supra* Part V.A–C.

tion is to make all of the relevant information available to the public, including, at a minimum, information about the source of the bulk materials, the safety records of the compounder that manufactured the drugs, the results of purity and sterility tests on the drugs, and the qualifications of the participants of compounders, pharmacists and physicians involved in the process, omitting or redacting information that specifically identifies execution participants.

VI. CONCLUSION

Death penalty states are in a difficult position. They have an obligation to enforce the laws that legislators enact on behalf of the citizens and to mete out the punishment that juries find just, including the death penalty. However, death penalty drug shortages are making it difficult to fulfill that obligation. In addition to adopting increasingly novel lethal injection protocols, some states are obtaining their execution drugs from unknown compounding pharmacies with unknown safety and manufacturing processes. And several states, like Georgia, have made it impossible to obtain this critical information, injecting additional risk and unpredictability into procedures already plagued by inconsistency and incompetence. This Note argues that citizens are entitled to details about how their state performs lethal injections; invocations of “just trust us” are not enough when it comes to the administration of the death penalty.²⁸⁴ Consequently, the Supreme Court should find that the First Amendment provides a right of access to the information concealed by Georgia’s lethal injection secrecy statute.

284. *Owens v. Hill*, 758 S.E.2d 794, 804 (Benham, J., dissenting).