
THE SUPPLY-SIDE ATTACK ON LETHAL INJECTION AND THE RISE OF EXECUTION SECRECY

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INTRODUCTION	428
I. DIMINISHING EXECUTION DRUG SUPPLY, RISING RISKS, AND SECRECY.....	435
A. <i>Taking the Battle to the Market: Attacking Lethal Injection Supply</i>	436
B. <i>Unintended Harms and the Rise of Execution Drug Supplier Secrecy Laws</i>	441
II. THE “NEW FRONT” OF DEATH PENALTY LITIGATION OVER EXECUTION SECRECY	448
A. <i>Distinguishing the Two Types of Execution Secrecy Challenges</i>	449
B. <i>Main Constitutional Avenues, Diverging Endpoints</i>	452
III. HARM PREVENTION AND SUPPLIER CONFIDENTIALITY	456
CONCLUSION.....	459

The strategy of taking the death penalty battle to the market by ferreting out and campaigning against lethal injection drug suppliers has been wildly successful in shriveling the execution drug supply. The supply-side strategy has not halted executions, however. Rather, the unintended consequences of shrinking the execution drug supply are heightened risks of harm as states resort to alternative drugs and a surge of new state secrecy laws to protect remaining supply sources. The new secrecy laws are facing a barrage of legal challenges and a circuit split on how to resolve them. This Article is about the unintended consequences of the supply-side attack strategy and how harm reduction is better served by challenging the lack of notice and adversarial testing regarding new drug protocols rather than outing and attacking the last remaining licensed suppliers.

While execution drug supplier confidentiality laws are often conflated with concealment of the method of execution, the Article argues it is important to distinguish the two. The success—and downsides—of the drug supplier outing strategy illustrates the legitimate harm prevention rationale behind execution

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drug supplier confidentiality laws. Confidentiality serves the important interest of safeguarding remaining licensed drug sources and reducing the need to resort to questionable backroom sources abroad or old methods of execution such as firing squads. In contrast, eleventh-hour drug substitutions heighten the risk of unintended suffering because the death cocktail protocol has not been subject to sufficient adversarial testing, much less scientific evaluation. For those concerned about reducing harm, it is counterproductive to attack compounding pharmacies licensed as competent to produce drugs for the public. Rather the focus should be on sufficient notice regarding the lethal injection protocol to evaluate and challenge changes in cocktail combinations, which pose a far greater risk of harm.

INTRODUCTION

Historically, the executioner was cloaked in anonymity to protect against retaliation by supporters of the condemned and to help communities find people to do the tough job.¹ Today, the scope of executioner confidentiality is rapidly evolving as states cope with the flight of drug manufacturers from supplying the prevailing means of execution—lethal injection drugs.² Every one of the thirty-five death penalty jurisdictions,³ plus the U.S. government

¹ GEOFFREY ABBOTT, *LORDS OF THE SCAFFOLD: A HISTORY OF THE EXECUTION* 26 (1991); STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 38-39 (2002); JOHN D. BESSLER, *DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA* 23-28 (1997); JOHN LAURENCE, *A HISTORY OF CAPITAL PUNISHMENT* 25 (1960); cf. Austin Sarat, *The Cultural Life of Capital Punishment: Responsibility and Representation in Dead Man Walking and Last Dance*, in *THE KILLING STATE: CAPITAL PUNISHMENT IN LAW, POLITICS, AND CULTURE* 226, 250 (Austin Sarat ed., 1999) (“The anonymous executioner is, at once, a stand-in for the community in whose name the execution was carried out and a sign of the ‘shame’ attached to those who turn our bloodlust into blood-thirsty deeds.”).

² See, e.g., Lindsey Bever, *States Work to Keep Execution Secrets Amid Death Row’s Desire to Know*, WASH. POST, Mar. 26, 2014, <http://www.washingtonpost.com/news/morning-mix/wp/2014/03/26/states-work-to-keep-execution-secrets-amid-death-rows-desire-to-know/>, archived at <http://perma.cc/P9YS-HE9W> (chronicling shortages and attempts to keep manufacturers secret); Megan McCracken & Jennifer Moreno, *Secret Drugs, Agonizing Deaths*, N.Y. TIMES, Apr. 14, 2014, at A23 (discussing desperate attempts of state officials to secure lethal injection drugs, legal battles over secrecy, and controversial executions); see also discussion *infra* Part I.A.

³ Today, thirty-two states permit imposition of the death penalty, but thirty-five states still carry out the death penalty because Connecticut, Maryland, and New Mexico abolished the death penalty without retroactive application to inmates already on death row. See *States With and Without the Death Penalty*, DEATH PENALTY INFORMATION CENTER <http://www.deathpenaltyinfo.org/states-and-without-death-penalty>, archived at <http://perma.cc/C6JV-RDYM> (last visited Aug. 8, 2014).

and military, uses lethal injection.⁴ Taking the death penalty battle to the marketplace, capital punishment opponents have ferreted out and campaigned against lethal injection drug suppliers.⁵ The strategy has proved dramatically successful in shrinking the lethal injection drug supply, as major manufacturers have halted sales for executions.⁶ States are scrambling to find alternative protocols and are turning to smaller compounding pharmacies that are licensed and regulated by the states rather than by the federal Food and Drug Administration (“FDA”).⁷

⁴ See, e.g., *Baze v. Rees*, 553 U.S. 35, 40-41 (2008) (discussing “the use of lethal injection by every jurisdiction that imposes the death penalty”). Some states also allow the choice of traditional or older execution methods such as hanging, firing squad, electrocution, and lethal gas. See, e.g., VA. CODE ANN. § 53.1-233 (West 2014) (providing for execution by electrocution or lethal injection); WASH. REV. CODE § 10.95.180 (West 2014) (permitting choice of lethal injection or hanging); CAL. CODE REGS. tit. 15, § 3349 (2014), available at http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/Title15-2014.pdf, archived at <http://perma.cc/49WB-T5N7> (offering choice of lethal gas or lethal injection); see also Mark Berman, *The Recent History of States Contemplating Firing Squads and Other Execution Methods*, WASH. POST, May 22, 2014, <http://www.washingtonpost.com/news/post-nation/wp/2014/05/22/the-recent-history-of-states-contemplating-firing-squads-and-other-execution-methods/>, archived at <http://perma.cc/EUM7-KNVB> (reporting that states such as Utah and Wyoming are considering bringing back firing squads for executions). Utah abolished the firing squad in 2004 but will allow death row inmates who chose death by firing squad before the abolition to exercise the choice; Oklahoma offers death by firing squad if other methods are deemed unconstitutional. *Id.*

⁵ See discussion *infra* Part I.A.

⁶ Raymond Bonner, *A Prolonged Stay: The Reasons Behind the Slow Pace of Executions*, PROPUBLICA, May 22, 2013, <http://www.propublica.org/article/a-prolonged-stay-the-reasons-behind-the-slow-pace-of-executions>, archived at <http://perma.cc/XQL2-GE87> [hereinafter Bonner, *A Prolonged Stay*] (“In California . . . the chief justice of the state supreme court has said there are unlikely to be any executions for three years, in part due to the shortage of appropriate lethal drugs.”); Erik Eckholm & Katie Zezima, *Drug Used in Executions Dropped by U.S. Supplier*, N.Y. TIMES, Jan. 22, 2011, at A11 (“The sole American manufacturer of an anesthetic widely used in lethal injections said Friday that it would no longer produce the drug.”); see also discussion *infra* Part I.A. *But cf.* Clive Stafford Smith, *A Response to Texas’ Charge of ‘Intimidation’ Against Reprieve*, GUARDIAN, Mar. 29, 2012, <http://www.theguardian.com/commentisfree/cifamerica/2012/mar/29/texas-charge-intimidation-reprieve>, archived at <http://perma.cc/ARD8-QTSG> (rebutting contentions by the Texas Department of Criminal Justice that the anti-death penalty group has engaged in “intimidation and commercial harassment” of manufacturers of medical drugs used in lethal injections” and that the group consists of “authoritarian ideologues who menace and harass private citizens who decline to submit to Reprieve’s opinion on the morality of capital punishment”).

⁷ See, e.g., *Ringo v. Lombardi*, 677 F.3d 793, 797 (8th Cir. 2012) (detailing drug shortages and state attempts to cope); Ashby Jones, *Lethal-Injection Drug Is Scrutinized*,

To cope with the shortages and prevent further flight, states in recent years have enacted laws that protect the identity of lethal injection drug suppliers.⁸ Some states go even further—refusing to disclose the execution protocol, or retaining the power to change the protocol close to the execution, leaving scant time to investigate and challenge the procedure.⁹ The new forms of execution secrecy are facing a barrage of legal challenges.¹⁰ In one of the most recent developments, the Ninth Circuit split from other appellate courts that have affirmed executions under the new secrecy laws by granting a stay of execution for nondisclosure of the drug supplier identity—only to have its stay of execution summarily lifted by the U.S. Supreme Court.¹¹

Though laws and courts tend to move slowly, the legal twists and battles over execution secrecy are accelerating, resulting in a proliferation of varying approaches, sometimes fashioned under intense time pressure.¹² A prime example is the headline-grabbing recent execution of Joseph Wood, sentenced to death after he escalated from domestic violence to murdering his ex-

WALL ST. J., June 2, 2014, at A3 (reporting on states scrambling to find alternative ways to carry out sentences after major drug shortages).

⁸ See *infra* Part II.B and Table 1 (charting new state execution secrecy laws).

⁹ See, e.g., *Sepulvado v. Jindal*, 729 F.3d 413, 418-20 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1789 (2014) (dismissing civil rights action challenging state's initial refusal to disclose execution protocol details and subsequent reservation of ability to vary protocol after disclosure); *Beatty v. Brewer*, 649 F.3d 1071, 1072-73 (9th Cir. 2011) (affirming denial of motion for temporary restraining order of execution notwithstanding claim that just eighteen hours before the scheduled execution, Arizona announced a new drug protocol because of troubles importing the lethal injection drugs used in the past); *Butts v. Chatman*, No. 5:13-CV-194(MTT), 2014 WL 185339, at *4 (M.D. Ga. Jan. 15, 2014) (dismissing request to disclose the execution drugs and protocol because "Georgia's lethal injection protocol and procedures change frequently" and by the time of the execution the protocol may have changed from that which was disclosed at the time of the suit).

¹⁰ E.g., *Wood v. Ryan*, 759 F.3d 1076, 1077 (9th Cir. 2014), *preliminary injunction of execution vacated sub nom.* *Ryan v. Wood*, 135 S. Ct. 21 (2014); *Wellons v. Ga. Dep't of Corr.*, 754 F.3d 1260, 1260 (11th Cir. 2014); *Sepulvado*, 729 F.3d at 414; *Beatty*, 649 F.3d at 1072; *Owens v. Hill*, 758 S.E.2d 794, 796 (Ga. 2014); *Lockett v. Evans*, Nos. 112,741, 112,764, 2014 WL 1584517, at *1 (Okla. Apr. 21, 2014), *stay of execution dissolved by* *Lockett v. Evans*, 330 P.3d 488 (Okla. 2014); *Butts*, 2014 WL 185339, at *4.

¹¹ Compare *Wood*, 759 F.3d at 1088 (granting preliminary injunction based on claim of nondisclosure of lethal drug source), with *Wellons*, 754 F.3d at 1267 (holding that nondisclosure of lethal injection drug manufacturer does not violate the Constitution), and *Sepulvado*, 729 F.3d at 421 (dismissing challenge to state refusal to disclose execution protocol), and *Owens*, 758 S.E.2d at 796 (similar).

¹² Cf., e.g., *Lackey v. Scott*, 885 F. Supp. 958, 962 (W.D. Tex. 1995) (discussing the "daunting time pressures" that are "a problem across the entire spectrum of habeas corpus death penalty litigation" and that make particularly difficult the evolution of jurisprudence in the field).

girlfriend and her father.¹³ Less than a month away from his scheduled execution, Wood sued Arizona officials, arguing that the state violated his constitutional rights when it refused to release the source, manufacturer, and lot numbers of the execution drugs.¹⁴ Thirteen days before Wood's execution, the district court denied the petition, allowing the execution to proceed.¹⁵ Four days before the execution, the Ninth Circuit reversed and issued a stay of execution.¹⁶ Just a day before the execution, the Supreme Court reversed the Ninth Circuit, allowing the execution to proceed as scheduled on July 23, 2014.¹⁷ To cap off the dramatic execution-eve legal battles, Wood took nearly two hours to die.¹⁸ This jarring outcome following the Supreme Court's summary lifting of the stay of execution is likely to spur more challenges to execution secrecy laws and receptivity to such claims.

The last-minute switches and secrecy are likely to intensify if states start seeking substitute protocols to replace those involving the anesthetic midazolam after the Supreme Court's recent grant of certiorari in *Glossip v. Gross* reviewing the use of midazolam in executions.¹⁹ States dealing with drug shortages turned to using midazolam instead of the fast-acting deeper sedative sodium thiopental, which was used to induce unconsciousness and prevent suffering in the three-drug protocol upheld by the Supreme Court in *Baze v. Rees*.²⁰ Oklahoma, Arizona and Ohio used midazolam in three prolonged and possibly painful executions that roused national controversy.²¹ Alternatives to using midazolam include protocols involving the fast-acting barbiturate pentobarbital.²² In the latest turmoil, Georgia officials wavered over whether to halt the execution of Kelly Renee Gissendaner just hours before her scheduled execution after a state pharmacist noticed the pentobarbital the state

¹³ *Wood*, 759 F.3d at 962; *State v. Wood*, 881 P.2d 1158, 1165-66 (Ariz. 1994).

¹⁴ Complaint at 17, *Wood v. Ryan*, No. 14-01447 (D. Ariz., June 26, 2014).

¹⁵ *Wood v. Ryan*, No. CV-14-1447-PHX-NVW (JFM), 2014 WL 3385115 (D. Ariz. July 10, 2014), *rev'd*, *Wood*, 759 F.3d at 1076.

¹⁶ *Wood*, 759 F.3d at 1088.

¹⁷ *Ryan v. Wood*, No. 14A82, 2014 WL 3600362, at *1 (S. Ct. July 22, 2014).

¹⁸ Erik Eckholm, *Arizona Takes Nearly 2 Hours to Execute Inmate*, N.Y. TIMES, July 24, 2014, at A1 [hereinafter Eckholm, *Arizona Takes Nearly 2 Hours to Execute Inmate*] ("In another unexpectedly prolonged execution using disputed lethal injection drugs, a condemned Arizona prisoner on Wednesday repeatedly gasped for one hour and 40 minutes, according to witnesses, before dying at an Arizona state prison.")

¹⁹ 2015 WL 341655 (S. Ct. Jan. 28, 2015).

²⁰ 553 U.S. 35, 44 (2008). See discussion *infra* Part I.B.

²¹ Adam Liptak, *Justices Stay Executions of 3 in Oklahoma, Pending Decision on Lethal Injection Drug Protocol*, N.Y. TIMES, Jan. 29, 2015, at A14, available at <http://www.nytimes.com/2015/01/29/us/justices-delay-executions-of-3-on-oklahomas-death-row.html>, archived at <http://perma.cc/4U9N-2TVL>.

²² See discussion *infra* Part I.B.

planned to use was “cloudy.”²³ Shortly before the execution, state officials called Gissendaner’s attorneys and told them her execution would be postponed because of the “cloudy” drugs—only to call back five minutes later to say the state was considering proceeding because the state pharmacist was not sure if the “cloudy” drugs came from “this week’s or last week’s” batch.²⁴ Ultimately the state postponed the execution, telling Gissendaner’s attorney that “this particular batch just didn’t come out like it was supposed to.”²⁵ The identity of the compounding pharmacy that prepared the drug is a “confidential state secret” under Georgia law.²⁶

In this fiercely fought context, this Article fills the need for a study of the propriety of protecting the identity of execution drug suppliers and the role of such laws in the prevention of suffering. There is a massive, rich literature on the rights and wrongs of the death penalty²⁷ but little scholarship regarding the new front of litigation surrounding execution drug supplier secrecy. The last section of Deborah Denno’s important new article showing turmoil in the courts after the Supreme Court’s 2008 decision in *Baze* notes that states are

²³ Gissendaner v. Bryson, Case Nos. 14-8647, 14A908, Emergency Motion for Stay of Execution (filed Mar. 2, 2015).

²⁴ *Id.*

²⁵ Alan Blinder, *Georgia Postpones 2 Executions, Citing “Cloudy” Drug*, N.Y. TIMES, Mar. 3, 2015, at A18, available at <http://www.nytimes.com/2015/03/04/us/execution-of-georgia-woman-is-postponed-indefinitely.html>, archived at <http://perma.cc/H8M9-7MFP>.

²⁶ GA. CODE ANN. § 42-5-36(d)(2) (West 2014).

²⁷ For just a sampling of a voluminous literature, see, e.g., Stephen B. Bright, *Will the Death Penalty Remain Alive in the Twenty-First Century?: International Norms, Discrimination, Arbitrariness, and the Risk of Executing the Innocent*, 2001 WIS. L. REV. 1 (presenting an array of arguments against the death penalty based on experience on the front lines of litigation); Harold Hongju Koh, *Paying “Decent Respect” to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085 (2002) (discussing the divergence of the United States from Europe on the propriety of the death penalty and diplomatic challenges raised from the persistence of the death penalty); Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407 (2005) (offering a retributivist argument against the death penalty); Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751 (2005) (arguing that executions constitute “a distinctive moral wrong” and “a distinctive kind of injustice”); Carol S. Steiker & Jordan M. Steiker, *No More Tinkering: The American Law Institute and the Death Penalty Provisions of the Model Penal Code*, 89 TEX. L. REV. 353 (2010) (presenting the American Law Institute’s rationale for withdrawing the Model Penal Code’s death penalty provisions, which have been a model for procedural revival of the death penalty after the moratorium imposed in *Furman v. Georgia*, 408 U.S. 238 (1972)); Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2005) (presenting consequentialist arguments for capital punishment).

withholding more information about their execution protocols and suppliers.²⁸ Because Denno's article is focused on the aftermath of *Baze*, however, it does not evaluate the constitutional claims surrounding secrecy challenges or the countervailing rationales for the laws.²⁹ A forthcoming article by Eric Berger argues that concealing the *method* of execution by refusing to disclose the drugs to be used would be unconstitutional—but he does not address the more frequently encountered and litigated issue of new state laws protecting the identity of drug suppliers.³⁰ Most new execution secrecy laws are focused on protecting the identity of drug suppliers, not conferring a license to conceal the nature of drugs used for execution.³¹

This Article is the first scholarly work to collect and evaluate the new drug supplier confidentiality laws and discuss their role in harm prevention.³² The Article surfaces a sad irony that goes unmentioned in scholarship: the rising risks of suffering during executions are an unintended consequence of a successful abolitionist campaign to force lethal injection drug suppliers to stop sales.³³ Regardless of one's views on the death penalty itself, it is important to understand the unintended consequences of well-meaning advocacy strategies to better prevent unwanted harms.

This Article evaluates the question of drug supplier confidentiality without taking sides in the larger war between people committed to halting executions and those seeking to implement the death sentences. Rather, the Article's focus is on harm reduction. Executions are persisting despite drug shortages, new secrecy laws, and protocol changes. Lawmakers in states such as Missouri, Utah, and Wyoming are already proposing a return to the firing squad if lethal injection is halted or stymied—and Oklahoma has already authorized

²⁸ Deborah W. Denno, *Lethal Injection Chaos Post-Baze*, 102 GEO. L.J. 1331, 1376-81 (2014) (“As states hone in on local compounding pharmacies as potential sources of lethal injection drugs, they are becoming increasingly less willing to share information about executions with the public, which raises the disturbing possibility that states are knowingly trying to hide the risks associated with compounded drugs.”).

²⁹ *Id.* (discussing the unclear future of lethal injection as means of carrying out executions in the wake of *Baze*); see also, e.g., Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 B.C. L. REV. 1367, 1373 (2014) (stating that “the legal academy . . . has neglected to examine the issue” of lethal injection secrecy and noting that though Denno's excellent overview of recent developments in the lethal injection controversy discusses the phenomenon of increasing state secrecy, “scholars have not yet examined whether state secrecy in lethal injection violates inmates' constitutional rights”).

³⁰ Berger, *supra* note 29, at 1388-92, 1401 (focusing on nondisclosure of the method of execution).

³¹ See *infra* Part I.B and Table 1 (collecting and analyzing the new state secrecy laws); Part III.B (arguing that to avoid constitutional problems, state laws should be narrowly construed as protecting supplier identity, not concealing the method of execution).

³² See *infra* Part I and Table 1.

³³ See *infra* Part I.A.

execution by firing squad if lethal injection is deemed unconstitutional.³⁴ Tennessee and Alabama authorize use of “any constitutional method of execution” if lethal injection or electrocution is held to be unconstitutional by a binding court.³⁵ Some may argue that traditional methods like hanging, firing squad, and electrocution are preferable to lethal injection because these methods do not sanitize the brutality of executions.³⁶ Yet when given a choice, inmates over the last decade have overwhelmingly chosen lethal injection over such alternative methods.³⁷ Regardless of one’s views on the ultimate question of the death penalty, unintended consequences that raise the risk of suffering associated with carrying out a death sentence should be openly acknowledged and addressed.

The profound divide in views over the death penalty tends to overshadow other legal questions, such as drug supplier confidentiality, that might impact whether an execution is halted or allowed to proceed, and can lead to overlooking the weighty rationales that support the opposing side.³⁸ Consideration of counterpoints is particularly needed on intensely divisive issues such as capital punishment because of the heightened danger of confirmation bias—the cognitive tendency to believe information that confirms one’s viewpoint and discount evidence to the contrary.³⁹ A corrective is to

³⁴ See, e.g., Berman, *supra* note 4; Kevin Murphy, *U.S. States Could Turn to Firing Squads If Execution Drugs Scarce*, REUTERS, Jan. 18, 2014, available at <http://www.reuters.com/article/2014/01/18/us-usa-executions-firingsquads-idUSBREA0H00C20140118>, archived at <http://perma.cc/M2YH-2KUM> (reporting on proposals in Missouri and other states to bring back firing squads).

³⁵ ALA. CODE § 15-18-82.1(c) (LexisNexis 2011 & Supp. 2013); TENN. CODE ANN. § 40-23-114(d) (2012 & Supp. 2014).

³⁶ See, e.g., *Wood v. Ryan*, 759 F.3d 1076, 1102-03 (9th Cir. 2014) (Kozinski, J., dissenting from denial of rehearing en banc) (arguing that “[u]sing 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”).

³⁷ Sixteen states either now or in recent history have given inmates the choice of lethal injection or execution by a method such as hanging, firing squad, gas chamber, or electrocution. See *Methods of Execution*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/methods-execution>, archived at <http://perma.cc/C5YA-W2ZF> (last visited Aug. 12, 2014) (listing the distribution of state execution methods). Yet of the 509 executions over the last decade, only eight persons have chosen execution by a means other than lethal injection—seven of the eight by electrocution and one by firing squad. See *Searchable Executions Database*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/views-executions>, archived at <http://perma.cc/4NXM-PAMZ> (last visited Aug. 12, 2014) (providing sortable data).

³⁸ See, e.g., Ivan Hernandez & Jesse Lee Preston, *Disfluency Disrupts the Confirmation Bias*, 49 J. EXP. SOC. PSYCH. 178, 179-81 (2013) (summarizing findings regarding the heightened risk of confirmation bias on polarizing issues such as capital punishment).

³⁹ See, e.g., Lea-Rachel D. Kosnik, *Refusing to Budge: A Confirmatory Bias in Decision*

consider opposing or contrasting views.⁴⁰ This Article presents a counterpoint thus far missing in legal scholarship.

The Article proceeds in three parts. Part I discusses the unintended consequences of taking the death penalty battle to the market and targeting lethal injection drug suppliers. As reliable sources flee, states are coping by changing drugs and protocols and enacting new execution secrecy laws to protect remaining drug supply sources. Table 1 collects the new laws, their scopes of coverage, and their enactment dates. Part II differentiates between drug supplier confidentiality and execution method secrecy as a historical, practical, and constitutional matter. The recent rise of drug supplier confidentiality laws make them a lightning rod for challenges, unfortunately diverting attention away from the real problem: last-minute drug changes that tend to evade close judicial scrutiny. Part III offers a harm prevention perspective on supplier confidentiality laws. Creating protections for licensed drug sources reduces the need to resort to questionable backroom sources abroad, eleventh-hour substitutions, or reversion to older—and arguably more brutal—methods of execution.

I. DIMINISHING EXECUTION DRUG SUPPLY, RISING RISKS, AND SECRECY

Death penalty battles are waged on a perilous minefield fraught with the risk of unintended consequences.⁴¹ The nation is wrestling with the most recent unintended consequence of taking the battle to the market by targeting lethal

Making?, 7 MIND & SOC'Y 193, 193-04, 207 (2008) (discussing the role of pre-existing attitudes on an individual's ability to assess new information and concluding that "initial predisposition affected subsequent evidence evaluation and attitude change significantly"); Charles G. Lord, Elizabeth Preston & Mark R. Lepper, *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOC. PSYCH. 1231, 1232, 1239 (1984) (reporting on findings that the risk of confirmation bias is particularly acute where beliefs on an issue such as capital punishment are strongly held and noting that the corrective strategy of considering opposite possibilities promoted improved impartiality).

⁴⁰ See, e.g., Lord, Preston & Lepper, *supra* note 39, at 1239 (reporting on experimental findings that the cognitive strategy of considering opposite views was a more effective corrective than an exhortation to be unbiased and fair).

⁴¹ For example, after the temporary moratorium on the death penalty in *Furman v. Georgia*, 408 U.S. 238 (1972), public opinion polls showed a steep climb in support for the death penalty. See, e.g., *Death Penalty*, GALLUP, <http://www.gallup.com/poll/1606/death-penalty.aspx> (last visited Aug. 8, 2014); Joseph H. Rankin, *Changing Attitudes Toward Capital Punishment*, 58:1 SOC. FORCES 194, 194-200 (1979) (discussing factors behind shift in public opinion including galvanizing opposition to the Supreme Court's moratorium and anger over rising crime rates); see also, e.g., Francis T. Cullen et al., *The Myth of Public Support for Capital Punishment*, in PUBLIC OPINION AND CRIMINAL JUSTICE 73, 77 (Jane L. Wood & Theresa A. Gannon eds., 2009) (acknowledging spike in public support for the death penalty after *Furman* but criticizing the methodology of public opinion polls).

injection drug suppliers with negative attention.⁴² Major manufacturers have fled from the business of supplying lethal injection drugs.⁴³ As a result, states seeking to carry out their legal judgments must scramble to find alternative suppliers, drugs, and protocols.⁴⁴ The unintended consequences are a rising risk of suffering during execution and a new wave of state execution secrecy laws and policies.⁴⁵ This section begins by explaining the unintended consequences of the strategy of attacking lethal injection drug supply, and mapping the rise of new execution secrecy laws as states vary their protocols and seek to protect remaining drug sources to cope with the shortage. This section also provides a table summarizing the scope, coverage, and enactment dates of the new lethal injection drug supplier secrecy laws.⁴⁶

A. *Taking the Battle to the Market: Attacking Lethal Injection Supply*

When avenues of direct legal challenges to capital punishment under the Eighth Amendment or Equal Protection Clause have closed, capital punishment abolitionists have persistently and creatively sought alternative routes.⁴⁷ The Supreme Court has explained that the death penalty is a

⁴² See, e.g., Guy Walters, *A Lethal Irony: Are Death Row Convicts Dying in Agony Because of the Well-Meaning Efforts of British Campaigners Fighting to Ban Executions?*, DAILY MAIL (U.K.), May 5, 2014, at 15 (discussing concerns that faulty executions by lethal injection are an unintended side effect of the successful campaign to halt drug sales by major drug manufacturers, relegating states to new protocols, drugs, and sources); see also discussion *infra* Part I.A-B.

⁴³ Bonner, *A Prolonged Stay*, *supra* note 6 (discussing the impact of death penalty abolition group Reprieve's campaign against drug manufacturers); Eckholm & Zezima, *supra* note 6 ("The sole American manufacturer of an anesthetic widely used in lethal injections said Friday that it would no longer produce the drug, a move likely to delay more executions and force states to adopt new drug combinations."); Nathan Koppel, *Drug Halt Hinders Executions in the U.S.*, WALL ST. J., Jan. 22, 2011, at A1 ("The sole U.S. maker of a key drug used in lethal injections halted its production amid a broad global campaign by opponents of the death penalty . . .").

⁴⁴ Greg Bluestein, *States Beg, Borrow and Import Scarce Execution Drug; Georgia Is Investigated*, STAR TRIB., Mar. 25, 2011, http://www.startribune.com/templates/Print_This_Story?sid=118660629%20, archived at <http://perma.cc/N8CK-3SHE> ("Prison officials around the country have been going to extraordinary — and in at least one case, legally questionable — lengths to obtain a scarce lethal-injection drug . . ."); Eckholm & Zezima, *supra* note 6 (stating that "[n]o other American companies manufacture the drug" predominantly used for lethal injections); Koppel, *supra* note 43 (exploring the immediate options available to states).

⁴⁵ See, e.g., Denise Grady, *Three-Drug Protocol Persists for Lethal Injections, Despite Ease of Using One*, N.Y. TIMES, May 2, 2014, at A16 (detailing recent painful executions as states coping with drug shortages have "improvise[d] lethal cocktails" and purchased drugs from "loosely regulated compounding pharmacies").

⁴⁶ See *infra* Table 1 and notes 137-143.

⁴⁷ See, e.g., HERBERT H. HAINES, *AGAINST CAPITAL PUNISHMENT: THE ANTI-DEATH*

constitutionally permitted punishment.⁴⁸ Legal battles have therefore focused on the death penalty's administration,⁴⁹ potential biases in judgment,⁵⁰ and excessive severity for certain classes of offenders or types of offenses.⁵¹ In 1972, a temporary moratorium on the death penalty based on claims of arbitrariness in its administration⁵² was followed by a revolt in public opinion, which shifted to majority support of capital punishment after it had waned in the post-World War II era.⁵³ States raced to adopt new procedures based on the Model Penal Code⁵⁴ to overcome the Supreme Court's imposed moratorium, employing measures the Court affirmed four years later.⁵⁵ Later legal attacks have since chipped away at the margins, producing bans on executing a small subset of offenders such as the mentally disabled,⁵⁶ juveniles,⁵⁷ child rapists,⁵⁸ or rapists generally.⁵⁹

PENALTY MOVEMENT IN AMERICA, 1972-1994, at 23-36 (1996) (describing the historical strategies of anti-death penalty advocates); Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1, 10-22 (2002) (chronicling how death penalty opponents have adapted to legal and public opinion shifts).

⁴⁸ See, e.g., *Baze v. Rees*, 553 U.S. 35, 47 (2008) (plurality opinion) ("We begin with the principle, settled by *Gregg*, that capital punishment is constitutional."); *id.* at 86 n.19 (Stevens, J., concurring) (discussing the Supreme Court's acknowledgment in *Furman v. Georgia* that capital punishment was not considered cruel at the time of the framing—and that punishment techniques were harsher and more painful at the time of the framing than in modern times).

⁴⁹ See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 176-89 (1976) (plurality opinion) (rejecting claim that capital punishment is cruel and unusual punishment violating the Eighth Amendment, but noting that the imposition of death still must be conducted under procedures to "minimize the risk of wholly arbitrary and capricious action").

⁵⁰ E.g., *McCleskey v. Kemp*, 481 U.S. 279, 291-94 (1987) (considering a claim that the death penalty is imposed in a racially biased manner because murderers of black victims are the least likely to receive a death sentence and black killers of white victims are most likely to receive the death penalty).

⁵¹ E.g., *Kennedy v. Louisiana*, 554 U.S. 407, 422-24 (2008) (child rape); *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (juveniles); *Coker v. Georgia*, 433 U.S. 584, 598-99 (1977) (plurality opinion) (rape).

⁵² *Furman v. Georgia*, 408 U.S. 238, 239 (1972) (per curiam) (discussing past arbitrary application of the death penalty in violation of the Eighth Amendment).

⁵³ See, e.g., *Death Penalty*, *supra* note 41 (showing public opinion trends over time); Rankin, *supra* note 41, at 194-200 (discussing factors behind rise in support for the death penalty beginning in the 1970s, including the moratorium and rising crime rates).

⁵⁴ MODEL PENAL CODE § 210.6 (1962) (withdrawn 2009).

⁵⁵ *Gregg v. Georgia*, 428 U.S. 153, 176-89 (1976) (plurality opinion) (holding that imposing the death penalty for the crime of murder does not violate the Constitution, and acknowledging "society's endorsement of the death penalty for murder" through the passage of various state legislation authorizing the death penalty for crimes resulting in death).

⁵⁶ *Atkins v. Virginia*, 536 U.S. 304, 320 (2002).

Another litigation strategy to try to halt the death penalty more broadly has been to challenge the method of execution now prevailing in all death penalty jurisdictions—lethal injection.⁶⁰ Until very recently, the standard execution protocol was to use a sequence of three drugs: (1) a barbiturate sedative called sodium thiopental that rapidly delivers unconsciousness to spare the condemned pain; (2) the muscle paralytic agent pancuronium bromide, which can cause suffocation by paralyzing the diaphragm; and (3) the toxin potassium chloride, which triggers cardiac arrest.⁶¹ Litigants argued that the method could constitute cruel and unusual punishment if the condemned is not effectively rendered unconscious, because he would be paralyzed while suffocating and suffering the burning sensation of cardiac arrest.⁶²

In *Baze*, the Supreme Court affirmed the constitutionality of lethal injection and rejected the Eighth Amendment claims by a 7-2 vote.⁶³ While the Court was split on the rationale, a three-Justice plurality explained that “the Constitution does not demand the avoidance of all risk of pain” because a “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.”⁶⁴ To rise to the level of cruel and unusual punishment, there must be “the deliberate infliction of pain for the sake of pain”⁶⁵ or an “objectively intolerable” “substantial risk of serious harm.”⁶⁶ After *Baze* affirmed the constitutionality of lethal injection in 2008, numerous stays of execution and moratoria lifted in states that had been stymied by legal challenges.⁶⁷

Abolitionists then took the lethal injection battle to another arena—the market—to get drug manufacturers to stop supplying lethal injection drugs.⁶⁸

⁵⁷ *Roper v. Simmons*, 543 U.S. 551, 568 (2005).

⁵⁸ *Kennedy v. Louisiana*, 554 U.S. 407, 422-24 (2008).

⁵⁹ *Coker v. Georgia*, 433 U.S. 584, 598-99 (1977) (plurality opinion).

⁶⁰ *See, e.g., Baze v. Rees*, 553 U.S. 35, 40 (2008) (discussing “the use of lethal injection by every jurisdiction that imposes the death penalty”).

⁶¹ *Id.* at 44; *see also, e.g.,* Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 *FORDHAM L. REV.* 49, 55, 91-100 (2007) (reporting on results of surveys of execution protocols).

⁶² *Baze*, 553 U.S. at 49.

⁶³ Justice Roberts wrote the plurality opinion, joined by Justices Kennedy and Alito. Justices Stevens, Scalia, Thomas, and Breyer concurred in the judgment. *Id.* at 39.

⁶⁴ *Id.* at 47.

⁶⁵ *Id.* at 48.

⁶⁶ *Id.* at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 846, 834 (1994)).

⁶⁷ *See id.* at 47-50 (rejecting claims that the three-drug lethal injection protocol then prevailing constituted cruel and unusual punishment); *see also, e.g.,* Linda Greenhouse, *Justices Uphold Lethal Injection in Kentucky Case*, *N.Y. TIMES*, Apr. 17, 2008, at A1 (examining numerous stays of execution and moratoria on lethal injection lifted after *Baze v. Rees*).

⁶⁸ *E.g.,* Koppel, *supra* note 43 (detailing successful campaign by death penalty opponents

The strategy proved dramatically successful in shriveling lethal injection drug supply. By the beginning of 2011, after a global campaign by death penalty opponents, the sole U.S. manufacturer of the key drug sodium thiopental announced it would cease production.⁶⁹ Though sodium thiopental historically has been used as an anesthetic, hospitals have largely turned to other drugs, strengthening the association of sodium thiopental with lethal injections and leaving the major drug manufacturer Hospira as its main provider.⁷⁰ Hospira tried to shift production to an Italian plant, but anti-death penalty campaigners marshaled media attention against the move.⁷¹ Italian officials alerted to the controversy expressed opposition, forcing Hospira to halt production in order to avoid sanctions.⁷² The exit of this trusted drug manufacturer posed a serious risk of delay for scheduled executions and forced states to explore new drugs, suppliers, and protocols.⁷³

Facing execution delays and dwindling supplies scheduled to expire, states turned to European drug manufacturers.⁷⁴ The British anti-death penalty group Reprieve partnered with U.S. anti-death penalty lawyers to ferret out new sources of lethal injection drugs and shut them down.⁷⁵ In 2010, the group launched its Stop the Lethal Injection Project (“SLIP”).⁷⁶ European suppliers, including the major Danish pharmaceutical company Lundbeck and a small British drug wholesaler called Dream Pharma, soon found themselves the targets of a shaming campaign.⁷⁷ Reprieve sparked a media blast against Dream Pharma, releasing the wholesaler’s address and phone number together with a series of critical articles.⁷⁸ By November 2010, the campaigners

against drug manufacturers supplying states with lethal injection drugs); *see also* Raymond Bonner, *Drug Company in Cross Hairs of Death Penalty Opponents*, INT’L HERALD TRIB., Mar. 31, 2011, at 2 [hereinafter Bonner, *Drug Company in Cross Hairs of Death Penalty Opponents*].

⁶⁹ Koppel, *supra* note 43.

⁷⁰ Eckholm & Zezima, *supra* note 6.

⁷¹ *See, e.g.*, Emma Draper, *Death Penalty: Stop Lethal Injection Project Case Briefing*, REPRIEVE (July 28, 2011), http://www.reprieve.org.uk/publiceducation/2011_02_03_lethal_injection_drugs/, archived at <http://perma.cc/545D-2KEZ> (describing successful campaign).

⁷² Koppel, *supra* note 43.

⁷³ Eckholm & Zezima, *supra* note 6.

⁷⁴ Bonner, *Drug Company in Cross Hairs of Death Penalty Opponents*, *supra* note 68; Eckholm & Zezima, *supra* note 6.

⁷⁵ Bonner, *A Prolonged Stay*, *supra* note 6; Bonner, *Drug Company in Cross Hairs of Death Penalty Opponents*, *supra* note 68.

⁷⁶ Walters, *supra* note 42; *see also, e.g.*, Draper, *supra* note 71.

⁷⁷ Bonner, *Drug Company in Cross Hairs of Death Penalty Opponents*, *supra* note 68.

⁷⁸ Bonner, *A Prolonged Stay*, *supra* note 6.

succeeded in securing a ban in the United Kingdom against the export of drugs for lethal injection.⁷⁹

As states turned to alternative drugs and protocols, including the anti-epileptic drug pentobarbital, Reprive turned to another target, the Danish company Lundbeck.⁸⁰ Unlike Dream Pharma, Lundbeck is a major drug manufacturer, with stockholders and publicly traded shares.⁸¹ Reprive launched a major campaign with social media blasts, media releases, and stockholder organizing.⁸² The company dropped from 17 to 40 on an annual ranking of the best companies in Denmark, and a pension fund sold its shares in the company.⁸³ The pressure led Lundbeck to halt and prevent sales of pentobarbital for executions.⁸⁴ By 2011, the European Union—whose member states eliminated the death penalty decades ago—updated its export restrictions to ban the sale of sodium thiopental, pentobarbital, and six other drugs for use in lethal injections.⁸⁵

Reprive even discovered and halted attempts by states to secure lethal injection drugs in India.⁸⁶ The drug shortages and resulting delays put state prison officials in desperate straits in their efforts to carry out sentences.⁸⁷ While some states looked beyond Europe, others utilized the dwindling stockpiles of other states. For example, California prison officials obtained twelve grams of sodium thiopental from Arizona, stating in an unintentionally ironic thank-you email, “You guys in AZ are life savers.”⁸⁸ Prison officials in

⁷⁹ Dominic Casciani, *U.S. Lethal Injection Drug Faces U.K. Export Restrictions*, BBC NEWS UK (Nov. 29, 2010), <http://www.bbc.com/news/uk-11865881>, archived at <http://perma.cc/6E8E-53HH>.

⁸⁰ Bonner, *A Prolonged Stay*, *supra* note 6 (“Reprive ratcheted up the pressure. Every time Lundbeck’s pentobarbital was used in an execution, it issued a press release.”).

⁸¹ *Id.*

⁸² *Id.*; Jan M. Olsen & Karl Ritter, *Danes Won’t Block Execution Drug*, ASSOCIATED PRESS, Mar. 30, 2011.

⁸³ Bonner, *A Prolonged Stay*, *supra* note 6.

⁸⁴ Greg Bluestein & Andrew Welsh-Huggins, *Prisons Face New Roadblock to Get Execution Drugs*, ASSOCIATED PRESS, July 1, 2011 (“A Danish drug maker moved Friday to curb the increasing use of one of its sedatives in U.S. executions by requiring distributors to sign an agreement that they won’t sell it for that purpose.”).

⁸⁵ Juerden Baetz, *Europeans Frustrate U.S. Executions*, OTTAWA CITIZEN, Feb. 19, 2014, at A10 (“The EU then updated its export regulation in 2011 to ban the sale of eight drugs—including pentobarbital and sodium thiopental—if the purpose is to use them in lethal injections.”).

⁸⁶ Prasanna D. Zore, *Under Pressure, Indian Firm Stops Sale of Lethal Injection to US*, INDIA ABROAD, (N.Y.C.), Apr. 15, 2011, at A21 (“Indian drug companies that were selling [sodium thiopental] . . . have announced that they will no longer sell the substance . . .”).

⁸⁷ Bluestein, *supra* note 44 (discussing lengths to which officials have gone to obtain drugs for executions according to records obtained by the Associated Press).

⁸⁸ *Id.*

Nebraska turned to a tiny Indian drug wholesaler called Kayem.⁸⁹ Reprieve intervened, contacting the company's managing director and alerting the media.⁹⁰ After Indian authorities seized records pertaining to the sales of sodium thiopental from Kayem's office in Mumbai, the company announced a halt to sales to U.S. prison authorities.⁹¹

Expressing concern over the targeting of suppliers, a lawyer for the Texas Department of Criminal Justice wrote that Reprieve was engaged in "intimidation and commercial harassment" and fomenting the risk of violence.⁹² The letter stated that Reprieve's tactics, including releasing the address and other identifiers of manufacturers, "create[] a substantial risk of physical harm to our supplier. . . . It is not a question of if, but when, Reprieve's unrestrained harassment will escalate into violence."⁹³ The letter to the Attorney General of Texas noted that Reprieve's methods "present classic, hallmark practices comparable to practices by gangs incarcerated in the TDCJ [Texas prison system] who intimidate and coerce rival gang members and which have erupted into prison riots."⁹⁴ Such concerns over the targeting of execution drug suppliers, combined with the struggle to find alternative protocols and sources, have led to the rise of new secrecy laws, discussed in the next subsection.

B. *Unintended Harms and the Rise of Execution Drug Supplier Secrecy Laws*

"No Drugs, No Executions: The End of the Death Penalty"⁹⁵ makes a catchy news headline and a tempting abolition strategy, but the reality is grimmer and more complex. There are numerous other drugs that can deliver death. Prison

⁸⁹ Zore, *supra* note 86.

⁹⁰ *Id.*; Raymond Bonner, *Indian Company Ends Sale of Lethal-Injection Drug to the U.S.*, ATLANTIC, Apr. 7, 2011, <http://www.theatlantic.com/national/archive/2011/04/indian-company-ends-sale-of-lethal-injection-drug-to-the-us/236943/>, archived at <http://perma.cc/8N3Q-HWKR>.

⁹¹ *Id.*

⁹² Ed Pilkington, *Texas Accuses Anti-Death Penalty Charity Reprieve of Fomenting Violence*, GUARDIAN, Mar. 28, 2012, <http://www.theguardian.com/world/2012/mar/28/death-penalty-texas-reprieve>, archived at <http://perma.cc/D8YZ-BQCH>; Smith, *supra* note 6; Allan Turner, *TDCJ Wants to Block Release of Lethal Injection Drug Info*, HOUS. CHRON., Apr. 3, 2012, <http://www.chron.com/default/article/TDCJ-wants-to-block-release-of-lethal-injection-3457080.php>, archived at <http://perma.cc/C9CG-4RUE>.

⁹³ Turner, *supra* note 92.

⁹⁴ Pilkington, *supra* note 92.

⁹⁵ See Dustin Volz, *No Drugs, No Executions: The End of the Death Penalty*, NAT'L J. ONLINE, Oct. 28, 2013, <http://www.nationaljournal.com/innovation-works/no-drugs-no-executions-the-end-of-the-death-penalty-20131028>, archived at <http://perma.cc/4PZL-VGHG>.

officials are switching to alternative combinations and protocols as their supplies of sodium thiopental become exhausted or expired.⁹⁶ For example, in lieu of sodium thiopental, corrections departments have substituted the fast-acting barbiturate and anti-epileptic pentobarbital, used alone or in combination with pancuronium bromide and potassium chloride in the three-drug protocol.⁹⁷ States have also shifted to protocols using the anesthetic midazolam.⁹⁸

Eighth Amendment challenges in the lower courts to these substitutions have largely been rejected as failing to establish a substantial risk of suffering, as required by *Baze v. Rees*.⁹⁹ Sometimes the denials are wry—such as the

⁹⁶ E.g., Brady Dennis & Lena H. Sun, *For More States, Execution Means Improvisation As Drug Supplies Dwindle*, WASH. POST, Apr. 30, 2014, http://www.washingtonpost.com/national/health-science/for-more-states-execution-means-improvisation-as-drug-supplies-dwindle/2014/04/30/53167218-d088-11e3-937f-d3026234b51c_story.html, archived at <http://perma.cc/LH7U-J8UN>; Tu Thanh Ha, *Failed Execution Points to U.S. Prisons' Scramble for New Deadly Drugs*, GLOBE & MAIL (Toronto), Apr. 30, 2014, <http://www.theglobeandmail.com/news/world/failed-execution-points-to-us-prisons-scramble-for-new-deadly-drugs/article18336806/>, archived at <http://perma.cc/28JS-HENW>; Michael Kiefer, *Lethal Injection Protocol Adjusted*, ARIZ. REP., Mar. 27, 2014, at A1; Lauren McGaughey, *Louisiana Will Adopt Ohio Lethal Injection Drugs One Week Before Scheduled Execution*, NEW ORLEANS TIMES-PICAYUNE, Jan. 27, 2014, http://www.nola.com/crime/baton-rouge/index.ssf/2014/01/execution_lethal_injection_la.html, archived at <http://perma.cc/2Y8L-3RUQ>.

⁹⁷ See, e.g., *Wellons v. Comm'r, Ga. Dep't of Corr.*, 754 F.3d 1260, 1262 (11th Cir. 2014) (rejecting request for stay of execution based on allegation that use of pentobarbital from a compounding pharmacy violates the Eighth Amendment); *In re Lombardi*, 741 F.3d 888, 891 (8th Cir. 2014) (affirming new protocol using pentobarbital); *Jackson v. Danberg*, 656 F.3d 157, 161-63 (3d Cir. 2011) (affirming the substitution by Delaware of the barbiturate pentobarbital for sodium thiopental against Eighth Amendment challenge by death row inmate); *Pavatt v. Jones*, 627 F.3d 1336, 1337-38 (10th Cir. 2010) (rejecting Eighth Amendment challenge of Oklahoma's substitution of pentobarbital for sodium thiopental on the eve of execution).

⁹⁸ See, e.g., *Chavez v. Fla. SP Warden*, 742 F.3d 1267, 1272 (11th Cir. 2014) (rejecting Eighth Amendment challenge to the substitution of midazolam hydrochloride).

⁹⁹ E.g., *Wellons*, 754 F.3d at 1262 (rejecting request for stay of execution based on allegation that use of pentobarbital from a compounding pharmacy violates the Eighth Amendment); *Chavez*, 742 F.3d at 1272 (rejecting Eighth Amendment challenge to the substitution of midazolam hydrochloride); *In re Lombardi*, 741 F.3d at 891 (affirming new protocol using pentobarbital); *Jackson*, 656 F.3d at 161-63 (affirming the substitution by Delaware of the barbiturate pentobarbital for sodium thiopental against Eighth Amendment challenge by death row inmate); *Pavatt*, 627 F.3d at 1337-38 (rejecting Eighth Amendment challenge of Oklahoma's substitution of pentobarbital for sodium thiopental on the eve of execution).

concise, vivid opening to the Eleventh Circuit's decision rejecting a challenge to the substitution of the anesthetic midazolam:

Juan Carlos Chavez kidnapped a nine-year-old boy at gunpoint, anally raped him, verbally taunted and terrorized him, shot him to death, dismembered his body, discarded his body parts in three planters, and then filled those planters with concrete. Facing imminent execution, Chavez has filed a lawsuit claiming that he may experience unnecessary pain when the State of Florida executes him by lethal injection.¹⁰⁰

While crimes involving such horror inflicted on victims have moved juries to vote for the death penalty, the nation has had little stomach for executions that result in visible suffering.

In 2014 alone, four “botched” executions in Arizona, Oklahoma, and Ohio have roused controversy and revulsion.¹⁰¹ In January 2014, Dennis McGuire was executed in Ohio for raping and murdering a twenty-two-year-old pregnant woman.¹⁰² Controversy flared when McGuire took fifteen minutes to die and appeared to struggle and gasp.¹⁰³ The same month, Michael Lee Wilson's last words in an execution in Ohio were “I feel my whole body burning.”¹⁰⁴ In April 2014, Clayton Lockett was executed in Oklahoma for shooting and then burying alive a nineteen-year-old woman.¹⁰⁵ Because of problems finding a usable vein to administer the lethal injection drugs, Lockett did not receive the full dose of the anesthetic midazolam and began to writhe, twitch, and mumble during the execution.¹⁰⁶ Most recently, in July 2014,

¹⁰⁰ *Chavez*, 742 F.3d at 1268.

¹⁰¹ See, e.g., *Another Botched Execution*, VA. PILOT & LEDGER-STAR, July 25, 2014, at A15 (discussing disgust over three controversial “botched” executions in 2014 alone in Arizona, Oklahoma, and Ohio); Jacob Gershman, *Inmate in Arizona Takes Two Hours to Die*, WALL ST. J., July 24, 2014, at A2 (describing controversy over the July 24 execution of Arizona inmate Joseph R. Wood); Megan McCracken & Jennifer Moreno, *Botched Executions Can't Be New Norm*, CNN, Sept. 28, 2014, <http://www.cnn.com/2014/07/26/opinion/mccracken-moreno-botched-executions/>, archived at <http://perma.cc/TK3L-JUMR> (discussing the four controversial “botched” executions of Clayton Lockett, Dennis McGuire, Michael Wilson, and Joseph Rudolph Wood).

¹⁰² Rick Lyman, *Ohio Execution Using Untested Drug Cocktail Renews the Debate over Lethal Injections*, N.Y. TIMES, Jan. 16, 2014, at A15.

¹⁰³ *Id.*

¹⁰⁴ Molly Hennessy-Fiske, *Prolonged Execution Raises Debate on Lethal Injections*, CHI. TRIB., Jan. 19, 2014, at I29.

¹⁰⁵ Erik Eckholm, *One Execution Botched, State Delays the Next*, N.Y. TIMES, Apr. 30, 2014, at A1 [hereinafter Eckholm, *One Execution Botched*].

¹⁰⁶ *Id.*; Erik Eckholm, *Defense Reports Puncture Led to Botched Execution*, N.Y. TIMES, June 14, 2014, at A14.

Joseph R. Wood took nearly two hours to die during his execution for murdering his former girlfriend and her father.¹⁰⁷

Midazolam was used in three of the four controversial executions—that of McGuire, Lockett and Woods.¹⁰⁸ Less than a year after the prolonged Woods execution, the Supreme Court—which had summarily reversed a stay of the Woods execution—granted certiorari and stayed the executions using midazolam of three prisoners on Oklahoma’s Death Row.¹⁰⁹

The legal battles and controversial executions of Clayton Lockett and Joseph R. Wood have also brought greater attention to the rise of execution secrecy laws.¹¹⁰ Like other states in recent years, Oklahoma has enacted a law expressly protecting the confidentiality of execution drug suppliers.¹¹¹ Arizona has interpreted its executioner confidentiality law to also protect the identities of drug suppliers.¹¹²

Less than a month away from their executions, Lockett, who was on death row for beating, shooting and burying alive a nineteen-year-old woman, and Charles Warner, who was sentenced for raping and murdering an eleventh-month-old baby, sought stays of execution based on nondisclosure of the identity of their lethal injection drug supplier or the drugs to be used.¹¹³ Their suit bounced between state and federal courts and between state courts.¹¹⁴ In the interim, the execution was delayed for thirty days—because the state lacked lethal injection drugs to carry out the executions.¹¹⁵ The Oklahoma Supreme Court finally accepted jurisdiction and permitted a temporary stay.¹¹⁶

¹⁰⁷ Eckholm, *Arizona Takes Nearly 2 Hours to Execute Inmate*, *supra* note 18.

¹⁰⁸ Mark Berman, *After Arizona, Here’s A Guide to the Drugs Used in Lethal Injections*, WASH. POST, July 24, 2014, <http://www.washingtonpost.com/news/post-nation/wp/2014/07/24/after-arizona-heres-a-guide-to-the-drugs-used-in-lethal-injections/>, archived at <http://perma.cc/CM3U-RHXJ>.

¹⁰⁹ *Glossip v. Gross*, 2015 WL 341655 (S. Ct. Jan. 28, 2015).

¹¹⁰ Erik Eckholm, *Court Delays Execution Over Secrecy with Drugs*, N.Y. TIMES, July 21, 2014, at A11; Eckholm, *One Execution Botched*, *supra* note 105.

¹¹¹ See OKLA STAT. ANN. tit. 22, § 1015(b) (West 2003 & Supp. 2014) (“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.”).

¹¹² *Wood v. Ryan*, No. CV-14-1447-PHX-NVW (JFM), 2014 WL 3385115, at *1 (D. Ariz. July 10, 2014). See also ARIZ. REV. STAT. ANN. § 13-757(C) (West 2010) (“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.”).

¹¹³ *Lockett v. Evans*, Nos. 112,741, 112,764, 2014 WL 1584517, at *1-2 (Okla. Apr. 21, 2014).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

The stay proved so controversial that the Governor indicated she would defy the stay and a state legislator called for impeachment of the justices.¹¹⁷ Two days later, the Oklahoma Supreme Court issued a decision dissolving the stay.¹¹⁸

The *Lockett* court observed that contrary to the allegation regarding nondisclosure of the identity of the execution drugs, the state had disclosed the drugs it would be using.¹¹⁹ Moreover, by its express terms, the state's secrecy statute only protected the identity of the drug source—and did not authorize officials to keep the method of execution secret.¹²⁰ With this limiting construction, the statute was not constitutionally infirm.¹²¹

Wood's legal battle regarding execution drug supplier confidentiality was similarly time-pressured and dramatic. Less than a month from his scheduled execution, Wood sued for a stay, arguing that the state's refusal to disclose the source, manufacturer, and lot numbers of its execution drugs violated his constitutional rights.¹²² Thirteen days before the execution, the district court denied the petition.¹²³ In a dramatic twist, the Ninth Circuit reversed and issued a stay of execution just four days before the execution, finding that protection of the execution drug supplier's identity violated the First Amendment.¹²⁴ In an even more dramatic twist, the Supreme Court reversed the Ninth Circuit just a day before the execution, allowing the execution to proceed as scheduled.¹²⁵

Litigants have contended that the new state secrecy laws are adopted to conceal poor-quality drugs and sources, pointing to increasing reliance on state-regulated compounding pharmacies for lethal injection drugs.¹²⁶

¹¹⁷ Eckholm, *One Execution Botched*, *supra* note 105, at A1.

¹¹⁸ *Lockett v. Evans*, 330 P.3d 488, 489 (Okla. 2014).

¹¹⁹ *Id.* at 490 (“[T]he DOC had already disclosed its new execution protocol and the identity of the drug or drugs to be used in its choice of five different drug or drug combinations.”).

¹²⁰ *Id.* at 491 (“By its terms, the secrecy provision does not make the identity of the drug or drugs secret and any reliance on the provision to do so would be misplaced.”).

¹²¹ *Id.*

¹²² Complaint at 1, *Wood v. Ryan*, No. 14-01447 (D. Ariz., June 26, 2014).

¹²³ *Wood v. Ryan*, No. CV-14-1447-PHX-NVW (JFM), 2014 WL 3385115, at *1 (D. Ariz. July 10, 2014), *rev'd*, *Wood v. Ryan*, 759 F.3d 1076 (9th Cir. 2014).

¹²⁴ *Wood*, 759 F.3d at 1088, *preliminary injunction of execution vacated sub nom.* *Ryan v. Wood*, No. 14A82, 2014 WL 3600362 (S. Ct. July 22, 2014).

¹²⁵ *Wood*, 2014 WL 3600362, at *1.

¹²⁶ *See, e.g.*, Petition for a Writ of Certiorari at *6, *Sepulvado v. Jindal*, No. 13-892 (S. Ct. Jan. 27, 2014), 2014 WL 333537 (alleging states are concealing their protocols and drug sources to avoid scrutiny of constitutional infirmities and to hide the risks of relying on compounding pharmacies); Plaintiff-Appellant's Opening Brief at *10-12, *Campbell v. Livingston*, No. 14-70020 (5th Cir. May 12, 2014), 2014 WL 2926034 (“As questions about the quality of those drugs are brought to the courts – and inadequate drugs have led to botched executions – states have sought to simply hide their execution methods and drug

Harkening back to the traditional mortar-and-pestle days of the pharmacy, compounding pharmacies mix and combine ingredients particularized to the customer's needs.¹²⁷ Because they are not deemed drug manufacturers over which the FDA has jurisdiction, compounding pharmacies are licensed and regulated by states rather than the federal government.¹²⁸ As such, compounding pharmacies are not required to obtain FDA approval of prescriptions before marketing or to report adverse events.¹²⁹ This exemption from FDA regulation is controversial for compounding pharmacies in the gray area of larger-scale industrial production, particularly after an outbreak of rare fungal meningitis was linked to contamination in an injectable drug made by a compounding center.¹³⁰

While critics accuse states of trying to cover up bad execution practices using execution secrecy laws,¹³¹ the reality is more complex. As Table 1 summarizes, most new execution secrecy laws expressly authorize only the protection of the identity of execution drug suppliers.¹³² Sponsors of existing confidentiality laws and similar pending legislation state the goals of these laws are to protect lethal injection drug suppliers from threats and other forms of intimidation.¹³³ Most of the laws were enacted between 2009 and 2013, as

sources from the light of day.”).

¹²⁷ JOHN F. MARRIOTT ET AL., PHARMACEUTICAL COMPOUNDING AND DISPENSING 37 (2d ed. 2010); Jesse M. Boodoo, *Compounding Problems and Compounding Confusion: Federal Drug Regulation of Compounded Drug Products and the FDMA Circuit Split*, 36 AM. J. L. & MED. 220, 220-21 (2010).

¹²⁸ 21 U.S.C. § 353a (2012). *See also, e.g.*, Kevin Outterson, *Regulating Compounding Pharmacies and NECC*, 367 NEW ENG. J. MED. 1969, 1969-71 (2012) (discussing the gray zone of regulation and attempts to gain FDA regulation of industrial compounding pharmacies).

¹²⁹ Outterson, *supra* note 128, at 1969-70.

¹³⁰ *Id.*

¹³¹ *See, e.g.*, Berger, *supra* note 29, at 21 (“Perhaps because they know their drugs and methods cannot be trusted, death penalty states often keep important details of their execution procedures secret.”); Denno, *supra* note 28, at 1376-81 (“As states hone in on local compounding pharmacies as potential sources of lethal injection drugs, they are becoming increasingly less willing to share information about executions with the public, which raises the disturbing possibility that states are knowingly trying to hide the risks associated with compounded drugs. . . . Providing cover solely to compounding pharmacies—now such a key component of the lethal injection process—fails to recognize the complex interdependency among the many different participants in the machinery of death. No participant should be holding secrets.”); *see also* discussion *supra* note 97.

¹³² *See infra* Table 1 and notes 138-147.

¹³³ *See, e.g.*, Owens v. Hill, 758 S.E.2d 794, 804 (Ga. 2014) (“The reasons for offering such privacy are obvious, including avoiding the risk of harassment or some other form of retaliation from persons related to the prisoners or from others in the community who might disapprove of the execution as well as simply offering those willing to participate whatever comfort or peace of mind that anonymity that might offer.”); Erik Eckholm, *Oklahoma Told*

lethal injection drug manufacturers were being exposed and shamed.¹³⁴ The Texas Attorney General also recently reversed his policy of requiring disclosure of the source of drugs citing concerns over “a substantial threat of physical harm,” and noting that pharmacies “by design are easily accessible to the public and present a soft target to violent attacks.”¹³⁵ Suppliers whose identities are revealed have halted sales due to threats, hate mail, constant press inquiries, and lawsuits.¹³⁶ While motives behind the rise of new execution secrecy laws are likely mixed, we should not overlook the legitimate concern regarding driving reliable sources away.

*Table 1. Lethal Injection Supplier Confidentiality Laws*¹³⁷

State	Enacted	Coverage
Arkansas	2009, <i>amended</i> 2013	Matters related to “[e]nsuring that the drugs and substances” prescribed for execution “are available for use on the scheduled date of execution.” ¹³⁸

It Can’t Shield Suppliers of Execution Drugs, N.Y. TIMES, Mar. 27, 2014, at A14 (stating that Oklahoma passed its supplier confidentiality laws to protect suppliers from threats that were leading to drug shortages); *Execution Drugs Secrecy Approved*, DAILY HOME (Talladega, Ala.), Mar. 20, 2014, at 2 (quoting bill sponsor Rep. Lynn Greer’s expressed rationale for the legislation to protect remaining sources of supply and pharmacies, which fear “lawsuits and backlash from death penalty opponents”).

¹³⁴ See *infra* Table 1 and notes 138-147.

¹³⁵ Nomaan Merchant, *AG: Texas Can Keep Execution Drug Source Secret*, DALLAS MORNING NEWS, May 29, 2014, <http://www.dallasnews.com/news/local-news/20140529-ag-texas-can-keep-execution-drug-source-secret.ece>, archived at <http://perma.cc/8CDX-EP7H>.

¹³⁶ See, e.g., Gary Grado, *State Secret: Arizona Tries to Conceal the Identity of Firm that Makes Chemical for Lethal Injections*, ARIZ. CAPITOL TIMES, Oct. 14, 2013, <http://azcapitoltimes.com/news/2013/10/14/state-secret-arizona-tries-to-conceal-identity-of-firm-that-makes-chemical-for-lethal-injections/>, archived at <http://perma.cc/85H9-WEZ4> (discussing the experience of a compounding pharmacy owner with threats, hate mail, frequent press inquiries, and lawsuits); Jon Herskovitz, *Texas Judge Orders Prisons to Name Lethal Injection Drug Supplier*, REUTERS, Mar. 27, 2014, available at <http://www.reuters.com/article/2014/03/27/usa-execution-texas-court-idUSL1N0MO1MO20140327>, archived at <http://perma.cc/W6F5-YZB2> (indicating that the Texas prison system’s previous supplier “cut ties to the system last year when its name was revealed and it came under threats”).

¹³⁷ Prison officials in states without statutes expressly authorizing nondisclosure of drug supplier identities have also refused to disclose identities out of concern that the public will subject suppliers to intimidation and worry that the suppliers will then refuse to sell lethal injection drugs. See, e.g., Plaintiff-Appellant’s Opening Brief, *supra* note 126, at *1-2, (appealing the refusal of Texas officials to disclose the identity of their lethal injection drug supplier); see also, e.g., Merchant, *supra* note 135 (“Unlike some states, Texas law doesn’t specifically say whether prison officials must disclose where they get their lethal injection drugs.”).

¹³⁸ The Arkansas Supreme Court ruled that the more sweeping grant of discretion in

Georgia	2013	“[T]he identifying information of any person or entity that manufacturers, supplies, compounds or prescribes the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence” is a state secret. ¹³⁹
Louisiana	2010	“[T]he procedures and policies concerning the process for implementing a sentence of death.” ¹⁴⁰
Missouri	2007	“[T]he execution team,” which has been construed to include lethal injection drug suppliers. ¹⁴¹
Oklahoma	2011	“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.” ¹⁴²
South Dakota	2013	“The name, address, qualifications, and other identifying information relating to the identity of any person or entity supplying or administering the intravenous injection” is confidential and disclosure is a misdemeanor. ¹⁴³
Tennessee	2013	“[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” including entities “involved in the procurement or provision of chemicals, equipment, supplies and other items for use” in an execution. ¹⁴⁴

II. THE “NEW FRONT” OF DEATH PENALTY LITIGATION OVER EXECUTION SECRECY

Drug supplier confidentiality laws are “the newest front” in death penalty battles.¹⁴⁵ This Part presents and analyzes the main axes defining the field of legal claims. These claims are organized by type of secrecy challenged and the

2009 to the Director of the Department of Correction to determine execution protocol and refuse to release information was a violation of the state constitution’s prohibitions on separation of powers. *Hobbs v. Jones*, 412 S.W.3d 844, 854-55 (Ark. 2012). In 2013, the legislature therefore enacted a more limited version noted in the chart. 2013 Ark. Acts 139.

¹³⁹ GA. CODE ANN. § 42-5-36(d) (2014).

¹⁴⁰ LA. REV. STAT. ANN. § 15:569(D) (2012 & Supp. 2014), § 49:967(E)(3) (2003 & Supp. 2014). The provisions exempt the information from the state’s Administrative Procedure Act, which includes provisions on rulemaking by agencies and making information publicly available.

¹⁴¹ *See, e.g.*, *ACLU v. Lombardi*, No. 13-04223-CV-C-BP, 2014 WL 2479998, at *3 (W.D. Mo. Apr. 3, 2014) (indicating construction to include lethal injection drug suppliers).

¹⁴² OKLA. STAT. ANN. tit. 22, § 1015(b) (West 2003 & Supp. 2014) (“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.”).

¹⁴³ S.D. CODIFIED LAWS § 23A-27A-31.2 (2004 & Supp. 2014).

¹⁴⁴ TENN. CODE ANN. § 10-7-504(h)(1) (West 2012 & Supp. 2014).

¹⁴⁵ *Ashby Jones, Secrecy on Executions Faces Challenges*, WALL ST. J., July 28, 2014, at A3.

main constitutional frames for the challenges. Part II.A distinguishes between the two types of secrecy challenges, namely those against non-disclosure of drug sources, and those against non-disclosure of execution protocols and drugs. Part II.B discusses the constitutional framework for these challenges grounded in the First and Fourteenth Amendments. While both types of secrecy claims invoke the same constitutional bases, the different nature and materiality of the information withheld is highly relevant in evaluating the constitutional claims.

A. *Distinguishing the Two Types of Execution Secrecy Challenges*

The current wave of execution secrecy challenges involves two main types of constitutional challenges.¹⁴⁶ The first type concerns state refusals to disclose the source of lethal injection drugs.¹⁴⁷ Increasingly, such refusals to disclose supplier identity are grounded in the new state laws protecting the confidentiality of persons or entities participating in the execution or supplying drugs or equipment for the procedure.¹⁴⁸ Sometimes, however, state prison officials base their refusal to disclose on agency policy and discretion in the absence of a clear legislative command to disclose or withhold information.¹⁴⁹ The pending secrecy challenges in Texas involve one of the most recent and controversial examples of officials changing policy based on concerns over threats to suppliers.¹⁵⁰

¹⁴⁶ *E.g.*, *Wood v. Ryan*, 759 F.3d 1076 (9th Cir. 2014), *preliminary injunction of execution vacated sub nom. Ryan v. Wood*, 135 S. Ct. 21 (2014); *Wellons v. Ga. Dep't of Corr.*, 754 F.3d 1260 (11th Cir. 2014); *Sepulvado v. Jindal*, 729 F.3d 413 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1789 (2014); *Beaty v. Brewer*, 649 F.3d 1071 (9th Cir. 2011); *Owens v. Hill*, 758 S.E.2d 794 (Ga. 2014); *Lockett v. Evans*, Nos. 112,741, 112,764, 2014 WL 1584517, at *1 (Okla. Apr. 21, 2014), *stay of execution dissolved by Lockett v. Evans*, 330 P.3d 488 (Okla. 2014); *Butts v. Chatman*, No. 5:13-CV-194(MTT), 2014 WL 185339, at *4 (M.D. Ga. Jan. 15, 2014).

¹⁴⁷ *E.g.*, *Wood*, 759 F.3d at 1077; *Wellons*, 754 F.3d at 1262; *Owens*, 758 S.E.2d at 796.

¹⁴⁸ *See, e.g.*, *Wellons*, 754 F.3d at 1262 (refusing to disclose source of lethal injection drugs based on the Lethal Injection Secrecy Act, codified at Ga. Code Ann. § 42-5-36); *Owens*, 758 S.E.2d at 796 (similar).

¹⁴⁹ *See, e.g.*, Plaintiff-Appellant's Opening Brief, *supra* note 126 (appealing the change in the Texas Attorney General's policy to refuse to disclose the identity of the state's lethal injection drug supplier); *Merchant*, *supra* note 135 ("Unlike some states, Texas law doesn't specifically say whether prison officials must disclose where they get their lethal injection drugs."); *cf. Wood v. Ryan*, No. CV-14-1447-PHX-NVW (JFM), 2014 WL 3385115, at *1 (D. Ariz. July 10, 2014), *rev'd*, *Wood*, 759 F.3d 1076 (9th Cir. 2014) (considering refusal to disclose based on the Department of Corrections' interpretation of a statute covering executioner confidentiality as also extending to the identity of the lethal injection drug supplier).

¹⁵⁰ *Merchant*, *supra* note 135.

The second main type of secrecy challenge concerns nondisclosure of execution protocols, such as the identity and quantity of execution drugs to be used.¹⁵¹ While state refusal to disclose this information is couched as concealment of the method of execution, states often end up disclosing their protocols near the time of execution.¹⁵² Such delayed disclosure leaves insufficient time to develop a robust challenge to the particular drug combination and to build a case of substantial risk of harm.¹⁵³

The second type of claim is rarer because as summarized in Table 1, nearly all of the new execution secrecy laws on their face only concern nondisclosure of participants in the execution and lethal injection drug suppliers.¹⁵⁴ Despite this statutory construction, some states have taken the position that they are not obliged to release information about the identity of the execution drugs and can change the protocol up to the execution date.¹⁵⁵ In such cases, the two types of secrecy issues may arise at the same time, where states refuse to disclose both the identity of the drugs and their source.¹⁵⁶ When challenged, states are more likely to disclose the identity of the lethal injection drugs, though the combination may be subject to change after disclosure.¹⁵⁷

¹⁵¹ *E.g.*, *Sepulvado*, 739 F.3d at 717; *Beaty*, 649 F.3d at 1072.

¹⁵² *E.g.*, *Sepulvado*, 739 F.3d at 717 (discussing similar cases in which prison officials have disclosed the identity of the execution drugs it plans to use on the eve of execution); *Owens*, 758 S.E.2d at 796 (appealing the effective denial of an opportunity to challenge the method of execution due to delayed disclosure of the identity of the execution drugs).

¹⁵³ *See, e.g.*, Consolidated Motion for Stay of Execution and Appeal from the Denial of Relief at 7, *Wellons v. Owens*, No. S14W1469 (Ga. June 17, 2014), 2014 WL 2919356 (arguing that changes of protocol on the eve of execution effectively deprive the defendant of the chance to know of the drugs that will be used to execute him with sufficient time to challenge their use).

¹⁵⁴ *See supra* Table 1 and notes 137-143.

¹⁵⁵ *See, e.g.*, *Sepulvado*, 739 F.3d at 718 (Dennis, J., dissenting from denial of rehearing en banc) (stating Louisiana has “adamantly insisted before the district court that it is under no obligation to officially release the details of the execution protocol”); *Lockett v. Evans*, Nos. 112,741, 112,764, 2014 WL 1584517, at *1 (Okla. Apr. 21, 2014), *stay of execution dissolved by* *Lockett v. Evans*, 330 P.3d 488 (Okla. 2014) (discussing allegation that the State has refused to disclose “not only the source of the drug or drugs to be used in their executions but also the identity of the drug or drugs”).

¹⁵⁶ *E.g.*, *Sepulvado*, 739 F.3d at 717; *Lockett*, 2014 WL 1584517, at *1.

¹⁵⁷ *See, e.g.*, *Sepulvado*, 739 F.3d at 718 (Dennis, J., dissenting) (indicating state disclosure of protocol and combination of drugs since filing of appeal); *id.* at 718-20 (arguing case is mooted by the state’s disclosure of the drugs it intends to use); Brief in Opposition to Petition for a Writ of Certiorari at 6, *Sepulvado*, 739 F.3d 716 (No. 13-892) (stating that petitioner’s claim “that Louisiana has declined to specify what drug it is using is blatantly false” because the state had disclosed the identity of the execution drugs).

Sometimes litigants blur the distinction between these two types of secrecy under the general and ominous label of “lethal injection secrecy.”¹⁵⁸ The blurred boundaries can arise because the state may have initially refused to disclose both the execution protocol and the identity of the drug source, but later released the protocol and not the source.¹⁵⁹ Litigants may also blur the conceptual boundary to creatively couch the state’s refusal to disclose a drug source as a refusal to disclose the method of execution because concealment of the method of execution is obviously more problematic.¹⁶⁰ It is important not to conflate the two types of secrecy, however, because the differences are historically, practically, and constitutionally significant.

Historically, the executioner’s identity was confidential, but the condemned and the public knew how death would come, whether by hanging, firing squad, or some other means.¹⁶¹ While not every executioner chose to be anonymous, communities typically shielded the executioner’s identity to protect against the risk of retaliation and to ensure that people would be willing to do the job.¹⁶² In contrast, there is no longstanding custom or entitlement to know the maker of the rope and scaffold used to hang, or the scaffold or the gun used to execute

¹⁵⁸ *E.g.*, Brief of Appellee-Plaintiff, *Owens v. Hill*, 758 S.E.2d 794 (Ga. 2014) (No. S14A0092), 2013 WL 6203923, at *1 (arguing that the state’s refusal to provide identifying information for the compounding pharmacy is a deprivation of information regarding the method of execution).

¹⁵⁹ *See, e.g.*, *Sepulvado*, 739 F.3d at 720 (“[O]n June 17, 2013, the State turned over its revised lethal-injection protocol.”).

¹⁶⁰ *See, e.g.*, *Wellons v. Ga. Dep’t of Corr.*, 754 F.3d 1260, 1262 (11th Cir. 2014) (arguing that despite disclosure of the identity of the execution drug, pentobarbital, the state is concealing the method of execution by refusing to disclose the identity of the compounding pharmacy because the substance the compounding pharmacy purports to be phenobarbital is fashioned “from unknown ingredients and in unknown circumstances by a compounding pharmacy”).

¹⁶¹ *See* BESSLER, *supra* note 1, at 23-28 (explaining that in early America, executions were planned to maximize public visibility, and only the executioner’s identity was kept secret); LAURENCE, *supra* note 1, at 169-83 (discussing the historically public nature of executions, particularly the practice of holding an execution at or near the place where the crime took place); LOUIS P. MASUR, *RISES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776-1865*, at 26-27 (1989) (“Magistrates and ministers designed public executions in the early American Republic as displays of civil and religious authority and order.”).

¹⁶² ABBOTT, *supra* note 1, at 26 (“Such disguises were necessary, for an executioner doing his duty could later be classed as a traitor, to be hunted down by the authorities when the opposition gained the ascendancy.”); BANNER, *supra* note 1, at 38-39 (“There was a tension between . . . the approval of death as a punishment and a strong reluctance to carry out the distasteful steps necessary to put that punishment into practice.”); BESSLER, *supra* note 1, at 25; *cf.* Sarat, *supra* note 1, at 226, 250 n.21 (“The anonymous executioner is, at once, a stand-in for the community in whose name the execution was carried out and a sign of the ‘shame’ attached to those who turn our bloodlust into blood-thirsty deeds.”).

someone by firing squad. Sometimes, as a matter of curiosity or professional pride, communities would profile the craftsmen behind the rope used to hang, but not as a matter of custom or compelled disclosure.¹⁶³ The manner of death, however, remained known to the people and to the condemned, even after executions transformed from a public carnival to a somber “private” event attended only by select representatives of the people.¹⁶⁴

Practically, the method of execution is highly material to evaluating whether someone will face a substantial risk of suffering. Death by injecting hydrochloric acid is clearly different than death from injection of an overdose of anesthetics. In contrast, the brand of the drug is less immediately relevant to the risk of pain, especially if the drug maker is licensed to do business with the public—even if the licensing is by state authorities rather than federal regulators. These historical and practical differences between the two types of secrecy are also constitutionally relevant, as discussed in the next section.

B. *Main Constitutional Avenues, Diverging Endpoints*

Constitutional challenges to both types of execution secrecy are usually grounded in the Fourteenth Amendment’s Due Process Clause and the First Amendment.¹⁶⁵ Surprisingly, the only challenge to survive upon reaching a

¹⁶³ See, e.g., Chris Woodyard, *Enough Rope: The Hangman’s Rope in the Press*, HAUNTED OHIO (Jan. 19, 2013), <http://hauntedohiobooks.com/news/enough-rope-the-hangmans-rope-in-the-press/>, archived at <http://perma.cc/B53M-HP3J> (describing a profile of a proud craftsman); John Brown, *Hanged with Kentucky Rope*, UNIV. OF KY. LIBRARIES, http://nkaa.uky.edu/record.php?note_id=1625, archived at <http://perma.cc/BWS3-A98N> (last visited Nov. 14, 2014) (describing how the rope used to hang abolitionist John Brown was then put on display and how Kentucky rope had the distinction—at least to the state at the time—of being selected); cf. *Wood v. Ryan*, 759 F.3d 1076, 1083 n.3 (9th Cir. 2014) (citing instances noted in the online Haunted Ohio series).

¹⁶⁴ See, e.g., *Cal. First Amend. Coalition v. Woodford*, 299 F.3d 868, 875-76 (9th Cir. 2002) (explaining the historically public nature of executions and preservation of public scrutiny even with the shift toward “private” executions in prisons attended by select members of the citizenry, including media witnesses); LAURENCE, *supra* note 1, at 23-28 (detailing carnival-like atmosphere in public American executions); MASUR, *supra* note 161, at 26-27, 114-16 (chronicling the move to “private” executions and reliance on media and other representatives to convey information to the people).

¹⁶⁵ E.g., *Wood*, 759 F.3d at 1077 (discussing constitutional challenge grounded in First Amendment); *Wellons*, 754 F.3d at 1264-67 (discussing constitutional challenge grounded in Due Process Clause, Eighth Amendment, and First Amendment); *Sepulvado v. Jindal*, 729 F.3d 413, 419-20 (5th Cir. 2013) (discussing constitutional challenge grounded in Due Process Clause and Eighth Amendment); *Owens v. Hill*, 758 S.E.2d 794, 801 (Ga. 2014) (discussing constitutional challenge grounded in Due Process and Eighth Amendment); *Lockett v. Evans*, Nos. 112,741, 112,764, 2014 WL 1584517, at *1-2 (Okla. Apr. 21, 2014) (discussing constitutional challenge grounded in Due Process and Supremacy Clauses); *Beaty v. Brewer*, 791 F. Supp. 2d 678, 680 (D. Ariz. 2011), *aff’d*, 649 F.3d 1071 (9th Cir. 2011) (discussing constitutional challenge grounded in Eighth Amendment and Due Process

federal appellate court or a state supreme court involved execution drug supplier confidentiality rather than more problematic method secrecy.¹⁶⁶ Moreover, the success was under the aegis of the First Amendment rather than the Due Process Clause.¹⁶⁷ To understand this counterintuitive state of affairs, it is important to understand the linked fate of due process and Eighth Amendment claims in the execution secrecy context.¹⁶⁸ It is also important to understand the judicial concerns over putting courts in the awkward position of superintending the methods and pharmaceutical science of lethal injection—particularly on the eve of execution.¹⁶⁹

Turning first to the due process claims, a death row inmate retains “a residual life interest” in an execution conforming to law, including the requirements of due process and the Eighth Amendment’s prohibitions against cruel and unusual punishment.¹⁷⁰ The applicability of procedural due process to vindicate unconstitutional practices does not create a viable legal claim where no unconstitutionality exists, however.¹⁷¹ That is why petitioners raising due process claims in execution secrecy cases argue that not knowing the method of execution or the source of execution drugs poses a substantial risk of suffering in violation of the Eighth Amendment, the standard of *Baze*.¹⁷² If the claims would not substantiate an Eighth Amendment violation, then the

Clause); *Butts v. Chatman*, 5:13-CV-194(MTT), 2014 WL 185339, at *3-4 (M.D. Ga. Jan. 15, 2014) (discussing constitutional challenge grounded in Eighth Amendment and Due Process Clause).

¹⁶⁶ *Wood*, 759 F.3d at 1077 (discussing death row inmate’s request for information regarding manufacturer of lethal-injection drug to be used in execution).

¹⁶⁷ *Id.* (“Wood argues that, by withholding this information, the Department has violated his First Amendment rights.”).

¹⁶⁸ See discussion *infra* notes 170-171.

¹⁶⁹ See, e.g., *Baze v. Rees*, 553 U.S. 35, 51 (2008) (plurality opinion) (explaining that courts are not “boards of inquiry charged with determining ‘best practices’ for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology” and such an approach “would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing their execution procedures”); *Bell v. Wolfish*, 441 U.S. 520, 531, 562 (1979) (expressing concern that courts have “become increasingly enmeshed in the minutiae of prison operations” and second-guessing “those who are actually charged with and trained in the running of the particular institution under examination”); *Mahers v. Halford*, 76 F.3d 951, 956 (8th Cir. 1996) (“[T]he state’s interest in maintaining administrative control over prisons is significant. Courts are not ideally situated to oversee the minute details of prison administration.”).

¹⁷⁰ *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 281 (1998) (plurality opinion).

¹⁷¹ *Id.*

¹⁷² *Baze*, 553 U.S. at 48, 50.

claim of a due process violation also fails—the general basis for dismissal of scores of suits.¹⁷³

By July 2014, when Arizona death row inmate Joseph R. Wood's appeal went before the Ninth Circuit, his claims were less compelling than others that had been dismissed by more secrecy-protective states.¹⁷⁴ Wood knew the drugs Arizona would use—the state had even disclosed invoices, order confirmations, and purchase orders for midazolam and hydromorphone that showed expiration dates more than a year after his execution.¹⁷⁵ He pressed forward with his claim, however, seeking the identity of the drug supplier (which had been redacted), documents surrounding the reason for the protocol shift, and the qualifications of the execution team.¹⁷⁶ The Ninth Circuit had already denied a claim regarding more disabling secrecy, where the type of drugs to be used in the protocol—the method of execution—were changed less than twenty-four hours before execution.¹⁷⁷

Though the legal landscape looked forbidding, Wood's lawsuit came at an opportune time. In just the first half of the year, there were three executions during which inmates did not fall unconscious as planned and seemed to experience pain, rousing national concern.¹⁷⁸ The Ninth Circuit panel hearing Wood's appeal openly acknowledged their concern following these three executions, writing:

[S]everal flawed executions this year, including two in Oklahoma, and one in Ohio featuring the same two drugs at issue here, have sparked public curiosity and debate over the types—and quality—of drugs that should be used in lethal injections. Given . . . the factual backdrop of the past six months in particular, more information about drugs used in lethal injections can help an alert public make better informed decisions about

¹⁷³ *E.g.*, *Wellons v. Ga. Dep't of Corr.*, 754 F.3d 1260, 1264-67 (11th Cir. 2014); *Sepulvado v. Jindal*, 729 F.3d 413, 419-20 (5th Cir. 2013); *Beaty v. Brewer*, 791 F. Supp. 2d 678, 680 (D. Ariz. 2011), *aff'd*, 649 F.3d 1071 (9th Cir. 2011); *Owens v. Hill*, 758 S.E.2d 794, 801 (Ga. 2014).

¹⁷⁴ *See* *Wood v. Ryan*, 59 F.3d 1076, 1077 (9th Cir., 2014).

¹⁷⁵ *Id.* at 1079 (“[T]he documents do display the expiration dates of the Midazolam and Hydromorphone: September and October 2015.”).

¹⁷⁶ *Id.* at 1082 (“Wood seeks access to documents—information regarding the drugs that will be used to execute him, the qualifications of the execution team, and the documents and evidence the State relied on in adopting its new execution protocol—that are related to, and arguably necessary for a full understanding of, a proceeding in which we have already granted a qualified right of access.”).

¹⁷⁷ *Beaty*, 791 F. Supp. 2d at 680.

¹⁷⁸ *See* discussion of the executions of Clayton Lockett, Dennis McGuire, and Michael Lee Wilson, *supra* notes 101-107.

the changing standards of decency in this country surrounding lethal injection.¹⁷⁹

Rather than follow in the unsuccessful path of many litigants before him who had asserted due process claims, Wood presented an assortment of First Amendment-influenced claims.¹⁸⁰ He argued that nondisclosure of the identity of the lethal injection drug supplier violated his right to petition the government for a redress of grievances and asserted that he had a First Amendment right to the information about the state's manner of implementing the death penalty.¹⁸¹

The First Amendment strategy worked—at least for three days. Splitting from other appellate courts that have dismissed constitutional challenges to supplier confidentiality laws, the Ninth Circuit ruled that Wood had raised sufficiently serious constitutional questions to warrant an injunction against the execution as scheduled.¹⁸² The *Wood* court viewed Wood as “seeking to enforce a public, First Amendment right” to be better informed about lethal injunctions amid “a seismic shift in the lethal injection world in the last five years” due to drug shortages.¹⁸³

Remarkably, a court that had not issued stays despite last-minute switches in the method of execution issued a stay in a case where the petitioner knew the method of death in advance.¹⁸⁴ The oddity of the court allowing executions to proceed despite nondisclosure of the method of death until the eve of execution while enjoining Wood's execution despite greater disclosures was not lost on the court.¹⁸⁵ To its great credit, the panel openly acknowledged the influence of

¹⁷⁹ *Wood*, 759 F.3d at 1085.

¹⁸⁰ *Id.* at 1077-79. He also creatively contended that state formulation of execution protocols without complying with the Food, Drug, and Cosmetic Act violated the Supremacy Clause of the Constitution. *Id.* at 1079 (relying on U.S. CONST. art. VI).

¹⁸¹ *Id.*

¹⁸² Compare *id.* at 1087 (issuing a stay of execution because of the likelihood of the constitutional challenge succeeding on the merits), with *Wellons v. Ga. Dep't of Corr.*, 754 F.3d 1260, 1267 (11th Cir. 2014) (dismissing challenge to nondisclosure of drug supplier identity for failure to state a claim), and *Lockett v. Evans*, 330 P.3d 488, 492 (Okla. 2014) (rejecting challenge to secrecy provision of death sentence statute), and *Owens v. Hill*, 758 S.E.2d 794, 806 (Ga. 2014) (similar); cf. *Sepulvado v. Jindal*, 729 F.3d 413, 421 (5th Cir. 2013) (dismissing challenge to state refusal to disclose execution protocol).

¹⁸³ *Wood*, 759 F.3d at 1085.

¹⁸⁴ Compare *id.*, with *Towery v. Brewer*, 672 F.3d 650, 652-53 (9th Cir. 2012) (holding oral argument on protocol switches less than forty-eight hours before execution—only to learn of new protocol switches because of expired drugs), and *Beaty v. Brewer*, 791 F. Supp. 2d 678, 680 (D. Ariz. 2011), *aff'd*, 649 F.3d 1071 (9th Cir. 2011) (discussing protocol changes less than twenty-four hours before execution).

¹⁸⁵ *Wood*, 759 F.3d at 1087 (discussing the denials of stays despite last-minute changes).

the recent history of problematic executions that had occurred using the same drug combination as Arizona planned to use for Wood.¹⁸⁶

The injunction would not last long—just three days later and a day before Wood’s scheduled execution, the Supreme Court reversed the Ninth Circuit, dissolving the injunction.¹⁸⁷ Issued under tight time pressures, the order tersely stated, “The district judge did not abuse his discretion in denying Wood’s motion for a preliminary injunction.”¹⁸⁸ The next day, Wood’s nearly two-hour-long execution would grip the nation, like the executions of the men before him, which also involved substitution of the sedative midazolam due to drug shortages.¹⁸⁹

III. HARM PREVENTION AND SUPPLIER CONFIDENTIALITY

Regardless of one’s views on whether the death penalty should continue, as long as a majority of the states have capital punishment, ensuring humane executions and preventing suffering must be shared goals. The recent executions gone awry illustrate the need for greater attention to harm prevention. Investigations are ongoing into the reasons behind the spate of highly public execution malfunctions.¹⁹⁰ While findings are still pending, none of the cases indicated that knowledge of the identity of the drug manufacturer would have made a difference. Rather, the material issue has been the untested nature of the drug combinations used and the drug injection protocols.¹⁹¹ The substitute sedative midazolam was used in all of the executions where the anesthesia did not work as planned.¹⁹² Early indications from an investigation into why Clayton Lockett took more than forty minutes to die in Oklahoma point to difficulties finding a usable vein and the need to resort to the difficult

¹⁸⁶ *Id.* at 1085.

¹⁸⁷ *Ryan v. Wood*, No. 14A82, 2014 WL 3600362 (S. Ct. July 22, 2014) (dissolving lower court’s injunction to stay Wood’s execution).

¹⁸⁸ *Id.*

¹⁸⁹ See Michael Kiefer, *Controversial Drug Used in Botched Okla. Execution to Be Used in Arizona*, ARIZ. REP., May 3, 2014, at A1 [hereinafter Kiefer, *Controversial Drug Used*].

¹⁹⁰ Rick Green & Graham Lee Brewer, *Botched Lethal Injection in Oklahoma: Independent Autopsy Finds IV Was Not Set Properly*, DAILY OKLAHOMAN, June 14, 2014, at 1; Fernando Santos & John Schwartz, *A Prolonged Execution in Arizona Leads to A Temporary Halt*, N.Y. TIMES, July 25, 2014, at A16.

¹⁹¹ Kiefer, *Controversial Drug Used*, *supra* note 189; Curtiss Killman, *21 Death-Row Inmates Challenge State Execution Protocols*, TULSA WORLD, June 26, 2014, http://www.tulsaworld.com/newshomepage3/death-row-inmates-challenge-state-execution-protocols/article_f20b763a-8bc7-562c-ba14-b8250e6fba32.html, archived at <http://perma.cc/6SM3-3CQX>; Lyman, *supra* note 102; Stuart Warner, *Why We Cover Execution Drugs*, ARIZ. REP., June 1, 2014, at F4.

¹⁹² Kiefer, *Controversial Drug Used*, *supra* note 189; Killman, *supra* note 191; Lyman, *supra* note 102; Warner, *supra* note 191.

procedure of setting the IV in a femoral vein.¹⁹³ In all four lethal injections gone awry, drug shortages had necessitated substitutions and revisions to new protocols.¹⁹⁴

Pushing out reliable lethal injection suppliers has not ended executions—but it has raised the risk of harm. States coping with supply shortages have changed drugs and protocols—even less than twenty-four hours before the scheduled executions.¹⁹⁵ It is little wonder that mistakes have arisen.

Those imagining that executions will simply cease or be invalidated have long to wait. In its last foray into lethal injection litigation, a plurality of the Supreme Court explained that to invalidate an execution method, litigants must meet a “heavy burden” of showing the procedure is “cruelly inhumane.”¹⁹⁶ The Supreme Court has made clear that courts are not “boards of inquiry charged with determining ‘best practices’ for executions, with each ruling supplanted by another round of litigation touting a new and improved methodology.”¹⁹⁷ Such a role “would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures in implementing their execution procedures.”¹⁹⁸ As the outcome of the barrage of litigation discussed in Part II shows, courts have indeed been highly deferential.¹⁹⁹

Moreover, death penalty states are already beginning to consider reviving older methods of execution as an alternative to lethal injection. In states such as Missouri, Utah, and Wyoming, lawmakers have proposed reviving execution by firing squad if lethal injection is halted or stymied.²⁰⁰ The Supreme Court affirmed that the use of firing squads does not violate the Eighth Amendment in the 1879 case *Wilkerson v. Utah*.²⁰¹ Oklahoma already

¹⁹³ Green & Brewer, *supra* note 190.

¹⁹⁴ Kiefer, *Controversial Drug Used*, *supra* note 189 (“But in 2010, the barbiturate of choice became unavailable, partly because it was an outdated drug and partly because the European companies that made it could not legally export it to the United States for executions.”); Nathan Koppel & Ashby Jones, *Botched Lockett Execution Spurs Review by Oklahoma*, WALL ST. J., May 1, 2014, at A5 (“States have struggled to find execution drugs as some pharmaceutical companies have stopped supplying them because of qualms with capital punishment.”).

¹⁹⁵ *E.g.*, *Towery v. Brewer*, 672 F.3d 650, 652-53 (9th Cir. 2012) (discussing challenge to new protocol adopted on the eve of two executions); *Beaty v. Brewer*, 791 F. Supp. 2d 678, 680 (D. Ariz. 2011), *aff’d*, 649 F.3d 1071 (9th Cir. 2011) (discussing substitution of lethal injection drug “less than 24 hours before Plaintiff’s scheduled execution”).

¹⁹⁶ *Baze v. Rees*, 553 U.S. 35, 51-52 (2008) (plurality opinion).

¹⁹⁷ *Id.* at 51.

¹⁹⁸ *Id.*

¹⁹⁹ *See supra* Part I.B.

²⁰⁰ Berman, *supra* note 4; Murphy, *supra* note 34.

²⁰¹ 99 U.S. 130, 134-35 (1879) (“Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are quite sufficient to show that the punishment

has the firing squad back-up option in place if lethal injection is deemed unconstitutional.²⁰² Both Tennessee and Alabama authorize use of “any constitutional method of execution” if lethal injection or electrocution is held to be unconstitutional by a binding court.²⁰³

In theory, a return to older methods of execution without the sanitized, quasi-medical feel of lethal injection might seem appealing in its honesty about the nature of execution.²⁰⁴ Nevertheless, those who are facing execution have overwhelmingly chosen lethal injection over alternative methods such as hangings, firing squads, or electrocution when given a choice.²⁰⁵ In the last decade, sixteen states have offered inmates the choice of lethal injection or execution by an alternative method such as hanging, the gas chamber, electrocution, or firing squad.²⁰⁶ Of the 509 executions across the nation over the last decade, only eight people have chosen execution by a method other than lethal injection.²⁰⁷ Of those eight, seven died by electrocution and only one died by firing squad.²⁰⁸ The preferences of those who face execution are plainly an important barometer of the relative dread and anticipated pain surrounding execution methods.

From a harm-minimization perspective, policies that ameliorate the problems posed by lethal injection drug shortages have value—even if these policies may be unpalatable to abolitionists because they also facilitate executions. Confidentiality for lethal injection drug manufacturers helps communities retain licensed drug suppliers that do business with the public—and thus are particularly sensitive to public opinion. While the resort to compounding pharmacies subject to state licensing and regulation rather than FDA control is controversial, suppliers subject to U.S. standards, whether state or federal, are preferable to backroom distributors in far-flung places abroad.²⁰⁹ Businesses sensitive to negative publicity are preferable to a race to the bottom for a drug source impervious to such publicity.

of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the eighth amendment.”).

²⁰² Berman, *supra* note 4.

²⁰³ ALA. CODE § 15-18-82.1(c) (LexisNexis 2011 & Supp. 2013); TENN. CODE ANN. § 40-23-114(d) (2012 & Supp. 2014).

²⁰⁴ *See, e.g.,* Wood v. Ryan, 759 F.3d 1076, 1102 (9th Cir. 2014) (Kozinski, J., dissenting from denial of rehearing en banc) (“Until about three decades ago, executions were carried out by means designated for that purpose alone: electric chairs were the most common, but gas chambers, hanging and the occasional firing squad were also practiced.”).

²⁰⁵ *See Searchable Executions Database, supra* note 37 (providing sortable data).

²⁰⁶ *See Methods of Execution, supra* note 37 (listing the distribution of state methods).

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *See infra* Part I.

Moreover, the focus on execution drug supplier confidentiality distracts from the more problematic practice of nondisclosure or last-minute disclosure of the method of death discussed in Part II.A. Where secrecy statutes are ambiguous, they should be narrowly construed as protecting supplier and executioner identity rather than the type and quantity of drugs in order to avoid constitutional problems. For example, the Oklahoma Supreme Court has rejected an attempt to read a broader authorization to withhold information in its drug supplier secrecy statute, ruling that the statute, properly construed, “makes secret only the identity of the persons who carry out the execution and the identity of the persons who supply the drugs and medical equipment necessary to do so.”²¹⁰

As a constitutional matter, the state need not disclose the drug supplier just like it need not disclose the manufacturer of the rope for hanging, the gun for execution by firing squad, or the identity of the person wielding the execution instruments.²¹¹ As long as the drugs are manufactured from a source licensed to do business with the public—including compounding pharmacies—the risk of error based on the identity of the source is the same faced by any of its customers and falls short of constitutional materiality. Moreover, patients who receive anesthesia or other drugs at a hospital get information about the name of the drug and its effects, but they are not regularly told the identity of the drug maker as a material element of informed consent.²¹² It would be puzzling to constitutionalize an entitlement for those convicted of death penalty-eligible murders that members of the public do not enjoy in standard practice. The specific identity of the drug manufacturer or compounding pharmacy is of limited materiality and is outweighed by the state’s legitimate interest in halting the flight of drug suppliers and reducing the risks of harm during executions because of the need to cope with drug shortages.²¹³

CONCLUSION

Regardless of one’s views on the moral question of whether capital punishment should exist, preventing state-inflicted suffering is a shared goal

²¹⁰ *Lockett v. Evans*, 330 P.3d 488, 491 (Okla. 2014).

²¹¹ See discussion *supra* Part II.A and text *supra* note 163.

²¹² See, e.g., Ruth R. Faden, *Disclosure of Information to Patients in Medical Care*, 19 MED. CARE 718, 719-23 (1981) (empirically investigating physician disclosures and noting “there is a long tradition in medical practice that physicians need to disclose only selected information to patients”); cf. Ruth R. Faden et al., *Disclosure Standards and Informed Consent*, 6 J. HEALTH POL., POL’Y & L. 255, 256-57 (1981) (discussing standards governing physician disclosures and discretion to control information flow to patients).

²¹³ See, e.g., *In re Lombardi*, 741 F.3d 888, 897 (8th Cir. 2014) (holding that “the identities of the prescribing physician, pharmacist, and laboratory are plainly not relevant” and that anxieties over the procedure and changes in the protocol are distinct and “do not depend on the identities of the physician, pharmacist, or laboratory”).

across the death penalty divide. As such, we should all be concerned about the unintended consequences of campaigns against lethal injection drug manufacturers that shrivel the drug supply and elevate the risks of harm associated with carrying out death sentences. To protect remaining sources of supply, states are enacting new execution supplier confidentiality laws. Execution secrecy is the new front of death penalty litigation, with numerous cases in the courts.

The ominous broad label of execution secrecy obscures two distinct types of secrecy with different historical, practical, and constitutional significance. Execution drug supplier confidentiality is a litigation lightning rod because of codification in new laws, but it should not be conflated with, nor distract from, the concealment of the method of execution or nondisclosure until right before an execution. Historically, the executioner's identity was confidential but the condemned and the public knew how death would come. In contrast, there is no longstanding custom or entitlement to know the maker of the rope and scaffold used to hang, or the gun used to execute someone by firing squad.

The method of execution is highly material to evaluating whether someone will face a substantial risk of suffering. The recent spate of executions gone awry illustrates the import of knowing the drug identity and protocol to evaluating the risk of substantial suffering. In contrast, knowing the specific identity of the supplier—so long as it is licensed to do business with the public—is of limited materiality outweighed by the state's legitimate interest in retaining licensed drug suppliers and reducing the risks posed by the need to cope with drug shortages. From a harm-minimization perspective, policies that ameliorate the problems posed by lethal injection drug shortages have value—even if they may be unpalatable to abolitionists because they also facilitate executions. Rather than diverting resources to red herrings, the focus should be on nondisclosure or execution-eve disclosure of the method of execution, not on confidentiality laws aimed at protecting legitimate suppliers lawfully licensed to do business with the public.